BRB No. 97-0352 BLA

ELIO SCOPEL Claimant-Petitioner v. THE YOUGHIOGHENY AND OHIO COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order upon Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

C. Douglas Ames (Elliott, Heller, Maas, Moro & Magill Co., L.P.A), Youngstown, Ohio, for claimant.

John G. Paleudis (Hanlon, Duff & Paleudis Co., LPA), St. Clairsville, Ohio, for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

Claimant appeals the Decision and Order upon Remand (88-BLA-00182) of Administrative Law Judge Robert D. Kaplan 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 on appeal to the Board for the second time. In the first Decision and Order, Administrative Law Judge George P. Morin determined that claimant's initial claim, filed on January 3, 1984, was finally denied on June 15, 1984, and that the present claim was a duplicate claim.[1] *See* 20 C.F.R. §725.309.

[1] Claimant filed his first application for benefits on January 3, 1984, which the district director denied on June 15, 1984 on the grounds that claimant failed to establish the

Judge Morin concluded that claimant was a miner under the Act, that employer was the responsible operator, and that claimant worked for thirty-five years in coal mine employment based on a stipulation of the parties. Judge Morin found the newly submitted evidence sufficient to demonstrate a material change in conditions pursuant to Section 725.309, and based on the filing date, adjudicated this case pursuant to the regulations at 20 C.F.R. Part 718. Judge Morin found the evidence of record sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded. On appeal, the Board affirmed Judge Morin's award of benefits after affirming his findings that claimant demonstrated a material change in conditions at Section 725.309 and that the evidence of record was sufficient to establish the presence of pneumoconiosis at Section 718.202(a)(4) and a totally disabling respiratory impairment due to pneumoconiosis at Section 718.204. *Scopel v. The Youghiogheny and Ohio Coal Company*, BRB No. 92-0521 BLA (Apr. 28, 1994)(unpub.). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, vacated the Decision and Order of the Board in light of the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) and remanded this case to the administrative law judge for further consideration. *The Youghiogheny and Ohio Coal Company v. Scopel*, No. 94-3671 (6th Cir. August 15, 1995)(unpub.).

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existence of pneumoconiosis arising out of coal mine employment and the presence of a totally disabling respiratory impairment due to pneumoconiosis. Director's Exhibit 30. Claimant took no further action until he filed the present claim on February 27, 1986. Director's Exhibit 1.

On remand, Administrative Law Judge Robert D. Kaplan concluded that claimant failed to prove any elements of entitlement in his prior claim.[2] After reviewing and weighing the newly submitted evidence, the administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4) and, therefore, that claimant had demonstrated a material change in conditions at Section 725.309. On the merits, the administrative law judge reviewed the entire record, then concluded that the evidence of record established the existence of pneumoconiosis at Section 718.202(a)(4). The administrative law judge also found claimant entitled to the presumption that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b) and that the presumption was not rebutted. The administrative law judge, however, found the weight of the evidence of record insufficient to establish the presence of a totally disabling respiratory impairment at Section 718.204(c). Accordingly, benefits were denied. In the instant appeal, claimant challenges the findings of the administrative law judge at Section 718.204 and urges affirmance of the findings of the administrative law judge at Sections 725.309 and 718.202(a)(4). Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[2] As Judge Morin was no longer working for the Office of Administrative Law Judges, this case was reassigned to Administrative Law Judge Robert D. Kaplan who issued a Decision and Order upon Remand on November 14, 1996.

[3] We affirm, as unchallenged on appeal, the following findings of the administrative law judge: that claimant was a miner; that employer is the responsible operator; that claimant had thirty-five years of coal mine employment; and the findings made pursuant to 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), and 718.204(c)(1)-(3). *See Skrack v. Island Creek Coal Company*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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*).

Employer has filed a Motion for Leave Instanter requesting permission to cite *Flynn v. Grundy Mining Company*, 21 BLR 1-40 (1997), a case published after the filing of employer's response brief in this appeal. Employer's motion is granted. In its motion, employer reasserts its response brief position that Judge Morin improperly found a material change in conditions at Section 725.309. Employer contends that for claimant to demonstrate a change in conditions, he must show a worsening of his condition. *See Id.*; *Sharondale Corporation v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). While we agree with employer's statement of the law, we disagree with employer's contention that Judge Morin improperly concluded that claimant demonstrated a material change in conditions at Section 725.309. Initially, we note that Judge Kaplan, on remand, made new findings on the issue of a material change in conditions under the standard enunciated in *Ross* and it is these findings we will consider. Judge Kaplan correctly determined that claimant failed to prove any elements of entitlement in his prior claim. *See Id.*; Director's Exhibit 30; Decision and Order at 2-3. The administrative law judge properly reviewed and weighed the newly submitted evidence and permissibly concluded that this evidence established the existence of pneumoconiosis at Section 718.202(a)(4), an element of entitlement not previously proven by claimant. *See Ross, supra.* Because claimant demonstrated that he now has pneumoconiosis by presenting new evidence that he suffers from a respiratory impairment related to his years of coal mine employment, *see* 20 C.F.R. §§718.202(a)(4), 718.201, a medical condition not previously diagnosed, the administrative law judge properly found that claimant established a material change in conditions as claimant's physical condition has worsened. *Id.* We, therefore, affirm the finding of the administrative law judge at 20 C.F.R. §725.309 as it is supported by substantial evidence and is in accordance with law.

In it's Response Brief, employer purports to raise on appeal the issue that the administrative law judge erred in finding the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4). Employer's response brief incorporates by reference to its Remand Brief, the argument that claimant failed both to prove the existence of pneumoconiosis and to establish a material change in conditions. Response Brief at 3-4. The Remand Brief contains a lengthy discussion of the material change issue, but incorporates by reference to employer's brief in the Sixth Circuit the argument that claimant did not establish pneumoconiosis at Section 718.202(a)(4). A review of that brief, filed in 1994, however, reflects that it criticizes Administrative Law Judge Morin's finding of the existence of pneumoconiosis, but it does not address Administrative Law Judge Kaplan's finding of the existence of pneumoconiosis, which is contained in the Decision and Order filed in 1996, currently on review. Since employer has not addressed Judge Kaplan's finding on the existence of pneumoconiosis, that finding must be affirmed as unchallenged on appeal.

See Skrack v. Island Creek Coal Company, 6 BLR 1-710 (1983).

Although employer may later contend that it did not waive this argument because elements of its nineteen-page argument challenging Judge Morin's finding could be made applicable to Judge Kaplan's finding, that argument must fail because a party cannot deputize the Board to reconstruct its arguments. Since employer has alleged no error with respect to Judge Kaplan's finding on the existence of pneumoconiosis, no relevant argument has been advanced with the requisite specificity.[4] *See* 20 C.F.R. §802.211(b).

Turning to the merits, claimant challenges the conclusions of the administrative law judge that he failed to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(4). Initially, we reject claimant's contention that the administrative law judge violated the remand order of the United States Court of Appeals for the Sixth Circuit when he failed to decide if the evidence of record was in equilibrium. The court specifically rejected the reliance on true doubt by Judge Morin and remanded this case for the administrative law judge to reconsider the evidence of record to determine if claimant met his burden of proof by a preponderance of the evidence. *See Ondecko, supra; Scopel*, No. 94-3671 (6th Cir. August 15, 1995). At Section718.204(c)(4), the administrative law judge found the opinion evidence that claimant was not totally disabled outweighs the contrary opinion evidence and therefore, claimant has failed to establish total

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[4] Not only did employer fail to make an argument regarding Judge Kaplan's finding of pneumoconiosis, employer nowhere stated with specificity where its argument regarding Judge Morin's determination could be found. Although Employer's Response Brief in the instant appeal incorporates by reference its argument presented in its Remand Brief, employer did not provide a page citation to the Remand Brief. Response Brief at 3-4. Employer's remand brief incorporated by reference the argument advanced in its brief before the Sixth Circuit, again it provided no page citation for the argument. Remand Brief at 2. Finally, employer's brief in the Sixth Circuit listed the argument in the table of contents, but again, provided no reference for the beginning of the argument. Brief for Petitioner at I. Employer's belief that such cryptic references to a nineteen-page discussion of an administrative law judge's treatment of evidence will suffice to advance an argument on appeal is delusionary. Brief for Petitioner at 7-26.

disability. Decision and Order at 7. The administrative law judge agreed with Judge Morin's findings that the conflicting opinions are in equilibrium, with the exception of his findings that Dr. Kuziak's statements can be interpreted to establish claimant is totally disabled. The administrative law acted within his discretion when he relied on Judge Morin's findings that the medical opinions were "equally probative," and as a result of finding that Dr. Kuziak's opinion is not sufficient to establish total disability, permissibly found the opinion evidence that claimant is not totally disabled outweighed the contrary opinion evidence. In addition, the administrative law judge concluded that even if he found the medical opinion evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment, he would deny benefits as he properly weighed all the probative and contrary probative evidence at Section 718.204(c)(1)-(4) and permissibly concluded that the weight of this evidence failed to demonstrate the presence of a totally disabling respiratory impairment. The administratiave law judge, therefore, rationally found that based on the record as a whole, the evidence failed to demonstrate the presence of a totally disabling respiratory impairment. *See Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines, Corporation*, 9 BLR 195 (1986), *aff'g on recon*. 9 BLR 1-236 (*en banc*). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We, therefore, affirm the findings of the administrative law judge at 20 C.F.R. §718.204(c)(4) as well as his denial of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the Decision and Order upon Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I agree with the majority regarding the administrative law judge's findings that claimant has established the existence of pneumoconiosis and therefore a material change in conditions pursuant to 20 C.F.R. §§718.202(a)(4), 725.309. However, I respectfully dissent from the opinion of the majority that the full weighing of the medical evidence by Judge Kaplan is sufficient to establish the existence of total disability pursuant to 20 C.F.R. §718.204. The findings of the administrative law judge regarding his weighing of the medical opinions are unclear. The administrative law judge found that "the opinion evidence that Claimant is not totally disabled outweighs the contrary opinion evidence." Decision and Order at 7. The record however indicates that the medical opinions which find claimant totally disabled outnumber the two opinions relied on by the administrative law judge to establish that claimant is not totally disabled. Furthermore, the administrative law judge has failed to provide another rationale for affirming his weighing of the medical opinions. Inasmuch as this analysis impacts on his weighing of all the medical evidence at Section 718.204, I would vacate the findings of the administrative law judge at Section 718.204(c) and remand this case for him to explain his rationale in weighing the medical opinion evidence and then weigh all of the relevant probative evidence together as set forth in *Fields v. Island Creek Coal Company*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines, Corporation*, 9 BLR 1-195 (1986), *aff'g on recon*. 9 BLR 1-236 (*en banc*).

ROY P. SMITH
Administrative Appeals Judge