BRB No. 00-0227 BLA

ROBERT HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN COAL CORPORATION	)	
	)	
Employer-Respondent	)	DATE ISSUED:
	)	
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 L. Hillyard, Administrative Law Judge, United States Department of Labor.

Robert Hensley, Pinsonfork, Kentucky, *pro se.*

Lois A. Kitts (Baird, Baird, Baird & Jones, P.S.C.), Pikeville, Kentucky, for employer.

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 (1998-

[1]Claimant is Robert Hensley, the miner, whose first claim for benefits was filed on July 13, 1973 and denied on January 3, 1979. Director's Exhibit 33. Claimant filed a second claim for benefits on August 21, 1981 which was ultimately denied on June 8, 1992 when the United States Court of Appeals for the Sixth Circuit affirmed Administrative Law Judge Robert L. Cox's finding that claimant was not entitled to benefits because he failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c) and, as a result, failed to involve the 20 C.F.R. §718.305 presumption of total disability due to pneumoconiosis. Director's Exhibit 33. Claimant filed the instant claim for benefits on April 29, 1997. Director's Exhibit 1.

BLA-0416) of Administrative Law Judge Robert L. Hillyard 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 claim involves a duplicate claim. The administrative law judge found that claimant established thirty-five years of qualifying coal mine employment and had established the existence of pneumoconiosis. The administrative law judge further found that the newly submitted evidence failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(4) and, thus, a material change in conditions pursuant 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. Employer responds urging affirmance. The Director, Office of Workers' Compensation Programs, responds declining to submit a brief on 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Section 718.305 provides for a rebuttable presumption, available to a minor, who filed his claim prior to January 1, 1982, that the miner is totally disabled due to pneumoconiosis if the miner was employed for 15 or more years in underground coal mines and the evidence demonstrates the existence of a totally disabling pulmonary or respiratory or pulmonary impairment. 30 U.S.C.§921 (c)(4), as implemented by 20 C.F.R. §718.305.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1995). In the instant claim, because claimant's prior claim was denied on the basis that he failed to establish total respiratory disability, the evidence developed subsequent to the prior denial must establish that claimant has a total respiratory disability. *See* Director's Exhibit 30; 20 C.F.R. §§718.3, 718.202, 718.204; *Ross, supra; Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987); *Grant v. Director, OWCP*, 857 F.2d 1102, 12 BLR 2-1 (6th Cir. 1988); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

The administrative law judge initially found that the record contains no newly submitted pulmonary function studies which produced qualifying results pursuant to Section

718.204(c)(1). Decision and Order at 10. This finding is incorrect. The record contains three newly submitted pulmonary function studies. The first two studies, which were discussed by the administrative law judge, yielded non-qualifying results. Director's Exhibits 8, 30. However, the record also contains a qualifying pulmonary function study dated January 20, 1998 which the administrative law judge did not discuss. Employer's Exhibit 3. Since the administrative law judge failed to discuss all of the newly submitted pulmonary function study evidence pursuant to Section 718.204(c)(1) we vacate the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(1) and remand the case to the administrative law judge for further findings pursuant to this section. *Tackett v. Director, OWCP,* 7 BLR 1-703 (1985).

The administrative law judge next properly found that the newly submitted arterial blood gas study yielded non-qualifying results pursuant to Section 718.204(c)(2). Decision and Order at10; Director's Exhibits 11. Further, the record does not contain evidence of cor pulmonale with right sided congestive heart failure pursuant to Section 718.204(c)(3). Thus, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(2)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge considered the newly submitted medical opinion evidence of record. Dr. Modur opined that claimant is "fully disabled" due to his pulmonary condition but provides no further explanation of his opinion. Director's Exhibit 28. The administrative law judge rationally assigned Dr. Modur's opinion less weight because his opinion was "brief and unsupported." Decision and Order at 11; Director's Exhibit 28; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Dr. Younes also opined that claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 10. The administrative law judge rationally assigned this opinion less weight because there is no indication that Dr. Younes was familiar with claimant's usual coal mine duties. Decision and Order at 11; Director's Exhibit 10; *Lafferty, supra; Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984).

The administrative law judge next considered the opinions of Drs. Fino, Branscomb and Hutchins, all of whom opined that claimant has a totally disabling respiratory impairment which is due to lung cancer and/or cigarette smoking. Employer's Exhibits 3-6, 8, 11. The administrative law judge found these opinions entitled to greater weight on the basis of the physicians' credentials and because their opinions are well-documented and well-reasoned. Decision and Order at 11. The administrative law judge then found that claimant did not

[2]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 and C, respectively. A "non-qualifying" study yields values that exceed those values.

establish total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c)(4) and, consequently, failed to establish a material change in conditions pursuant to Section 725.309. However, inasmuch as claimant's prior claim was denied because claimant failed to establish the existence of a total respiratory disability, the administrative law judge erred in failing to explain why the opinions of Drs. Fino, Branscomb and Hutchins, all of whom opined that claimant has a totally disabling respiratory impairment, are insufficient to establish total respiratory disability and, consequently, a material change in conditions. Decision and Order at 11; Director's Exhibit 33; Employer's Exhibits 3-6, 8, 11; *Ross, supra.* As a result, we vacate the administrative law judge's findings that claimant failed to establish total respiratory disability pursuant to Section 718.204(c)(4) and a material change in conditions pursuant to Section 725.309 and instruct the administrative law judge on remand to reconsider the newly submitted evidence of record relevant to those issues.

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 findings 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