BRB No. 97-1803 BLA

VIRGIL J. HESS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Virgil J. Hess, Christiansburg, Virginia, *pro se*.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (96-BLA-1688) of Administrative Law Judge Edward Terhune Miller 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). The instant case involves a duplicate claim filed on September 13, 1994.[1] The administrative law

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration on May 26, 1970 which was ultimately denied by the Department of Labor (DOL) on October 15,

judge found that the issue before him was whether the evidence was sufficient to establish modification of the district director's February 22, 1995 denial of claimant's 1994 duplicate claim. The administrative law judge found that the evidence was insufficient to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits.
The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

1990. Director's Exhibit 35. There is no indication that claimant took any further action in regard to his 1970 claim.

Claimant subsequently filed another claim on September 13, 1994. Director's Exhibit 1. The district director denied the claim on February 22, 1995. Director's Exhibit 18. Claimant filed a request for modification on March 7, 1996. Director's Exhibit 19. On March 13, 1996, the district director denied claimant's request for modification as untimely. Director's Exhibit 20. However, the district director subsequently found that claimant's failure to timely request reconsideration of the denial of benefits was due to his reliance on incorrect information supplied by the DOL. Director's Exhibit 28. The district director, therefore, notified claimant that the DOL would reconsider its February 22, 1995 decision. *Id.* In a Proposed Decision and Order dated July 11, 1996, the district director denied claimant's request for modification. Director's Exhibit 33. The case was forwarded to the Office of Administrative Law Judges on August 16, 1996. Director's Exhibit 36.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *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); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In considering the instant claim, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant established a basis for modification of the district director's denial of claimant's 1994 duplicate claim.[2] This error, however, is harmless in view of the administrative law judge's proper determination that the newly submitted evidence was insufficient to establish total disability under 20 C.F.R. §718.204(c).[3] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge properly found that all of the pulmonary function studies of record are non-qualifying.[4] Decision and Order at 8; Director's Exhibits

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[2]The Board has held that any party dissatisfied with a district director's determination on a duplicate claim is entitled to have the matter considered by the Office of Administrative Law Judges. *See Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991) (*en banc*). Moreover, an administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. *Id.*

[3]The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). While claimant established invocation at 20 C.F.R. §727.203(a)(1) based upon positive x-ray evidence of pneumoconiosis, claimant's 1970 claim was denied because the evidence established that claimant did not suffer from a totally disabling pulmonary impairment under 20 C.F.R. §727.203(b)(2). Director's Exhibit 35. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of total disability pursuant to 20 C.F.R. §718.204(c).

[4]A "qualifying" pulmonary function study or arterial blood gas study yields

10, 35. Consequently, the newly submitted pulmonary function study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1).

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values which are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. *See* 20 C.F.R. §718.204(c)(1) and (c)(2). A "non-qualifying" study yields values which exceed the requisite table values.

In his consideration of the newly submitted arterial blood gas study evidence, the administrative law judge noted that the record contains a qualifying arterial blood gas study conducted on January 25, 1996.[5] Director's Exhibit 23. The administrative law judge, however, noted that Dr. Michos questioned the reliability of the January 25, 1996 arterial blood gas study. *See* Decision and Order at 7. Although Dr. Michos noted that the January 25, 1996 arterial blood gas study was technically acceptable, he noted that it appeared to be an "in hospital" arterial blood gas study which "may not be representative of [claimant's] true lung function." Director's Exhibit 29. Dr. Michos further noted that a repeat arterial blood gas study may be warranted if the January 25, 1996 study was conducted while claimant was an inpatient.[6] *Id.* In light of Dr. Michos' comments, the administrative law judge properly questioned the reliability of claimant's January 25, 1996 arterial blood gas study. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984). Inasmuch as the administrative law judge properly questioned the reliability of the only qualifying arterial blood gas study of record, the newly submitted arterial blood gas study evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2).

The administrative law judge properly found that the record does not contain any evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 8. Consequently, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3).

In his consideration of the newly submitted medical opinion evidence, the administrative law judge properly noted that Dr. Payne did not address the extent of claimant's disability. Decision and Order at 5-6; Director's Exhibit 19. The only other newly submitted medical opinion is that of Dr. Vasudevan. In a report dated November 17, 1994, Dr. Vasudevan indicated that claimant did not suffer from any pulmonary impairment. Director's Exhibit 11. Consequently, the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20

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[5]The only other newly submitted arterial blood gas study, a study conducted on October 14, 1994, is non-qualifying. Director's Exhibit 14. Moreover, all of the arterial blood gas studies submitted in connection with claimant's prior claim are non-qualifying. Director's Exhibit 35.

[6]In a letter dated February 29, 1996, Dr. Payne indicated that claimant's January 25, 1996 arterial blood gas study was taken while claimant was hospitalized and was suffering from a left lower lobe bronchopneumonia. *See* Director's Exhibit 19.

C.F.R. §718.204(c)(4).[7]

Inasmuch as the newly submitted medical evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997).

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

REGINA C. McGRANERY

[7]The medical opinion evidence submitted in connection with claimant's prior claim is also insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). In a report dated April 2, 1973, Dr. Scott indicated that claimant's pulmonary disease would not prevent him from performing work in the coal mines. Director's Exhibit 35.

Administrative Appeals Judge

Deskbook Sections: Part III.F.2 - Merger of Claims/Duplicate Claims & Part III.G. - Modifications.

Where a district director has denied modification of a duplicate claim (in a case which has not progressed beyond the district director level), the administrative law judge should consider whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), rather than determining whether claimant has established a basis for modification of the district director's denial of his duplicate claim. An administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. ***Hess v. Director, OWCP***, BLR , BRB No. 97-1803 BLA (Sept. 15, 1998).

Stacey,

This case was originally designated "Not Published". After review by some of the staff members, Judges and Attorneys, there was information found in this case that should be "Published".

Sorry for the inconvenience.

Thank you,
Renee A.