BRB No. 99-1202 BLA

JOSEPH M. PINTER, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
U.S. STEEL MINING COMPANY	)	
	)	
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 Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Joseph M. Pinter, Jr., Princeton, West Virginia, *pro se*.

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 (98-BLA-0810) of Administrative Law Judge Lawrence P. Donnelly denying benefits on a duplicate 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] After accepting the parties'

[1]Claimant's first claim, filed on May 30, 1978, was denied by the Social Security Administration on October 12, 1978 and January 29, 1979 and by the Department of Labor (DOL) on December 4, 1979. Director's Exhibit 29. The DOL found that claimant met the disability standards, but could not award benefits as claimant was still working and did not have complicated pneumoconiosis. *Id.* In a letter dated February 27, 1980, claimant informed the DOL that he was not pursuing his 1978 claim. *Id.* Claimant's second claim, filed on May 26, 1992, was denied by the district director on November 2, 1992 and March10, 1993 because claimant failed to establish a material change in

stipulation to twenty-four years of coal mine employment, the administrative law judge found that the newly submitted evidence established pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.§§718.202(a) and 718.203(b). Therefore, the administrative law judge determined that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d). However, the administrative law judge found the evidence insufficient to establish total disability pursuant to 20 C.F.R.§718.204(c)(1)-(4). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[2]

In an appeal filed by a claimant without the assistance of counsel, the Board will consider 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 supported by substantial evidence, are rational, and are consistent 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 (1985).

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conditions. The district director found that neither pneumoconiosis, pneumoconiosis arising out of coal mine employment or total disability was established. Director's Exhibit 30. There is no record that claimant further pursue his 1992 claim. The instant duplicate claim was filed on January 27, 1997. Director's Exhibit 1.

[2]We affirm the administrative law judge's finding that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203(b), and thus, a material change in conditions under 20 C.F.R. §725.309(d), and his finding of twenty-four years of coal mine employment, as unchallenged on appeal and not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The administrative law judge found "invalid" the previously submitted evidence relating to disability. Decision and Order at 9. All the previously submitted pulmonary function and blood gas studies of record were non-qualifying[3] with the exception of the pulmonary function study performed in May 11, 1979 which yielded qualifying values.[4] Director's Exhibit 29. The record contains a report by a cardiopulmonary technician finding the May 11, 1979 study unacceptable due to less than optimal effort, cooperation and comprehension[5], and a report of the same study by Dr. Hatfield, diagnosing moderate obstructive disease. *Id*. Because the administrative law judge did not explain his finding that the previously submitted evidence is "invalid" in light of the May 11, 1979 pulmonary function study which yielded qualifying values, or address the report by the cardiopulmonary technician and Dr. Hatfield's opinion, we vacate his finding with regard to the previously submitted evidence relating to total disability at Section 718.204(c)(1).

With respect to the newly submitted pulmonary function studies, the administrative law judge found that although the tests yielded qualifying values, "the reviews of Dr. Gaziano puts into question the validity of all of them."[6] Decision and Order at 10. The administrative law judge failed to explain his preference of Dr. Gaziano's opinion over the opinion of Dr. Jabour, who administered the newly submitted pulmonary function studies. Therefore, we vacate the administrative law judge's finding that the newly submitted pulmonary function studies do not establish total disability and remand for the administrative law judge to consider all the evidence under Section 718.204(c)(1). The administrative law judge is instructed to provide a specific reason for crediting the reviewing or administering physician in determining whether

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[3] A "qualifying" pulmonary function 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 in the tables. 20 C.F.R. § 718.204(c)(1) and (c)(2).

[4]In a letter dated August 29, 1979, the claims examiner informed claimant that the May 11, 1979 study was not going to be "used" in assessing entitlement because the "doctor" administering the study indicated that claimant's effort was "submaximal." Director Exhibit 29.

[5]The cardiopulmonary technician suggested a retest "with stricter attention to initial expiratory effort." Director's Exhibit 29.

[6]The administrative law judge found that Dr. Jabour, the administering physician, "did not defend the studies as being in compliance with the required standards, as set forth at §718.103 and Appendix B" and that "[a]bsent a credible rebuttal, Dr. Gaziano's reviews show that these studies are not in substantial compliance with the Regulations." Decision and Order at 10.

the pulmonary function studies of record support a finding of total disability at Section 718.204(c)(1). *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Under Section 718.204(c)(2) and (c)(3), the administrative law judge properly found that none of the arterial blood gas studies of record yielded qualifying values, and that the record is devoid of any evidence regarding the existence of cor pulmonale with right sided congestive heart failure under Section 718.204(c)(3).

Under Section 718.204(c)(4), the administrative law judge found the medical opinion evidence insufficient to establish total disability, finding unreliable Dr. Jabour's opinion that claimant is totally disabled because it was based on unreliable pulmonary function study results. In view of our decision to vacate the administrative law judge's finding under Section 718.204(c)(1), we must also vacate his finding that claimant did not establish total disability under Section 718.204(c)(4). The record consists of medical opinions and treatment notes by six physicians and one physician's assistant who treated or examined the claimant. The administrative law judge did not consider the previously submitted medical opinion evidence, namely opinions authored by Drs. Cardona, Hatfield and Vasudevan. The administrative law judge listed the newly submitted medical opinions of Drs. Bird and Jabour, but only included Dr. Jabour's opinion in his final analysis.[7] Further, the administrative law judge mischaracterized the treatment notes of Physician's Assistant Ramsey as a physician's opinion. On remand, having found a material change in conditions pursuant to 20 C.F.R. §725.309, the administrative law judge is required to review the entire record to determine whether total disability has been demonstrated based on the old and new evidence, under Section 718.204(c)(4). *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert. denied*, 117 S.Ct. 763 (1997). In addition, on remand, the administrative law judge must weigh all the relevant evidence together, like and unlike, in determining whether claimant established total disability pursuant to 20 C.F.R. §718.204(c). *See Clark, supra*; *Fields, supra*; *Shedlock v. Bethlehem Mines Corp.* 9 BLR 1-

[7]Dr. Bird diagnosed pneumoconiosis and obtained a pulmonary function study that was interpreted as normal. Director's Exhibit 19. Physician's Assistant Ramsey diagnosed moderate or severe chronic obstructive pulmonary disease. Claimant's Exhibit 1. The previously submitted medical opinion evidence relevant to the issue of total disability consists of reports by Drs. Cardona, Hatfield and Vasudevan. Claimant's Exhibit 1; Director's Exhibits 29, 30. Dr. Cardona diagnosed that the x-ray taken on April 2, 1984 revealed "20% partial permanent disability" related to pneumoconiosis; Dr. Hatfield diagnosed a moderate degree of impairment based on the spirometry performed on May 11, 1979; and Dr. Vasudevan determined that claimant was not disabled.

195 (1986). If the administrative law judge finds the presence of a totally disabling respiratory impairment, he must further determine whether pneumoconiosis is at least a contributing cause of claimant's totally disabling respiratory impairment. *See* 20 C.F.R. 718.204(b); *Robinson v. Pickands Mather & Co.*, 914 F. 2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge