BRB No. 98-0932 BLA

EUGENE FARLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 5/6/99
	)	
RAWHIDE COAL COMPANY, INC.	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
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.

Eugene Farley, *pro se*, Evarts, Kentucky.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-0833) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on claims 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 instant case involves a duplicate claim filed on June 3, 1995.[1] The administrative law judge recognized the issue before him

[1]The relevant procedural history is as follows: Claimant originally filed a claim for benefits on September 6, 1991. It was ultimately denied by the Department of Labor (DOL) on August 5, 1992. Claimant did not pursue this claim further. Claimant filed a new claim for benefits on June 3, 1995. Director's Exhibit 1. On December 12, 1995, the district director denied the claim. Director's Exhibit 19. Claimant filed a request for modification on

to be whether the evidence of record was sufficient to establish modification within the meaning of 20 C.F.R. §725.310. Decision and Order at 8-9. The administrative law judge found that the standards of this provisions were not met. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to 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. *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 the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

In order to establish entitlement to benefits 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. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Claimant's original application for benefits was denied because the evidence failed to establish that claimant was totally disabled due to pneumoconiosis arising

---

March 38, 1996. Director's Exhibit 21. On November 1, 1996, the district director denied the request for modification. Director's Exhibit 39. On November 13, 1996, claimant filed a request for a hearing before an administrative law judge. Thereafter, the parties agreed to have the case decided on the record.

out of coal mine employment. Director's Exhibit 43. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of the presence of pneumoconiosis and total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718.202, 718.204.

The administrative law judge credited claimant with 5.89 years of coal mine employment[2] and found the new evidence submitted by claimant insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c). Thus, the administrative law judge denied benefits on the basis of the previous denial.

[2]Claimant alleged approximately twelve years of coal mine employment. We recognize that a finding of at least ten years of coal mine employment would give rise to the presumption that claimant's pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). However, we affirm the administrative law judge's finding of less than ten years of coal mine employment. The administrative law judge relied upon claimant's testimony, his Employment History form and his Social Security Statement of Earnings. Decision and Order at 4. Inasmuch as the administrative law judge set forth his method of computation and explained what evidence he credited and rejected in his computation, we affirm his finding. *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984); *see Dawson v. Old Ben Coal Co.*, 11LR 1-58 (1988). Therefore, on remand, if the administrative law judge finds that claimant has established the presence of pneumoconiosis, he must make a determination as to whether the pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(c).

In assessing the evidence, the administrative law judge considered only that evidence submitted after the district director's denial of the request for modification of the duplicate claim. This constituted legal error. The administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant established a basis for modification of the district director's denial of claimant's duplicate claim pursuant to 20 C.F.R. §725.310.[3] *Hess v. Director, OWCP,* BLR , BRB No. 97-1803 BLA (Sept. 15, 1998). The Board has held that any party dissatisfied with a district director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges. *See Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991) (*en banc*). Thus, the administrative law judge should have reviewed, *de novo*, the issue of whether the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d).

Inasmuch as the administrative law judge failed to consider all of the evidence relevant to the duplicate claim, this case must be remanded for a revaluation of the record evidence. *Burks v. Hawley Coal Mining Corp.,* 2 BLR 1-323 (1979); *see also Wright v. Director, OWCP,* 7 BLR 1-475 (1984); *Hess v. Clinchfield Coal Co.,* 7 BLR 1-295 (1984). Therefore, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §§718.202, 718.204, and remand this case with the instriction that the administrative law judge consider all of the evidence submitted in conjunction with the duplicate claim.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

[3]The administrative law judge assessed only the evidence "obtained on November 23, 1996[after the district director's denial of the request for modification of the duplicate claim][which] includes a chest x-ray interpreted by Drs. Wiot and Wright, a pulmonary function test, a new arterial blood gas study, and Dr. Wright's medical opinion." Decision and Order at 10.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge