BRB No. 99-0139 BLA

DAVID FULLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL 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 Alexander Karst, Administrative Law Judge, United States Department of Labor.

David Fuller, Haysi, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-1586) of Administrative Law Judge Alexander Karst (the administrative law judge) denying benefits on a request for modification of 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). The instant case involves a duplicate claim filed on January 26, 1993.[1] The administrative law judge found that the issue

[1]Claimant filed his initial claim on May 30, 1973. Director's Exhibit 26. On September 17, 1985, Administrative Law Judge Roy N. LaRocca issued a Decision and Order denying benefits because claimant failed to establish the existence of

pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed another claim on July 5, 1990. *Id*. However, on December 16, 1991, Administrative Law Judge Frank J. Marcellino issued a Decision and Order denying benefits because claimant failed to establish a material change in conditions. *Id*. This denial became final because claimant did not pursue the claim any further. Claimant filed his most recent claim on January 26, 1993. Director's Exhibit 1. Although a Department of Labor (DOL) claims examiner found that claimant was entitled to benefits, Director's Exhibit 21, Administrative Law Judge Stuart A. Levin issued a Decision and Order denying benefits on December 14, 1994, Director's Exhibit 35. The basis of Judge Levin's denial was claimant's failure to establish a material change in conditions. *Id*. Subsequently, employer filed a request for reconsideration on December 20, 1994, Director's Exhibit 36, and claimant filed an appeal on January 9, 1995, Director's Exhibit 37. On January 12, 1995, employer filed a request to dismiss claimant's appeal as premature, Director's Exhibit 39, which the Board granted, *Fuller v. Clinchfield Coal Co.*, BRB No. 95-0888 BLA (Order)(Jan. 30, 1995)(unpub.). On May 9, 1995, Judge Levin issued an Order which granted employer's request for reconsideration and corrected a typographical error in his December 14, 1994 decision. Director's Exhibit 41. Claimant filed correspondence dated May 6, 1996 in

before him was whether claimant established modification of Administrative Law Judge Stuart A. Levin's December 14, 1994 denial of benefits. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found the evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge found the evidence insufficient to establish either a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310, and thus, he denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, 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 on appeal to be whether the Decision and Order below is supported by substantial evidence. *See 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 conclusions of law are rational, supported by substantial evidence, and 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).

In considering whether claimant established a basis for modification of Judge Levin's December 14, 1994 denial of benefits, the administrative law judge should have considered whether the newly submitted evidence on modification is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Nonetheless, we hold that the administrative law judge's error in this regard is harmless in view of the administrative law judge's proper determination that the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, adopted a standard whereby an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and

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pursuit of his claim, Director's Exhibit 42, which the DOL construed as a request for modification, Director's Exhibit 43.

determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him, and thereby has established a material change in conditions at 20 C.F.R. §725.309(d). *See 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). Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 26. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, and thus, a change in conditions at 20 C.F.R. §725.310, the newly submitted evidence on modification must support a finding of either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c).

Initially, we hold that the administrative law judge properly found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since the newly submitted x-ray readings of record are negative for pneumoconiosis.[2] Director's Exhibits 47, 51, 52, 60. Next, we hold as a matter of law that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since there is no biopsy evidence of record. In addition, we hold as a matter of law that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the newly submitted opinions of Drs. Sargent and Sutherland. Whereas Dr. Sargent found that claimant does not suffer from coal

[2]The administrative law judge observed that "[t]here was...one narrative report submitted which makes no mention of pneumoconiosis and a second narrative evidencing scar tissue 'felt to be from pneumoconiosis.'" Decision and Order at 3; Director's Exhibits 42, 56. The administrative law judge properly found that "[t]he sole x-ray interpretation mentioning scar tissue 'felt to be from pneumoconiosis' is insufficient to establish pneumoconiosis under the applicable regulations," Decision and Order at 4, since this narrative did not provide a positive x-ray reading in accordance with the ILO classification system, *see* 20 C.F.R. §718.102.

workers' pneumoconiosis, Director's Exhibit 51, Dr. Sutherland found that claimant's chest x-ray showed interstitial markings consistent with chronic obstructive pulmonary disease and pneumoconiosis, Director's Exhibit 56. The administrative law judge properly discredited Dr. Sutherland's opinion because he found that it is not reasoned.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Therefore, since the administrative law judge properly discredited the only medical opinion of record that could support a finding of pneumoconiosis, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

[3]The administrative law judge correctly stated that "Dr. Sutherland does not indicate the bases for his conclusions." Decision and Order at 4; Director's Exhibit 56.

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function study evidence or arterial blood gas study evidence of record yielded qualifying[4] values, Director's Exhibit 51, we hold that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1) and (c)(2). Director's Exhibits 30, 46; Employer's Exhibit 8. Further, we hold as a matter of law that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

We next address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). Whereas Dr. Sargent found that claimant is not totally disabled, Director's Exhibit 51, Dr. Sutherland found that claimant is totally disabled,[5] Director's Exhibit 56. As previously noted, the administrative law judge properly discredited Dr. Sutherland's opinion because he found that it is not reasoned. *See Clark, supra*; *Fields, supra*; *Fuller, supra*. Therefore, since the administrative law judge properly discredited the only medical opinion of record that could support a

[4]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 exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[5]The administrative law judge observed that "[p]rogress notes from Claimant's treating physician, Dr. Sutherland, for the period from 1990 through 1997, includ[es] a comment that 'further exposure to mine environment would further disable [claimant].'" Decision and Order at 3; Director's Exhibit 56. This determination does not constitute a finding of total disability under the Act. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

finding of total disability, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4).

Since the newly submitted evidence on modification is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See 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). Consequently, we hold that substantial evidence supports the administrative law judge's finding that the newly submitted evidence is insufficient to establish a change in conditions at 20 C.F.R. §725.310.[6] *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-8 (1994); *Napier v. Director, OWCP*, 17 BLR 1-111 (1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]We note that the administrative law judge rendered a finding that the evidence is insufficient to establish a mistake in a determination of fact at 20 C.F.R. §725.310, consistent with the holding of the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge