BRB No. 98-0984 BLA

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| MACEO R. FORTE | ) | |
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| Claimant-Petitioner | ) | ) |
| v. | ) | |
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| EASTERN ASSOCIATED COAL COMPANY | ) | |
| | ) | |
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| Employer-Respondent | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | DATE ISSUED: 5/24/99 |
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| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Maceo R. Forte, Kimball, West Virginia, *pro se.*

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1494) of Administrative Law Judge Richard T. Stansell-Gamm (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). Claimant filed his initial application for benefits on November 29, 1990. The district director denied benefits on May 24, 1991 on the ground that claimant failed to establish any of the elements of entitlement. Director's Exhibit 27. In a Decision and Order issued on July 16, 1993, Administrative Law Judge Edward J. Murty Jr. credited claimant with over thirty-two years of coal mine employment, and found that the x-ray and medical opinion evidence of record was insufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R.

§718.202(a). Accordingly, benefits were denied.

Claimant filed the present duplicate claim on December 6, 1995. Director's Exhibit 1. At the formal hearing, the parties stipulated that claimant had established at least twenty-seven years of coal mine employment. After considering the newly submitted evidence, the administrative law judge found that claimant had failed to establish any of the elements necessary for entitlement and, thus, failed to establish a material change in conditions. 20 C.F.R. §725.309(d). Accordingly, benefits were again denied. In the instant appeal, claimant generally contends that he is entitled to benefits. Employer and the Director, Office of Workers' Compensation Programs, have not participated in this appeal.[1]

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

[1]Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Lisa Lee Mines v. Director, 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).

judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of pneumoconiosis was not established by the newly submitted evidence pursuant to Section 718.202(a). The administrative law judge properly found that the requirements of Section 718.202(a)(1)-(2) were not met since all of the newly submitted x-ray readings were negative for the presence of pneumoconiosis and the record contains no biopsy or autopsy evidence. *See* 20 C.F.R. §718.202(a)(1), (a)(2). The administrative law judge also properly found that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(3) as the presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 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 5-6; Director's Exhibits 12, 13, 23.

Pursuant to Section 718.202(a)(4), the administrative law judge rationally determined that Dr. Krishnan's diagnosis of pneumoconiosis was entitled to little weight since the physician's report was not submitted into the record, but was merely summarized in Dr. Zaldivar's report. *See Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Moore v. Dixie Pine Coal Co.,* 8 BLR 1-334 (1985); *York v. Jewell Ridge Coal Corp.,* 7 BLR 1-766 (1985); Decision and Order at 10; Director's Exhibit 23; Employer's Exhibit 4. Moreover, it was within the administrative law judge's discretion to credit the reports of Drs. Zaldivar and Vasudevan, both of which found no evidence of pneumoconiosis, as well documented and reasoned. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.,* 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985); Decision and Order at 10; Director's Exhibits 9, 23; Employer's Exhibit 4.

We also affirm the administrative law judge's finding that total disability was not established at Section 718.204(c)(1)-(3). The administrative law judge properly found that claimant failed to establish total disability under Section 718.204(c)(1) since all of the pulmonary function studies of record produced non-qualifying values.[2] Decision and Order at 11; Director's Exhibits 8, 23; Employer's Exhibit 4.

[2]A "qualifying" pulmonary function or blood gas study is one that yields values equal to or less than the values set forth in the tables appearing at Appendices B

The administrative law judge also rationally found that claimant failed to meet his burden of establishing total disability under Section 718.204(c)(2) by a preponderance of the evidence as the newly submitted blood gas studies consist of a qualifying study performed on January 26, 1996 and a non-qualifying study performed on August 7, 1996. Decision and Order at 11-12; Director's Exhibits 11, 23; Employer's Exhibit 4; *see generally Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLA 2A-1 (1994); *Fields, supra*. Moreover, claimant is precluded from establishing total disability pursuant to Section 718.204(c)(3) as the record contains no evidence indicating the presence of cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3).

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and C to 20 C.F.R. Part 718.

Pursuant to Section 718.204(c)(4), however, we hold that the administrative law judge erred in his weighing of the medical reports relevant to the issue of total disability. The newly submitted medical opinion evidence includes the opinion of Dr. Zaldivar, who found no evidence of any respiratory impairment, and that of Dr. Vasudevan, who diagnosed a mild to moderate respiratory impairment due to smoking. Director's Exhibits 9, 23; Employer's Exhibit 4. The administrative law judge erred in finding that the report of Dr. Vasudaven did not support a finding of total disability without considering whether this physician's finding of a mild to moderate respiratory impairment rendered claimant totally disabled from performing his usual coal mine work.[3] *See Taylor v. Evans & Gambrel Co.,*12 BLR 1-83 (1988); *DeFore v. Alabama By-Products Corp.,* 12 BLR 1-27 (1988); *McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48 (1986); Decision and Order at 12. We therefore vacate the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(c)(4) and remand the case to the administrative law judge. On remand, the administrative law judge should compare Dr. Vasudaven's finding of a mild to moderate respiratory impairment with the exertional requirements of claimant's usual coal mine employment to determine whether the opinion is sufficient to support a finding of total disability under Section 718.204(c)(4). *Id*. If the administrative law judge finds the medical opinion evidence sufficient to establish total disability pursuant to Section 718.204(c)(4), the administrative law judge must weigh together all of the newly submitted contrary probative evidence to determine whether total disability is established. *See Fields, supra*. Should the administrative law judge find that claimant has established total disability under Section 718.204(c) and therefore that claimant has established a material change in conditions under Section 725.309, he must then consider all of the evidence of record in considering entitlement on the merits.

[3]Claimant testified that his last position in the mines was that of a roof bolter, which required him to operate the controls of the machinery, and carry materials weighing in excess of one hundred pounds. December 4, 1997 Hearing Transcript at 29-31.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge