BRB No. 03-0687 BLA

RONNIE L. LOWE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 05/26/2004
	)	
MARTIN COUNTY COAL CORPORATION	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronnie L. Lowe, Inez, Kentucky, *pro se*.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2002-BLA-0289) of Administrative Law Judge Thomas F. Phalen, Jr., 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).[1] This case is before the Board for a

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective

second time.[2] Based on the date of filing, the administrative law judge adjudicated this petition for modification pursuant to 20 C.F.R Part 718 (2000), and noted the parties' stipulation that claimant established seventeen years of coal mine employment with the named responsible operator. The administrative law judge found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b) (2000) or to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(1)-(4), (c)(2000). The administrative law judge further found that claimant had not established a change in condition or a mistake of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a).

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on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]Claimant filed an application for benefits on November 20, 1996, which was denied on September 30, 1999, by Administrative Law Judge Daniel J. Roketenetz due to claimant's failure to establish any required element of entitlement. Director's Exhibits 1, 54. On appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a) (2000), and the denial of benefits. *Lowe v. Martin County Coal Corp.*, BRB No. 00-0194 BLA (Oct. 11, 2000) (unpub.). On June 12, 2001, claimant submitted correspondence which the district director construed as a petition for modification. Director's Exhibits 65, 66. The district director repeatedly denied claimant's request for modification, and claimant requested a formal hearing. Director's Exhibits 74, 79, 80.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204(2000). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[3]

Turning first to the administrative law judge's consideration of the newly submitted evidence pursuant to Section 718.202(a)(1) (2000), the Decision and Order indicates that the administrative law judge considered ten newly submitted x-ray interpretations, and credited the greater number of negative readings by the more qualified readers in finding that the existence of pneumoconiosis was not established. Decision and Order at 5-6, 13. We note, however, that the record contains twelve interpretations of four x-ray films. Employer's Exhibits 1, 9, 12, 19; Claimant's Exhibit 1; Director's Exhibits 17, 72, 73, 78. The recitation of the x-ray evidence contained in the Decision and Order fails to indicate that the administrative law judge considered the positive x-ray reading of Dr. Sundaram dated February 18, 2002, or Dr. Wiot's negative interpretation of the film dated September 10, 2002, in determining that the x-ray evidence did not establish the existence of pneumoconiosis. Employer's Exhibit 22; Claimant's Exhibit 1; Decision and Order at 5-6, 13. As the administrative law judge's recitation of the relevant evidence does not accurately reflect the medical record, remand of the present case is required to allow the administrative law judge to consider all the evidence relevant to Section 718.202(a)(1) (2000). *See Perry*, 9 BLR 1-1; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

We affirm however, the administrative law judge's findings that the requirements of Section 718.202(a)(2)-(3) (2000), were not met since the record contains no biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, 718.306 (2000), are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 13; Director's Exhibit 1; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a)(4) (2000), the record contains the newly submitted medical reports of Drs. Branscomb, Morgan, Repsher, Jarboe, Fino and Dahhan, who found no evidence of pneumoconiosis, the report of Dr. Sikder who diagnosed coal workers' pneumoconiosis and chronic obstructive pulmonary disease, and Dr. Sundaram who

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[3]Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

diagnosed coal workers' pneumoconiosis. Employer's Exhibits 2, 4, 5, 7, 9, 10, 15, 18; Claimant's Exhibit 5; Director's Exhibits 70, 72. The administrative law judge credited the opinions of Drs. Dahhan, Branscomb, Repsher, Jarboe and Fino, and the portion of Dr. Morgan's opinion regarding the absence of legal pneumoconiosis, in finding that the existence of pneumoconiosis was not established. Decision and Order at 7-10, 13-16. The administrative law judge also found that Dr. Sikder's opinion, and the portion of Dr. Morgan's report regarding the presence of clinical pneumoconiosis, were unreasoned and insufficient to satisfy claimant's burden of establishing the presence of pneumoconiosis. Decision and Order at 14-15. However, the Decision and Order does not reflect that the administrative law judge considered Dr. Sundaram's medical report diagnosing the presence of pneumoconiosis. Accordingly, the administrative law judge's findings at Section 718.202(a)(4) (2000), must be vacated. On remand the administrative law judge must consider and weigh all the relevant medical reports of record. *Perry,* 9 BLR 1-1; *Tackett,* 7 BLR 1-703.

We also hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence of record was insufficient to establish the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1),(2) (2000), as the administrative law judge rationally determined that all of the newly submitted pulmonary function studies produced non-qualifying values,[4] or were found invalid by the administering physicians, and the newly submitted arterial blood gas studies also produced non-qualifying values. Decision and Order at 6, 17; Employer's Exhibits 9, 15, 17; Claimant's Exhibits 4, 5; Director's Exhibits 8, 11, 31-33, 38, 46, 72. As the administrative law judge's findings are supported by substantial evidence, they are affirmed. *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994); *Schetroma v. Director, OWCP,* 18 BLR 1-19 (1993). We further affirm the administrative law judge's findings at Section 718.204(c)(3) (2000), as the record contains no evidence of cor pulmonale with right sided congestive heart failure. Decision and Order at 17; *see generally Budash v. Bethlehem Mines Corp.,* 16 BLR 1-27 (1991).

Pursuant to Section 718.204(c)(4) (2000), the administrative law judge found that the newly submitted medical reports of Drs. Dahhan, Morgan, Branscomb, Repsher, Jarboe and Fino, finding no evidence of a totally disabling respiratory impairment, outweighed the opinion of Dr. Sikder that claimant has mild obstructive airways disease. Decision and Order

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[4]A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendices B and C to 20 C.F.R. Part 718 (2000). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1),(2) (2000).

at 18; Employer's Exhibits 2, 4, 5, 7, 9, 10, 15, 18, 19; Director's Exhibits 70, 72. Consequently, the administrative law judge found that a totally disabling respiratory impairment had not been established by the medical opinion evidence. Decision and Order at 18. However, the administrative law judge failed to consider Dr. Sundaram's opinion diagnosing totally disabling pneumoconiosis pursuant to this section. Claimant's Exhibit 5. Accordingly, we must vacate the administrative law judge's findings at Section 718.204(c)(4) (2000). On remand, the administrative law judge must reweigh all the medical reports of record relevant to the issue of total disability. *Zimmerman v. Director, OWCP,* 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). In considering the evidence on remand, the administrative law judge must also consider whether the physicians who found no evidence of a totally disabling respiratory impairment were familiar with the exertional requirements of claimant's former coal mine work in light of the holding in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

In addition, as the administrative law judge has not considered all the newly submitted evidence of record, we must also vacate the administrative law judge's findings pursuant to Section 725.310 (2000). Decision and Order at 18; *Consolidation Coal Co. v. Worrell,* 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990). On remand, the administrative law judge must reconsider whether the newly submitted evidence of record establishes a change in condition. 20 C.F.R. §725.310 (2000).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge