BRB No. 97-1147 BLA

ALTON LAMBERT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
MCCLURE RIVER COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

Alton Lambert, Castlewood, Virginia, *pro se*[1]

Michael F. Blair (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

[1]Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1167) of Administrative Law Judge Robert G. Mahony (the administrative law judge) denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge adjudicated this duplicate claim[2] pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that "Claimant's prior claim was denied on the basis that the evidence failed to show the Claimant has pneumoconiosis, that the disease arose from his coal mine employment or that it has resulted in total disability." Decision and Order at 3; *see* Director's Exhibit 55. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Lisa Lee Mines v. Director,*

[2]Claimant filed his initial claim on August 21, 1986. Director's Exhibit 55. On January 12, 1989, Administrative Law Judge John J. Forbes, Jr. issued a Decision and Order denying benefits. *Id*. The bases of Judge Forbes' denial were claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. The Board subsequently affirmed Judge Forbes' denial of benefits. *Lambert v. McClure River Coal Co.*, BRB No. 89-0314 BLA (May 21, 1991)(unpub.). Claimant filed his most recent claim on June 21, 1993. Director's Exhibit 1.

OWCP [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

In finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence, which consists of twenty-three interpretations. Director's Exhibits 12-14, 27, 29, 31, 36, 43-47, 49. The administrative law judge correctly stated that "all but one of [the newly submitted x-ray readings] was (sic) negative for pneumoconiosis." Decision and Order at 3. Since twenty-two of the twenty-three x-ray interpretations of record are negative for pneumoconiosis, substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).[3] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).

Further, the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Additionally, the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled

[3]Whereas the June 8, 1994 x-ray was read as positive for pneumoconiosis by Dr. Fisher, a B-reader and a Board-certified radiologist, Director's Exhibit 36, the x-rays dated September 15, 1986, September 17, 1986, October 30, 1986, December 15, 1992, August 5, 1993, October 28, 1993 and November 6, 1995 were read as negative by physicians who are B-readers and Board-certified radiologists, Director's Exhibits 14, 27, 43, 44, 46, 47, 49. Although the administrative law judge did not discuss the qualifications of the various physicians who provided x-ray interpretations, any error by the administrative law judge in this regard is harmless since the negative x-ray readings were provided by physicians who have the same qualifications as Dr. Fisher. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Next, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the relevant newly submitted medical opinions of record. The administrative law judge stated that "[t]he additional medical opinion evidence submitted...fails to establish the presence of pneumoconiosis." Decision and Order at 5. Whereas Dr. Dormer opined that claimant "does not have significant pneumoconiosis," Director's Exhibit 10, Dr. Sargent opined that claimant does not suffer from pneumoconiosis,[4] Director's Exhibits 10, 45. Dr. DeMott diagnosed alcoholic liver disease with cirrhosis.[5] Director's Exhibit 29. In addition, Dr. Garfield diagnosed arteriosclerotic heart disease, chronic bronchitis aggravated by cigarette smoking, and opined that claimant does not suffer from a clinically significant pulmonary disease. Director's Exhibit 31. The administrative law judge interpreted Dr. Dormer's statement that claimant "does not have significant pneumoconiosis" as a diagnosis of pneumoconiosis. Decision and Order at 5. The administrative law judge, however, properly discredited Dr. Dormer's opinion because he found it to be not well reasoned.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Thus, since the administrative law judge properly found that none of the credible reports of record contained a diagnosis of pneumoconiosis or any chronic lung disease arising out of coal mine employment, *see Shoup v. Director, OWCP*, 11 BLR 1-110 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986), we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the evidence insufficient to establish total disability. Since none of the newly submitted

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[4]The administrative law judge failed to consider Dr. Fino's opinion that claimant does not suffer from pneumoconiosis. Employer's Exhibit 2. Nonetheless, any error by the administrative law judge in this regard is harmless since Dr. Fino's opinion supports the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *See Larioni, supra*.

[5]Although Dr. DeMott noted that there was "some question of black lung disease" with regard to claimant's past medical history, Dr. DeMott did not diagnose pneumoconiosis. Director's Exhibit 29; *see Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61, 2-66 (4th Cir. 1995); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985).

[6]The administrative law judge stated that Dr. Dormer "failed to adequately explain the basis for her diagnosis of pneumoconiosis." Decision and Order at 5.

pulmonary function studies or arterial blood gas studies of record yielded qualifying[7] values, we affirm the administrative law judge's finding that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 9, 11, 31, 45. Additionally, since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

[7]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Finally, we address the administrative law judge's evaluation of the newly submitted medical reports of record at 20 C.F.R. §718.204(c)(4). The administrative law judge stated that "the medical opinion evidence [is] insufficient to establish...a totally disabling respiratory or pulmonary impairment." Decision and Order at 5. Drs. Dormer and Sargent opined that claimant does not suffer from a respiratory impairment.[8] Director's Exhibits 10, 45; Employer's Exhibit 2. Therefore, since none of the physicians of record opined that claimant suffers from a total respiratory disability, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since claimant failed to establish either the existence of pneumoconiosis or total disability based on the newly submitted evidence, the administrative law judge properly concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Rutter*, *supra*.

[8]The administrative law judge stated that "Dr. Antonio Valdes-Rodriguez assessed a 20% whole person disability for his disc operation and a 14% whole person disability for his right foot drop." Decision and Order at 3; Director's Exhibit 31. The administrative law judge failed to consider Dr. Fino's opinion that claimant does not suffer from a respiratory impairment. Employer's Exhibit 2. However, any error by the administrative law judge in this regard is harmless since Dr. Fino's opinion supports the administrative law judge's finding at 20 C.F.R. §718.204(c)(4). *See Larioni, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge