BRB No. 99-0170 BLA

LESTER E. HOLMES Claimant-Petitioner v. BEITZEL CORPORATION and ROBERTS & SCHAEFER COMPANY Employer-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 of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

Kevin C. McCormick, Elizabeth S. Rudnick (Whiteford, Taylor & Preston L.L.P.), for Beitzel Corporation.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for Roberts & Schaefer Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-1518) of Administrative Law Judge Daniel L. Leland 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). On May 17, 1996, claimant filed the present application for benefits, which is a duplicate claim because it was filed more than one year after the denial of his previous claim. Director's Exhibits 1, 41; 20 C.F.R. §725.309(d).[1] The district director denied benefits and claimant requested a hearing, which was held on April 16, 1998. The administrative law judge issued his Decision and Order on October 8, 1998.

The administrative law judge found that the medical evidence developed since the previous denial failed to establish either the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and therefore failed to demonstrate a material change in conditions as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge erred in not allowing him to submit evidence in rebuttal of post-hearing evidence submitted by Beitzel Corporation (Beitzel). Claimant also asserts that the administrative law judge applied an improper material change in conditions standard and erred in his weighing of the medical evidence at Sections 718.202(a)(1) and 718.204(c). Beitzel and Roberts & Schaefer (Roberts) respond, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

---

[1] Claimant's initial application for benefits filed on February 22, 1988 was denied on July 25, 1988 and the district director administratively closed the claim on September 25, 1988. Director's Exhibit 41.

[2] As a threshold matter, we have considered and rejected Beitzel's argument that claimant abandoned his appeal by failing to timely file his petition for review and brief. Beitzel's Brief at 4; *see* 20 C.F.R. §802.217(a). Additionally, we affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

At the formal hearing, claimant proffered Claimant's Exhibits 1-4, which included two physical examination reports with associated medical data, and a supplemental medical report. Beitzel objected to the admission of these exhibits on the ground that they had not been exchanged with Beitzel at least twenty days before the hearing as required by Section 725.456(b)(1). Hearing Transcript at 11. Upon questioning by the administrative law judge, claimant's counsel explained that he had inadvertently omitted to send any of these exhibits to Beitzel, and had similarly omitted to send one of the exhibits, the supplemental medical report, to Roberts. Hearing Transcript at 11-12. Claimant's counsel acknowledged that the record should be held open for both operators to respond. Accordingly, with the consent of the parties the administrative law judge admitted Claimant's Exhibits 1-4 into evidence and ordered that the record be held open for ninety days "for both responsible operators to respond to the medical evidence submitted by the [c]laimant which they had not received." Hearing Transcript at 13; *see* 20 C.F.R. §725.456(b)(2), (3). There was no further discussion of this issue until the close of the hearing, when the administrative law judge indicated that he would issue an order for a briefing schedule once the post-hearing evidence was submitted, and then asked the parties whether there was anything further. Claimant's counsel responded, "Nothing further, your honor." Hearing Transcript at 190.

---

§§718.202(a)(2)-(3), 718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Roberts chose not to submit post-hearing evidence. On June 16, 1998, Beitzel submitted a physical examination report and a physician's critical review of a pulmonary function study associated with one of claimant's physical examination reports. Employer's Post-Hearing Exhibits A-E. Thereafter, the administrative law judge issued an order indicating that the record would close on July 20, 1998, and that the parties should file their briefs on or before that date. However, six days before the record closing date, claimant moved for an extension of thirty additional days to respond to Beitzel's evidence plus thirty days thereafter for briefs. Both operators objected. The administrative law judge denied claimant's motion, finding that claimant did not supply a reason for why he should be permitted to develop additional evidence "when the basis for Beitzel's post-hearing submission was claimant's untimely submission of evidence in the first place" under Section 725.456(b)(1). Order Denying Claimant's Request to Submit Post-Hearing Evidence, Aug. 4, 1998 at 2. Claimant renewed his motion, arguing that because Beitzel chose to have claimant examined when claimant had already submitted to a prior operator examination,[3] fundamental fairness required the opportunity to respond. With his second motion, claimant proffered an August 10, 1998 report by Dr. Rasmussen commenting on Beitzel's post-hearing examination report.

[3] Review of the record indicates that the examination to which claimant previously submitted was done at the request of Roberts. Director's Exhibit 37.

The administrative law judge again denied claimant's motion. The administrative law judge found that Beitzel's post-hearing physical examination report was a reasonable response to claimant's two examination reports which were submitted at the hearing without having been exchanged with Beitzel, considering that Beitzel had not had claimant examined as of the hearing.[4] Order Denying Claimant's Second Request to Submit Post-Hearing Evidence, Aug. 25, 1998 at 2. The administrative law judge further noted that "claimant made no request at the hearing to limit the rebuttal evidence Beitzel could submit." *Id*. Accordingly, the administrative law judge found that it was not against principles of fundamental fairness to deny claimant's request to submit post-hearing evidence.

Claimant contends that the administrative law judge denied him a full and fair hearing by not permitting him to submit evidence in rebuttal of Beitzel's post-hearing submissions. Claimant's Brief at 3-4. We review the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-153 (1989).

We hold that the administrative law judge did not abuse his discretion in declining to admit claimant's proffered post-hearing evidence. *See Clark, supra*. Under the terms of the administrative law judge's order at the hearing, the record was not held open for claimant to submit additional evidence but rather for Beitzel to respond to claimant's late evidence. Hearing Transcript at 13. Additionally, the record does not indicate that claimant took any steps at the hearing or promptly thereafter to define the nature of Beitzel's response or to request permission to respond. Moreover, the relevant procedural regulations do not entitle claimant to rebut Beitzel's evidence submitted in response to claimant's late evidence. *See Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 149-50, 16 BLR 2-1, 2-6 (4th Cir. 1991)(Section 725.456(b)(3) provides a post-hearing response period only for the party that needs to take action in response to the late evidence). Finally, the administrative law judge did not abuse his discretion in concluding that under the

[4] The Department's complete pulmonary examination and Roberts' examination report did not yield diagnoses of pneumoconiosis or total disability. Director's Exhibit 7, 37. Beitzel's approach appears to have been to rely on those medical reports, while developing documentary evidence challenging its designation as the responsible operator. Employer's Exhibit 8.

circumstances of this case Beitzel's post-hearing examination and pulmonary function study review report were a reasonable response to claimant's two examination reports. *See generally Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-49 (1990) Therefore, we reject claimant's contention that he was denied a full and fair hearing, and we turn to the administrative law judge's weighing of the medical evidence.

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *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). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

Claimant's previous claim was denied because he failed to establish total disability pursuant to Section 718.204(c). Director's Exhibit 41. Therefore, the threshold issue before the administrative law judge was whether the new medical evidence established this element.[5]

[5] For this reason, we reject as meritless claimant's contention that the administrative law judge erred by considering only the new evidence for a material change in conditions. Claimant's Brief at 5.

Claimant contends that the administrative law judge erred by finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).[6] Claimant's Brief at 5. Contrary to claimant's contention, the administrative law judge properly weighed the new x-ray readings in light of the readers' radiological credentials and permissibly found that the preponderance of the readings did not establish pneumoconiosis. Decision and Order at 4, 15; *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Claimant next contends pursuant to Section 718.204(c)(4) that the administrative law judge failed to consider medical evidence and lay testimony that claimant's pulmonary condition worsened to the point that he is unable to perform the heavy labor required by his coal mine employment as an iron worker-connector. Claimant's Brief at 6. Contrary to claimant's contention, the administrative law judge considered the evidence and testimony that claimant asserts was overlooked. Specifically, the administrative law judge considered Dr. Rasmussen's statement that claimant's exercise capacity in 1997 was reduced compared to his capacity in 1988, claimant's testimony that his job required heavy labor and that he retired because of worsening breathing problems, and the testimony of three supervisors acknowledging that claimant's job required heavy labor.[7] Decision and Order at 3, 7, 10-11.

---

[6] Although not necessary to deciding the material change in conditions issue on the procedural facts of this case, the administrative law judge addressed the pneumoconiosis element in his decision. Decision and Order at 15-16.

[7] The supervisors' testimony primarily concerned the regularity of claimant's exposure to coal mine dust during his employment in the construction and repair of coal preparation facilities. Hearing Transcript at 77-190.

However, the administrative law judge also had to consider and weigh the opinions by examining physicians Drs. Bellotte and Renn, who both were familiar with claimant's job duties, *see Walker v. Director, OWCP*, 927 F.2d 181, 183, 15 BLR 2-16, 2-22 (4th Cir. 1991), and who opined that claimant's mild obstruction left him with sufficient respiratory capacity to perform the duties of an iron worker-connector. Director's Exhibit 7, 37; Employer's Post-Hearing Exhibit A. Because the administrative law judge found Dr. Renn, who is Board-Certified in Internal Medicine and Pulmonary Disease, to be more highly qualified in pulmonary medicine than Dr. Rasmussen, who is Board-Certified in Internal and Forensic Medicine, the administrative law judge permissibly accorded greater weight to Dr. Renn's opinion. Decision and Order at 16; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Additionally, since the administrative law judge found that there were no conforming, qualifying[8] pulmonary function or blood gas studies, he rationally concluded that the opinions of Drs. Bellotte and Renn were better supported by the objective medical data of record than Dr. Rasmussen's opinion finding claimant totally disabled. *See Hicks, supra*; *Akers, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-141 (1985)

Claimant argues that because Dr. Rasmussen conducted an exercise blood gas study, he was in a better position to measure claimant's ability to perform work. Claimant's Brief at 7. The implication is that no one else did such testing, but in fact Dr. Bellotte also performed an exercise blood gas study and declared its non-qualifying results normal, which the administrative law judge noted. Director's Exhibit 7; Decision and Order at 6. Because the administrative law judge considered all of the relevant medical evidence and made permissible credibility determinations in finding that the new evidence did not establish total disability pursuant to Section 718.204(c)(4), *see Hicks, supra*; *Akers, supra*, we reject claimant's allegation of error and we affirm the administrative law judge's finding. Therefore, we also affirm the administrative law judge's finding that the new evidence did not establish a material change in conditions pursuant to Section 725.309(d). *See Rutter, supra*.

[8] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge