BRB No. 97-0838 BLA

EARL MORRISON Claimant-Petitioner v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)))))))))))	 DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

Earl Morrison, Whitwell, Tennessee, *pro se*.

Jill M. Otte (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (96-BLA-1183) of Administrative Law Judge Jeffrey Tureck 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 credited claimant with one year of coal mine employment and adjudicated this duplicate claim[1]

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[1]Claimant filed his initial claim on December 8, 1980. Director's Exhibit 17. On September 16, 1981, the Department of Labor (DOL) denied the claim because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment. *Id*. Although claimant subsequently indicated that he disagreed with the denial, DOL closed claimant's 1980 claim because he did not submit additional evidence or request a hearing. *Id*. Claimant filed another claim on October 4, 1983, which was denied on February 9, 1984 by DOL because claimant failed to establish the existence of pneumoconiosis arising

pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds by letter, urging affirmance of the administrative law judge's Decision and Order.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised on appeal to be whether the Decision and Order below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and 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).

Initially, we must consider whether claimant made a knowing and voluntary waiver of his right to representation pursuant to 20 C.F.R. §725.362(b) as claimant was not represented in the proceedings before the administrative law judge. *See Shapell v. Director, OWCP*, 7 BLR 1-304 (1984). An examination of the record indicates that claimant's procedural and due process rights were fully protected during the hearing, inasmuch as the administrative law judge's inquiries with regard to claimant's right to representation and cost thereof were in substantial compliance with the requirements enunciated in *Shapell*. *See* 20 C.F.R. §725.362(b).

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out of coal mine employment and total disability due to pneumoconiosis. Director's Exhibit 16. Since claimant did not pursue this claim any further, the denial became final. Claimant filed his most recent claim on October 27, 1994. Director's Exhibit 1.

We next address the merits of this claim as considered by the administrative law judge pursuant to 20 C.F.R. Part 718. After considering the newly submitted evidence, the administrative law judge found that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. The administrative law judge correctly stated that the Department of Labor "denied claimant's prior claim because he failed to show both that he suffered from coal workers' pneumoconiosis and that he was totally disabled due to a respiratory or pulmonary impairment." Decision and Order at 3; Director's Exhibit 16. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,[2] has held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-18 (6th Cir. 1994).

We affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) since each of the three x-ray interpretations of record is negative for pneumoconiosis. Decision and Order at 3; Director's Exhibits 9, 10, 13. Further, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) since the record does not contain any biopsy results demonstrating the presence of pneumoconiosis. Decision and Order at 3. Additionally, we hold as a matter of law that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3) since none of the presumptions set forth therein is applicable to the instant claim. *See* 20 C.F.R. §§718.304, 718.305, 718.306. The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Similarly, claimant is not entitled to the presumption of pneumoconiosis at 20 C.F.R. §718.305 because he filed his claim after January 1, 1982. *See* 20 C.F.R. §718.305(e); Director's Exhibit 1. Lastly, this claim is not a survivor's claim; therefore, the presumption of pneumoconiosis at 20 C.F.R. §718.306 is also inapplicable.

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[2]Inasmuch as claimant performed his most recent coal mine employment in Tennessee, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Further, in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the newly submitted medical reports of Dr. Soteres. The administrative law judge stated that "Dr. Soteres's reports fail to support a finding of pneumoconiosis or any other respiratory or pulmonary condition related to coal mine employment." Decision and Order at 3. Although Dr. Soteres, in a report dated January 13, 1995, diagnosed bronchitis and **suspicious** coal workers' pneumoconiosis, Director's Exhibits 7, 19 (emphasis added), Dr. Soteres, in a subsequent report dated November 11, 1996, opined that claimant does not suffer from coal workers' pneumoconiosis, Director's Exhibit 19. The administrative law judge properly concluded that "Dr. Soteres **clarified** his diagnosis."[3] Decision and Order at 3 (emphasis added); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hopton v. United States Steel Corp.*, 7 BLR 1-12 (1984). Thus, since the administrative law judge, within a reasonable exercise of his discretion, concluded that Dr. Soteres did not diagnosis pneumoconiosis or any chronic lung disease arising out of coal mine employment, we affirm the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), as supported by substantial evidence.

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[3]The administrative law judge stated that "[a]ccording to Dr. Soteres, he initially diagnosed claimant with suspicious coal workers' pneumoconiosis based on a small area in the right lower lobe of claimant's lung visible on x-ray which he felt required further evaluation by a B-reader." Decision and Order at 3. Further, the administrative law judge stated that "[g]iven that Dr. Sargent, a B-reader, subsequently read both the January 1, 1995 and an August 30, 1995 x-ray [as] negative for pneumoconiosis, Dr. Soteres is now satisfied that claimant does not suffer from the disease." *Id.*

With regard to 20 C.F.R. §718.204(c), the administrative law judge found the newly submitted evidence insufficient to establish total disability. The administrative law judge properly found that the newly submitted pulmonary function study and arterial blood gas study did not produce qualifying[4] values.[5] Director's Exhibits 6, 8, 19; 20 C.F.R. §718.204(c)(1) and (c)(2). Finally, the administrative law judge properly found that the newly submitted report of Dr. Soteres does not indicate that claimant suffers from a total respiratory disability.[6] *See Beatty v. Danri Corp. and Triangle Enterprises*, 16 BLR 1-11 (1991). Consequently, claimant is unable to establish total disability at 20 C.F.R. §718.204(c)(4). Since claimant failed to establish either the existence of pneumoconiosis or total disability, based on the newly submitted evidence, the administrative law judge properly concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Ross*, *supra*.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

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[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[5] Since the record does not contain any evidence of cor pulmonale with right sided congestive heart failure, we hold as a matter of law that the evidence is insufficient to establish total disability at 20 C.F.R. §718.204(c)(3).

[6] Dr. Soteres opined that claimant does not suffer from a totally disabling respiratory impairment. Director's Exhibit 19. The administrative law judge correctly stated that "[t]here is no other medical opinion evidence filed in connection with the duplicate claim." Decision and Order at 3.

NANCY S. DOLDER
Administrative Appeals Judge