BRB No. 02-0755 BLA

DEE ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS=	)	DATE ISSUED:
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COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan, Hyden, Kentucky, for claimant.

Helen H. Cox (Howard M. Radzely, Acting 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), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (01-BLA-1018) of Administrative Law Judge Joseph E. Kane rendered on this 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).[1] The administrative law

[1] 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.

judge accepted the parties stipulation of thirty-two years of coal mine employment based on his review of the record, and concluded that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and a totally disabling respiratory impairment, elements previously adjudicated against claimant, and thus, found that a material change in conditions was not established pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied. [2]

On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Board erred in failing to grant claimant=s motion to remand the claim to the district director so that he could withdraw the claim. The Director, Office of Workers' Compensation Programs (the Director), contends that the Board properly denied claimant's request to remand the case to the district director so that claimant could withdraw the claim pursuant to the Board's recent holdings in *Clevenger v. Mary Helen Coal Co.*, BRB No. 01-0884 BLA (Aug. 30, 2002)(*en banc*) and *Lester v. Peabody Coal Co.*, BRB No. 02-0193 BLA (Sep. 9, 2002)(*en banc*), but urges the Board to remand the case to the administrative law judge because the administrative law judge failed to consider whether Dr. Baker's opinion established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(2) and if reached, to determine whether the evidence of record establishes a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). [3]

The Board=s scope of review is defined by statute. If the administrative law judge=s findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

[2] Claimant filed his initial claim for benefits on July 18, 1991. That claim was denied on February 10, 1995, because claimant failed to establish any of the elements of entitlement. Director=s Exhibits 16-39, 269. The denial was affirmed by the Board on July 25, 1995. Director=s Exhibit 16-01. The instant, duplicate claim was filed June 23, 2000.

[3] The motion to remand filed by the Director, Office of Workers' Compensation Programs is accepted as his response brief.

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. "718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

At the outset, we reject claimant's argument that the Board erred in denying claimant's motion to remand this case to the district director so that claimant could withdraw his claim. We agree with the Director that the Board's recent holdings in *Clevenger* and *Lester* preclude the Board from allowing claimant to withdraw his claim after the administrative law judge has issued a decision on the merits.

Claimant next contends that the administrative law judge erred in his weighing of the new x-ray evidence by relying on the qualifications of the x-ray readers and the numerical superiority of the negative x-ray evidence. We disagree. Of the three readings of the new x-ray, one was a positive reading by a B-reader and two were negative readings by dually qualified physicians. The administrative law judge accorded greater probative weight to the two negative readings by dually the qualified physicians than to the single positive reading by the B-reader. Decision and Order at 8; Director's Exhibits 8-10. This was rational. 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(*en banc*). Accordingly, we affirm the administrative law judge=s finding that the new x-ray evidence failed to establish the existence of pneumoconiosis and a material change in conditions.

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[4] We also reject claimant's suggestion that the instant case be held in abeyance because, as the Director contends, claimant has presented no evidence that the Board's decision in *Clevenger v. Mary Helen Coal Co.*, BRB No. 01-0884 BLA (Aug. 30, 2002)(*en banc*) has been appealed to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. While the Board's decision in *Lester v. Peabody Coal Co.*, BRB No. 02-0193 BLA (Sep. 9, 2002)(*en banc*) has been appealed to the United States Court of Appeals for the Fourth Circuit, this case does not arise within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226-227 (2002)(*en banc*). *See* 20 C.F.R. §§802.303(a); 802.410(a).

[5] The administrative law judge's finding that the existence of pneumoconiosis

Claimant also argues that the administrative law judge erred in not finding that Dr. Baker's opinion established the existence of pneumoconiosis and a material change in conditions. The Director requests that the case be remanded to the administrative law judge to determine whether Dr. Baker's findings establish the existence of legal pneumoconiosis.

In the only new opinion of record, Dr. Baker diagnosed the existence of coal worker's pneumoconiosis based on a positive x-ray and coal dust exposure history. Dr. Baker also diagnosed a mild restrictive defect due to coal dust exposure, and mild resting arterial hypoxemia and chronic bronchitis due to "coal dust exposure and cigarette smoking." Director=s Exhibit 8. While the administrative law judge permissibly discounted Dr. Baker=s finding of clinical pneumoconiosis because he found it based solely on positive x-ray and history of coal dust exposure, *see Cornett v. Benham Coal Co., Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 2000), the administrative law judge erred in failing to consider whether Dr. Baker's other findings established the existence of legal pneumoconiosis as defined by the Act. 20 C.F.R. §718.201; *see Cornett*, *supra*; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). Accordingly, we vacate the administrative law judge's finding that the new medical opinion evidence did not establish the existence of pneumoconiosis and a material change in conditions and remand the case for the administrative law judge to reconsider the totality of Dr. Baker's opinion at 20 C.F.R. §§718.201, 718.202(a)(4).

Finally, claimant contends that the administrative law judge erred in not finding that Dr. Baker's opinion established a totally disabling respiratory impairment due to pneumoconiosis. In response, the Director contends that while the administrative law judge correctly found that the new evidence, *i.e.*, the non-qualifying pulmonary function study and blood gas study and Dr. Baker's opinion, did not establish a totally disabling respiratory impairment due to pneumoconiosis, there is previously submitted evidence, *i.e.*, Dr. Clark's opinion that claimant was totally disabled by pneumoconiosis, Director's Exhibit 16-212, by which claimant could establish total disability due to pneumoconiosis if the administrative law judge finds a material change in conditions established. *See Ross*, *supra*. Accordingly, if, on remand, the

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cannot be established at 20 C.F.R. §718.202(a)(2), (3) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The administrative law judge correctly found that the newly submitted evidence was insufficient to establish total disability as the new pulmonary function and blood gas studies produced non-qualifying values, there was no evidence of cor

administrative law judge finds a material change in conditions established based on a finding of legal pneumoconiosis, he must then consider whether all of the elements of entitlement are established based on the record as a whole. *Ross*, *supra*.

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pulmonale with right-sided congestive heart failure in the record, and Dr. Baker concluded that claimant had the ability to perform his usual coal mine employment despite having a mild respiratory impairment. *See* 20 C.F.R. §718.204(b)(2); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff=d. on recon*. (1987)(*en banc*).

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 consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge