BRB No. 98-0938 BLA

JIMMY ROBERTS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED:
	)	
SUN COAL COMPANY	)	
	)	
Employer/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 on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Kenneth S. Stepp, Inverness, Florida, for claimant.

Harold Rader (Law Offices of Neville Smith), Manchester, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (95-BLA-0971) of Administrative Law Judge Robert L. Hillyard 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). This case is before the Board for the second time. In the original Decision and Order, the administrative law judge credited claimant with twenty-nine years and six months of coal mine employment and adjudicated this claim[1] 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). The administrative law judge also found the newly submitted evidence insufficient to establish 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.[2] Accordingly, the administrative law judge found the newly submitted evidence insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310, and, thus, he denied benefits. In response to claimant's appeal, the

[1]Claimant filed his initial claim on September 3, 1985. Director's Exhibit 45. This claim was denied by the Department of Labor (DOL) on February 27, 1986 and September 28, 1987 because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. *Id*. Inasmuch as claimant did not pursue this claim any further, the denial became final. Claimant filed his second claim on August 21, 1989. Director's Exhibit 1. On January 23, 1990, the DOL denied this claim based on claimant's failure to establish a material change in conditions. Director's Exhibit 13. Claimant filed another claim on February 13, 1990, Director's Exhibit 2, and on June 21, 1990, the DOL issued another denial based on claimant's failure to establish a material change in conditions, Director's Exhibit 14. On June 26, 1991, claimant requested modification. Director's Exhibit 17. Administrative Law Judge Aaron Silverman issued a Decision and Order - Denial of Modification on August 5, 1993. Director's Exhibit 38. Although Judge Silverman stated that "[n]othing is seen in this file documenting a request for modification within one year of June 21, 1990," *id*. at 2 n.3, he nonetheless considered the evidence of record and found that claimant failed to establish a change in conditions. On June 17, 1994, claimant filed his most recent claim, which the DOL construed as a request for modification. Director's Exhibits 39, 40.

[2]The administrative law judge stated that "the Claimant is requesting modification of the denial of benefits issued in his second claim which is a duplicate claim." Decision and Order at 4. The administrative law judge also stated that "[b]ecause the claim in which the miner is requesting modification is a duplicate claim, the standard used must be the same standard required in a duplicate claim." *Id*.

Board rejected claimant's contention that a state award of partial disability precludes employer from challenging its liability under federal black lung law. However, the Board vacated the administrative law judge's denial of benefits since the administrative law judge erroneously considered only the evidence submitted after the request for modification and not after the denial of the first claim.[3] *Roberts v. Shamrock Coal Co*., BRB No. 96-1490 BLA (June 26, 1997)(unpub.).

On remand, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found the newly submitted evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(4). Hence, the administrative law judge concluded that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. Accordingly, the administrative law judge found the newly submitted evidence insufficient to establish a change in conditions at 20 C.F.R. §725.310, and, therefore, he again denied benefits. On appeal, claimant generally contends that the administrative law judge erred in finding no pneumoconiosis at 20 C.F.R. §718.202(a)(1), (a)(4) and no total disability at 20 C.F.R. §718.204(c)(4). Claimant also contends that the award of benefits by the Kentucky State Workers' Compensation Board precludes employer from challenging its liability under federal black lung law. Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

The Board's scope of review is defined by statute. If the administrative law

---

[3]The Board noted that in determining whether claimant established a material change in conditions, the administrative law judge erred in only considering the evidence filed subsequent to August 5, 1993, and not September 28, 1987, the date the first claim was finally denied.

[4]Inasmuch as the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2), (a)(3) and 718.204(c)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

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 this Board and may not be 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).

The administrative law judge stated that "[t]his proceeding arises from a request for modification of a denial of benefits in a [duplicate] claim." Decision and Order on Remand at 1. 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 "[t]he Claimant's original claim was denied when the Claimant failed to establish the presence of pneumoconiosis, pneumoconiosis arising out of coal mine work, and that the Claimant was totally disabled due to pneumoconiosis." Decision and Order on Remand at 14. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), 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. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Initially, claimant generally contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and insufficient to establish total disability at 20 C.F.R. §718.204(c)(4). However, claimant does not delineate how the administrative law judge erred in his analysis of the evidence at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(c)(4). Claimant merely notes the presence of positive x-ray interpretations and other medical opinions that indicate that he suffers from pneumoconiosis and total disability. Thus, claimant has failed to allege any specific error in the administrative law judge's findings or legal conclusions, and as such, claimant fails to provide a basis upon which the Board may review the administrative law judge's findings.[5] *See Cox v. Benefits Review Board*, 791 F.2d

[5]The administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and insufficient to establish total disability at 20 C.F.R. §718.204(c)(4) are

445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4), and 718.204(c)(4).

Next, claimant contends that the award of benefits by the Kentucky State Workers' Compensation Board precludes employer from challenging its liability under federal black lung law. The Board has previously rejected claimant's contention that a state award of partial disability precludes employer from challenging its liability under federal black lung law since the finding of a state workmen's compensation board is not binding on the administrative law judge. *Roberts v. Shamrock Coal Co*., BRB No. 96-1490 BLA, slip op. at 2 (June 26, 1997)(unpub.). We hold that the Board's prior disposition of this issue constitutes the law of the case, as claimant has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

---

furthermore supported by substantial evidence.

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and insufficient to establish total disability at 20 C.F.R. §718.204(c), we hold that substantial evidence supports the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309.[6] *See Ross, supra*. Therefore, we affirm the

[6]In its Decision and Order dated June 26, 1997, the Board held that the administrative law judge properly determined that claimant is requesting modification of the denial of his second claim, which is a duplicate claim. Moreover, as previously noted, the Board held that in determining whether claimant established a material change in conditions, the administrative law judge erred in only considering the evidence filed subsequent to August 5, 1993, and not September 28, 1987, the date the first claim was finally denied. However, further review of the record indicates that claimant did not file a timely request for modification of the DOL's June 21, 1990 denial of claimant's second claim. Moreover, claimant did not file another claim after the June 21, 1990 denial until June 17, 1994. Director's Exhibit 39. Therefore, contrary to our prior holding, since claimant's 1994 claim is a duplicate claim rather than a request for modification of a duplicate claim, the evidence submitted prior to the DOL's June 21, 1990 denial should not have been considered by the administrative law judge in determining whether claimant established a material change in conditions. *Stacy v. Cheyenne Coal Co*., BLR , BRB No. 98-0670 BLA (Feb. 10, 1999). Nonetheless, inasmuch as substantial evidence supports the

administrative law judge's denial of benefits.

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

---

administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309, we hold that any error in this regard is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

JAMES F. BROWN
Administrative Appeals Judge