BRB No. 98-1049 BLA

ROBERT FLETCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WOLF CREEK COLLIERIES	)	
	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Robert Fletcher, Inez, Kentucky, *pro se*.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (95-BLA-2269) of Administrative Law Judge Daniel J. Roketenetz 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). This case is before the Board for the second time. Claimant's initial application for benefits filed on June 6, 1978 was finally denied on April 25, 1984 by Administrative Law Judge Robert M. Glennon. Director's Exhibit 71 at 1. Claimant's

second application for benefits filed on June 18, 1985 was denied on November 23, 1987 by Administrative Law Judge W. Ralph Musgrove. Director's Exhibit 70. Claimant appealed but later requested, by counsel, that his appeal be dismissed pursuant to 20 C.F.R. §802.401(a). *Id*. The Board granted claimant's motion and dismissed the appeal on July 28, 1988. *Id*. On September 26, 1990, claimant filed the present application for benefits which is a duplicate claim because it was filed more than one year after the previous denial. *See* 20 C.F.R. §725.309(d).

Administrative Law Judge Charles P. Rippey denied the duplicate claim on February 15, 1994 because he found that the evidence developed since the prior denial failed to establish a material change in conditions as required by Section 725.309(d). Director's Exhibit 61. Nine months later, claimant submitted additional medical evidence and requested modification of the denial pursuant to 20 C.F.R. §725.310. On modification, Administrative Law Judge Daniel J. Roketenetz found that the new medical evidence considered in conjunction with the prior evidence failed to establish a change in conditions, and concluded that there had been no mistake in a determination of fact pursuant to Section 725.310. Accordingly, he denied benefits.

Pursuant to claimant's appeal without counsel, the Board affirmed the administrative law judge's finding that claimant failed to establish a change in conditions under Section 725.310, but vacated his mistake in fact finding and remanded the case for the administrative law judge to make findings sufficient to permit review. *Fletcher v. Wolf Creek Collieries*, BRB No. 96-1588 BLA (Aug. 21, 1997)(unpub.).

On remand, the administrative law judge reconsidered all of the medical evidence developed since Judge Musgrove's denial of the second claim and found that it failed to establish any element of entitlement previously decided against claimant and therefore did not demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), 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 to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is

rational, and is 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).

To be entitled to benefits under 20 C.F.R. Part 718, a miner must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a miner 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 Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether the miner has established at least one of the elements previously decided against him. *Ross, supra*. If so, the miner has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra*.

Claimant was previously denied benefits because he failed to establish any element of entitlement pursuant to Sections 718.202(a) and 718.204. Director's Exhibits 70, 71. In the current duplicate claim, Judge Rippey denied benefits because he found that the new evidence failed to establish any element previously decided against claimant and therefore did not establish a material change in conditions under Section 725.309(d). Director's Exhibit 61. Therefore, on modification Judge Roketenetz reconsidered all of the evidence submitted in the current duplicate claim to determine whether a material change in conditions was established. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Ross, supra*.

Pursuant to Section 718.202(a)(1), the administrative law judge noted correctly that all of the x-ray readings submitted with claimant's third claim were negative for pneumoconiosis. Director's Exhibits 14, 21, 22, 31, 32, 48, 49, 52. Having already found the weight of the additional readings submitted on modification to be negative when viewed in light of the readers' qualifications, [1996] Decision and Order at 6; Director's Exhibits 62, 64, 65; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), the administrative law judge found that "[p]neumoconiosis was not established . . . by the evidence submitted before Judge

Rippey or by the x-rays submitted with the request for modification." Decision and Order on Remand at 3. Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(1), which we therefore affirm.

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and that the presumptions at Sections 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 on Remand at 3; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Param, Fritzhand, Broudy, Lane, and Fino submitted in the third claim. Director's Exhibits 9, 10, 29, 30, 46, 47. Dr. Param, whose qualifications are not in the record, examined claimant, recorded his work history and subjective complaints, considered an unspecified x-ray,[1] and administered a pulmonary function study. Director's Exhibit 29. Dr. Param diagnosed pneumoconiosis. *Id*. By contrast, after examination and testing, Drs. Fritzhand and Broudy diagnosed chronic bronchitis due to smoking, and Dr. Broudy opined that claimant has no respiratory impairment arising from his coal mine employment. Director's Exhibits 9, 10. Drs. Lane and Fino reviewed the medical evidence and concluded that claimant does not have pneumoconiosis. Director's Exhibits 46, 47. The record indicates that Drs. Broudy, Lane, and Fino are Board-certified in Internal Medicine, and that Drs. Broudy and Fino are additionally certified in Pulmonary Disease.

The administrative law judge noted that Judge Rippey erred when he found that none of the physicians diagnosed pneumoconiosis, Director's Exhibit 61 at 2, since Dr. Param had, in fact, diagnosed the disease. Director's Exhibit 29. However, the administrative law judge permissibly accorded diminished weight to to Dr. Param's opinion because he found that the opinions of the "pulmonary specialists, whose opinions are supported by the objective laboratory data, support a conclusion that claimant is not suffering from the disease." Decision and Order on Remand at 4; *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*). Recalling that he had already found Dr. Baker's diagnosis of pneumoconiosis

[1] This may have been the September 18, 1990 x-ray, which received no positive ILO readings. Director's Exhibits 31, 32.

submitted on modification to be insufficiently documented or reasoned to establish the existence of pneumoconiosis, [1996] Decision and Order at 8; Director's Exhibit 62; *see Fife, supra*, the administrative law judge rationally found that "the great weight of the medical opinion evidence of record supports [the] ultimate determination that the [c]laimant is not suffering from pneumoconiosis." Decision and Order on Remand at 4. Because the administrative law judge properly weighed the evidence and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Pursuant to Section 718.204(c)(1), the administrative law judge considered the three pulmonary function studies submitted in the third claim plus the single pulmonary function study submitted on modification. Director's Exhibits 7, 8, 29, 62. Of the four tests, only the first one, administered by Dr. Param on September 21, 1990, was qualifying.[2] Director's Exhibit 29. Because five physicians invalidated that study for insufficient effort, Director's Exhibits 38-40, 41, 47; *see Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-23-24 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987), and because all of the subsequent studies were non-qualifying, the administrative law judge rationally found that the lone qualifying study did not establish total disability. *See Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11, 1-14 (1991)(administrative law judge must weigh evidence supportive of a finding of total disability against the contrary probative evidence); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We therefore affirm the administrative law judge's finding pursuant to Section 718.204(c)(1).

Pursuant to Section 718.204(c)(2), the administrative law judge correctly found that all of the blood gas studies submitted with the third claim and on modification were non-qualifying. Director's Exhibits 7, 8, 62. We therefore affirm the administrative law judge's finding that total disability was not established at Section 718.204(c)(2). Decision and Order on Remand at 5.

Pursuant to Section 718.204(c)(3), the administrative law judge considered the diagnosis of cor pulmonale contained in Dr. Param's report. Director's Exhibit 29. This diagnosis was legally insufficient to demonstrate total disability at Section 718.204(c)(3) because it was not a diagnosis of cor pulmonale with right-sided

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

congestive heart failure. *See* 20 C.F.R. §718.204(c)(3); *Newell v. Freeman United Coal Mining Co*., 13 BLR 1-37, 1-39 (1989). Moreover, the administrative law judge permissibly discounted Dr. Param's opinion as undocumented and unreasoned, since Dr. Param offered no support or explanation for the cor pulmonale diagnosis. *See Fife, supra*; *Rowe, supra.* Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(3).

Pursuant to Section 718.204(c)(4), the administrative law judge found within his discretion that the "opinions of Drs. Lane, Broudy, Fritzhand, and Fino affirmatively establish that claimant is not totally disabled due to pneumoconiosis. The opinions of these physicians are supported by the great weight of the objective laboratory data in the record, and thus are well-supported by the record." Decision and Order on Remand at 6; *see Fife, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985). Although the administrative law judge did not mention Dr. Param's contrary opinion in making this finding, when summarizing the medical opinions earlier in his decision he considered that Dr. Param "conclud[ed] that the [c]laimant was totally disabled." Decision and Order on Remand at 3; Director's Exhibit 29. Viewing the administrative law judge's decision as a whole, it is clear to us that the administrative law judge was aware of Dr. Param's opinion that claimant is disabled, but considered the non-disability opinions by Drs. Fritzhand, Broudy, Lane, and Fino to be more consistent with the objective evidence and therefore worthy of greater weight than Dr. Param's opinion. *See Wetzel, supra*. Substantial evidence supports the administrative law judge law judge's finding pursuant to Section 718.204(c)(4), which we therefore affirm.

Because the administrative law judge permissibly found that claimant failed to establish any element of entitlement previously decided against him, we affirm the administrative law judge's determination that a material change in conditions was not established pursuant to Section 725.309(d). *See Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge