BRB No. 00-0197 BLA

EUGENE FARLEY Claimant-Petitioner v. RAWHIDE COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand - Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Eugene Farley, Evarts, Kentucky, *pro se.*

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand - Denying Benefits (97-BLA-0083) of Administrative Law Judge Thomas F. Phalen, Jr., 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 has been before the Board previously and involves a request for modification on a duplicate claim.[1] On remand, the administrative law judge considered the evidence submitted subsequent to the previous denial of benefits issued on December 12, 1995, and found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 by establishing that he either now suffered from pneumoconiosis or a totally disabling respiratory disability. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in his weighing of the medical evidence. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not 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. *See 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 by 30 U.S.C. §932(a); *See O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1]In its previous decision in this case, the Board affirmed the administrative law judge's determination that the evidence established 5.89 years of coal mine employment and held that the administrative law judge erred in considering the issue to be whether claimant established a basis for modification of the district director's denial of claimant's duplicate claim. The Board instructed the administrative law judge, on remand, to consider *de novo* the issue of whether the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Farley v. Rawhide Coal Co., Inc.*, BRB No. 98-0932 (May 6, 1999)(unpub.).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R.§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). As this case involves a duplicate claim, claimant must establish through the newly submitted evidence at least one of the elements of entitlement previously adjudicated against him in order to establish a material change in conditions. *Sharondale v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If claimant is successful in establishing a material change in conditions, he is then entitled to have his claim considered on the merits. *See Ross, supra*.

In determining whether claimant established the existence of pneumoconiosis, the administrative law judge first considered the x-ray evidence submitted subsequent to the previous denial of benefits. The administrative law judge found that ten interpretations of three new x-rays had been submitted. Decision and Order on Remand at 4 - 5; Director's Exhibits 13 - 18, 21, 41, 42; Employer's Exhibits 1, 2. After discussing each of the ten interpretations, the administrative law judge found that the vast majority of interpretations are negative for pneumoconiosis, and that most of these negative interpretations are by physicians with superior radiographic qualifications. Decision and Order on Remand at 5. In making this determination, the administrative law judge acted within his discretion in relying on the numerical superiority of the negative interpretations by better qualified physicians. *See Worhach v. Director, OWCP, 17 BLR 1-105 (1993)*; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). We therefore affirm the administrative law judge's determination that the evidence of record submitted subsequent to the denial of the previous claim fails to establish that claimant suffers from pneumoconiosis pursuant to Section 718.202(a)(1).

Next, the administrative law judge determined that claimant could not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) as the newly submitted evidence did not include biopsy evidence. Decision and Order on Remand at 5. The administrative law judge also determined that pneumoconiosis was not established at Section 718.202(a)(3) as the presumptions set forth in Sections 718.304, 718.305 and 718.306 are inapplicable because this is a living miner's claim filed after January 1, 1982, and the newly submitted evidence does not contain evidence of complicated pneumoconiosis. Decision and Order on Remand at 5. As these findings are supported by the record, we affirm the administrative law judge's finding that claimant did not establish a material change in conditions pursuant to Section 718.202(a)(2) or (a)(3). *See* 20 C.F.R. §§718.202(a)(2); 718.202(a)(3); 718.304; 718.305; 718.306.

The administrative law judge then considered whether the newly submitted medical opinions established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge found that Dr. Baker diagnosed pneumoconiosis, chronic bronchitis, and chronic obstructive disease and related these conditions, in part, to coal dust exposure. Decision and Order on Remand at 6; Director's Exhibits 11, 12. The administrative law judge found that this diagnosis was supported by the underlying documentation that Dr. Baker relied upon, but was not supported by the record as a whole. *Id*. The administrative law judge then considered medical opinions by Drs. Broudy and Wright, which did not diagnose the presence of pneumoconiosis. The administrative law judge found that both physicians' diagnoses were supported by the "normal values" obtained on diagnostic tests and by the physical examination performed on claimant, which revealed clear airways. Decision and Order on Remand at 10; Director's Exhibits 10, 41. The administrative law judge found that the preponderance of the arterial blood gas and pulmonary function studies, chest x-rays and physical examinations "do not weigh in favor of a chronic lung disease causally related to coal dust exposure." Decision and Order on Remand at 6. The administrative law judge then rationally accorded greater weight to the opinions of Drs. Broudy and Wright, over the contrary opinion of Dr. Baker because the former opinions were supported by the objective evidence of record were better reasoned. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*). Thus, we affirm the administrative law judge's finding that the new evidence of record fails to establish that claimant suffers from pneumoconiosis pursuant to Section 718.202(a)(4).

The administrative law judge then considered whether claimant established that he is now totally disabled. At Section 718.204(c)(1) and (c)(2), the administrative law judge properly determined that the new pulmonary functions studies and blood gas studies were non-qualifying,[2] and therefore did not establish total disability. *See* 20 C.F.R. §718.204(c)(1), (c)(2). At Section 718.204(c)(4), the administrative law judge found that Dr. Baker diagnosed a mild impairment, but that this opinion was outweighed by the opinions of Drs. Broudy and Wright, that claimant retains the respiratory capacity to perform his last coal mine work, because these opinions were supported by the objective medical data of record. Decision and Order on Remand at 7. As the administrative law judge rationally found that the opinions of Drs. Broudy and Wright were better supported by the non-qualifying objective evidence, we affirm his determination that the newly medical opinions fail to establish total disability pursuant to Section 718.204(c)(4). *See*

[2]A "qualifying" pulmonary function study or arterial 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 the table values.

Trumbo, *supra*; *Clark*, *supra*. We thus, affirm the administrative law judge's conclusion that claimant did not establish that he is totally disabled pursuant to Section 718.204(c).[3] Inasmuch as the administrative law judge properly considered the newly submitted evidence, we affirm his finding that claimant failed to establish a material change in conditions pursuant to Section 725.309. *See Ross*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[3]We note that the administrative law judge did not make a finding pursuant to Section 718.204(c)(3). This error does not require remand, however, as the newly submitted evidence does not contain evidence of cor pulmonale with right-sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3).