BRB No. 03-0489 BLA

SABATO COSIMO SALERNO	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 02/26/2004
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for claimant.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2002-BLA-5051) of Administrative Law Judge Janice K. Bullard 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] The administrative law judge found, and the parties stipulated to, twenty-

[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

three years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Decision and Order at 3. The administrative law judge, after determining that the instant case was a duplicate claim, noted the proper standard and found that the parties stipulated to the existence of pneumoconiosis arising out of coal mine employment which would constitute a material change in conditions pursuant to 20 C.F.R. §725.309. Decision and Order at 2-4; Hearing Transcript at 10-11. The administrative law judge further concluded that the evidence of record was insufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Decision and Order at 5-11. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to Section 718.204(b)(2)(iv). The Director, Office of Workers' Compensation Programs (the Director), responds asserting that a material change in conditions has not been established and urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence.[3]

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 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The record indicates that claimant filed his initial claim for benefits on April 19, 1984, which was finally denied by the Benefits Review Board on January 18, 1992 as claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibits 1-17/52, 1-17/53. Claimant requested modification on June 30, 1992, the denial of which was affirmed by the Board on February 29, 1996. Director's Exhibits 1-17/64, 1-17/76, 1-17/77, 1-17/92, 1-17/93, 1-17/98. Claimant filed a second claim on March 30, 1999, which was subsequently withdrawn on July 18, 2000. Director's Exhibit 1-18. Claimant took no further action until he filed another application for benefits on July 17, 2001, the subject of the instant appeal. Director's Exhibit 3.

[3]The administrative law judge's length of coal mine employment determination as well as her findings pursuant to 20 C.F.R. §§718.202, 718.203 and 718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error. Initially, we must address the Director's assertion that the administrative law judge erred in accepting the stipulation that a material change in conditions, was established. Director's Brief at 3, n.3. Stipulations of fact are permitted in claims arising under the Act and are binding on the parties. *See Grant v. Director, OWCP*, 6 BLR 1-619 (1983). Stipulations that are contrary to law or allow an incorrect application of the law are not controlling on the courts, however, and will not be accepted. *See Puccetti v.Ceres Gulf*, 24 BRBS 25 (1990); *Nippes v. Florence Mining Co.*, 12 BLR 1-108 (1985)(McGranery, J., dissenting); *McDevitt v. George Hyman Construction Co.*, 14 BRBS 677 (1982). In the instant case, the record indicates that the parties stipulated to the existence of pneumoconiosis arising out of coal mine employment. Hearing Transcript at 10-11. Following an inquiry by the administrative law judge, counsel for both parties also stated that based on the stipulation of pneumoconiosis arising out of coal mine employment, they would stipulate that establishing these elements of entitlement would constitute a change in condition to satisfy the subsequent claim issue. Hearing Transcript at 11-12. We agree with the Director that the administrative law judge erred in accepting the stipulation that a material change in conditions was established in this case.

The United States Court of Appeals for the Third Circuit 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, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[4] *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). An element of entitlement which was not explicitly addressed in the denial of the prior claim does not constitute an element of entitlement previously adjudicated against a claimant. *See Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97 (2000)(*en banc*). Thus, such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

material change in conditions at 20 C.F.R. §725.309 in accordance with the holding in *Swarrow*.[5] *Caudill*, 22 BLR 1-97.

In this case, claimant=s previous claim was finally denied because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment; not because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment.[6] Director's Exhibits 1-17/52, 1-17/53, 1-17/92, 1/17/98. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, the newly submitted evidence must support a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204. As the material change in conditions stipulation is contrary to law in the instant case, we reverse the administrative law judge's acceptance of the stipulation. A remand of this case is not required, however, as the administrative law judge has fully considered the newly submitted evidence to determine if it was sufficient to establish total respiratory of pulmonary disability pursuant to 20 C.F.R. §718.204(b)(2). *Swarrow*, 72 F.3d 308, 20 BLR 2-76; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 5-11.

Considering the newly submitted evidence of record to determine if total disability was established, the administrative law judge considered the entirety of the relevant medical evidence and acted within her discretion in concluding that the evidence was insufficient to

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[5]Under the "one-element standard" adopted by the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), a miner is provided an opportunity to establish a material change in conditions by proving any element of entitlement *previously adjudicated against him*. Hence, the focus of the material change in conditions standard in *Swarrow* is on specific findings made against the claimant in the prior claim.

[6]In the original claim Administrative Law Judge Thomas W. Murrett found the existence of pneumoconiosis arising out of coal mine employment established but denied benefits as claimant failed to establish that he was totally disabled. Director's Exhibit 1-17/52. The Benefits Review Board affirmed the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment as well as the denial of benefits on the basis that claimant failed to establish a totally disabling respiratory or pulmonary impairment, an essential element of entitlement. Director's Exhibit 1-17/53; *Salerno v. Conrail/Lehigh Valley R.R.*, BRB No. 89-1692 BLA (June 18, 1992) (unpublished). Claimant subsequently requested modification, which Administrative Law Judge Ainsworth H. Brown denied as claimant failed to establish a totally disabling respiratory or pulmonary impairment and the Board affirmed the administrative law judge's denial of modification as supported by substantial evidence. Director's Exhibits 1-17/64, 1-17/92, 1-17/98.

establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2). *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Claimant argues that the administrative law judge erred in failing to find total disability as she failed to give adequate consideration to the medical opinions of record. Claimant specifically contends that the administrative law judge erred in failing to accord appropriate weight to the opinion of Dr. Manganiello, the miner's treating physician, as it is sufficient to establish that claimant suffers from a totally disabling respiratory or pulmonary impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Claimant's Brief at 6-9. We do not find merit in claimant's argument. Claimant's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Further, contrary to claimant=s contention, an administrative law judge is not required to accord determinative weight to an opinion solely because it is offered by a treating physician. *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997); *Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997); *Tedesco v. Director,* OWCP, 18 BLR 1-103 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

The administrative law judge adequately examined and discussed all of the relevant newly submitted evidence of record as it relates to total disability and permissibly concluded that the medical opinion evidence fails to carry claimant's burden pursuant to Section 718.204(b)(2)(iv). Claimant's Brief at 5-9; Decision and Order at 8-11; Director's Exhibits 8, 29; Claimant's Exhibit 1; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The administrative law judge properly considered the entirety of the newly submitted medical opinion evidence of record, *i.e.*, the opinions of Drs. Manganiello and Levinson, and permissibly found that the medical opinions were insufficient to establish total disability. Decision and Order at 8-11; Director's Exhibits 8, 29; Claimant=s Exhibit 1. Dr. Manganiello stated that he had been treating claimant for approximately ten years and opined that claimant has pulmonary disease related to coal dust exposure and that claimant cannot return to his coal mine work or any type of comparable work. Claimant=s Exhibit 1. Dr. Levinson, who is Board-certified in Internal Medicine with a subspecialty in Pulmonary Disease, opined that claimant has COPD due to smoking and coal dust exposure but does not have any significant or disabling pulmonary impairment. Director=s Exhibits 8, 9, 29. The administrative law judge properly accorded determinative weight to the opinion of Dr. Levinson because his opinion is more reasoned, is consistent with the clinical studies of record and in light of his superior credentials. *See Clark,* 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel,* 8 BLR 1-139; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order at 11.

The administrative law judge, in this instance, rationally considered the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark, 12 BL*R *1-149*; *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*, 10 BLR 1-19; *Wetzel*, 8 BLR 1-139; *Lucostic*, 8 BLR 1-46; *Fuller*, 6 BLR 1-1291; Decision and Order at 10-11; Director's Exhibits 8, 29; Claimant's Exhibit 1. Further, although Dr. Manganiello was the miner's treating physician, the administrative law judge fully considered the factors set forth in 20 C.F.R. §718.104(d) and provided a rational reason for finding his opinion insufficient to meet claimant's burden of proof. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 22 BLR 2-386 (3d Cir. 2002); *Mancia*, 130 F.3d 579, 21 BLR 2-114; *Lango*, 104 F.3d 573, 21 BLR 2-12; *Evosevich v. Consolidation Coal* Co., 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986); *Tedesco*, 18 BLR 1-103; *Trumbo*, 17 BLR 1-85; *Clark*, 12 BLR 1-149; *Hutchens*, 8 BLR 1-16; Decision and Order at 10-11. Consequently, as claimant makes no other specific challenge to the administrative law judge's findings with respect to total disability, we affirm the administrative law judge's credibility determinations and her finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv) as they are supported by substantial evidence and are in accordance with law. *See Trent*, 11 BLR 1-26*; Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Mabe*, 9 BLR 1-67*; Perry*, 9 BLR 1-1; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Inasmuch as claimant has failed to establish a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's denial of benefits as the newly submitted evidence is insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Swarrow*, 72 F.3d 308, 20 BLR 2-76.

Accordingly, the administrative law judge's material change in conditions finding is reversed and the Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge