

BRB No. 04-0566 BLA

RALPH E. CUMMINS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
LODESTAR ENERGY, INCORPORATED/ UNDERWRITERS SAFETY CLAIMS)	DATE ISSUED: 04/08/2005
)	
and)	
)	
COSTAIN AMERICA, INCORPORATED)	
)	
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 on Remand of Thomas F. Phalen, Jr.,
Administrative Law Judge, United States Department of Labor.

Ralph E. Cummins, Princeton, Kentucky, *pro se*.¹

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire,
Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor;
Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice),

¹Claimant was represented by Joseph Kelly (Monhollon & Kelly, P.S.C.) of
Madisonville, Kentucky. However, on August 23, 2004, Mr. Kelly notified the Board of his
withdrawal from the case as claimant's counsel. By Order dated September 9, 2004, the
Board held that it will review this appeal under the general standard of review, which is
whether the Decision and Order of the administrative law judge is rational, in accordance
with law and supported by substantial evidence. *Cummins v. Lodestar Energy, Inc.*, BRB
No. 04-0566 BLA (Sept. 9, 2004)(unpub. order); *see also* 20 C.F.R. §§802.211(e), 802.220.

Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order on Remand (01-BLA-0815) of Administrative Law Judge Thomas F. Phalen, Jr. denying benefits on a duplicate claim² 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).³ This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with fifteen years of coal mine employment based on the parties' stipulation and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found the newly submitted evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Consequently, the administrative law judge found the evidence insufficient to establish a

²Claimant filed a claim for benefits on December 5, 1994. Director's Exhibit 30. On June 1, 1995, the Department of Labor denied benefits because claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* Claimant requested a hearing on June 6, 1995. *Id.* On September 5, 1995, the Department of Labor held the 1994 claim in abeyance pending a decision on claimant's Kentucky Workers' Compensation claim in accordance with claimant's request. *Id.* The Department of Labor indicated that no further action would be taken on the claim until the district director was provided with all pertinent documents relating to the decision rendered in the Kentucky Workers' Compensation claim. *Id.* On August 29, 1995, claimant was awarded benefits in the Kentucky Workers' Compensation claim. *Id.* On July 11, 1996, the Department of Labor denied benefits. The Department of Labor specifically stated that its initial finding that claimant cannot be found entitled to benefits remains unchanged. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed the most recent claim for benefits on March 9, 2000. Director's Exhibit 1.

³The 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.

material change in conditions pursuant to 20 C.F.R. §725.309 (2000).⁴ Accordingly, the administrative law judge denied benefits. In response to claimant's appeal, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iv). However, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309 (2000), and remanded the case to the administrative law judge to consider Dr. Settle's September 2001 report.⁵ *Cummins v. Lodestar Energy, Inc.*, BRB No. 02-0537 BLA (Apr. 24, 2003)(unpub.).

On remand, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Consequently, the administrative law judge found the evidence insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). Accordingly, the administrative law judge again denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's denial of benefits.

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 Corp.*, 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 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).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. In *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must consider all of

⁴The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. See 20 C.F.R. §725.2.

⁵The Board noted that although the administrative law judge considered Dr. Settle's July 2000 report, he did not specifically discuss Dr. Settle's September 2001 report. *Cummins v. Lodestar Energy, Inc.*, BRB No. 02-0537 BLA, slip op. at 4 (Apr. 24, 2003)(unpub.).

the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him in order to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).

The Sixth Circuit also held that a miner must show that his condition has worsened since the filing of an initial claim. *Ross*, 42 F.3d at 999, 19 BLR at 2-20. Hence, the Sixth Circuit held that a miner must show that the new evidence differs qualitatively from the evidence submitted with the previously denied claim. *Ross*, 42 F.3d at 999, 19 BLR at 2-21; *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000). In this case, claimant's December 5, 1994 claim was denied because claimant failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 30. Since the Board previously affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3) and total disability at 20 C.F.R. §718.204(b)(2)(i)-(iv), the administrative law judge correctly stated that "[t]he sole issue in this case on remand is whether, after considering Dr. Settle's September 2001 report, the newly submitted evidence is sufficient to establish the existence of pneumoconiosis." Decision and Order on Remand at 2; *see* 20 C.F.R. §718.202(a)(4). The administrative law judge also correctly stated, "if after considering this report, the undersigned finds that claimant has established the existence of pneumoconiosis, claimant will have demonstrated a material change in condition, and I must then consider whether the evidence as a whole is sufficient to establish entitlement to benefits pursuant to Part 718." Decision and Order on Remand at 2.

The administrative law judge found the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The record contains the reports of Drs. O'Bryan, Westerfield, and Settle, claimant's treating physician. In a report dated April 3, 2000, Dr. O'Bryan opined that claimant does not suffer from an occupational lung disease caused by his coal mine employment.⁶ Director's Exhibit 6. Similarly, in a report dated November 12, 2000, Dr. Westerfield opined that claimant does not suffer from coal workers' pneumoconiosis or a pulmonary impairment due to coal mine employment. Employer's Exhibit 1. In contrast, in a letter dated September 21, 2001, Dr. Settle diagnosed black lung disease. *Id.* Dr. Settle opined that "[claimant] has environmental lung disease, [*i.e.*,] dust, coal mine, [and] black lung damage to his lungs."⁷ Claimant's

⁶Dr. O'Bryan diagnosed moderate restrictive ventilatory impairment, dyspnea, organic heart disease, and coronary artery disease. Director's Exhibit 6.

⁷In addition, in a letter dated July 25, 2000, Dr. Settle diagnosed significant lung disease related to coal dust exposure. Director's Exhibits 16, 20. In its 2003 Decision and Order, the Board determined that "the administrative law judge rationally found [that Dr.

Exhibit 1. The administrative law judge permissibly discounted Dr. Settle's September 21, 2001 opinion because it is not reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge specifically stated:

After consideration, I find that Dr. Settle's September 21, 2001 letter is neither well-reasoned, nor well-documented. The letter fails to connect any objective testing or medical evidence to his conclusion that [c]laimant has black lung disease. It does not set forth specific clinical findings, observations, facts and other data on which he based his diagnosis, nor does his opinion set forth adequate documentation and data to support the conclusions. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Furthermore, Dr. Canonico's office notes, which Dr. Settle states confirms his opinion, do not diagnose black lung disease, nor do the reports tie Dr. Canonico's diagnosis of pulmonary infiltrates and restrictive lung disease to coal dust exposure. In sum, I find nothing in Dr. Settle's letter that entitles it to probative weight.

Decision and Order on Remand at 4.

The Sixth Circuit has held that there is no rule requiring deference to the opinion of a treating physician in black lung claims.⁸ *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). The Sixth Circuit has held that the opinions of treating physicians should be given the deference they deserve based upon their power to persuade. *Id.* The Sixth Circuit explained that the case law and applicable regulatory scheme clearly provide that the administrative law judge must evaluate the opinions of treating physicians just as they consider the reports of other experts. *Id.* In this case, the administrative law judge found that Dr. Settle's opinion is not sufficiently reasoned. Decision and Order on Remand at 4. Consequently, the administrative law judge properly found that Dr. Settle's opinion is insufficient to establish the existence of pneumoconiosis at 20 C.F.R.

Settle's July 25, 2000] opinion [was] not reasoned and documented because the physician did not state with specificity upon what evidence he relied in rendering his opinion." *Cummins v. Lodestar Energy, Inc.*, BRB No. 02-0537 BLA, slip op. at 4 n.6 (Apr. 24, 2003)(unpub.).

⁸Section 718.104(d) provides that an adjudicator must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record. 20 C.F.R. §718.104(d). The United States Court of Appeals for the Sixth Circuit has recognized that this provision codifies judicial precedent and does not work a substantive change in the law. *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

§718.202(a)(4). Since the administrative law judge permissibly discounted Dr. Settle's opinion, the only newly submitted medical opinion of record that could establish the existence of pneumoconiosis, because it is not reasoned, *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Fuller*, 6 BLR at 1-1294, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In view of our affirmance of the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we also affirm the administrative law judge's finding that the evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000). *Ross*, 42 F.3d at 997-98, 19 BLR at 2-18.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge