BRB No. 01-0171 BLA

BUDE JARVIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CARBON FUEL COMPANY	)	
	)	DATE ISSUED:
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy F. Cogan (Cassidy, Myers, Cogan, Voegelin & Tennant, L.C.), Wheeling, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0455) of Administrative Law Judge Daniel L. Leland 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] The instant case involves a duplicate claim filed on July 22, 1996.[2] In

[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 on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). By Order dated August 10, 2001, the Board rescinded its Order requiring the parties to submit briefs on the issue of the impact of the amended regulations to this case.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on March 13, 1979. Director's Exhibit 40-1. In a Decision and Order dated April 19, 1988, Administrative Law Judge George P. Morin found that the x-ray evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Director's Exhibit 40-52. Judge Morin, however, found that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). *Id.* Judge Morin found that there was no "pulmonary or respiratory impairment whatsoever." *Id.* Judge Morin further found that claimant was not entitled to benefits under 20 C.F.R. §410.490. *Id.* Finally, because Judge Morin found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), he found that claimant was not entitled to benefits under 20 C.F.R. Part 718. *Id.* Accordingly, Judge Morin denied benefits. *Id.* Claimant subsequently filed an appeal with the Board. By Order dated December 16, 1988, the Board dismissed claimant's appeal as abandoned. *Jarvis v. Carbon Fuel Co.*, BRB No. 88-1778 BLA (Dec. 16, 1988) (Order) (unpublished).

Claimant filed a second claim on May 22, 1989, along with additional medical evidence. Director's Exhibit 40-56. Since claimant's 1989 claim was filed within one year of the issuance of the last denial of his 1979 claim, the 1989 claim constituted a timely request for modification of the 1979 claim. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). In a Decision and Order dated May 2, 1991, Judge Morin denied claimant's request for modification under 20 C.F.R. §725.310 (2000). Director's Exhibit 40-84. Judge Morin

the initial decision, Administrative Law Judge Clement J. Kennington found that the only issue before him was whether the evidence was sufficient to establish the existence of complicated pneumoconiosis. Judge Kennington found that the evidence was insufficient to establish the existence of complicated pneumoconiosis. Accordingly, Judge Kennington denied benefits.

Claimant filed an appeal with the Board. While his appeal was pending, claimant filed a request for modification with the district director. By Order dated August 25, 1999, the Board dismissed claimant's appeal and remanded the case to the district director for modification proceedings.[3] *Jarvis v. Carbon Fuel Co.*, BRB No. 98-1585 BLA (Aug. 25, 1999) (Order) (unpublished).

In a Decision and Order dated September 28, 2000, Administrative Law Judge Daniel L. Leland (the administrative law judge) found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish complicated pneumoconiosis. Claimant also argues that the administrative law judge did not "discharge

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also denied claimant's request for a waiver of recovery of an overpayment. *Id.* Judge Morin subsequently denied claimant's motion for reconsideration. Director's Exhibit 40-88. By Decision and Order dated May 17, 1993, the Board held that Judge Morin considered the evidence submitted since the last denial and permissibly found, based on the numerical superiority of the readings, as well as the overall qualifications of the x-ray readers, that the record evidence as a whole did not establish the existence of complicated pneumoconiosis. *Jarvis v. Carbon Fuel Co.*, BRB No. 91-1843 BLA (May 17, 1993) (unpublished) (Brown, J. concurring and dissenting). The Board, therefore, affirmed Judge Morin's denial of benefits. *Id.* The Board also affirmed Judge Morin's denial of claimant's request for a waiver of recovery of an overpayment. *Id.* By Decision and Order dated May 12, 1994, the United States Court of Appeals affirmed the Board's May 17, 1993 Decision and Order. *Jarvis v. Carbon Fuel Co.*, No. 93-1698 BLA (4th Cir. May 12, 1994) (unpublished).

Claimant filed a third claim on July 22, 1996. Director's Exhibit 1.

[3]The Board informed claimant that the case would be reinstated only if claimant requested reinstatement. *Jarvis v. Carbon Fuel Co.*, BRB No. 98-1585 BLA (Aug. 25, 1999) (Order) (unpublished). The Board further informed claimant that his request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number BRB No. 99-1585 BLA. *Id.*

his duty regarding a claimant unrepresented by a lawyer." Claimant also reserves the right to assert other errors "upon receipt of the entire record." Employer has filed an untimely response brief.[4] The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that the administrative law judge did not "discharge his duty regarding a claimant unrepresented by a lawyer." Claimant's Brief at 33. At the April 22, 1998 hearing before Judge Kennington, claimant was represented by Melody Moss, a lay representative. *See* Director's Exhibit 52. Ms. Moss also represented claimant at the July 26, 2000 hearing before the administrative law judge. Claimant indicated that he was aware that Ms. Moss was not an attorney and approved of her representation. Hearing Transcript at 5. The administrative law judge provided claimant with an opportunity to submit and object to the admission of evidence. The administrative law judge provided claimant with sixty days following the hearing in which to submit additional x-ray evidence. Claimant was also provided an opportunity to question witnesses at the hearing. We, therefore, hold that claimant was provided a fair hearing in regard to his modification request.

Claimant also reserves the right to assert other errors "upon receipt of the entire record." Claimant's Brief at 40. By letter dated November 2, 2000, claimant's counsel requested a sixty day extension in which to "review the record" and decide whether he would represent claimant. By letter dated November 21, 2000, claimant's counsel requested copies of some pulmonary function tests that he found unreadable. By letter dated November 28, 2000, claimant's counsel requested a revised briefing schedule.

By Order dated January 29, 2001, the Board directed claimant to file his Petition and Review and brief within thirty days of receipt of the Order. The Board further stated that:

> [C]laimant's counsel has requested a copy of the official record. Counsel is advised that this is a voluminous case record and that there is a charge for photocopying the documents requested. Please inform the Board if you still want a copy of the record.

[4]Employer has filed a "Motion to Receive Brief Out-of-Time." We deny employer's motion and decline to accept its untimely response brief. 20 C.F.R. §802.217.

Order at 1-2.

Despite the Board's offer to provide claimant's counsel with a copy of the record, claimant has never requested a complete copy of the record.[5] We hold that claimant was provided with an adequate opportunity to obtain a complete copy of the record in the instant case.

We now turn our attention to the merits of the instant case. In his adjudication of claimant's 1996 claim, the administrative law judge considered whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Before making such a finding, the administrative law judge should have addressed whether

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[5]Claimant filed a brief on March 5, 2001. However, by letter dated April 6, 2001, claimant's counsel informed the Board that he had not received Judge Leland's September 28, 2000 Decision and Order. Claimant's counsel also requested "all of the information past Exhibit 76."

By Order dated August 2, 2001, the Board granted claimant twenty days from receipt of the Order in which to file a supplemental brief. The Board noted that it was enclosing copies of Employer's Exhibits 1-10 and Director's Exhibits 72 and 73.

By letter dated August 21, 2001, claimant's counsel informed the Board that he had not yet received a copy of Judge Leland's Decision and Order of September 28, 2000. By Order dated September 5, 2001, the Board provided claimant with a copy of Judge Leland's Decision and Order dated September 28, 2000. The Board also provided claimant with ten days in which to file a revised and/or supplemental brief.

By letter dated September 10, 2001, claimant's counsel stated, *inter alia*, that he did not have "all of the exhibits." Claimant nevertheless submitted a revised brief on September 17, 2001.

Claimant's counsel has requested a copy of Director's Exhibit 57. Director's Exhibit 57 consists of the interpretations rendered by Drs. Wiot and Shipley of claimant's May 21, 1997 x-ray, along with their curricula vitae. Both of the interpretations are negative for complicated pneumoconiosis. Claimant already has a copy of Dr. Wiot's interpretation of claimant's May 21, 1997 x-ray as this was included as an exhibit to Dr. Wiot's deposition testimony. *See* Employer's Exhibit 10. There is no evidence contained in Director's Exhibit 57 which would alter any of our holdings in the instant case.

the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310.[6] *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). However, to the extent that we affirm the administrative law judge's finding pursuant to 20 C.F.R. §725.309 (2000), the administrative law judge's failure to make an initial finding pursuant to 20 C.F.R. §725.310 constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth 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. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1979 claim was denied because claimant failed to establish that he was totally disabled. Director's Exhibit 40. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability.

[6]Although Sections 725.309 and 725.310 have been revised, these revisions only apply to claims filed after January 19, 2001.

In his consideration of whether the newly submitted evidence was sufficient to establish total disability, the administrative law judge initially found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000).[7] Decision and Order at 5. All of the newly submitted pulmonary function and arterial blood gas studies are non-qualifying. Director's Exhibits 16, 18, 46. There is no newly submitted medical opinion evidence that supports a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment[8] and there is no evidence of cor pulmonale with right sided congestive heart failure. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence

[7]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[8]In a report dated August 21, 1996, Dr. Rasmussen opined that claimant had normal lung function and retained the pulmonary capacity to perform his last coal mine employment. Director's Exhibit 17.

In a report dated March 25, 1998, Dr. Zaldivar opined that there was no pulmonary impairment present. Director's Exhibit 48. Dr. Zaldivar opined that from a pulmonary standpoint, claimant was not totally disabled from performing his usual coal mining work. *Id.* During an April 13, 1998 deposition, Dr. Zaldivar opined that claimant did not have any pulmonary impairment at all. Director's Exhibit 53 at 20.

In a report dated February 2, 2000, Dr. Zaldivar opined that there was no pulmonary impairment. Director's Exhibit 73. Dr. Zaldivar opined that from a pulmonary standpoint, claimant was capable of performing all work for which he had been trained. *Id.* During a July 11, 2000 deposition, Dr. Zaldivar opined that claimant did not suffer from a disabling pulmonary impairment. Employer's Exhibit 9 at 18. Dr. Zaldivar opined that claimant did not have any pulmonary impairment at all. *Id.*

In a report dated May 18, 1998, Dr. Crisalli opined that claimant did not suffer from any pulmonary or respiratory impairment whatsoever. Director's Exhibit 55. Dr. Crisalli opined that claimant's pulmonary function was normal. *Id.*

In a report dated July 4, 2000, Dr. Morgan opined that claimant had no pulmonary or respiratory impairment. Employer's Exhibit 8.

In a report dated July 5, 2000, Dr. Fino opined that claimant was not disabled, in whole or in part, from a pulmonary standpoint. Employer's Exhibit 8.

is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) and, therefore, insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

The record, however, contains newly submitted evidence supportive of a finding of complicated pneumoconiosis. This evidence, if credited, could establish entitlement to the irrebuttable presumption set out at 20 C.F.R. §718.304[9] and, therefore, could establish a finding of a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

The administrative law judge found that the newly submitted evidence is insufficient to establish the existence of complicated pneumoconiosis.[10] Decision and Order at 5-6. Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of complicated pneumoconiosis.

[9]20 C.F.R. §718.304 has not been revised.

[10]The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom*. *Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In his consideration of whether the newly submitted evidence was sufficient to establish complicated pneumoconiosis, the administrative law judge noted that while Dr. Francke, a B reader and Board-certified radiologist, interpreted claimant's August 21, 1996 x-ray as revealing size A large opacities, Director's Exhibit 9, five equally qualified physicians, Drs. Wheeler, Scott, Wiot, Shipley and Spitz, interpreted this x-ray as negative for complicated pneumoconiosis.[11] Director's Exhibits 45, 47, 49. The administrative law judge, therefore, properly found that the preponderance of the interpretations of claimant's August 21, 1996 x-ray is negative for complicated pneumoconiosis. Decision and Order at 5-6.

The administrative law judge also noted that while Dr. Aycoth, a B reader, interpreted claimant's May 21, 1997 x-ray as revealing size A large opacities, Director's Exhibit 42, Drs. Scott, Wheeler, Wiot, Shipley, Spitz, Meyer and Pendergrass, all dually qualified as B readers and Board-certified radiologists, interpreted this x-ray as negative for complicated pneumoconiosis.[12] Director's Exhibits 54, 57, 59; Employer's Exhibits 3, 7. The administrative law judge, therefore, properly found that the preponderance of the interpretations of claimant's May 21, 1997 x-ray is negative for complicated pneumoconiosis. Decision and Order at 5-6.

The administrative law judge finally noted that while Dr. Cohen, a B reader, interpreted claimant's most recent x-ray, a film taken on January 19, 2000, as positive for complicated pneumoconiosis, Claimant's Exhibit 1, three dually qualified physicians, Drs. Wiot, Spitz and Shipley, interpreted this x-ray as negative for complicated pneumoconiosis. Employer's Exhibits 1, 4, 6. The administrative law judge, therefore, properly found that the preponderance of the interpretations of claimant's January 19, 2000 x-ray is negative for complicated pneumoconiosis.[13]

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[11]The administrative law judge also noted that Dr. Gaziano, a B reader, and Dr. Patel, a Board-certified radiologist, also interpreted claimant's August 21, 1996 x-ray as negative for pneumoconiosis. Decision and Order at 5-6; Director's Exhibits 20-22.

[12]The administrative law judge noted that three physicians qualified as B readers, Drs. Castle, Morgan and Fino, also interpreted claimant's May 21, 1997 x-ray as negative for complicated pneumoconiosis. Decision and Order at 5-6; Employer's Exhibits 7, 8.

[13]The record also contains numerous interpretations of x-rays taken on July 11, 1991 and October 11, 1994. None of these interpretations is positive for complicated pneumoconiosis. Director's Exhibits 45, 47, 49, 73; Employer's Exhibits 3, 7, 8.

Decision and Order at 5-6.

Although the administrative law judge noted that Dr. Deardorff testified at the hearing before Judge Kennington that claimant's August 21, 1996 x-ray might show complicated pneumoconiosis, the administrative law judge accorded Dr. Deardorff's testimony "little weight" because of its equivocal nature. Decision and Order at 6 n.3. The administrative law judge acted within his discretion as trier of fact in finding that Dr. Deardorff's testimony was too equivocal to support a finding of complicated pneumoconiosis.[14] S*ee Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 6 n.3; Director's Exhibit 52.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of

[14]Even if Dr. Deardorff's interpretation of claimant's August 21, 1996 x-ray were sufficient to support a finding of complicated pneumoconiosis, the administrative law judge's finding that the preponderance of the interpretations of claimant's August 21, 1996 was negative for complicated pneumoconiosis is nonetheless supported by substantial evidence. Hence, the administrative law judge's error, if any, in discrediting Dr. Deardorff's interpretation of claimant's August 21, 1996 x-ray is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

complicated pneumoconiosis.[15]

In light of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish either total disability pursuant to 20 C.F.R. §718.204(c) (2000) or the existence of complicated pneumoconiosis, we affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Rutter*, *supra*.

[15]Claimant argues that the administrative law judge should have discredited the x-ray interpretations of Drs. Scott, Shipley, Wiot, Spitz, Wheeler and Abramowicz because they "read the same x-rays differently on different occasions." Claimant's Brief at 7. We disagree. While several physicians offered different interpretations as to the degree of claimant's simple pneumoconiosis on a particular x-ray, they did not alter their conclusions that claimant's x-rays did not reveal the presence of complicated pneumoconiosis.

We also reject claimant's contention that the administrative law judge, in his consideration of the x-ray evidence, "merely counted heads." The administrative law judge clearly considered the radiological qualifications of the respective readers. *See* Decision and Order at 5-6.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge