BRB No. 99-1144 BLA

LONNIE J. MATNEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GARDEN CREEK POCAHONTAS 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 of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

Lonnie J. Matney, Hurley, Virginia, *pro se*.[1]

Douglas A. Smoot and Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

[1]Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested on behalf of claimant that the Board review the decision of Administrative Law Judge Lawrence P. Donnelly. In a letter dated August 10, 1999, the Board stated that claimant would be considered to be representing himself on appeal. *See Shelton v. Claude V. Keen Trucking Co.,* 19 BLR 1-88 (1995)(Order).

Claimant, without the assistance of counsel, appeals the Decision and Order (98-BLA-0858) of Administrative Law Judge Lawrence P. Donnelly (the administrative law judge) denying benefits on a duplicate claim[2] 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 administrative law judge credited claimant with approximately thirty-seven years of coal mine employment 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(c)(1)-(4). Consequently, the administrative law judge concluded that the evidence is insufficient to 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 challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[3]

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[2]Claimant filed his initial claim on September 7, 1994. Director's Exhibit 28. On October 13, 1995, Administrative Law Judge Robert G. Mahony issued a Decision and Order denying benefits. *Id*. The bases of Judge Mahony's denial were claimant's failure to establish the existence of pneumoconiosis and total disability. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on November 12, 1997. Director's Exhibit 1.

[3]Inasmuch as the administrative law judge's length of coal mine employment finding, which is not adverse to this *pro se* claimant, is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. *See 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).

Claimant's previous claim was denied because he failed to establish the existence of pneumoconiosis and total disability. Director's Exhibit 28. The administrative law judge stated that because "the record is somewhat ambiguous as to whether the Claimant last performed coal mine work in Pennsylvania (DX 4), Virginia (DX 3), or Kentucky (DX 2)..., it is unclear whether this case arises in the Third, Fourth, or Sixth Circuit."[4] Decision and Order at 7. However, the administrative law judge, citing *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227, (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), and *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994), stated that "all three of these circuits have adopted the same standard for finding a 'material change in conditions.'" *Id*. As noted by the administrative law judge, the courts in these circuits have held that an administrative law judge must consider all of 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 to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Rutter, supra*; *Swarrow, supra*; *Ross, supra*. Thus, inasmuch as the administrative

[4]The record indicates that claimant lives in Hurley, Virginia, and that employer's claims agent, Employers Service Corporation, is located in Charleston, West Virginia. However, the record does not indicate that claimant performed his most recent coal mine employment in either Virginia or West Virginia. While the Social Security Administration Itemized Statement of Earnings lists Pittsburgh, Pennsylvania as employer's address, Director's Exhibits 5, 28, Employment History forms dated August 22, 1994 and November 4, 1997 list Lexington, Kentucky as employer's address, Director's Exhibits 2, 28. Further, a Department of Labor form, which was neither signed nor dated, indicates that Lexington, Kentucky was the mine site where claimant performed his most recent coal mine employment for employer from January 1982 until May 1994. Director's Exhibit 6.

law judge properly considered the issue of whether claimant established a material change in conditions at 20 C.F.R. §725.309 in accordance with the one-element standard, we hold that any error by the administrative law judge in failing to render a specific determination with respect to the state where claimant performed his most recent coal mine employment is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see also Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, the newly submitted evidence must support a finding of either the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R. §718.204(c).

In finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence. Of the fifteen newly submitted x-ray interpretations of record, eleven readings are negative for pneumoconiosis, Employer's Exhibits 1-3, 5, 7-9, 12, and four readings are positive, Director's Exhibits 12-14; Employer's Exhibit 4. In addition to noting the numerical superiority of the negative x-ray readings, the administrative law judge also considered the qualifications of the various physicians.[5] *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Thus, inasmuch as it is supported by substantial evidence, we affirm 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)(1).

Next, we affirm 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)(2) since there is no biopsy or autopsy evidence demonstrating the existence of pneumoconiosis. In addition, we affirm 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)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not

[5]The administrative law judge stated that "the majority of the recent x-ray interpretations, including those by dual qualified B-readers and Board-certified radiologists, are negative for pneumoconiosis." Decision and Order at 8.

entitled to the presumption at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Further, 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). The administrative law judge considered the opinions of Drs. Fino, Forehand, Dahhan, Hippensteel and Jarboe. Whereas Dr. Forehand opined that claimant suffers from pneumoconiosis, Director's Exhibit 10, Drs. Fino, Dahhan, Hippensteel[6] and Jarboe opined that claimant does not suffer from pneumoconiosis, Employer's Exhibits 4, 6, 10, 11, 13, 15. Inasmuch as four of the five physicians of record, who provided newly submitted medical reports, opined that claimant does not suffer from pneumoconiosis, we affirm 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)(4). *See Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

[6]The administrative law judge stated that "Drs. Dahhan, Jarboe, and Fino clearly and unequivocally found that neither the radiological nor the physiological evidence warranted a finding of pneumoconiosis, as defined in [20 C.F.R.] §718.201." Decision and Order at 8. In contrast, the administrative law judge stated that "Dr. Hippensteel's opinion is somewhat ambiguous regarding the pneumoconiosis issue." *Id*. The administrative law judge observed that "[o]n the one hand, Dr. Hippensteel's x-ray reading is positive for pneumoconiosis under the classification requirements of [20 C.F.R.] §718.102(b)." *Id*. The administrative law judge also observed that "[o]n the other hand, Dr. Hippensteel found the x-ray evidence to be inconsistent with coal workers' pneumoconiosis, and he did not attribute any respiratory or pulmonary impairment to Claimant's coal mine dust exposure." *Id*. However, an x-ray report, in and of itself, does not qualify as a medical report at 20 C.F.R. §718.202(a)(4). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Hence, an administrative law judge is not required to find that a miner suffers from pneumoconiosis based on a positive x-ray interpretation. Nonetheless, inasmuch as the administrative law judge rationally found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), we hold that any error by the administrative law judge with regard to his weighing of the opinion of Dr. Hippensteel is harmless. *See Larioni, supra*.

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. Since none of the newly submitted pulmonary function studies of record yielded qualifying[7] values, Director's Exhibit 9; Employer's Exhibit 4, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(1).

In finding the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(2), the administrative law judge considered the newly submitted arterial blood gas studies dated November 26, 1997 and April 22, 1998. While the April 22, 1998 study yielded non-qualifying values at rest and during exercise, Director's Exhibit 4, the November 26, 1997 study yielded non-qualifying values at rest and qualifying values during exercise, Director's Exhibit 11. Inasmuch as the administrative law judge rationally found that "the preponderance of the newer arterial blood gas tests, including the most recent, are...not qualifying," Decision and Order at 9, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(2). *See Ondecko, supra*. Additionally, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3) since the record does not contain evidence of cor pulmonale with right sided congestive heart failure.

Finally, we address the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). The administrative law judge considered the newly submitted opinions of Drs. Fino, Forehand, Dahhan, Hippensteel and Jarboe. Drs. Fino, Forehand, Dahhan, Hippensteel and Jarboe opined that claimant does not suffer from a disabling respiratory impairment. Director's Exhibit 10; Employer's Exhibits 4, 6, 10, 11, 13, 15. Since none of the physicians opined that claimant suffers from a disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total

[7]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. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

disability at 20 C.F.R. §718.204(c)(4). *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Ross, supra*.

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge