BRB No. 97-1821 BLA

JACK HANKS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
OLD BEN 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 April 22, 1997 Order and the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Jack Hanks, Petersburg, Indiana, *pro se.*

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: , and , Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the April 22, 1997 Order and the Decision and Order Denying Benefits (95-BLA-0246) of Administrative Law Judge Donald W. Mosser (the administrative law judge) 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). Initially, claimant filed a claim in February, 1979. Director's Exhibit 21 at 54-57. In a Decision and Order Denying Benefits issued on March 2, 1981, Administrative Law Judge Harmon D. Maxson noted that employer conceded that claimant

had at least thirty years of coal mine employment and found that the resting blood gas study performed on April 9, 1979 was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3), but that the presumption was rebutted because claimant was not disabled due to pneumoconiosis arising out of coal mine employment. Accordingly, benefits were denied. Director's Exhibit 21. Claimant appealed, and the Board affirmed Judge Maxson's denial of benefits as supported by substantial evidence. *Hanks v. Old Ben Coal Co.*, BRB No. 81-657 BLA (July 1, 1982)(unpub.).

Claimant filed a second claim in December, 1989. Director's Exhibit 22 at 45-48. On May 15, 1990, the district director issued a Proposed Decision and Order of No Material Change in Condition and Denial of Claim, which became final thirty days later. Director's Exhibit 22 at 1-3; 20 C.F.R. §725.419. The district director denied benefits on the basis that there had been no material change in claimant's condition and that claimant failed to establish total disability due to pneumoconiosis arising out of coal mine employment. Director's Exhibit 22 at 4-5.

There is nothing in the record to indicate that claimant took any further action until August, 1993, when he filed the present claim. Director's Exhibit 1. A hearing was held before the administrative law judge on December 12, 1996. At the hearing, the administrative law judge granted claimant, who was represented by counsel, ninety days to submit evidence from recent treatment of claimant by Dr. Combs into evidence. By letter dated March 10, 1997, claimant submitted Dr. Combs's report dated November 7, 1996. Claimant's Exhibit 1. The administrative law judge, in an Order issued on April 22, 1997, excluded from the record Dr. Combs's references to four positive x-ray interpretations by

other physicians, which Dr. Combs reviewed. On August 20, 1997, the administrative law judge issued a Decision and Order Denying Benefits. The administrative law judge accepted a stipulation by the parties that claimant worked for thirty-two years in coal mine employment. 1997 Decision and Order at 3; 1996 Hearing Transcript at 7. The administrative law judge found that because the newly submitted evidence failed to establish that claimant suffers from coal worker's pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), claimant failed to establish a material change in conditions under 20 C.F.R. §725.309 pursuant to the decision of 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). The administrative law judge also stated that the evidence submitted with claimant's prior claims fails to establish that claimant suffers from pneumoconiosis. Accordingly, benefits were denied.

Claimant appeals, contending generally that the administrative law judge erred in denying benefits. Employer has filed a response brief supporting affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in the present appeal unless specifically requested to do so by the Board.[1]

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 the Board and may not be

[1] We affirm the administrative law judge's finding of thirty-two years of coal mine employment inasmuch as it is not contested and not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disturbed. 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).

In order to establish entitlement for a duplicate claim in the instant case, claimant must establish a material change in conditions subsequent to the closing of the record in the prior claim.[2] *See* 20 C.F.R. §725.309(d); *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008, 21 BLR 2-113, 2-127 (7th Cir. 1997)(*en banc* rehearing), *modifying* 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995). Claimant can establish a material change by showing that, while he did not have black lung disease at the time of the first application, he has since contracted it and become totally disabled by it. *Spese*, *supra*, 117 F.3d at 1007, 21 BLR at 2-125; *McNew*, *supra*. The Seventh Circuit has also stated that if the prior denial was premised upon alternate grounds, claimant can avoid automatic denial of his claim on *res judicata* grounds by showing a material change in *either* the black lung disease or the total disability element. *Spese*, *supra*, 117 F.3d at 1009, 21 BLR at 2-127.

[2] Inasmuch as claimant's coal mine employment occurred in Indiana, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. Director's Exhibit 2; Director's Exhibit 21 at 49, 53; Director's Exhibit 22 at 43; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The administrative law judge, in his April 22, 1997 Order, excluded the references to the four positive x-ray readings in Dr. Combs's 1996 opinion,[3] Claimant's Exhibit 1, because they were not submitted in accordance with the procedural requirements of 20 C.F.R. §725.456(b), and "good cause has not been shown for the failure to submit the x-ray readings in question at this time." 1997 Order at 2. The administrative law judge added that at the time he granted claimant's counsel leave to submit additional evidence, the administrative law judge had anticipated an additional examination or treatment by Dr. Combs, but the administrative law judge had not anticipated the development of x-ray evidence. *Id*.

In deleting portions of Dr. Combs's report, the administrative law judge was not deleting actual x-ray interpretations but was deleting Dr. Combs's references to x-ray readings of other physicians which he reviewed in rendering his report. The administrative law judge did not act reasonably in deleting those references because they were not additional evidence, as the administrative law judge suggested, but were underlying documentation that Dr. Combs reviewed. *See generally Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987). We, therefore, vacate the administrative law judge's exclusion of Dr. Combs's references to x-rays.

With regard to Section 718.202(a)(1), the administrative law judge found that the newly submitted x-ray evidence consists of eight B reader[4] interpretations which are

[3] Dr. Combs, in a 1996 opinion, found claimant to be totally disabled from pneumoconiosis due to his coal mine employment. Claimant's Exhibit 1.

[4] According to the record, three of these physicians may not have been B readers at the time they made their x-ray interpretations, according to the B reader certificates submitted into the record. *See* Employer's Exhibits 2-4, 6-8 (Drs. Binns, Gogineni and

negative for pneumoconiosis, and that no positive x-ray interpretations are in the record. Director's Exhibits 12, 16; Employer's Exhibits 1-4; 1997 Decision and Order at 7. Inasmuch as all of the newly submitted x-ray readings were negative, we affirm the administrative law judge's finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

Since the administrative law judge correctly found that there was no biopsy evidence in the record which establishes the presence of a coal dust induced disease, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2). 1997 Decision and Order at 7. Inasmuch as the administrative law judge properly found that there was no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304, the claim was filed after January 1, 1982, *see* 20 C.F.R. §718.305(e); Director's Exhibit 1, and the claim involves a living miner, *see* 20 C.F.R. §718.306, we affirm the administrative law judge's finding that Section 718.202(a)(3) is not applicable to this claim. 1997 Decision and Order at 7 n.2.

Wershba).

With regard to Section 718.202(a)(4), the administrative law judge stated that Dr. Combs's report was marred by his reliance upon x-ray evidence that is absent from the record and that the portions of Dr. Combs's report that rely upon such x-rays have been stricken from the record. 1997 Decision and Order at 7.[5] The administrative law judge also stated that Dr. Combs's report was contradicted by the reports of Drs. Long, Dahhan and Castle, each of whom found insufficient evidence to support a finding of pneumoconiosis. Director's Exhibit 17; Employer's Exhibits 9, 10; 1997 Decision and Order at 7. Inasmuch as we vacate the administrative law judge's decision to strike the portions of Dr. Combs's report that refers to his review of four x-ray readings, we vacate the administrative law judge's finding that Dr. Combs's opinion is entitled to little weight and his finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See supra*. On remand, the administrative law judge should consider whether each medical opinion is documented and

[5] The record contains *two* newly submitted medical reports from Dr. Combs, one dated November 7, 1996, Claimant's Exhibit 1; *see* note 3, *supra* and the other dated January 6, 1994. Director's Exhibit 9. Dr. Combs diagnosed pulmonary fibrosis due to environmental pollutants including coal dust in his 1994 report. *Id*. This diagnosis meets the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201.

reasoned.[6] *Fields*, *supra*.

[6] A medical opinion is documented if it sets forth the clinical findings, observations, facts and other data upon which the physician based his opinion and a medical opinion is considered reasoned if the physician explains how the opinion's documentation supports his conclusion. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

The administrative law judge also found that the evidence submitted with claimant's prior claims fails to establish that claimant suffers from pneumoconiosis. 1997 Decision and Order at 7.[7] We hold that the administrative law judge erred in not discussing Dr. Combs's 1990 opinion diagnosing pneumoconiosis from coal mine exposure. Director's Exhibit 22; *see* 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). We therefore vacate the administrative law judge's finding that the evidence submitted with claimant's prior claim fails to establish that claimant suffers from pneumoconiosis, and remand the case to the administrative law judge for further consideration.

[7] None of the x-ray evidence submitted into the record for the previous claims meets the classification requirement to be positive for pneumoconiosis. *See* Director's Exhibits 21, 22; 20 C.F.R. §718.102. Three medical opinions were submitted into the record for the previous claims. Dr. Stewart found claimant's cardiopulmonary system to be negative, with claimant's condition not related to dust exposure in coal mine employment. Director's Exhibit 21 at 37-38. Dr. Dayson found early asymptomatic coronary artery disease. Director's Exhibit 21 at 43. Dr. Combs, in an opinion signed February 28, 1990, diagnosed pneumoconiosis from coal mine exposure, coronary artery disease and chronic obstructive pulmonary disease, and stated that claimant cannot return to his coal mine job because of shortness of breath with coal mine exposure and exertion. Dr. Combs stated that fifty percent of claimant's impairment was due to pneumoconiosis. Director's Exhibit 22 at 25-28. The record indicates that Dr. Combs is Board-certified in internal medicine. Claimant's Exhibit 1.

Finally, it is not clear whether the administrative law judge ever admitted Employer's Exhibits 9-12 into the record.[8] Employer submitted this evidence after the hearing and the administrative law judge issued an Order dated April 25, 1997 allowing the parties ten days to file an objection to this evidence. There does not appear to be any evidence of record indicating whether the parties responded or the administrative law judge officially admitted this evidence into the record. The administrative law judge relied upon this evidence in his Decision and Order Denying Benefits. 1997 Decision and Order at 5-7. On remand, the administrative law judge must determine whether this evidence was ever admitted into the record. *See generally* 20 C.F.R. §725.456.

[8] Employer's Exhibits 9-12 contain independent medical reviews by Drs. Dahhan and Castle, together with their qualifications. *See* Employer's Exhibits 9-12.

Accordingly, the administrative law judge's April 22, 1997 Order and Decision and Order Denying Benefits are affirmed in part and vacated in part and this case is remanded for further consideration by the administrative law judge consistent with this opinion.

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge