BRB No. 00-0738 BLA

DALLAS CRUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	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 on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden LLP), Washington, D.C., for employer.

Timothy S. Williams (Judith E. Kramer, Acting Solicitor of Labor; 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand (96-BLA-0134) of Administrative Law Judge Clement J. Kichuk 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] This case, involving modification of a duplicate claim, is before the Board for the second time. Claimant filed a duplicate claim on May 3, 1989.[2] By Decision and Order dated September 16, 1993, Administrative Law Judge J.

[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 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on October 19, 1981. Director's Exhibit 21. By Decision and Order dated April 18, 1988, Administrative Law Judge Richard D. Mills found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Id.* Judge Mills also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). *Id.* However, Judge Mills found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *Id.* Accordingly, Judge Mills denied benefits. *Id.* There is no indication that claimant

Michael O'Neill found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Alternatively, Judge O'Neill found that the evidence of record was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge O'Neill denied benefits. By Decision and Order dated June 22, 1994, the Board affirmed Judge O'Neill's finding that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Crum v. Wolf Creek Collieries*, BRB No. 93-2559 BLA (June 22, 1994) (unpublished). The Board also affirmed Judge O'Neill's finding that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] The Board, therefore, affirmed Judge O'Neill's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied duplicate claim. Finding that the newly submitted evidence was sufficient to establish total disability due to pneumoconiosis, Judge O'Neill found that the evidence was sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). Judge O'Neill, therefore, modified the denial of claimant's duplicate claim and awarded benefits as of August, 1994, the month in which claimant filed his request for modification. By Decision and Order dated September 28, 1999, the Board noted that Judge O'Neill should have considered whether the duplicate claim evidence along with the newly submitted modification evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), rather than determining whether claimant's new evidence alone established a change in conditions justifying modification. *Crum v. Wolf Creek Collieries*, BRB Nos. 98-1594 BLA and 98-1594 BLA-A (Sept. 28, 1999) (unpublished). The Board held that the issue properly before

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took any further action in regard to his 1981 claim.

Claimant filed a second claim on May 3, 1989. Director's Exhibit 1.

[3]The Board also affirmed findings rendered by Judge Mills in his adjudication of claimant's earlier 1981 claim. The Board affirmed Judge Mills's findings pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(c) (2000) as unchallenged on appeal. *Crum v. Wolf Creek Collieries*, BRB No. 93-2559 BLA (June 22, 1994) (unpublished).

Judge O'Neill pursuant to claimant's modification request was whether all of the evidence in the duplicate claim, plus that submitted on modification, established the requisite material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The Board noted that claimant's initial claim was denied because he failed to establish that he was totally disabled. *Id.* The Board held, therefore, that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the duplicate claim evidence, plus the new evidence submitted on modification, had to be sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Id.*

The Board also vacated Administrative Law Judge Richard D. Mills's earlier finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. *Crum v. Wolf Creek Collieries*, BRB Nos. 98-1594 BLA and 98-1594 BLA-A (Sept. 28, 1999) (unpublished). The Board held that claimant should be afforded the opportunity to establish a material change in conditions by showing the existence of pneumoconiosis with the duplicate claim evidence plus the new evidence submitted on modification. *Id.*

In its consideration of Judge O'Neill's finding that the evidence was sufficient to establish total disability due to pneumoconiosis, the Board agreed with employer that Judge O'Neill failed to provide a valid rationale for his finding that claimant's August 14, 1994 qualifying pulmonary function study was a valid study. *Crum v. Wolf Creek Collieries*, BRB Nos. 98-1594 BLA and 98-1594 BLA-A (Sept. 28, 1999) (unpublished). The Board, therefore, instructed Judge O'Neill, on remand, to reconsider whether claimant's August 14, 1994 pulmonary function study was valid. *Id.* The Board further instructed Judge O'Neill to assess the credibility of Dr. Sundaram's opinion "after resolving the pulmonary function study evidence." *Id.* The Board finally held that it was reasonable for Judge O'Neill to consider the month of claimant's modification request as the onset date of benefits and that he could use it again on remand if he properly credited Dr. Sundaram's opinion in finding a material change in conditions and entitlement established. *Id.*

Due to Judge O'Neill's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the duplicate claim evidence and the newly submitted modification evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). The administrative law judge further found that this evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). The administrative law judge, therefore, found that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310. The administrative law judge also found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied claimant's request for modification of his denied duplicate claim. On appeal, claimant contends that the administrative law judge erred in his consideration of the x-ray evidence. Claimant also argues that the administrative law

judge, in his consideration of the medical opinion evidence, erred in not according greater weight to the opinion of his treating physician. 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.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which all the parties have responded.[4] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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).

[4]Claimant, employer and the Director, Office of Workers' Compensation Programs, assert that the amended regulations do not affect the outcome of this case.

We initially find it necessary to clarify the issue that was properly before the administrative law judge on remand. An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[5] The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim.

The relevant issue before the administrative law judge on remand was whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge O'Neill's denial of claimant's 1989 duplicate claim) was sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

In order to establish a material change in conditions, the newly submitted evidence must support a finding of total disability.[6] Thus, in order to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the newly submitted evidence (*i.e.,* the evidence submitted subsequent to Judge O'Neill's denial of claimant's 1989 duplicate claim) must support a finding of total disability.

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[5]Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310, these revisions only apply to claims filed after January 19, 2001.

[6]Claimant's 1981 claim was denied because claimant failed to establish that he was totally disabled. Director's Exhibit 21. 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 total disability. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

The record contains only one newly submitted pulmonary function study. The study, conducted on August 16, 1994 in connection with Dr. Sundaram's examination, is qualifying. Director's Exhibit 57. Although Dr. Kraman validated claimant's August 16, 1994 pulmonary function study, Drs. Hippensteel, Renn, Vest, Tuteur, Castle and Paul opined that the study was invalid. The administrative law judge found that Dr. Renn's invalidation of claimant's August 16, 1994 pulmonary function study,[7] as supported by the invalidations of Drs. Hippensteel, Vest, Tuteur,

[7]Dr. Renn provided the following nine reasons for his conclusion that claimant's August 16, 1994 pulmonary function study was invalid for accurate interpretation or for the deprivation of significant data with which to assess true ventilatory function:

> 1. Failure to maintain maximal effort throughout the entire FVC maneuver. The effect resultant from this is underestimation of the FEV1.
>
> 2. Failure to maintain the FVC maneuver for the requisite six seconds and to plateau of two seconds duration defined as volume accumulation of less than 40 ml/2 seconds. The effect resultant from this is underestimation of the FVC.
>
> 3. Failure to maintain the FVC maneuver for the requisite fifteen seconds, a satisfactory plateau not having been reached within the initial six seconds. The effect resultant from this is underestimation of the FVC.
>
> 4. FVC maneuvers do not correlate, one with the other, within the requisite 5% or 100 ml, whichever is greater.
>
> 5. There were no, rather than the requisite three, satisfactory maneuvers performed.
>
> 6. There is little represented during performance of the FVC maneuvers other than passive, rather than forced active, exhalation. The effect resultant from this is underestimation of both the FVC and FEV1.
>
> 7. There was but one, rather than the requisite three satisfactory, MVV maneuver [sic] performed. Certain parameters of quality control cannot

Castle and Paul, was better reasoned than Dr. Kraman's contrary opinion.[8] Decision and Order on Remand at 22-23; Director's Exhibit 57; Employer's Exhibit 10. Inasmuch as this finding is unchallenged on appeal, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, we hold that the newly submitted pulmonary function study evidence (*i.e.*, claimant's August 16, 1994 pulmonary function study) is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(i).[9]

The administrative law judge noted that there were no newly submitted arterial

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be applied.

8. There were no, rather than the requisite three, satisfactory MVV maneuvers performed.

9. MVV was not performed at 50-60% of the FVC.

Employer's Exhibit 10.

[8]Dr. Kraman, without explanation, indicated that claimant's August 16, 1994 pulmonary function study was acceptable. Director's Exhibit 57.

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

blood gas studies and no evidence that claimant suffered from cor pulmonale. Decision and Order on Remand at 21. The administrative law judge, therefore, found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2) and (c)(3) (2000). *See* 20 C.F.R. §718.204(b)(2)(ii), (iii). Inasmuch as no party has challenged these findings, these findings are affirmed. *Skrack*, *supra*.

The record contains newly submitted medical reports from Dr. Sundaram. Dr. Sundaram examined claimant on August 16, 1994. In a report dated August 16, 1994, Dr. Sundaram indicated that claimant suffered from "an occupational lung disease caused by his coal mine employment based upon x-ray." Director's Exhibit 53. Dr. Sundaram also indicated that claimant was not physically able, from a pulmonary standpoint, to do his usual coal mine employment. *Id.*

Dr. Sundaram reexamined claimant on January 26, 1995. In an undated report, Dr. Sundaram noted that claimant's chest x-ray was "consistent with coal workers' pneumoconiosis." Unmarked Claimant's Exhibit. Dr. Sundaram further opined that claimant was "unable to bend, crawl, stoop [or] work at unprotective heights or extreme ranges of temperature." *Id.* Dr. Sundaram, therefore, opined that claimant was unable to return to active coal mine employment. *Id.*

A subsequent undated report indicates that Dr. Sundaram examined claimant on February 21, 1996, April 3, 1996, May 31, 1996 and July 10, 1996. In this report, Dr. Sundaram diagnosed coal workers' pneumoconiosis and COPD. Unmarked Claimant's Exhibit.

In his consideration of whether the newly submitted medical opinion evidence was sufficient to establish total disability, the administrative law judge noted that Dr. Sundaram did not engage in any discussion of the exertional requirements of claimant's last coal mining job. Decision and Order on Remand at 24. The administrative law judge, therefore, found that Dr. Sundaram's findings on physical examination were inadequate to support his conclusion that claimant was unable to perform his usual coal mine employment. *Id.* The administrative law judge also discredited Dr. Sundaram's finding of total disability because it was based in part upon a pulmonary function study that had been invalidated. *Id.* The administrative law judge further found that the opinions of Drs. Fino, Chandler and Broudy that claimant was not totally disabled were entitled to greater weight because they had the opportunity to review all of the evidence of record (with the exception of Dr. Sundaram's reports) and were aware of the physical requirements of claimant's usual coal mine employment. *Id.*

Inasmuch as no party challenges the administrative law judge's finding that Dr. Sundaram's opinions are insufficient to establish total disability, this finding is affirmed. *Skrack*, *supra*. Inasmuch as Dr. Sundaram was the only physician to submit medical opinions since Judge O'Neill's denial of claimant's 1989 duplicate claim, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability, we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Nataloni*, *supra*.

Inasmuch as no party challenges the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is also affirmed. *Skrack*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand 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