BRB No. 01-0873 BLA

HAZEL C. FOWLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
ISLAND CREEK COAL COMPANY	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Hazel C. Fowler, Birch River, West Virginia, *pro se.*[1]

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

[1]Leonard Wood filed an appeal on behalf of claimant. By Order dated August 24, 2001, the Board acknowledged claimant's appeal and indicated it would review the appeal under the general standard of review. *See* 20 C.F.R. §§802.211(e); 802.220.

PER CURIAM:

Claimant[2], without the assistance of counsel, appeals the Decision and Order-Denying Benefits (00-BLA-0672) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a miner's duplicate 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).[3] The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), and thereby found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000).[4] Accordingly, the administrative law judge denied the claim.

The relevant procedural history of this case is as follows: Claimant filed his first claim for benefits with the Social Security Administration (SSA) on December 27, 1972. Claimant filed an election card electing SSA review on April 18, 1978. The claim was last denied by SSA on April 18, 1979. Director's Exhibit 41. Claimant took no further action on this claim and the denial became final. Claimant also filed a claim for benefits with the Department of

---

[2]Claimant is Hazel C. Fowler, the miner, who has filed three claims for benefits. The current duplicate claim was filed on March 1, 1999. Director's Exhibit 1.

[3]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 they 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.

[4]While 20 C.F.R. §725.309 was amended, the amended regulation applies only to claims filed after January 19, 2001, and thus, is inapplicable to the instant claim.

Labor (DOL) on June 6, 1975. DOL denied this claim on May 22, 1981 because the evidence failed to establish total respiratory disability and total disability due to pneumoconiosis. Director's Exhibit 40. Claimant took no further action on this claim and the denial became final. Claimant then filed the instant duplicate claim for benefits on March 1, 1999. Director's Exhibit 1. Following a hearing, the administrative law judge issued a Decision and Order dated July 17, 2001, denying benefits. Claimant then filed the instant appeal with the Board.

In an appeal by a claimant filed 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 1-36 (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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). Employer has filed a response to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[5]

In order to establish entitlement to benefits in a living miner's claim, claimant must establish that he has pneumoconiosis, that such pneumoconiosis arose out of coal mine employment, and that such pneumoconiosis is totally disabling. Failure to prove any of these requisite elements of entitlement compels a denial of benefits. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[5]We affirm, as unchallenged on appeal and not adverse to claimant, the following findings of the administrative law judge: that claimant established 38 years of qualifying coal mine employment; that employer is the putative responsible operator, both by stipulation of the parties, and that claimant's wife qualifies as a dependent for purposes of augmentation. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because claimant was not represented by counsel at the hearing before the administrative law judge, we must address whether claimant was informed of his right to be represented by counsel. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). In order to conduct a full and fair hearing, the administrative law judge must inform a claimant without counsel of his right to be represented by an attorney of his choice, without charge to him. *Id.* 20 C.F.R. §725.362(b) requires the administrative law judge to make an appropriate and adequate inquiry regarding claimant's *pro se* status. In doing so, the administrative law judge must determine whether claimant's lack of counsel is knowing and voluntary. *Shapell, supra*. In the instant case, we hold that the administrative law judge satisfied his requirement to inform claimant of his rights, and we note that claimant elected to go forward with his lay representative. H. Tr. at 10-11. Moreover, the administrative law judge conducted almost the entire examination of claimant, H. Tr. at 18-22, and also asked questions of claimant's wife, H. Tr. at 16-17, thereby providing further development of the evidence where he deemed it necessary. *See King v. Cannelton Industries,* 8 BLR 1-146 (1985). We hold, therefore, that the administrative law judge complied with the requirements of Section 725.362(b) and *Shapell* in conducting the hearing.[6]

Claimant's lay representative asserts, however, in his letter appealing the administrative law judge's Decision and Order, that claimant did not receive a fair hearing because the administrative law judge did not let the lay representative "finish his case." While it is true that, at one point, the administrative law judge interrupted the lay representative during his questioning of claimant's wife, the administrative law judge did so in order to obtain direct examination from claimant. After a break for claimant's testimony, claimant's wife resumed the witness stand. Employer's counsel immediately undertook cross-examination without objection from claimant's lay representative, nor did claimant's lay representative request permission for redirect examination. H. Tr. at 17-29. Later, during the lay representative's closing argument, the administrative law judge curtailed the lay representative's commentary on the fairness of the current law concerning black lung benefits, suggesting instead that the lay representative address Congress on the matter. H. Tr. at 32-35. The conduct of the hearing is a matter generally within the sound discretion of the administrative law judge, as the adjudication officer. *See Wagner v. Beltrami Enterprises,* 16 BLR 1-65 (1990); *Amrose v. Director, OWCP, 7 BLR 1-* 899 (1985); *Clifford v. Director, OWCP*, 7 BLR 1-827 (1985). Moreover, in order to establish that a party's right to a full and fair hearing has been denied, there must be a clear showing of substantial prejudice. *Lafferty*

[6]Claimant was advised of his right to counsel, pursuant to *Shapell v. Director, OWCP*, 7 BLR 1-304 (1984), only after the administrative law judge admitted all of the documentary exhibits into evidence in this case. While the administrative law judge's conduct of the hearing in this regard does not constitute reversible error, the administrative law judge should have advised claimant of his right to counsel at the start of the hearing.

v. Cannelton Industries, 12 BLR 1-190 (1989). We hold that, given the facts of this case, the administrative law judge did not abuse his discretion or deny claimant's due process rights, but rather provided claimant with a full and fair hearing.

We now address the administrative law judge's consideration of the newly submitted evidence at Section 725.309(d)(2000). In order to establish a material change in conditions, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995)(*en banc*), *cert. denied*,117 S.Ct. 763 (1997). The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). We note that it was unnecessary for the administrative law judge to consider this evidence, as the prior denial in this case was not based upon a finding that the evidence failed to establish the existence of pneumoconiosis. These findings, therefore, are not germane to the issue of whether claimant established a material change in conditions. However, in view of our decision to remand this case, *see* discussion *infra* at 6-7, we will review the administrative law judge's findings at 20 C.F.R. §718.202(a). As discussed *infra*, we find no error in the administrative law judge's consideration of the newly submitted evidence under Section 718.202(a).

At 20 C.F.R. §718.202(a)(1), the administrative law judge accurately summarized 44 interpretations of 23 x-rays. Decision and Order at 10. He correctly found that only two of the interpretations were positive for pneumoconiosis and that there were 14 newly-submitted negative interpretations by physicians who were both B-readers and Board-certified radiologists, compared to one positive reading by a dually-qualified reader. *Id*. The administrative law judge permissibly accorded greater weight to the interpretations of the dually-qualified readers. *Id*; *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Martinez v. Director, OWCP*, 10 BLR 1-24 (1987). Inasmuch as the vast majority of the more highly qualified readers provided negative readings, the administrative law judge rationally found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1). Decision and Order at 22; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984).

The administrative law judge also correctly found that the record contains no biopsy or autopsy evidence pursuant to 20 C.F.R. §718.202(a)(2) and that the presumptions at 20 C.F.R. §718.202(a)(3) are not applicable. Decision and Order at 10.

At 20 C.F.R. §718.202(a)(4), the administrative law judge found that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis. The

administrative law judge correctly concluded that only Dr. Rasmussen found pneumoconiosis. Director's Exhibit 10; Decision and Order at 10. The administrative law judge weighed Dr. Rasmussen's opinion against the opinions of Drs. Zalvidar, Morgan, Spagnolo, Castle and Fino, all of whom concluded that claimant did not suffer from pneumoconiosis. Director's Exhibit 27; Employer's Exhibit 2, 5, 7, 8 and 11; Decision and Order at 11.[7] The administrative law judge permissibly credited the opinions of Drs. Zalvidar, Morgan, Spagnolo, Castle and Fino over Dr. Rasmussen's opinion, based on the preponderance of medical opinion evidence, after noting that the former were all highly qualified pulmonary specialists. *See Edmiston, supra; Sheckler, supra;* Decision and Order at 11.

We next address the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(i). The administrative law judge correctly found that of the two newly submitted pulmonary function studies of record, only one produced qualifying values. Director's Exhibits 9, 27; Decision and Order at 11. The administrative law judge correctly found that the physician who administered the qualifying test, as well as all of the physicians who reviewed the test, found it to be invalid due to suboptimal effort. Director's Exhibit 27; Decision and Order at 11. Thus, the administrative law judge properly found the pulmonary function study evidence insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(i). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc)*; Fields v. Island Creek Coal Corp.*, 10 BLR 1-19 (1987)*; Winchester v. Director v. OWCP,* 9 BLR 1-177 (1986).

The administrative law judge also correctly found that the two newly submitted blood gas studies both produced non-qualifying values at 20 C.F.R. §718.204(b)(2)(ii). Director's Exhibits 11, 33; Decision and Order at 12. Thus, the administrative law judge properly found the newly submitted blood gas study evidence insufficient to establish total disability pursuant to Section 718.204(b)(2)(ii). *See Clark, supra; Fields, supra; Tucker v Director v. OWCP*, 10 BLR 1-35 (1987).

[7]The administrative law judge incorrectly stated that there are six contrary opinions when in fact, there is a total of six opinions, and only five newly submitted contrary opinions of record. We note this error, but hold that it is harmless as it does not impart the outcome of this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

At 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 disease. Thus, we affirm the administrative law judge's finding that total respiratory disability is not established pursuant to Section 718.204(b)(2)(iii). *See Newell v. Freeman United Coal Corp.*, 13 BLR 1-37 (1987).

With respect to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Rasmussen's opinion, that claimant was totally disabled due to pneumoconiosis, was outweighed by the other opinions of record which stated that claimant suffered from a totally disabling respiratory impairment due to other causes. Decision and Order at 12. The inquiry at Section 718.204(b)(2)(iv) is whether claimant is totally disabled due to a respiratory or pulmonary impairment, without regard to cause. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dolzanie v. Director,* OWCP, 6 BLR 1-865 (1984); *see also Beatty v. Danri Corp*., 16 BLR 1-11 (1991). All of the medical opinions of record conclude that claimant is totally disabled due to a respiratory impairment, although Dr. Fino's opinion is a qualified opinion.[8] Director's Exhibits 10, 27; Employer's Exhibits 2, 5, 7, 8 and 11. We vacate, therefore, the administrative law judge's finding that the newly submitted evidence fails to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(iv), and remand the case for reconsideration of the newly submitted medical opinion evidence at Section 718.204(b)(2)(iv). In the event that the administrative law judge finds total disability established at Section 718.204(b)(2)(iv) on remand, he must weigh the newly submitted evidence supportive of a totally disabling respiratory impairment against all of the newly submitted contrary probative evidence of record, in order to determine if claimant has established the existence of a totally disabling respiratory impairment at Section 718.204(b)(2), and thereby demonstrated a material change in conditions pursuant to Section 725.309(d) (2000). *See Clark, supra*; *Fields, supra; Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). If the administrative law judge determines that the newly submitted evidence establishes a totally disabling respiratory impairment, then he must consider whether claimant has established entitlement based upon all of the evidence of record. *Rutter, supra.*

[8]Dr. Fino questioned the validity of the qualifying pulmonary function study. Dr. Fino then stated that, assuming claimant's qualifying pulmonary function study was valid, claimant was totally disabled from returning to his last coal mining job due to cigarette smoking. Employer's Exhibit 8.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this decision.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge