BRB No. 97-0245 BLA

ROBERT J. LOVELL Claimant-Petitioner v. CONSOLIDATION COAL COMPANY Employer-Respondent 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 Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Robert J. Lovell, Princeton, West Virginia, *pro se*.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, representing himself, appeals the Decision and Order (95-BLA-2074) of Administrative Law Judge Jeffrey Tureck 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 8, 1994.[1] The administrative law judge found the evidence insufficient to

[1]The relevant procedural history of the case is as follows: Claimant initially filed a Part B claim for benefits with the Social Security Administration (SSA) on April 30, 1973. Director's Exhibit 27. The SSA denied the claim on September 5, 1973. *Id.* After claimant elected Department of Labor review of his denied Part B claim, the Department of Labor denied the claim on May 25, 1979. *Id.* There is no evidence that claimant took any further action in regard to his 1973 claim.

establish a material change in conditions pursuant to 20 C.F.R. §725.309. 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 administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

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). The district director denied claimant's prior 1973 claim because he failed to establish that he was totally disabled by pneumoconiosis. Director's Exhibit 27. 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.

Claimant filed a second claim on September 8, 1994. Director's Exhibit 1.

The administrative law judge initially noted that all three of the newly submitted pulmonary function studies of record are non-qualifying[2] and, therefore, insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1). Decision and Order at 2-3; Director's Exhibits 8, 25; Employer's Exhibit 1. However, inasmuch as both of the newly submitted arterial blood gas studies conducted on October 28, 1994 and May 10, 1995 are qualifying, the administrative law judge found that this evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2).[3] Decision and Order at 2-3; Director's Exhibit 10; Employer's Exhibit 1.

The administrative law judge finally considered the newly submitted medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4). The newly submitted medical opinion evidence includes opinions proffered by Drs. Vasudevan, Zaldivar, Castle, Morgan and Loudon. Inasmuch as each of these physicians opined that claimant was not totally disabled from a pulmonary standpoint,[4] the administrative law judge properly found that the

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

[3]Because the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(c)(3).

[4]Dr. Vasudevan opined that claimant did not suffer from any pulmonary impairment. Director's Exhibit 9. Dr. Zaldivar opined that from a respiratory standpoint, claimant was not totally disabled. Employer's Exhibit 5. Dr. Castle opined that claimant had no significant pulmonary or respiratory impairment whatsoever. Employer's Exhibits 6, 11. Dr.

newly submitted medical opinion evidence was insufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(c)(4). Decision and Order at 3.

An administrative law judge must weigh all the relevant evidence together, both like and unlike, in considering whether a claimant has established total disability pursuant to 20 C.F.R. §718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). In the instant case, the administrative law judge found that the two qualifying arterial blood gas studies conducted on October 28, 1994 and May 10, 1995 were outweighed by the newly submitted medical opinion evidence. Decision and Order at 3. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c).

The administrative law judge also considered whether the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. The administrative law judge noted that Drs. Gaziano and Francke interpreted claimant's October 28, 1994 x-ray as positive for complicated pneumoconiosis. Decision and Order at 3; Director's Exhibits 13, 14. The introduction of legally sufficient evidence of complicated pneumoconiosis, however, does not automatically qualify a claimant for invocation of the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, resolve the conflicts, and make findings and conclusions. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom*. *Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Morgan opined that claimant's lung function was normal and that claimant would be capable of performing his last coal mine employment from a pulmonary standpoint. Employer's Exhibit 8. Dr. Loudon opined that claimant was not totally disabled from a pulmonary standpoint. Employer's Exhibit 9.

Although Drs. Gaziano and Francke interpreted claimant's October 28, 1994 x-ray as revealing a large, size A large opacity, the administrative law judge correctly stated that each of these physicians suggested that the large opacity could be cancer.[5] Director's Exhibits 13, 14. The administrative law judge also observed that Drs. Wheeler, Scott, Kim and Pendergrass each interpreted claimant's x-rays as negative for complicated pneumoconiosis. Decision and Order at 3. The record reflects that Drs. Wheeler, Scott, Kim and Pendergrass, each of whom has radiological qualifications at least equal to those of Drs. Gaziano and Francke, interpreted claimant's October 28, 1994 x-ray as negative for complicated pneumoconiosis. Employer's Exhibits 2, 4, 7.

The administrative law judge, in evaluating the relative weight of the x-ray evidence, also properly considered Dr. Wheeler's status as a "preeminent radiologist" at Johns Hopkins University, noting that Dr. Wheeler ran the "pneumoconiosis section" of the hospital and also spent time teaching at the hospital. Decision and Order at 4; Employer's Exhibit 10. The administrative law judge also noted that Dr. Wheeler interpreted x-rays for the Tuberculosis Clinic in Baltimore. *Id.* The administrative law judge acted within his discretion in according greater weight to Dr. Wheeler's interpretations based upon his additional radiological qualifications.[6] *See generally Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). We, therefore, affirm the administrative law judge's finding that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.

Inasmuch as the administrative law judge properly found that the newly submitted evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(c) or a finding of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant failed to

[5]In regard to the lesion in claimant's right lobe, Dr. Gaziano commented on his report that he "need rule out cancer of lung." Director's Exhibit 13. Dr. Francke similarly commented that the size A large opacity in the right upper lung could be either pneumoconiosis or cancer. Director's Exhibit 14. Although Dr. Francke favored "the former," he recommended a comparison with old films to check. *Id.*

[6]The administrative law judge also noted that Dr. Castle opined that the x-ray interpretations of record do not support a finding of complicated pneumoconiosis. Decision and Order at 3-4; Employer's Exhibit 11.

establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Rutter*, *supra*.

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

REGINA C. McGRANERY
Administrative Appeals Judge