BRB No. 02-0601 BLA

JAMES L. HARRIS)
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Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED:
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant..

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0622) of Administrative Law Judge Michael P. Lesniak 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).[1]

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[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.

The instant case involves a duplicate claim filed on August 15, 2000.[2] Claimant filed a second claim on August 15, 2000. Director's Exhibit 1. The administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] Accordingly, the administrative law judge denied benefits. On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change in conditions has been established, an 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. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's 1973 claim was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 23. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of pneumoconiosis or a finding of total disability.

Claimant contends that the administrative law judge erred in finding the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis. Claimant's statements, however, neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly

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[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on May 21, 1973. Director's Exhibit 23. The SSA denied the claim on October 12, 1973, October 13, 1978 and May 1, 1979. *Id.* The Department of Labor denied the claim on August 7, 1980. *Id.* There is no evidence that claimant took any further action in regard to his 1973 claim.

[3]Although Section 725.309 has been revised, these revisions only apply to claims filed after January 19, 2001.

submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Similarly, because claimant has not identified any specific error on the part of the administrative law judge in determining that the biopsy evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), this finding is also affirmed. *See Cox*, *supra*; *Sarf*, *supra*.

Because no party challenges the administrative law judge's finding that claimant is not entitled to the presumptions set out at 20 C.F.R. §718.202(a)(3), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 10.

Claimant, however, contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although claimant does not challenge the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis, claimant notes that Dr. Gabriele interpreted a CT scan of the miner's chest as consistent with silicosis[4] and that Dr. Gupta interpreted a PET scan as consistent with pneumoconiosis. Claimant's Brief at 2. Because the administrative law judge did not consider Dr. Gabriele's interpretation of a July 10, 2001 CT scan[5] Dr. Renn subsequently interpreted claimant's July 10, 2001 CT scan as revealing "no radiographic changes consistent with either coal workers' pneumoconiosis or asbestosis." Employer's Exhibit 25 at 21. or Dr. Gupta's interpretation of a June 16, 2000 PET scan,[6]Claimant's Exhibit 3. we vacate the

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[4]Silicosis constitutes "clinical" pneumoconiosis. *See* 20 C.F.R. §718.201(a)(1).

[5]Dr. Gabriele found that claimant's July 10, 2001 CT scan showed "progression of bilateral upper lung changes and conglomeration of densities." Claimant's Exhibit 2. Dr. Gabriele opined that these findings "could possibly be related to silicosis" and, therefore, suggested a clinical correlation. *Id.* In his final impression, Dr. Gabrielle noted that "further aggregation of upper lung densities [was the] likely consequence of silicosis," but suggested a "correlation with occupational exposure." *Id.*

[6]Dr. Gupta interpreted claimant's June 16, 2000 PET scan as follows:

> Small areas of mild-to-moderate glucose metabolic activity distributed somewhat in a symmetrical fashion, as wall [sic] as the pulmonary nodule in the right suprahilar region, are more suggestive of an inflammatory or granulomatous process with hilar adenopathy such as pneumoconiosis. The

administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4) and remand the case for further consideration.

On remand, if the administrative law judge finds the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must weigh all the newly submitted evidence relevant to 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(4) together in determining whether claimant suffers from pneumoconiosis.[7] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Turning to the issue of whether the newly submitted evidence is sufficient to establish total disability, we note that claimant contends that the parties "stipulated that the claimant was totally and permanently disabled by a chronic pulmonary condition." Claimant's Brief at 2. Contrary to claimant's contention, there is no evidence of such a stipulation. In fact, the administrative law judge found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).[8] Decision and Order at 12.

In his consideration of whether the evidence was sufficient to establish total disability, the administrative law judge properly found that all six of the newly submitted pulmonary function studies of record are non-qualifying. Decision and Order at 12; Director's Exhibits 7, 19; Claimant's Exhibit 3; Employer's Exhibits 2, 4. Although the administrative law judge found that claimant's September 28, 2000 arterial blood gas study was qualifying, he found that two previous arterial blood gas studies conducted on November 29, 1999 and December 7, 1999 and a subsequent arterial blood gas study conducted on January 17, 2001 were non-qualifying. Decision and Order at 12; Director's Exhibits 9, 19; Claimant's Exhibit 3; Employer's Exhibit 2. Inasmuch as they are based upon substantial evidence, we affirm the administrative law judge's findings that the newly submitted pulmonary function and arterial blood gas studies are

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> area of moderate glucose metabolic activity in the right suprahilar region has low probability of malignancy.

[7]The Fourth Circuit has held that although Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a miner suffers from the disease. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

[8]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now set out at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

insufficient to establish total disability. 20 C.F.R. §718.204(b)(2)(i) and (ii).

The administrative law judge also properly found that there is no evidence of cor pulmonale with right sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 12.

Claimant, however, contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability. Claimant argues that all of the examining physicians, Drs. Jaworski, Kanj and Renn, found that he was totally disabled from a pulmonary standpoint.

The administrative law judge noted that Dr. Kanj, claimant's treating physician, found that claimant had a significant impairment from a pulmonary standpoint that would prevent him from performing his previous coal mine employment. Decision and Order at 12; Claimant's Exhibit 4. The administrative law judge, however, found that Dr. Kanj failed to adequately explain his rationale in light of non-qualifying test results. *Id.* Because claimant does not specifically challenge the administrative law judge's basis for discrediting Dr. Kanj's opinion, we affirm the administrative law judge's finding that Dr. Kanj's opinion was entitled to less weight. *Skrack*, *supra*.

The administrative law judge noted that Dr. Jaworski found a severe impairment that would prevent claimant from performing his previous coal mine employment. Decision and Order at 12; Director's Exhibit 8. The administrative law judge, however, discredited Dr. Jaworski's opinion because the pulmonary function study evidence was non-qualifying. *Id.* The administrative law judge erred in discrediting Dr. Jaworski's opinion on this basis. Test results which exceed the applicable table values may be relevant to the overall evaluation of a claimant's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Dr. Jaworski interpreted claimant's non-qualifying September 28, 2000 pulmonary function study as revealing a mild obstruction. Director's Exhibit 8. Moreover, Dr. Jaworski indicated that his opinion, that claimant's severe pulmonary impairment prevented him from performing his last coal mining job, was based upon claimant's "reduced oxygen tension and history of severely reduced DLCO." Director's Exhibit 8. Thus, Dr. Jaworski's assessment of claimant's pulmonary capacity was based in significant part upon claimant's qualifying September 28, 2000 arterial blood gas study and a reduced DLCO value.

The administrative law judge also found that Drs. Renn, Branscomb, Naeye and Bush "all concluded that, from a respiratory/pulmonary standpoint, [claimant] is not disabled." Decision and Order at 12. Although the opinions of Drs. Branscomb and Bush

support a finding that claimant was not totally disabled from a pulmonary standpoint,[9]

In a report dated July 2, 2001, Dr. Bush opined that claimant had "no evidence of respiratory impairment." Employer's Exhibit 17. the administrative law judge failed to explain his basis for finding that the opinions of Drs. Naeye and Renn support such a finding.[10]Employer's Exhibit 25 at 39-40.

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[9]In a report dated May 2, 2001, Dr. Branscomb opined that although claimant is totally disabled by his cardiac disease, there is "no indication of any primary pulmonary impairment such as that associated with CWP or COPD." Employer's Exhibit 12. During an August 27, 2001 deposition, Dr. Branscomb opined that claimant retained the capacity, from a pulmonary standpoint, to perform his usual coal mining job. Employer's Exhibit 24 at 43.

[10]In a report dated June 9, 2001, Dr. Naeye opined that claimant was disabled by severe ischemic heart disease. Employer's Exhibit 15. During an August 20, 2001 deposition, Dr. Naeye opined that he did not find any pulmonary impairment attributable to claimant's coal dust exposure. Employer's Exhibit 22 at 20. Dr. Naeye, however, did not explicitly indicate that claimant did not suffer from a totally disabling respiratory or pulmonary impairment.

During an October 18, 2002 deposition, Dr. Renn stated that:

> [Claimant] has a disabling pulmonary impairment based upon the fact that the Amiodarone would affect his lungs, based upon the fact that the emphysema would affect his lungs, that those both, both of those in conjunction with his heart disease causing left ventricular cardiac failure have all conspired to reduce his diffusing capacity to the extent that he have exercise induced hypoxemia. Now, even if we take away the diffusing capacity, which I did not have before when I did my report in February, and now, even now it is my belief that he has normal dynamic ventilatory function to the extent that he could perform heavy manual labor for extended periods of time. He has normal dynamic ventilatory function, but now I have the added factor that he doesn't have normal diffusion. And I believe that he would have exercise induced hypoxemia, and for that matter would be impaired to the extent that he couldn't do his work. But he also couldn't do his work because of his heart disease.

The administrative law judge erred to the extent that he combined his analysis of whether the evidence was sufficient to establish the existence of a totally disabling respiratory or pulmonary impairment with an analysis of whether the evidence was sufficient to establish that claimant's totally disabling pulmonary impairment was due to pneumoconiosis. To the extent that Drs. Naeye and Renn opined that claimant suffered from a totally disabling pulmonary impairment attributable to heart disease, their opinions would support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and remand the case for further consideration.

On remand, should the administrative law judge find the newly submitted medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), he must weigh all the relevant newly submitted evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b), and thus, whether a material change in conditions is established. *See 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*. 9 BLR 1-236 (1987) (*en banc*).

Should the administrative law judge, on remand, find the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he must consider claimant's 2000 claim on the merits. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge