

BRB No. 93-0277 BLA

KERNIE FEE )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 CRANKS COAL AND ENERGY COMPANY)  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:  
 )  
 Employer/Carrier- )  
 Respondents )  
 )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-In-Interest ) DECISION and ORDER

Appeal of the Decision and Order of Charles W. Campbell, Administrative Law Judge, United States Department of Labor.

Kernie Fee, Cawood, Kentucky, *pro se*.

Mark F. Lindsay (Arter & Haden), Washington, D.C., for employer.

Karen N. Blank (Thomas S. Williamson, Jr., Solicitor of Labor; 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: , Acting Chief Administrative Appeals Judge, and ,  
Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (91-BLA-0672) of Administrative Law Judge Charles W. Campbell 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). This case involves a duplicate claim. Claimant filed his first claim for benefits on August 29, 1985. The district director denied this claim on June 19, 1986 as claimant failed to establish the existence of pneumoconiosis, that his pneumoconiosis arose from coal mine employment, and total disability due to pneumoconiosis. Claimant filed a second claim for benefits on January 17, 1990. The administrative law judge considered this claim pursuant to 20 C.F.R. Part 718 and determined that claimant established ten and three-quarter years of coal mine employment. The administrative law judge then considered the evidence submitted with claimant's second claim and determined that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, thus, failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. Claimant appeals this denial. Employer responds in support of the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs (the Director), responds urging that the administrative law judge's finding that claimant failed to

establish a material change in conditions pursuant to 20 C.F.R. §725.309 be affirmed and stating that the administrative law judge's findings on the merits are erroneous.

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).

As this case involves a duplicate claim issue, the administrative law judge was first required to consider the evidence submitted subsequent to the denial of the first claim pursuant to 20 C.F.R. §725.309 in order to determine if a material change in conditions had been established. After reviewing the evidence submitted subsequent to the first denial pursuant to 20 C.F.R. §718.202(a), the administrative law judge erred in finding that claimant did not establish a material change in conditions as there is x-ray evidence and medical opinion evidence of pneumoconiosis which, if fully credited, could change the prior administrative result. See Director's Exhibit 15; Claimant's Exhibit 1; *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). As a result, the administrative law judge's findings that claimant failed to establish a material change

in conditions pursuant to 20 C.F.R. §725.309(d) and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) are vacated and that the case is remanded for consideration of the evidence pursuant to 20 C.F.R. §725.309. If, on remand, the administrative law judge finds a material change in conditions established, he must then consider all of the evidence of record, meaning the evidence submitted both prior to and after the denial of claimant's first claim, pursuant to 20 C.F.R. Part 718. See *Shupink, supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge