BRB No. 01-0282 BLA

ROBERT B. ERVIN)
)
Claimant-Petitioner)
)
v.)
)
CLINCHFIELD COAL COMPANY) DATE ISSUED:
)
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 Denying Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Robert B. Ervin, Castlewood, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (00-BLA-0605) of Administrative Law Judge Daniel F. Solomon on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

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[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, has requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[2] The administrative law judge found that the parties stipulated to a coal mine employment history of at least thirty-five years. Decision and Order at 6. The administrative law judge also found that the instant claim constituted a request for modification of a duplicate claim[3] and that the case was thus

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001).

[3] Claimant initially filed a claim with Department of Labor on November 28, 1978, which was denied by Administrative Law Judge Giles J. McCarthy, pursuant to 20 C.F.R. §410.490, on October 20, 1979. Director's Exhibit 35. Subsequently, the Board vacated the denial of benefits, and remanded the claim to the administrative law judge for consideration under 20 C.F.R. Part 727 and 20 C.F.R. Part 410, Subpart D, if reached, pursuant to the holding in *Pauley v. BethEnergy Mines, Inc.*, 111 S.Ct. 2524, 15 BLR 2-155 (1991). *Ervin v. Clinchfield Coal Co.*, BRB No. 89-3841 BLA-A (Jan. 12, 1993)(unpub.). Director's Exhibit 35. While the case was pending before the Office of Administrative Law Judges, claimant sought modification and submitted additional evidence. The case was therefore remanded to the district director, who denied the request for modification. Subsequent to a hearing on modification requested by claimant, Administrative Law Judge Reno E. Bonfanti issued a Decision and Order denying claimant's request for modification and denying benefits. On appeal, the Board affirmed this Decision and Order denying benefits. *Ervin v. Clinchfield Coal Co.*, BRB No. 95-1990 BLA (Jan. 19, 1996)(unpub.). Director's Exhibit 35. On October 3,1997, claimant filed a duplicate claim, which was denied by Administrative Law Judge John C. Holmes on March 17, 1999. Director's Exhibit 44. On October 20, 1999, claimant filed a request for modification of that decision. Director's Exhibit 46. On October 20, 2000, Administrative Law Judge Daniel F. Solomon issued the Decision and Order denying benefits on the duplicate claim from which claimant now appeals.

governed by the standard enunciated by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, *rev'g en banc* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *cert. denied*, 117 S.Ct. 763 (1997). Decision and Order at 2-4. The administrative law judge proceeded to find that the evidence of record failed to establish a mistake in a prior determination of fact and that since the newly submitted evidence failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment, a change in conditions was not established. Decision and Order at 6-15. Accordingly, benefits were denied. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-361 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At the outset, the standard of review in the instant case is whether the evidence submitted in support of the duplicate claim and the evidence submitted in support of modification, if any, is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Where, as here, a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent request for modification on the claim must also be denied unless the administrative law judge finds that there has been a material change in conditions since the denial of the first claim. *See* 20 C.F.R. §725.309(d)(2000); *Hess*, *supra*. Here, claimant has made a timely request for modification of the district director's determination that claimant failed to establish a material change in conditions, thereby invoking the administrative law judge's authority to consider whether there was a change in conditions since the denial of the duplicate claim. 20 C.F.R. §725.310 (2000); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Hess*, *supra*; *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). However, this in no way diminished claimant's burden to prove a material change in conditions before he is entitled to the adjudication of his claim on the merits. 20 C.F.R. §725.309(d)(2000); *see Rutter*, *supra*. Consequently, the issue before the administrative law judge pursuant to claimant's modification request was whether all of the evidence submitted in support of the duplicate claim plus all the evidence submitted in support of modification established the requisite material change in conditions pursuant to Section 725.309(d)(2000). *See Hess*, *supra*. The

duplicate claim was initially denied because claimant failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 35.

In finding that claimant failed to establish the existence of pneumoconiosis, the administrative law judge concluded that there was no mistake in the previous determination that the x-ray evidence failed to establish the existence of pneumoconiosis. The administrative law judge further considered the four newly submitted x-ray interpretations, Director's Exhibits 46, 50, 55, and found that the weight of these interpretations failed to support a finding of the existence of pneumoconiosis. In a permissible exercise of his discretion, the administrative law judge found that claimant failed to carry his burden of affirmatively establishing the existence of pneumoconiosis by x-ray evidence as the weight of the readings by the physicians with the superior credentials of B-reader and/or board-certified radiologist[4] were negative for the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.3d 49, 16 BLR 2-61 (4th Cir. 1992); *Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985); *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We therefore affirm the administrative law judge's determination that the weight of the x-ray evidence failed to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[4] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A "board-certified radiologist" is a physician who is certified in radiology or diagnostic roentgenology by the American Board of Radiology.

Next, we affirm the administrative law judge's conclusion that the medical opinion evidence also failed to support a finding of the existence of pneumoconiosis. The administrative law judge found that there was no mistake in the previous determination that the medical opinion evidence failed to support such a finding. Decision and Order at 6. In considering the newly submitted evidence, the administrative law judge permissibly found that Dr. Hippensteel's opinion that claimant did not suffer from pneumoconiosis, Director's Exhibit 63, was entitled to greater weight than the contrary opinion of Dr. Robinette, Director's Exhibit 47, as the opinion of Dr. Hippensteel was better-supported by the underlying documentation of record. *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). Thus, the administrative law judge provided a valid basis for the weight accorded the medical opinion evidence relevant to the existence of pneumoconiosis, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). Accordingly, we affirm the administrative law judge's determination that claimant has failed to establish the existence of pneumoconiosis by medical opinion evidence.[5] 20 C.F.R. §718.202(a); *Ondecko*, *supra*.

The administrative law judge further concluded that claimant was unable to establish the presence of a totally disabling respiratory impairment. Initially, the administrative law judge reviewed all of the previously submitted evidence and concluded that there was no mistake in the prior determination of fact. Decision and Order at 6. Turning to the newly submitted evidence, the administrative law judge concluded that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment through pulmonary function study evidence. The administrative law judge permissibly found, that while two newly submitted pulmonary function studies demonstrated qualifying values,[6] Director's Exhibit 63, the studies were entitled to little weight based on the opinion of Dr. Hippensteel calling their validity into question. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *see generally Old Ben Coal Co.*

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[5] Likewise, the administrative law judge correctly found that claimant could not establish the existence of pneumoconiosis at Sections 718.202(a)(2) and (3) as there was no evidence sufficient to establish the existence of pneumoconiosis under these sections or to entitle claimant to the presumptions contained therein. 20 C.F.R. §718.202(a)(2), (3).

[6] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

v. Battram, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280 (7th Cir. 1988); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134 (7th Cir. 1988); *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189 (1984); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J. dissenting). Thus, we affirm the administrative law judge's determination that claimant failed to produce credible evidence sufficient to carry his burden of demonstrating the presence of a totally disabling respiratory impairment by pulmonary function study evidence. *See* 20 C.F.R. §718.204(b)(2)(i); *see Ondecko*, *supra*.

Lastly, we affirm the administrative law judge's conclusion that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment based on Dr. Hippensteel's opinion, that claimant was able to return to coal mine employment from a pulmonary standpoint, Director's Exhibit 63, because it was best-supported by the underlying documentation of record. *See Clark*, *supra*; *Peskie*, *supra*; *Lucostic*, *supra*. In so doing, the administrative law judge rationally discredited the opinion of Dr. Robinette, that claimant was totally disabled, Director's Exhibit 47, since the physician failed to provide any credible support for his conclusion. *See Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). We therefore affirm the administrative law judge's weighing of the medical opinions regarding the presence of a totally disabling respiratory impairment, *see Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 1-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *see generally*, *Hicks*, *supra*; *Akers*, *supra*, and we affirm the administrative law judge's determination that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment through medical opinion evidence. *See* 20 C.F.R. 718.204(b)(2).[7]

Since the newly submitted evidence has failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, claimant is precluded from establishing a material change in conditions pursuant to Section 725.309(d)(2000), *see Rutter*, *supra*; *Hess*, *supra*, and claimant is, therefore, precluded from establishing entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v.*

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[7] Further, because the record does not contain any qualifying blood gas study evidence or evidence of cor pulmonale with right sided congestive heart failure, claimant is precluded from demonstrating the presence of a totally disabling respiratory impairment through these means. *See* 20 C.F.R. §718.204(b)(2)(ii), (iii).

W.G. Moore and Sons, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge