BRB No. 98-1626 BLA

WESLEY B. WYATT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/24/99
	)	
CONSOLIDATION COAL 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 Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Wesley B. Wyatt, Princeton, West Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-BLA-1408) of Administrative Law Judge Pamela Lakes Wood with respect to 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 her Decision and Order, the administrative law judge noted that the record contained a total of four claims for benefits.[1] The administrative law judge considered, therefore, whether the evidence

[1]Claimant filed his initial application for benefits on June 16, 1982. The district director denied this claim in a letter issued on May 12, 1983, on the grounds that claimant failed to demonstrate that he was suffering from a totally disabling respiratory or pulmonary impairment to which pneumoconiosis contributed. Director's Exhibit 18.

proffered with the fourth claim supported a finding of a material change in conditions pursuant to 20 C.F.R. §725.309, in accordance with the standard adopted by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *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).[2] The administrative law judge determined that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). The administrative law judge concluded, therefore, that claimant failed to demonstrate a material change in conditions and denied benefits accordingly. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

Claimant took no further action until filing a second claim on May 10, 1984. *Id.*. The district director treated this claim as a request for modification under 20 C.F.R. §725.310 and in correspondence issued on May 22, 1984, informed claimant that he had thirty days within which to submit additional evidence and without such additional evidence, his claim would remained denied. *Id.*. Claimant did not respond within the period specified; rather, he filed a third application for benefits on January 8, 1985, which the district director denied in a letter issued on May 3, 1985, on the grounds that claimant did not establish any of the elements of entitlement. *Id.*. Claimant filed his fourth claim for benefits on December 4, 1995. Director's Exhibit 1.

[2]In *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), the court held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must prove at least one of the elements of entitlement previously adjudicated against him.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After review of the administrative law judge's Decision and Order and the relevant evidence of record, we affirm the administrative law judge's determination that claimant did not establish a material change in conditions pursuant to Section 725.309, as it is rational and supported by substantial evidence. With respect to the administrative law judge's consideration of the newly submitted evidence under Section 718.202(a)(1), the administrative law judge acted within her discretion in finding that the existence of pneumoconiosis was not established by the x-ray evidence, as the two positive readings of the film dated December 29, 1995 by physicians qualified as B readers, were outweighed by the two negative interpretations of the same film by physicians dually qualified as B readers and Board-certified radiologists and by the three negative interpretations of the film obtained on September 4, 1996, by dually qualified physicians. Decision and Order at 6; Director's Exhibits 10, 11; Employer's Exhibits 1, 3-8; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). The administrative law judge also rationally determined that claimant could not establish a material change in conditions under Section 718.202(a)(2) and (a)(3), as the record does not contain any biopsy evidence and the claim at issue was filed by a living miner after January 1, 1982. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304-306.

Under Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Ranavaya, Zaldivar, Dahhan, and Hippensteel. Dr. Ranavaya examined claimant on December 29, 1995, and diagnosed pneumoconiosis based upon a three year history of coal dust exposure and radiological evidence. Director's Exhibit 8. Drs. Zaldivar examined claimant on September 4, 1996 and also reviewed medical reports prepared by other physicians of record. Dr. Zaldivar concluded that claimant is not suffering from pneumoconiosis, but does have emphysema caused by cigarette smoking, and pulmonary fibrosis, which is not related to pneumoconiosis or dust exposure. Employer's Exhibits 4, 6. Drs. Dahhan and Hippensteel conducted record reviews; each concluding that claimant does not have pneumoconiosis. Employer's Exhibits 6, 7. The administrative law judge rationally determined that Dr. Ranavaya's opinion was outweighed by the opinions of Drs. Zaldivar, Hippensteel, and Dahhan, as the latter opinions are better supported by the objective evidence of record, including claimant's employment history. Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139

(1985). We affirm, therefore, the administrative law judge's finding that the newly submitted medical opinions of record are insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Thus, we also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4).

Turning to the issue of total disability, the administrative law judge determined correctly that the pulmonary function studies and blood gas studies proffered with the most recent claim do not support a finding of total disability under Section 718.204(c)(1) and (c)(2) on the ground that none of the studies produced qualifying values.[3] Decision and Order at 8; Director's Exhibit 7; Employer's Exhibits 1, 4; 20 C.F.R. §718.204(c)(1), (c)(2); Appendices B and C to 20 C.F.R. Part 718. The administrative law judge also determined correctly that total disability could not be established pursuant to Section 718.204(c)(3), as the record does not contain any evidence that claimant has cor pulmonale with right sided congestive heart failure. Decision and Order at 8; 20 C.F.R. §718.204(c)(3). Regarding the newly submitted medical opinions, the administrative law judge rationally found that inasmuch as Drs. Zaldivar, Dahhan, and Hippensteel stated that claimant does not have a disabling respiratory or pulmonary impairment and Dr. Ranavaya diagnosed a minimal impairment, total disability was not established under Section 718.204(c)(4). Decision and Order at 8; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *Boyd v. Freeman United Coal Mining Co.*, 6 BLR 1-159 (1983). Thus, we affirm the administrative law judge's finding that claimant did not establish total disability pursuant to Section 718.204(c)(1)-(4).

In light of the administrative law judge's appropriate determination that the newly submitted medical evidence of record was insufficient to demonstrate either the existence of pneumoconiosis or total disability due to pneumoconiosis, the elements of entitlement previously adjudicated against claimant, we must affirm the administrative law judge's finding that claimant did not establish a material change in conditions pursuant to Section 725.309. *See Rutter*, *supra*. We must also affirm, therefore, the denial of benefits. *Id.*.

[3]A "nonqualifying" pulmonary function study or blood gas study yields values which exceed the applicable table values set forth in Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1), (c)(2). A "qualifying" test yields values which are equal to or less than the requisite table values.

Accordingly, the administrative law judge's Decision and Order 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