BRB No. 03-0729 BLA

ORVAL RECTOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/30/2004
	)	
WILLIAMSON 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 of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Orval Rector, Marion, Illinois, *pro se*.

James Adamson (Swanson, Martin & Bell), Chicago, Illinois, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2002-BLA-0160) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) 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).[1] Based

[1] 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.

on the date of filing, the administrative law judge adjudicated this petition for modification of a duplicate claim, pursuant to 20 C.F.R Part 718 (2000), and credited claimant with eighteen years of coal mine employment.[2] The administrative law judge found the newly submitted evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(1)-(4) (2000), or a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate 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 1-84 (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

---

[2] The record indicates that claimant filed an application for benefits on March 7, 1994, which was denied by the district director on June 8, 1994 due to claimant's failure to establish any required element of entitlement. Director's Exhibit 25. Claimant's subsequent petition for modification was denied by the district director on August 31, 1994, on the same grounds. Director's Exhibit 25. Claimant took no further action until he filed a second application for benefits on March 14, 1997. Director's Exhibit 1. This claim was denied by the district director on September 12, 1997, due to claimant's failure to establish any required element of entitlement. Director's Exhibit 10. Claimant again requested modification of the denial of his claim. On May 31, 2000, the administrative law judge issued a Decision and Order in which he denied benefits on the grounds that the evidence submitted since the denial of claimant's first application of benefits on August 31, 1994, was insufficient to establish the existence of pneumoconiosis or total disability due to pneumoconiosis. The administrative law judge further found, therefore, that claimant did not demonstrate a material change in conditions and denied benefits accordingly. Director's Exhibit 28. Claimant appealed the denial to the Board, but before the resolution of the appeal, claimant again requested modification. The Board dismissed claimant's appeal on February 8, 2001, and remanded the claim to the district director. Director's Exhibit 31. The district director denied claimant's modification requests and claimant asked for a formal hearing in a letter dated November 27, 2001. Director's Exhibits 34, 35, 38, 46, 47.

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).

Turning first to the administrative law judge's consideration of the newly submitted evidence pursuant to Section 718.202(a)(1) (2000), we hold that the administrative law judge rationally credited the greater number of negative x-ray readings from physicians with specialized qualifications in the field of radiology. Decision and Order at 5, 6, 16; Director's Exhibits 4, 6, 7, 16, 18, 37, 45; Employer's Exhibits A1-A4; Claimant's Exhibit A1; *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We also affirm the administrative law judge's findings that the requirements of Section 718.202(a)(2)-(3) (2000) were not met, as the record contains no biopsy evidence, and the regulatory presumptions contained at 20 C.F.R. §§718.304, 718.305, and 718.306 (2000), are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 16-17; Director's Exhibit 1; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986).

Pursuant to Section 718.202(a)(4) (2000), the administrative law judge rationally accorded little weight to the July 17, 2001, and August 28, 2001 reports of Dr. Dave, as they indicated that the existence of pneumoconiosis was a "possibility," Director's Exhibit 37, or "likely," Director's Exhibit 39, and were therefore equivocal. Decision and Order at 19; *Justice v. Island Creek Coal Co.*, 11 BLR1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987). It was also within the administrative law judge's discretion as the fact finder to determine that the September 25, 2001 report in which Dr. Dave diagnosed coal workers' pneumoconiosis was not documented and reasoned because Dr. Dave failed to provide a rationale for his diagnosis, relied on an x-ray reading which was interpreted as negative by more qualified physicians and a non-qualifying, non-conforming pulmonary function study. Decision and Order at 19-20; Director's Exhibit 40; *Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002),[3] *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Trent*, 11 BLR 1-26; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

The administrative law judge also permissibly gave little weight to the opinion of Dr. Bowman-Marsh, claimant's treating physician, who diagnosed the presence of pneumoconiosis, as this doctor failed to explain her inconsistent diagnoses of emphysema on October 5, 2000, chronic obstructive pulmonary disease on January 19, 2001, and

[3] Since the miner's last coal mine employment took place in the State of Illinois, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. Director's Exhibit 25; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

pneumoconiosis on October 1, 2001. Decision and Order at 18-19; Director's Exhibits 29, 30, 41; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.*, Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Clark*, 12 BLR 1-149. Thus, the administrative law judge rationally determined that this physician's opinion was not reasoned and documented. Decision and Order at 18-19; *Livermore*, 297 F.3d 668, 22 BLR 2-399; *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983); *Fields*, 10 BLR 1-19.

Dr. Cohen's diagnosis of pneumoconiosis was also permissibly found unreasoned and undocumented, as the administrative law judge rationally found that Dr. Cohen relied on inaccurate employment and smoking histories, and failed to identify adequately the reasoning or data which supported his diagnosis. Decision and Order at 20-21; Director's Exhibit 16; *Livermore*, 297 F.3d 668, 22 BLR 2-399; *Clark*, 12 BLR 1-149; *Tackett*, 12 BLR 1-11. Similarly, Dr. Sanjabi's finding of pneumoconiosis was found undocumented and unreasoned and the administrative law judge accorded it little weight. Decision and Order at 21; Director's Exhibit 4. It was within the administrative law judge's discretion as the trier of fact to find this report unsupported by the evidence because it was based on an x-ray reading which was interpreted as negative by more qualified readers, a pulmonary function study which was interpreted as showing only a mild obstruction, underestimated claimant's smoking history, and failed to indicate any familiarity with claimant's coal mine employment history. The administrative law judge rationally found, therefore, that this opinion could not establish the existence of pneumoconiosis. Decision and Order at 21; Director's Exhibit 4; *Clark*, 12 BLR 1-149; *Fields*, 10 BLR 1-19.

The administrative law judge credited the opinion of Dr. Tuteur, a Board-certified pulmonologist, who found no evidence of pneumoconiosis. Decision and Order at 17-18, 21; Employer's Exhibits 1-3, 6. Because the administrative law judge determined that this report was well-documented, reasoned, and more thorough than the other reports of record, and that Dr. Tuteur possessed superior qualifications in the field of pulmonary medicine, the administrative law judge rationally accorded this opinion determinative weight. Decision and Order at 17-18, 21; Employer's Exhibits 1-3, 6; *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *Smith v. Director, OWCP*, 843 F.2d 1053, 11 BLR 2-125 (7th Cir. 1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Accordingly, we affirm the administrative law judge's finding that the newly submitted medical reports of record do not establish the existence of pneumoconiosis under Section 718.202(a). *Livermore*, 297 F.3d 668, 22 BLR 2-399.

Although we have affirmed the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a) (2000), the Decision and Order does not reflect consideration of the newly

submitted evidence of record relevant to the issue of total disability pursuant to Section 718.204.[4] Under the holding of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc rehearing), modifying* 94 F.3d 369 (7th Cir. 1996), a claimant may demonstrate a material change in conditions by establishing at least one of the elements of entitlement previously adjudicated against him. In this case, the various denials of benefits have been premised upon a determination that claimant did not establish any of the elements of entitlement. Thus, the administrative law judge should have considered whether the newly submitted evidence is sufficient to establish that claimant is totally disabled pursuant to Section 718.204(b). We must vacate, therefore, the administrative law judge's finding that claimant did not establish a material change in conditions pursuant to Section 725.309 and the denial of benefits, and remand the present case for consideration of the newly submitted evidence relevant to Section 718.204. If the administrative law judge determines that this evidence supports a finding of total disability, the administrative law judge must consider all the previously submitted evidence of record, in conjunction with the newly submitted evidence, to determine whether any required element of entitlement can be established. *Spese*, 117 F.3d 1001, 21 BLR 2-113.

[4] The provisions pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), are now found at 20 C.F.R. §718.204(b).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge