BRB No. 03-0600 BLA

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| WILLIAM S. EVANS | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| WOLFE CREEK COLLIERIES, d/b/a SMC COAL & TERMINAL COMPANY | ) | DATE ISSUED: 04/26/2004 |
| | ) | |
| 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 – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

William S. Evans, Pilgrim, Kentucky, *pro se*.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order – Denial of Benefits (02-BLA-0157) of Administrative Law Judge Daniel J.

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[1]Susie Davis of the Kentucky Black Lung Association, Pikeville, Kentucky, requested on behalf of claimant that the Board review the administrative law

Roketenetz 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).[2] This case involves a request for modification of the denial of benefits in a duplicate claim. Claimant filed a duplicate claim on September 17, 1997.[3] In a Decision and Order dated May 22, 2001, Administrative Law Judge Thomas F. Phalen, Jr. credited claimant with 27.42 years of coal mine employment and considered entitlement under the applicable regulations at 20 C.F.R. Part 718 (2000). Judge Phalen found the newly submitted evidence associated with the duplicate claim insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) and total disability pursuant to 20 C.F.R. §718.204(c) (2000). Accordingly, Judge Phalen determined that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) and denied benefits. Claimant filed an appeal with the Board on June 12, 2001. In an Order dated June 29, 2001, the Board noted that claimant filed his appeal without the assistance of counsel and expressed a desire to seek modification. *Evans v. SMC Coal & Terminal Co.*, BRB No. 01-0746 BLA (June 29, 2001)(unpublished Order). The Board remanded the case to the district director for modification proceedings. *Id*.

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judge=s decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Claimant filed an initial claim on August 26, 1991, which was denied on May 26, 1992 by the district director, who found that claimant did not establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000). Director's Exhibit 32. Claimant took no further action until filing another claim on May 24, 1995. Director's Exhibit 33. The district director denied benefits on January 25, 1996 upon determining that claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) (2000) and 718.203 (2000), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). *Id*. Claimant thereafter took no further action in pursuit of benefits until filing the instant duplicate claim on September 17, 1997. Director's Exhibit 1.

In a letter to claimant dated October 12, 2001, the district director notified claimant that because no new evidence had yet been submitted, his request for modification was being forwarded to the Office of Administrative Law Judges. Director's Exhibit 72. After conducting a hearing on February 5, 2003, at which newly submitted reports from Drs. Baker and Fino were admitted into the record, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) issued a Decision and Order dated May 28, 2003. After crediting claimant with 27.42 years of coal mine employment, the administrative law judge considered all of the evidence of record and found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). The administrative law judge further found, assuming *arguendo* that the presence of pneumoconiosis had been established, the evidence of record is insufficient to establish total disability and total disability due to pneumoconiosis pursuant to Section 718.204(b)(2)(i)-(iv), (c). The administrative law judge thus concluded that claimant failed to establish a change in conditions or demonstrate a mistake in a determination of fact in the previous denial pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to participate in this appeal.

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 order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), an administrative law judge should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*,

14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[4] The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim.

The relevant issue before the administrative law judge in this case was whether the newly submitted (*i.e.*, the evidence submitted subsequent to Judge Phalen's denial of claimant's 1997 duplicate claim) was sufficient to establish a material change in conditions pursuant to Section 725.309 (2000), thereby establishing a change in conditions pursuant to Section 725.310 (2000).

In order to establish a material change in conditions pursuant to Section 725.309 (2000) in this case, the newly submitted evidence must support a finding of either the existence of pneumoconiosis or total disability.[5] Similarly, in order to establish a change in conditions pursuant to Section 725.310 (2000), the newly submitted evidence (*i.e.*, the evidence submitted after Judge Phalen denied claimant's 1997 duplicate claim) must establish either the existence of pneumoconiosis or a finding of total disability.

In considering whether claimant established the existence of pneumoconiosis, the administrative law judge considered all of the evidence of record relevant to the issue. With regard to the x-ray evidence at Section 718.202(a)(1), the administrative law judge correctly noted that one new x-ray interpretation was admitted into the record in association with claimant's request

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[4]Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310, these revisions only apply to claims filed after January 19, 2001.

[5]The earlier claims filed by claimant in 1991 and 1995, before the 1997 duplicate claim which was denied by Judge Phalen, were both finally denied in light of claimant's failure to establish the existence of pneumoconiosis and total disability. Director's Exhibits 32, 33. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of either the existence of pneumoconiosis or total disability. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

for modification – namely, Dr. Baker's positive, 1/0 reading of an x-ray taken on May 11, 2002. Decision and Order at 7; Claimant's Exhibit 1. The administrative law judge found the positive reading of Dr. Baker, a B reader, insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1) in light of the numerical superiority of the negative x-ray interpretations of record submitted by physicians who are dually-qualified B reader/Board-certified radiologists. Decision and Order at 7-8. The administrative law judge misstated that "*[e]very* B-reader of record who is also a Board-certified radiologist found the x-ray evidence of record negative for the disease." Decision and Order at 7 (emphasis added). In fact, one dually-qualified B reader/Board-certified radiologist – Dr. Ahmed – interpreted an x-ray as positive. Dr. Ahmed read the film taken on April 12, 2000 as 1/0 positive for pneumoconiosis. Director's Exhibit 40. The administrative law judge's omission with regard to Dr. Ahmed's reading constitutes harmless error, however, since substantial evidence supports the administrative law judge's finding that the majority of the x-ray readings of record, including those by the best qualified radiologists, are negative for pneumoconiosis. The April 12, 2000 film read as positive by Dr. Ahmed, Director's Exhibit 40, was reread as negative by Drs. Miller, Wiot, Spitz and Sargent, who are B reader/Board-certified radiologists. Director's Exhibits 40, 59. Additionally, among the thirty-six readings of the sixteen x-rays of record taken between 1991 and 2002, twenty-nine of the readings are negative for pneumoconiosis.[6] Director's Exhibits 5, 18, 20, 22, 24, 25, 32-34, 40, 54, 57, 59. We, therefore, affirm the administrative law judge=s finding that the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990).

Additionally, the administrative law judge properly found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2), as there is no autopsy or biopsy evidence in the record. Decision and Order at 8. He also properly found that claimant could not establish the existence of pneumoconiosis under Section 718.202(a)(3), as none of the presumptions

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[6]Of the twenty-nine negative interpretations of record, twenty-three were submitted by dually-qualified B reader/Board-certified radiologists. Director's Exhibits 5, 18, 22, 25, 32-34, 40, 54, 57. The seven positive readings of record were submitted by Dr. Ahmed, a dually-qualified B reader/Board-certified radiologist, Dr. Baker, a B reader, and Drs. Belhasen, Lafferty and Potter, none of whom is a B reader or Board-certified radiologist. Director's Exhibits 19, 21, 27, 28, 40; Claimant's Exhibit 1.

thereunder applies.[7] *Id*. We, therefore, affirm the administrative law judge=s findings pursuant to 20 C.F.R. §718.202(a)(2), (a)(3).

In addressing whether claimant established the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge correctly stated that two new medical reports were submitted on modification: the reports of Drs. Baker and Fino. Dr. Baker examined claimant on May 11, 2002, diagnosed coal workers' pneumoconiosis, and advised that claimant should not have further coal dust exposure.[8] Claimant's Exhibit 1. Dr. Baker indicated that he based his diagnosis of coal workers' pneumoconiosis on claimant's abnormal x-ray taken on May 11, 2002, and on claimant's significant history of coal dust exposure of approximately twenty-eight years. *Id*. In contrast, Dr. Fino, in his report dated January 31, 2003, indicated that claimant does not suffer from pneumoconiosis. Employer's Exhibit 1. Dr. Fino based his opinion upon his prior examination of claimant in August 1998, and upon a review of Dr. Baker's 2002 opinion. *Id*. The administrative law judge properly credited Dr. Fino's opinion as well-reasoned and well-documented on the basis that Dr. Fino reviewed other medical evidence of record in addition to the report of his own examination of claimant in opining that claimant does not suffer from pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order at 10; Employer=s Exhibit 1. The administrative law judge further properly discounted Dr. Baker's opinion as neither well-reasoned nor well-documented because Dr. Baker did not provide any other reason for his diagnosis of pneumoconiosis aside from his x-ray reading and notation of claimant's coal dust exposure. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark*, 12 BLR at 1-155; Decision and Order at 10; Claimant's Exhibit 1.

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[7]The record does not contain any evidence supportive of invocation of the presumption under 20 C.F.R. §718.304. Furthermore, as claimant=s claim for benefits was filed after January 1, 1982, the presumption at 20 C.F.R. §718.305 does not apply. Finally, as this is not a survivor=s claim, the presumption at 20 C.F.R. §718.306 is inapplicable.

[8]Dr. Baker indicated that claimant's pulmonary function study and arterial blood gas study administered on May 11, 2002 were "normal," and that claimant had a "class I impairment" with an FEV1 and FVC both being greater than eighty percent of predicted. Claimant's Exhibit 1. Dr. Baker stated that claimant is totally disabled from his usual coal mine employment because he should no longer be exposed to coal dust. *Id*.

The administrative law judge also found the previously submitted medical opinion evidence (*i.e.*, the evidence submitted prior to claimant's request for modification) insufficient to establish the existence of pneumoconiosis. The previously submitted medical opinion evidence consists of opinions from Drs. Sikder, Belhasen, Lafferty, Baker and Potter, Director's Exhibits 19, 20, 21, 23, 27, 28, which indicate that claimant has pneumoconiosis, and contrary opinions from Drs. Fino, Younes, Broudy and Fritzhand, Director's Exhibits 5, 24, 32, 33. The administrative law judge stated that he was discounting the opinions of Drs. Sikder, Belhasen, Lafferty and Potter as neither well-reasoned nor well-documented for the reasons provided by Judge Phalen in his May 22, 2001 Decision and Order. Decision and Order at 10. Judge Phalen properly discounted Dr. Sikder's opinion because while Dr. Sikder stated she based her opinion that claimant has pneumoconiosis on a positive x-ray reading, she did not specify which x-ray she was referring to, and did not indicate whether she read the film herself or was relying upon another physician's interpretation. *Clark*, 12 BLR at 1-155; Judge Phalen Decision and Order at 16-17; Director's Exhibit 20. Judge Phalen properly discounted the opinions of Drs. Belhasen, Lafferty and Potter because these physicians are not pulmonary specialists, whereas Drs. Younes and Fino, whose opinions Judge Phalen credited, are Board-certified pulmonary specialists. *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-613 (6th Cir. 2003); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983); Judge Phalen Decision and Order at 16-17; Director's Exhibits 5, 23, 24. Judge Phalen discounted the opinions of Drs. Belhasen and Lafferty on the additional ground that each doctor relied, in part, upon his own positive interpretation of an x-ray which was reread as negative by physicians with superior radiological qualifications.[9] *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984); Judge Phalen Decision and Order at 16; Director's Exhibits 19, 21. Finally, Judge Phalen properly accorded greater weight to the contrary opinions of Drs. Fino and Younes on the basis of their qualifications as Board-certified pulmonary specialists, *Odom*, 342 F.3d at 493, 22 BLR at 2-623-624; *Dillon*, 11 BLR at 1-115, and because he found these opinions to be well-reasoned and documented, and supported by the objective evidence of record. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert.*

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[9]Dr. Belhasen examined claimant on February 9, 1998, and interpreted the x-ray taken on that date as positive for pneumoconiosis. Director's Exhibit 21. The x-ray was reread as negative for the disease by Drs. Sargent, Gogineni and Binns, who are B reader/Board-certified radiologists. Director's Exhibits 18, 25. Dr. Lafferty examined claimant on February 6, 1998, and interpreted an x-ray taken on January 30, 1998 as positive for pneumoconiosis. Director's Exhibit 19. The January 30, 1998 film was also reread as negative by Drs. Sargent, Gogineni and Binns. Director's Exhibits 18, 25, 26.

*denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Judge Phalen Decision and Order at 17; Director's Exhibits 5, 24, 33. We, therefore, affirm the administrative law judge=s finding that the medical opinion evidence of record is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Because the administrative law judge properly found the evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a requisite element of entitlement under Part 718, he properly denied benefits. *Trent*, 11 BLR at 1-27; *Gee*, 9 BLR at 1-5; *Perry*, 9 BLR at 1-2. Consequently, we need not address the administrative law judge=s findings under 20 C.F.R. §718.204(b), or how these findings bear on the administrative law judge's finding that modification was not established pursuant to 20 C.F.R. §725.310 (2000), inasmuch as any errors therein would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge=s Decision and Order – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge