BRB No. 97-0820 BLA

WILLIAM G. HITCHCOCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MIDLAND COAL COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand of Robert G. Mahony, Administrative Law Judge, United States Department of Labor.

William G. Hitchcock, Farmington, Illinois, *pro se*.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appears without the assistance of counsel and appeals the Decision and Order on Remand (91-BLA-1882) of Administrative Law Judge Robert G. Mahony 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 filed a claim for benefits on October 31, 1985, which the district director denied in a letter issued on January 21, 1986. Director's Exhibit 22. Claimant filed a second application for benefits on June 22, 1987. Following an informal conference, this claim was finally denied by the district director on February 24, 1989, on the grounds that claimant failed to establish that he is totally disabled due to pneumoconiosis. Director's Exhibit 23. On May 29, 1990, claimant filed a third claim, which the district director denied. Director's Exhibits 11, 18. Claimant requested a hearing and the case was transferred to the Office of Administrative Law Judges and assigned to Administrative Law Judge Robert G. Mahony (the administrative law judge).

In his Decision and Order, the administrative law judge found that the newly submitted evidence of record was sufficient to support a finding of a material change in conditions pursuant to 20 C.F.R. §725.309(d), as this evidence included medical reports in which several physicians concluded that claimant has a totally disabling respiratory impairment which is attributable, at least in part, to dust exposure in coal mine employment. The administrative law judge further found that claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4) and that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also determined that claimant demonstrated that he was totally disabled due to pneumoconiosis under 20 C.F.R. §718.204. Accordingly, benefits were awarded.

In response to employer's appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established at Section 718.202(a)(4) and that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). With respect to the administrative law judge's findings under Section 725.309(d), however, the Board vacated the administrative law judge's determination that claimant demonstrated a material change in conditions and remanded the case for reconsideration of the evidence in accordance with the standard adopted by the United States Court of Appeals for the Seventh Circuit in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).[1] The Board also vacated the administrative law judge's finding, on the merits, that claimant established total disability pursuant to Section 718.204(c)(4). Finally, the Board instructed the

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's qualifying coal mine employment occurred in Illinois. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Under the *McNew* standard, in order to establish a material change in conditions under 20 C.F.R. §725.309(d), a claimant must establish either that the miner did not have black lung disease at the time of his first application but subsequently contracted it and became totally disabled by it or that his disease progressed to the point of becoming totally disabling although it was not totally disabling at the time of his first application. *See Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991).

administrative law judge to address separately the issue of whether claimant's total disability is due to pneumoconiosis under Section 718.204(b). *Hitchcock v. Midland Coal Co.*, BRB No. 92-2431 BLA (Mar. 31, 1994)(unpub.). On remand, the administrative law judge found that the evidence was insufficient to support a finding of either a material change in conditions pursuant to Section 725.309(d) or that claimant is suffering from a totally disabling respiratory or pulmonary impairment under Section 718.204(c)(1)-(4). The administrative law judge further found that claimant did not establish that he is totally disabled due to pneumoconiosis under Section 718.204(b). Accordingly, benefits were denied. Claimant filed an appeal with the Board and appeared without the assistance of counsel.

The Board vacated the administrative law judge's finding that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) and his finding that claimant did not establish total disability under 20 C.F.R. §718.204(c)(4), inasmuch as the administrative law judge failed to identify adequately the medical reports which he found outweighed by the medical reports of Drs. Tuteur and Paul. The Board also held that the administrative law judge neglected to consider whether the exertional limitations described in Dr. Paul's report supported a finding of total disability. The Board remanded the case to the administrative law judge for reconsideration of Section 725.309(d) under the standard adopted by the United States Court of Appeals for the Seventh Circuit in *McNew*. *Hitchcock v. Midland Coal Co.*, BRB No. 95-0557 BLA (June 29, 1995)(unpub.).

On remand, the administrative law judge determined that the newly submitted evidence did not support a finding of total disability under Section 718.204(c)(4) and, therefore, that claimant failed to demonstrate a material change in conditions under Section 725.309(d). Accordingly, benefits were denied. Employer has responded to claimant's appeal and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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).

After consideration of the administrative law judge's Decision and Order on Remand and the evidence of record, we affirm the administrative law judge's determination that the newly submitted medical evidence is insufficient to establish total disability, as this finding does not contain any error requiring remand. As an initial matter, we note that subsequent to the issuance of *McNew*, the United States Court of Appeals for the Seventh Circuit indicated in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR

2-115 (7th Cir. 1997), that under the *McNew* standard, if the prior denial was premised upon alternative grounds, *i.e.*, that the claimant failed to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis, automatic denial of the subsequent claim can be avoided if a material change in conditions is demonstrated with respect to one of these elements of entitlement. Inasmuch as the denial of claimant's second claim in this case was based upon claimant's failure to prove that he was totally disabled due to pneumoconiosis, claimant must establish that his pneumoconiosis has become totally disabling in order to establish a material change in conditions pursuant to Section 725.309(d). *See Spese*, *supra*; *McNew*, *supra*.

With respect to the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304, the administrative law judge rationally found that claimant is not entitled to this presumption. The administrative law judge acted within his discretion as fact-finder in determining that the reading of complicated pneumoconiosis proffered by Dr. Berg, whose qualifications are not of record, was outweighed by the interpretation in which Dr. Harron, a B reader and Board-certified radiologist, stated that although the nodule visualized on claimant's x-ray is compatible with complicated pneumoconiosis, it is in an unusual location and is "in all probability" an old calcified granuloma. *See* Decision and Order on Remand at 3; Employer's Exhibit 9; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

Concerning Section 718.204(c)(1) and (c)(2), the administrative law judge stated correctly that in its first Decision and Order, the Board affirmed the administrative law judge's finding that neither the newly submitted pulmonary function studies nor the newly submitted blood gas studies support a finding of total disability under Section 718.204(c)(1) or (c)(2), as none of these tests produced qualifying values.[2] Decision and Order on Remand at 3; *see Hitchcock v. Midland Coal Co.*, BRB No. 92-2431 BLA (Mar. 31, 1994)(unpub.), *slip opinion at 9, n.12*; 20 C.F.R. §718.204(c)(1), (c)(2); Appendices B and C to 20 C.F.R. Part 718. Although the administrative law judge did not render a finding under Section 718.204(c)(3), remand for this purpose is not required, as the record contains no evidence suggesting that claimant is suffering from cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(c)(3).

With respect to his consideration of the newly submitted medical opinions of record under Section 718.204(c)(4), the administrative law judge complied with the Board's remand instructions and set forth his findings with respect to each opinion. Decision and Order on Remand at 4-7. The administrative law judge rationally determined that Dr.

[2]A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set forth in the tables in Appendices B and C to 20 C.F.R. Part 718. A nonqualifying study exceeds those values.

Lenyo's deposition testimony could not support a finding of a material change in conditions pursuant to Section 725.309(d), as Dr. Lenyo testified regarding the results of an examination performed during the pendency of claimant's second claim. Decision and Order on Remand at 4; *see Spese*, *supra*; *McNew*, *supra*. The administrative law judge also acted within his discretion in finding that Dr. Rao's diagnosis of a significant deterioration in claimant's lung function was entitled to little weight, as Dr. Rao's opinion did not include a statement that claimant is suffering from a totally disabling respiratory impairment and Dr. Rao's conclusion is not supported by the objective evidence of record. Decision and Order on Remand at 5, 6; *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). In addition, the administrative law judge also rationally determined that the opinion in which Dr. Reed, claimant's treating physician, stated that claimant would have difficulty performing his duties as a scraper operator did not support a finding of total disability, as Dr. Reed did not identify the objective evidence underlying his conclusion. Decision and Order on Remand at 6; Director's Exhibit 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985).

The administrative law judge also properly found that the opinions of Drs. Hoffman and Paul did not support a finding of total disability, as neither physician diagnosed a totally disabling respiratory or pulmonary impairment. Decision and Order on Remand at 4, 6; *see Gee*, *supra*. Moreover, the administrative law judge rationally determined that the physical limitations identified in each report represented claimant's recitation of his symptoms rather than an independent assessment of claimant's abilities. Decision and Order on Remand at 4, 6; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988). This finding is supported by substantial evidence, inasmuch as the limitations noted by Dr. Hoffman appear in the section of his report in which he recorded claimant's medical and occupational histories while Dr. Paul specifically stated at his deposition that the limitations he recorded were described to him by claimant. Director's Exhibits 16, 20 at 8. With respect to the opinion of Dr. Nathan, the administrative law judge acted within his discretion in holding that Dr. Nathan's statement that more recent pulmonary function testing demonstrated a mild respiratory impairment did not support a finding of total disability. Decision and Order on Remand at 5; Director's Exhibit 15 at 31; *see Gee*, *supra*; *King v. Cannelton Industries, Inc.*, 8 BLR 1-146 (1985). Finally, the administrative law judge properly accorded greater weight to the opinion in which Dr. Tuteur stated that claimant does not have a totally disabling respiratory or pulmonary impairment on the grounds that this opinion is based upon a thorough examination, is well-reasoned, and is well-supported by the objective evidence of record. Decision and Order on Remand at 6-7; Director's Exhibit 20; *see Clark*, *supra*; *Lucostic*, *supra*; *Peskie*, *supra*. The administrative law judge rationally concluded, therefore, that the newly submitted medical opinions did not support a finding of total disability under Section 718.204(c)(4).

Inasmuch as the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability under Section 718.204(c)(1)-(4) is rational and supported by substantial evidence, it is affirmed. In light of our affirmance of

this finding, we must affirm both the administrative law judge's determination that claimant did not establish a material change in conditions under Section 725.309(d) and the denial of benefits. *See Spese*, *supra*; *McNew*, *supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge