BRB No. 99-1204 BLA

HOBART D. McNEIL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
McNEIL TRUCKING COMPANY	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
FIRST SOUTHERN INSURANCE COMPANY	)	
	)	
Carrier-Respondent	)	
	)	
JEFF COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	DATE ISSUED:
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Carrier-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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Hobart D. McNeil, Corbin Kentucky, *pro se*.

Amy E. Wilmot (Arter & Hadden LLP), Washington, D.C., for employer, Jeff Coal Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (99-BLA-0540) 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). In this duplicate claim,[1] the administrative law judge considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). After crediting claimant with eight years of coal mine employment, the administrative law judge found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found the newly submitted evidence of record insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis. See 20 C.F.R §§718.204(b), 718.204(c). Accordingly, benefits were denied. Claimant appeals, generally challenging the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond 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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-85 (1994); *McFall v. Jewell Ridge Coal Co.*, 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 by 30 U.S.C. §932(a).

[1]Claimant filed his initial claim on November 24, 1992. The district director denied the claim on May 7, 1993. No further action was taken and the denial became final. Claimant filed the instant claim on January 7, 1998. Director's Exhibit 1.

In order to establish entitlement to benefits in a living miner's claim 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. *See* 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*).

Section 725.309 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). The United States Court of Appeals for the Sixth Circuit, under whose jurisdiction the instant case arises, has held that in considering whether claimant has established a material change in conditions, the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has proven at least one element of entitlement previously adjudicated against him. *See Ross, supra.*

At Section 718.202(a)(1), the administrative law judge correctly determined that the newly submitted evidence consisted of seven interpretations of four x-rays dated February 13, June 29, October 6, and December 17, all in 1998. Director's Exhibits 3, 10, 11, 22, 32-34. The administrative law judge properly found that claimant failed to establish the existence of pneumoconiosis by x-ray, since six of the seven x-ray interpretations of record were negative for pneumoconiosis. The sole positive interpretation was by Dr. Ballard Wright, who possessed no special qualifications as an x-ray reader. Director's Exhibit 32. The administrative law judge permissibly gave greater weight to the negative interpretations by the physicians possessing the dual qualifications of Board-certified radiologist and B reader. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 10. As there is no newly submitted biopsy evidence, the administrative law judge correctly found that claimant cannot establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). Likewise, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis at Section 718.202(a)(3), as none of the presumptions found in Sections 718.304, 718.305, or 718.306 is applicable in the instant case. *Id.* Thus, we affirm the administrative law judge's findings at Section 718.202(a)(1), (a)(2) and (a)(3).

At Section 718.202(a)(4), the administrative law judge considered the six newly submitted medical opinions of record. The administrative law judge found that the opinions of Drs. Broudy, Dahhan, Branscomb and Fino, who found no evidence of pneumoconiosis, were reasoned, documented and supported by the objective evidence. Director's Exhibits 22, 33; Employer's Exhibits 1, 2, 4, 5. The administrative law judge found that Dr. Baker's

opinion consisted of conflicting statements, and consequently accorded it less weight.[2] *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Director's Exhibit 10. The administrative law judge permissibly accorded less weight to Dr. Wright's opinion, as he relied on an incorrect smoking history of one to two cigarettes daily for thirty years or more, where the other evidence of record indicated at least one pack per day for forty-four years. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 12. Thus, we affirm the administrative law judge's findings at Section 718.202(a)(4).

Having found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis, and therefore was insufficient to establish a material change in conditions, the administrative law judge next considered whether the evidence could establish a material change in conditions by establishing a totally disabling respiratory impairment at Section 718.204(c).

The administrative law judge initially found that, while two pulmonary function studies had been invalidated by Dr. Branscomb, as all four of the newly submitted pulmonary function studies of record were qualifying, the pulmonary function study evidence nevertheless supported a finding of total disability at Section 718.204(c)(1).[3] Director's Exhibits 10, 22, 32, 33; Decision and Order at 12. At Section 718.204(c)(2), the administrative law judge properly found that the two newly submitted blood gas studies were non-qualifying, and therefore, did not establish a totally disabling respiratory impairment. *See* 20 C.F.R. § 718.204(c)(2); Director's Exhibits 10, 22. Likewise, the administrative law judge properly found Section 718.204(c)(3) was inapplicable to the instant case as the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

[2]Dr. Baker stated that claimant did not have an occupational lung disease caused by his coal mine employment, but also stated that claimant does have a pulmonary impairment related to cigarette smoking and coal dust exposure. Director's Exhibit 10.

[3]Although an administrative law judge may credit invalidations of pulmonary function studies, the administrative law judge must provide reasons for relying on the invalidation reports of qualifying pulmonary function study evidence. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985).

At Section 718.204(c)(4), the administrative law judge found that all six newly submitted physicians' opinions of record diagnosed a totally disabling respiratory impairment. Decision and Order at 13, Director's Exhibits 10, 22, 32, 33, Employer's Exhibits 2, 4, 5. While the evidence at Sections 718.204(c)(1) and (c)(4) thus supports a finding of a material change in conditions, inasmuch as the administrative law judge has not weighed all of the newly submitted evidence at Section 718.204(c), like and unlike, we remand this case to the administrative law judge to weigh all of the evidence supportive of total disability against the contrary probative evidence at Section 718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *affirmed on recon*, 9 BLR 1-236 (1987)(*en banc*). If, on remand, the administrative law judge finds that claimant has established a material change in conditions pursuant to Section 725.309, he must consider all the evidence of record, both old and new, to determine if claimant has established all the elements of entitlement.[4] *See Ross, supra*.

Accordingly, the Decision and Order of the administrative law judge 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.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[4]The administrative law judge is advised to make separate findings as to total disability at Section 718.204(c), and total disability due to pneumoconiosis at Section 718.204(b). In order to establish total disability due to pneumoconiosis at Section 718.204(b) in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit claimant must establish that his totally disabling respiratory impairment is due "at least in part" to his pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge