BRB No. 98-1058 BLA

| | | |
|---|---|---|
| ARCHIE PRICE | ) | |
| | ) | |
| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| L & M TRUCKING COMPANY | ) | |
| | ) | DATE ISSUED: |
| and | ) | |
| | ) | |
| WAUSAU UNDERWRITERS INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION AND ORDER |

Appeal of the Decision and Order - Denying Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Archie Price, Elkhorn City, Kentucky, *pro se*.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky.

BEFORE: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appears without the assistance of counsel and appeals from the Decision and Order - Denying Benefits (97-BLA-0959) of Administrative Law Judge J. Michael O'Neill (the administrative law judge) 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).[1] The relevant procedural history of this case is as follows: Claimant filed an application for benefits on July 27, 1992. Director's Exhibit 41 at 1. The district director finally denied this claim on January 6, 1993, on the ground that claimant did not establish any of the elements of entitlement. Director's Exhibit 41 at 104. Claimant took no further action until filing a second application for benefits on September 12, 1995. Director's Exhibit 1. The district director last denied this claim on January 6, 1997. Director's Exhibit 40. At claimant's request, the case was transferred to the Office of Administrative Law Judges for hearing.

In his Decision and Order, the administrative law judge credited claimant with at least ten years of coal mine employment and noted that the record contained two claims. The administrative law judge indicated that he would first consider whether claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d). Applying the standard adopted by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, the administrative law judge stated that in order to demonstrate a material change in conditions under Section 725.309(d), claimant was required to prove at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 999, 19 BLR 2-10, 2-21 (6th Cir. 1994). Inasmuch as claimant's initial claim was denied because he did not prove that he had pneumoconiosis or was totally disabled by it, the administrative law judge weighed the newly submitted evidence to determine whether it supported either a finding of pneumoconiosis or a finding of total disability. The administrative law judge concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or that claimant is suffering from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, the administrative law judge found that claimant did not demonstrate a material change in conditions under Section 725.309(d) and benefits were denied. Claimant's appeal followed. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal by a claimant filed 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

[1]Claimant was represented by counsel at the hearing before the administrative law judge.

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).

Pursuant to Section 718.202(a)(1), the administrative law judge rationally determined that the newly submitted x-ray evidence of record did not support a finding of pneumoconiosis, as the four negative readings performed by physicians who are Board-certified radiologists and/or B readers outweighed the single positive reading submitted by a physician with no special qualifications. Decision and Order at 7; Director's Exhibits 15, 17, 18, 20; Claimant's Exhibit 2; *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-68 (1985); *see also Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). In this regard, the administrative law judge acted within his discretion in declining to accord greater weight to the positive x-ray interpretation merely because the film was between sixteen and eighteen months more recent than the films read as negative for pneumoconiosis. *See Woodward*, *supra*; *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988).

Concerning Section 718.202(a)(2), the administrative law judge determined properly that claimant cannot establish the existence of pneumoconiosis under this subsection, as the record does not contain any biopsy evidence. Decision and Order at 5; 20 C.F.R. §718.202(a)(2). Claimant also cannot establish the existence of pneumoconiosis pursuant to the presumptions referenced in Section 718.202(a)(3), as the relevant claim was filed by a living miner after January 1, 1982, and the record is devoid of evidence of complicated pneumoconiosis. 20 C.F.R. §§718.202(a)(3), 718.304-306.

With respect to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Fritzhand, Broudy, and Sundaram. Decision and Order at 10; Director's Exhibits 12, 13; Claimant's Exhibit 2. All three physicians performed examinations of claimant. Dr. Sundaram's opinion appears on a form submitted to the Kentucky Workers' Compensation Board. Claimant's Exhibit 2. Dr. Sundaram checked a box indicating that claimant is suffering from an occupational lung disease caused by his coal mine employment based on the findings on a chest x-ray. *Id.*. Drs. Fritzhand and Broudy did not find any evidence of pneumoconiosis. Director's Exhibits 12, 13.

The administrative law judge rationally determined that the opinions of Drs. Fritzhand and Broudy were entitled to greater weight than the opinion of Dr. Sundaram, inasmuch as Drs. Fritzhand and Broudy based their conclusions upon a more detailed knowledge of claimant's medical and smoking histories. Decision and Order at 10; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United*

*States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge also permissibly accorded additional weight to Dr. Broudy's opinion based upon his qualifications as a physician who is Board-certified in both Internal Medicine and Pulmonary Disease. Decision and Order at 10; Employer's Exhibit 1; *see Clark*, *supra*; *McMath*, *supra*. Dr. Sundaram's qualifications are not of record. The administrative law judge acted rationally, therefore, in concluding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Thus, the administrative law judge's finding that the newly submitted medical evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4) is affirmed, as it is rational and supported by substantial evidence.

Turning to the issue of total disability under Section 718.204(c)(1)-(4), the administrative law judge determined correctly that claimant did not demonstrate total disability pursuant to Section 718.204(c)(1) and (c)(2), as none of the newly submitted objective tests of record produced qualifying values.[2] Decision and Order at 11-12; 20 C.F.R. §718.204(c)(1), (c)(2); Appendices B and C to 20 C.F.R. Part 718; Director's Exhibits 9, 10, 14; Claimant's Exhibits 1, 2.[3] With respect to Section 718.204(c)(3), the

[2]A "qualifying" pulmonary function study or blood gas study is one that produces values equal to or less than the values set forth in the tables appearing in Appendix B and Appendix C to 20 C.F.R. Part 718. A "nonqualifying" study is one that produces values in excess of the table values.

[3]When weighing the four pulmonary function studies of record, the administrative law judge indicated that he gave no weight to the studies performed on August 24, 1995 and October 8, 1995, as they were found to be invalid. Decision and Order at 11; Director's Exhibit 9; Claimant's Exhibit 1. We need not address the propriety of the administrative law judge's finding with respect to the validity of these studies, however, inasmuch as neither study is qualifying under the table values set forth in Appendix B to 20 C.F.R. Part 718. Thus, error, if any, in the administrative law judge's consideration

administrative law judge properly found that claimant was precluded from establishing total disability under this subsection inasmuch as the record is devoid of evidence that claimant is suffering from cor pulmonale with right sided congestive heart failure. Decision and Order at 12; 20 C.F.R. §718.204(c)(3).

Under Section 718.204(c)(4), the administrative law judge weighed the newly submitted medical opinions of Drs. Sundaram, Broudy, and Fritzhand. Decision and Order at 12; Director's Exhibits 12, 13; Claimant's Exhibit 1. Based upon the results of the pulmonary function study that he obtained, Dr. Sundaram found that claimant is suffering from a totally disabling respiratory impairment. Claimant's Exhibits 1, 2. Dr. Broudy determined that claimant retains the respiratory capacity to perform the work of a miner. Director's Exhibit 12. Dr. Fritzhand indicated that claimant does not suffer from any respiratory or pulmonary impairment. Director's Exhibit 13.

---

of these studies is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge acted within his discretion in according more weight to the opinions of Drs. Broudy and Fritzhand on the ground that these physicians based their conclusions upon a consideration of more extensive data than that relied upon by Dr. Sundaram.[4] Decision and Order at 12; *see Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*. Finally, the administrative law judge also permissibly relied upon the fact that Dr. Broudy possesses superior qualifications as a physician who is Board-certified in Internal Medicine and Pulmonary Disease. Decision and Order at 12; *see Clark*, *supra*; *McMath*, *supra*. The administrative law judge rationally concluded, therefore, that the newly submitted medical opinions do not support a finding of total disability pursuant to Section 718.204(c)(4). Thus, the administrative law judge's determination that claimant did not prove disability under Section 718.204(c)(1)-(4) is affirmed, as it is supported by substantial evidence.

Inasmuch as the administrative law judge rationally found that the newly submitted evidence is insufficient to establish any of the elements of entitlement previously adjudicated against claimant, the administrative law judge's determination that claimant failed to demonstrate a material change in conditions pursuant to Section 725.309(d) is also affirmed. *See Ross*, *supra*. We affirm, therefore, the denial of benefits.

[4]The administrative law judge noted correctly that Drs. Broudy and Fritzhand each obtained detailed medical and smoking histories and a blood gas study in addition to a pulmonary function study. Decision and Order at 12; Director's Exhibits 9, 10, 12-14. The administrative law judge also indicated that Dr. Fritzhand obtained an electrocardiogram from claimant. Decision and Order at 12; Director's Exhibit 13. In contrast, Dr. Sundaram stated that claimant worked for 22 years as a miner and obtained a pulmonary function study, but did not record claimant's medical or smoking histories. Claimant's Exhibits 1, 2.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge