BRB No. 98-0261 BLA-A

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| BOBBY R. ENGLAND | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | DATE ISSUED: |
| U.S. STEEL MINING COMPANY | ) | |
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| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| | ) | DECISION and ORDER |
| Party-in-Interest | ) | |

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Bobby R. England, Princeton, West Virginia, *pro se*.

Howard G. Salisbury, Jr. (Kay, Casto, Chaney, Love & Wise), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (97-BLA-0396) of Administrative Law Judge Richard T. Stansell-Gamm denying benefits on a 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). Claimant's first application for benefits filed on May 31, 1973 was finally denied by the Department of Labor on October 10, 1980. Director's Exhibit 22. On May 29, 1996, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the previous denial. Director's Exhibit 1; *see* 20

C.F.R. §725.309(d).

At the June 25, 1997 hearing before Administrative Law Judge Jeffrey Tureck, claimant requested and was granted a continuance in order to obtain counsel.[1] Hearing Transcript at 2-3. Subsequently, claimant informed the administrative law judge in writing that he was unable to obtain counsel, no longer wished to have a hearing, and requested a decision on the record. Claimant's Letter, August 21, 1997; *see* 20 C.F.R. §725.461(a). Employer indicated that it had no objection, and Administrative Law Judge Richard T. Stansell-Gamm issued an order cancelling the hearing. Order Cancelling Hearing, September 24, 1997.

Considering the claim on the record only, the administrative law judge credited claimant with at least thirty-four years of coal mine employment, found that the new evidence failed to establish either the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(c), and concluded therefore that a material change in conditions was not established as required by 20 C.F.R. §725.309(d). Accordingly, he denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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[1] Claimant indicated that he had been represented earlier in the proceedings by Frederick K. Muth. Hearing Transcript at 2.

[2] The Director initially filed a notice of appeal, but subsequently requested, pursuant to 20 C.F.R. §802.401, that his appeal be dismissed. Director's Motion to Dismiss, December 4, 1997. The Board granted the Director's motion and dismissed the Director's appeal, BRB No. 98-0261 BLA. *England v. U.S. Steel Mining Co*., BRB Nos. 98-0261 BLA/A (Dec. 10, 1997)(Order)(unpub.). Claimant's appeal, BRB No. 98-0261 BLA-A, remains pending before the Board. *Id*. We affirm

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 (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 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant 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). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *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). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

The administrative law judge noted that claimant was previously denied benefits because he failed to establish the existence of pneumoconiosis or total respiratory disability pursuant to Section 718.204(c). Decision and Order at 3; Director's Exhibit 22. The administrative law judge then considered the new evidence to determine whether it established a material change in conditions by establishing either of these elements. *See Rutter, supra*.

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the administrative law judge's finding regarding length of coal mine employment as it is unchallenged on appeal and is not adverse to claimant. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(1), the administrative law judge considered all six readings of two x-rays taken since the 1980 denial. The July 16, 1996 x-ray received two positive readings and three negative readings. One of the positive readings was by a B-reader and the other was by a Board-certified radiologist and B-reader. Director's Exhibits 14, 15. All three of the negative readings were by Board-certified radiologists and B-readers. Employer's Exhibits 1-3. The November 13, 1996 x-ray was read negative by a B-reader. Employer's Exhibit 4.

In weighing the readings of the July 16, 1996 x-ray, the administrative law judge reasonably determined to accord greater weight to the interpretations by physicians possessing credentials as both Board-certified radiologists and B-readers. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Trent*, 11 BLR at 1-27-28. The administrative law judge also noted accurately that the negative B-reading of the November 13, 1996 x-ray was uncontradicted. The administrative law judge permissibly found that, "[c]onsidering the weight of the medical opinion regarding the lack of pneumoconiosis in these two x-rays," the newly submitted x-rays failed to establish the existence of pneumoconiosis. Decision and Order at 6; *see Adkins, supra*; *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Substantial evidence supports the administrative law judge's finding. We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to Section 718.202(a)(2) and (3), the administrative law judge correctly found that the record contains no biopsy evidence and the presumptions at Sections 718.304, 718.305, and 718.306 are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. Decision and Order at 5; *see* 20 C.F.R. §§718.304, 718.305, 718.306. We therefore affirm these findings.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the newly submitted examination reports of Drs. Jabour and Hippensteel. Dr. Jabour, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and diagnosed pneumoconiosis based upon "radiographic findings of profusion, P/Q/1," and "obstructive airways disease with airways hyper-reactivity" due to coal dust exposure and asthma. Director's Exhibit 10. At his deposition however, Dr. Jabour testified that it was "hard to say" whether claimant's airways hyperactivity was related to coal dust exposure. Employer's Exhibit 5 at 5. Dr. Hippensteel, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed Dr. Jabour's report and data. He concluded that claimant does not have pneumoconiosis and has no

respiratory impairment from any source. Employer's Exhibit 4.

In finding that the existence of pneumoconiosis was not established, the administrative law judge permissibly accorded diminished weight to Dr. Jabour's diagnosis of pneumoconiosis because he found that it was based primarily on the x-ray and claimant's subjective complaints, but was not well-supported by the examination, pulmonary function, and blood gas study results, which were all normal, according to Dr. Jabour. Decision and Order at 9; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989)(*en banc*); Director's Exhibit 10; Employer's Exhibit 5 at 6-9. The administrative law judge noted that Dr. Hippensteel's conclusions on the other hand were "consistent with the x-ray evidence and results of the pulmonary function tests and arterial blood gas tests . . . ." Decision and Order at 10. In addition, the administrative law judge acted within his discretion as fact-finder in discounting as equivocal Dr. Jabour's opinion regarding the etiology of claimant's hyperactive airways disorder.[3] *See Hicks, supra; Akers, supra*; *Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988). Therefore, we affirm the administrative law judge's finding that the medical opinions failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Sections 718.204(c)(1) and (c)(3), the administrative law judge correctly noted that both of the newly submitted pulmonary function studies yielded non-qualifying values,[4] Director's Exhibit 9; Employer's Exhibit 4, and that there was no evidence in the record of cor pulmonale with right-sided congestive heart failure. We therefore affirm these findings.

Pursuant to Section 718.204(c)(2), the administrative law judge considered the two new blood gas studies. The July 16, 1996 study was qualifying at rest but non-qualifying after exercise, Director's Exhibit 11, while the November 13, 1996 study was non-qualifying both at rest and after exercise. Employer's Exhibit 4. Drs. Jabour and Hippensteel opined that claimant's blood gas study results were normal. Employer's Exhibits 4, 5 at 7-8. In light of the administrative law judge's duty to

[3] Dr. Jabour testified that "[i]t is difficult to say really . . . . [w]hether it was his own underlying intrinsic asthma, or whether it was triggered by the chronic exposure to coal dust, it's difficult to say." Employer's Exhibit 5 at 5.

[4] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

weigh the evidence supportive of a finding of total disability against the contrary probative evidence, he reasonably found that "as noted by both doctors, after exercise, [claimant's] blood gas exchange is normal. Considering that factor and that three of the four blood gas tests are normal, I do not find this one test establishes a respiratory disability." Decision and Order at 12; *see Lane v. Union Carbide Corp*., 105 F.3d 166, 171, 21 BLR 2-34, 2-43 (4th Cir. 1997); *Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11, 1-14 (1991); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(2).

Pursuant to 718.204(c)(4), the administrative law judge accurately noted that both physicians opined that claimant is not totally disabled from a respiratory standpoint. Employer's Exhibits 4 at 3-4, 5 at 9. The administrative law judge further noted that Dr. Jabour testified that it was "hard to say" whether the minimal impairment that he detected was sufficient to prevent claimant from working in his usual coal mine employment as an inside laborer. Employer's Exhibit 5 at 11. The administrative law judge permissibly concluded that Dr. Jabour's "equivocal answer is not sufficient to prove that [claimant] could not return to his last coal mine employment due to a respiratory impairment." Decision and Order at 12; *see Justice, supra*. Substantial evidence supports the administrative law judge's finding. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c)(4).

Because the administrative law judge properly considered this duplicate claim under the applicable legal standard, we affirm his finding that the new evidence failed to establish any element of entitlement previously adjudicated against claimant and thus, failed to establish a material change in conditions pursuant to Section 725.309(d). *See Rutter, 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