BRB No. 07-0637 BLA

P.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	
	)	DATE ISSUED: 04/30/2008
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 Denial of Request for Modification of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

P.V., Pikeville, Kentucky, *pro se*.

Francesca L. Maggard (Lewis and Lewis), Hazard, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denial of Request for Modification (05-BLA-0024) of Administrative Law Judge Daniel F. Solomon (the administrative law judge), rendered on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

[1] Claimant filed his initial claim for benefits on February 12, 1997. Director's Exhibit 16. It was denied on July 13, 1999, for failure to establish any element of entitlement. *Id*. Claimant did not appeal.

amended, 30 U.S.C. §901 *et seq*. (the Act).[2] This case is before the Board for the second time. Claimant filed this claim on December 4, 2000. Director's Exhibit 1. The district director issued a Proposed Decision and Order on March 15, 2001, denying benefits. Director's Exhibit 6. Pursuant to claimant's request, the case was forwarded to the Office of Administrative Law Judges (the OALJ). On July 11, 2003, Administrative Law Judge Thomas F. Phalen, Jr. found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and, therefore, established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 16. Judge Phalen denied benefits, however, because he found that, although claimant established that he was totally disabled, he did not establish that his total disability was due to pneumoconiosis. *Id*.

Claimant appealed. Pursuant to a motion to remand filed by the Director, Office of Workers' Compensation Programs (the Director), the Board vacated the decision and remanded the case to the district director to provide claimant with a complete pulmonary evaluation. *[P.V.] v. Kentucky Carbon Corp.*, BRB No. 03-0742 BLA (June 24, 2004)(unpub.). On remand, following the provision of a complete pulmonary evaluation, the case was returned to the OALJ and assigned to the administrative law judge.

Although the case was before the administrative law judge as a duplicate claim, he considered the claim as a request for modification of the district director's March 15, 2001 decision. The administrative law judge credited claimant with twenty-seven years and seven months of coal mine employment,[3] as stipulated by the parties, and, focusing on the medical evidence developed after March 15, 2001, found that claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a), 718.204, and therefore did not establish a basis to modify the district director's 2001 decision. Accordingly, the administrative law judge denied benefits.

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The record indicates that claimant's last coal mine employment occurred in Kentucky. Director's Exhibit 16. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

On appeal, claimant generally challenges the administrative law judge's Decision and Order. Employer responds, urging affirmance of the denial of benefits. The Director has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Sixth Circuit has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994). Claimant "must also demonstrate that this change rests upon a qualitatively different evidentiary record" than was considered in the previous claim. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 479, 23 BLR 2-44, 2-63 (6th Cir. 2003)(Moore, J., concurring in the result). If claimant is successful, he has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence supports a finding of entitlement. *Flynn*, 353 F.3d at 480, 23 BLR at 2-66.

Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 16. Therefore, claimant had to submit new, qualitatively different evidence establishing either of these elements of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2000); *see Ross*, 42 F.3d at 997, 19 BLR at 2-18.

Thus, the issue properly before the administrative law judge was whether all of the new evidence in the duplicate claim established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), since the denial of the previous claim in 1999. Consequently, the administrative law judge erred in considering this claim as a request

for modification of the district director's 2001 decision denying benefits. Therefore, and for the reasons that follow, we remand this case for further consideration.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight readings of five x-rays dating between August 12, 2002 and November 22, 2004,[4] and he considered the readers' radiological credentials. After noting that overall, there were two positive readings, five negative readings, and one reading that did not address the existence of pneumoconiosis, the administrative law judge examined the six readings of the four most recent x-rays, and found that the pattern of those readings did not reflect the progression of pneumoconiosis:

> [T]he majority of the [2004] x-rays were read as negative for pneumoconiosis. Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. Of the x-rays taken in [2004], four of the six readings are negative for pneumoconiosis. There is nothing in the interpretation of the more recent films to indicate the manifestation of the latent and progressive nature of the disease.
>
> I find that the [c]laimant has not established the presence of pneumoconiosis through the use of x-ray evidence.

Decision and Order at 8 (internal citations omitted). The administrative law judge acted within his discretion in treating as contemporaneous the four x-rays taken within three months of each other in 2004, and in relying on the preponderance of negative interpretations by Board-certified radiologists and B readers. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993). Although the administrative law judge did not specifically resolve the two conflicting interpretations

[4] Drs. Brandon and Wheeler, both of whom are "dually qualified" as Board-certified radiologists and B readers, rendered conflicting positive and negative readings, respectively, of the August 12, 2002 x-ray. Dr. Burnett, who is dually qualified, noted an abnormal heart size, without further comment, on the August 30, 2004 x-ray, and Dr. Halbert, who is also dually qualified, read the same x-ray as negative for pneumoconiosis. Dr. Dahhan, a B reader, read the October 9, 2004 x-ray as negative for pneumoconiosis. Dr. Fino, a B reader, and Dr. Wheeler, a dually qualified reader, read the November 5, 2004 x-ray as negative for pneumoconiosis. Dr. Forehand, a B reader, read the November 22, 2004 x-ray as positive for pneumoconiosis. Director's Exhibits 19, 23; Employer's Exhibits 1-3, 7.

by Drs. Brandon and Wheeler of the earlier, August 12, 2002 x-ray, any error was harmless, because this x-ray could only have been found to be in equipoise, as the administrative law judge found that Drs. Brandon and Wheeler were both Board-certified radiologists and B readers. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Director's Exhibit 18; Employer's Exhibit 2. Because it is supported by substantial evidence, we affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).[5]

Pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge correctly found that the record contains no biopsy evidence. Although the administrative law judge did not make a finding pursuant to 20 C.F.R. §718.202(a)(3), the record reflects that the presumptions listed therein are inapplicable.[6]

Pursuant to 20 C.F.R. §718.202(a)(4), the record contains relevant medical opinions from six different physicians. There are five reports from Dr. Ammisetty, and one each from Drs. Mettu, Dahhan, Fino, Tuteur, and Jarboe. Director's Exhibits 4, 19, 23; Claimant's Exhibits 1, 4, 5; Employer's Exhibits 1-3. The record also contains claimant's medical treatment records. Director's Exhibit 19; Claimant's Exhibits 2, 6.

The administrative law judge acted within his discretion in finding that the treatment records were not well reasoned, because they lacked any explanation for the notation of black lung disease. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). Additionally, the administrative law judge permissibly found that Dr. Ammisetty's November 1, 2004 report diagnosing "possible" pneumoconiosis, and his November 15, 2004 report diagnosing COPD, lacked "detailed explanation." *Id.* However, the record contains three additional reports by Dr. Ammisetty dated December 20, 2000, December 15, 2004, and October 4, 2005, all of which diagnose a pulmonary impairment secondary to coal dust exposure. Director's Exhibits 4, 23; Claimant's Exhibit 1. The administrative law judge erred in not

[5] The administrative law judge overlooked two negative interpretations of a December 20, 2000 x-ray by Drs. Kendall and Sargent, that could only have supported his finding that the new x-rays did not establish pneumoconiosis. Director's Exhibits 4, 5; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[6] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

considering this evidence. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Robertson v. Alabama By-Products Corp.*, 7 BLR 1-793, 1-795 (1985). Therefore, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4), and remand the case for him to consider the remaining reports from Dr. Ammisetty. Additionally, the administrative law judge did not discuss Dr. Mettu's August 30, 2004 medical report diagnosing claimant with chronic bronchitis aggravated by coal dust exposure, and should consider it on remand. *See* 20 C.F.R. §718.201(a)(2); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Director's Exhibit 9.

With respect to the physicians who opined that claimant does not have pneumoconiosis, the administrative law judge found that Dr. Tuteur's opinion was unpersuasive because it was based upon generalities. Substantial evidence supports the administrative law judge's permissible credibility determination.[7] *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003); *Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5, 1-7 (1985); Employer's Exhibit 9. However, the administrative law judge failed to discuss the newly submitted opinions of Drs. Dahhan and Fino, and should consider them on remand. Employer's Exhibits 1, 3. Additionally, the administrative law judge discounted Dr. Jarboe's opinion because Dr. Jarboe considered both new evidence and evidence in the record of the prior claim. Since the administrative law judge was required to compare the old and new evidence to determine whether a material change in conditions was established, he erred in discrediting Dr. Jarboe's opinion because it referred to evidence from the prior claim. *See Flynn*, 353 F.3d at 479, 23 BLR at 2-63. The administrative law judge should reconsider Dr. Jarboe's opinion on remand.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge weighed six new pulmonary function studies dated December 20, 2000, February 6, 2001, September

---

[7] The administrative law judge stated:

> Dr. Tuteur asserts that non-miners who smoke have a 20% incidence rate of chronic bronchitis as opposed to the 1% of miners who do not smoke. The implication is that the nexus between smoking and chronic bronchitis is, by far, more substantial than [the nexus between chronic bronchitis] and coal mine dust exposure. . . . Assuming, *arguendo*, that smoking induced chronic bronchitis is more probable than coal mine dust induced chronic bronchitis, this has no relevance to the [c]laimant's physical condition. Dr. Tuteur has not specifically addressed the specifics of the [c]laimant's physical condition.

Decision and Order at 10.

16, 2004, October 9, 2004, November 5, 2004, and November 15, 2004. The administrative law judge found that only the October 9, 2004 and November 5, 2004 pulmonary function studies, conducted by Drs. Dahhan and Fino, were qualifying.[8]

In so finding, the administrative law judge erred in failing to resolve the differences in height recorded by the physicians so that the qualifying or non-qualifying nature of the new pulmonary function studies could be determined. *Protopappas v. Director, OWCP*, 6 BLR 1-221, 1-223 (1983). Moreover, contrary to the administrative law judge's finding, the record reflects that Dr. Ammisetty's December 20, 2000 pulmonary function study was qualifying at any of the heights at which claimant was measured.[9] Director's Exhibit 4. Therefore, we vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i) and instruct him to make a finding as to claimant's height, and to reconsider the new pulmonary function studies.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge correctly found that four new arterial blood gas studies dated February 16, 2004, October 9, 2004, November 5, 2004, and December 15, 2004 were non-qualifying. Decision and Order at 11; Director's Exhibits 19, 23; Employer's Exhibits 1, 3. A fifth study, conducted on December 20, 2000 and not considered by the administrative law judge, also yielded non-qualifying values. Director's Exhibit 4; *see Larioni*, 6 BLR at 1278. As it is supported by substantial evidence, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii). Additionally, pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge correctly found that the record contains no evidence of cor pulmonale with right-sided congestive heart failure. We therefore affirm this finding.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge discredited Dr. Ammisetty's opinion that claimant was totally disabled because he found that it was based on non-qualifying pulmonary function study values. As discussed, the record reflects that Dr. Ammisetty's December 20, 2000 pulmonary function study was qualifying. Thus, substantial evidence does not support the administrative law judge's credibility determination. Further, the administrative law judge did not consider Dr.

[8] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values in Appendices B and C of Part 718. A "non-qualifying" study yields values exceeding the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

[9] Dr. Burki reviewed the December 20, 2000 pulmonary function study and opined that it was invalid based on the spirometry curve shapes. Director's Exhibit 4. Dr. Ammisetty, however, stated that claimant's effort and cooperation were "good." *Id*. On remand, the administrative law judge should resolve the difference of opinion as to the validity of this study in determining whether it supports a finding of total disability.

Ammisetty's November 1, 2004, November 15, 2004, December 15, 2004, and October 4, 2005 reports diagnosing a mild to moderate impairment. Director's Exhibit 23; Claimant's Exhibits 1, 4, 5. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for him to consider this evidence. On remand, the administrative law judge should also consider the newly submitted opinions of Drs. Dahhan, Fino, Jarboe, Mettu, and Tuteur regarding whether claimant is totally disabled. *See* 30 U.S.C. §923(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); Director's Exhibit 19; Employer's Exhibits 1-6.

In sum, we remand this case for the administrative law judge to reconsider whether the new evidence establishes a material change in conditions pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), 725.309(d)(2000), under *Ross*. If so, the administrative law judge must then determine whether all of the evidence supports a finding of entitlement. *Flynn*, 353 F.3d at 480, 23 BLR at 2-66.

Accordingly, the administrative law judge's Decision and Order Denial of Request for Modification is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S.DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge