BRB No. 94-3778 BLA

KENNETH McINTURFF)
)
Claimant-Petitioner)
)
v.)
)
HRC COAL COMPANY)
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and)
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VIRGINIA COAL PRODUCERS)
)
and)
)
UNITED CASTLE COAL) DATE ISSUED:
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employers/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 of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Kenneth McInturff, Castlewood, Virginia, *pro se*.
Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.
Michael J. Pollack (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (93-BLA-0698) of Administrative Law Judge Charles P. Rippey 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). The administrative law judge found that claimant established twenty-eight years of qualifying coal mine employment, and considered the claim as a petition for modification pursuant to 20 C.F.R. §725.310. The administrative law judge then found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), total respiratory impairment pursuant to 20 C.F.R. §718.204(c), or a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied.

On appeal, claimant generally challenges the denial of benefits. Employers respond, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

The administrative law judge erred in stating that the 1984 claim is a petition for modification pursuant to Section 725.310. This error is harmless because the administrative law judge ultimately considered this duplicate claim pursuant to Section 725.309. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). However, the administrative law judge erred in finding that claimant failed to establish a material change in conditions pursuant to Section 725.309.

[1]Claimant is Kenneth McInturff, the miner, whose first claim for benefits, filed on September 11, 1981, was denied on September 9, 1982. Director's Exhibit 21. Claimant filed this claim on June 12, 1984. Director's Exhibit 1.

In determining whether claimant has established a material change in conditions, the administrative law judge must consider the relevant and probative new evidence in light of the previous denial to determine if there is a reasonable possibility that the evidence, if credited on the merits, could change the prior administrative result. *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992).[2] This determination by the administrative law judge is to be made without weighing the new evidence supportive of a finding of a material change against any contrary evidence. If the administrative law judge finds that claimant has established a material change in conditions, claimant is entitled to have his new claim considered on the merits. 20 C.F.R. §725.309; *Shupink*, *supra*.

In this case, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to Section 725.309 because the evidence submitted since the 1982 denial of benefits was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and a totally disabling respiratory impairment pursuant to Section 718.204(c). However, the record contains four interpretations of x-rays taken subsequent to the 1982 denial which are positive for the existence of pneumoconiosis. Director's Exhibits 9, 23, 29, 70. Further, Drs. Endres-Bercher, Abernathy, and Robinette opined, in medical reports issued subsequent to the 1982 denial, that claimant has pneumoconiosis. Director's Exhibits 23, 70, 86; Employer's Exhibit 1. Inasmuch as the record contains evidence which, if fully credited, could change the prior administrative result, we reverse the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309. *See Shupink*, *supra*.

Pursuant to Sections 718.204(c)(1) and (2), the administrative law judge considered all of the pulmonary function study and arterial blood gas study evidence

[2]Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, adopted a standard which requires a claimant to establish either that the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and become totally disabled by it or that the miner's disease has progressed to the point of total disability although it was not totally disabling at the time of the miner's first application. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *reh'g granted en banc*, No. 94-2523 (Nov. 16, 1995). Because the Fourth Circuit has granted a motion for *en banc* reconsideration of the decision in *Rutter*, we will consider whether the evidence establishes a material change in conditions pursuant to 20 C.F.R. §725.309 in accordance with the standard set out in *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992).

of record and properly found that none of this evidence produced qualifying results. Decision and Order at 5; Director's Exhibits 5, 7, 21, 23, 70, 91. Further, because the record contains no evidence of cor pulmonale with right-sided congestive heart failure, the existence of a totally disabling respiratory impairment is not established pursuant to Section 718.204(c)(3). Thus, we affirm the administrative law judge's findings pursuant to Section 718.204(c)(1)-(3).

Pursuant to Section 718.204(c)(4), the administrative law judge properly found that none of the physicians of record specifically diagnosed the existence of a totally disabling respiratory impairment. Decision and Order at 4-5; Director's Exhibits 21, 23,70, 86; Employer's Exhibit 1. The administrative law judge stated that Dr. Kanwal noted claimant's physical limitations but failed to relate them to claimant's ability to perform his usual coal mine employment, and that claimant was working at the time of Dr. Kanwal's examination. Decision and Order at 5; Director's Exhibit 21. The administrative law judge then determined that, based on the pulmonary function studies, arterial blood gas studies, and medical reports, claimant failed to establish total respiratory disability pursuant to Section 718.204(c).

While the Fourth Circuit court has held that the physical limitations listed in a physician's report must be considered as the doctor's assessment unless explicit evidence suggests otherwise, *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), *rev'd on other grounds*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), the administrative law judge in this case found that claimant was still working at the time of Dr. Kanwal's examination and that Dr. Kanwal did not relate these limitations to claimant's ability to work, *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-44 (1985)(en banc), *aff'd on recon*. 9 BLR 1-104 (1986)(en banc).

Inasmuch as the administrative law judge must weigh all of the evidence of record and draw his own conclusions and inferences, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and has broad discretion to assess the record and determine whether a party has met its burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(c). Further, as claimant has failed to establish total respiratory disability, an essential element of entitlement pursuant to 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[3]

[3]The administrative law judge erroneously failed to consider x-ray interpretations by Drs. Robinette and Myers pursuant to Section 718.202(a)(1), Director's Exhibit 23, 29, and erroneously discredited Dr. Kanwal's report regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4) because it is based on a positive

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed, and his finding pursuant to Section 725.309 is reversed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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x-ray when the weight of the x-ray evidence is negative. Decision and Order at 4; *see Taylor v. Director, OWCP*, 9 BLR 1-22 (1986); *see also Fitch v. Director, OWCP*, 9 BLR 1-45
(1986). However, we need not address these errors in view of our disposition of this case. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry*, *supra*.