BRB No. 97-0777 BLA

LETRELL HAMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
KODAK MINING INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

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

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (95-BLA-2621) of Administrative Law Judge Richard K. Malamphy 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 eight and one-quarter years of coal mine employment, found employer to be the responsible operator, and noted that this claim is a duplicate claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge found that the new evidence failed to establish the existence of

pneumoconiosis pursuant to 20 C.F.R. §718.202 and therefore, also failed to establish a material change in conditions pursuant to Section 725.309(d). Accordingly, he denied benefits.

On appeal, claimant contends that the administrative law judge failed to apply the definition of pneumoconiosis set forth in the Act in weighing the new medical opinions at Section 718.202(a)(4). Claimant further asserts that the administrative law judge failed to consider whether the new evidence established total respiratory disability pursuant to Section 718.204(c). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is 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).

Where a claimant files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, and determine whether claimant has established at least one of the elements previously decided against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLA 2-10 (6th Cir. 1994). If so, claimant has demonstrated a material change in conditions and the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Ross, supra.*

Claimant was previously denied benefits because he failed to establish any element of entitlement pursuant to Sections 718.202(a) and 718.204. Director's Exhibit 35. The administrative law judge considered the newly submitted evidence to determine whether it established a material change in conditions. Decision and Order at 3, 5-8; *see Ross, supra.*

[1] We affirm as unchallenged on appeal the administrative law judge's findings regarding length of coal mine employment, responsible operator status, and pursuant to 20 C.F.R. §718.202(a)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Pursuant to Section 718.202(a)(4), claimant contends that the administrative law judge failed to determine whether the medical opinion evidence established the existence of pneumoconiosis as defined by the Act. Claimant's Brief at 3. Claimant's contention lacks merit. The administrative law judge considered specifically whether "pneumoconiosis as defined in §718.201" was established by the four new medical opinions. Decision and Order at 6. Drs. Dahhan, Fino, and Branscomb all concluded that claimant suffered no pulmonary disease or impairment arising out of coal dust exposure. Director's Exhibit 9; Employer's Exhibits 1, 2; *see* 20 C.F.R. §718.201. Dr. Sundaram made no cardiopulmonary diagnosis. Director's Exhibits 10, 11. Therefore, we reject claimant's contention.

Claimant further asserts that *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), compels remand for the administrative law judge to reconsider the medical opinion evidence. Claimant's Brief at 3-6. Contrary to claimant's contention, *Warth* is inapplicable to the facts of this case. None of the physicians ruled out the existence of pneumoconiosis based on the presence of a purely obstructive respiratory impairment. In fact, the only type of respiratory impairment identified by any of the physicians was restrictive. Director's Exhibit 9. Therefore, we reject claimant's contention and affirm the administrative law judge's finding pursuant to Section 718.202(a)(4).

Claimant alleges that the administrative law judge failed to consider whether the new evidence established total respiratory disability pursuant to Section 718.204(c). Claimant's Brief at 3. We agree that under Section 725.309(d), the administrative law judge should have considered whether the new evidence established this element of entitlement. *See Ross, supra*. However, review of the record indicates that remand is not required in this case. Pursuant to Section 718.204(c)(1)-(3), all of the new objective studies were non-qualifying[2] and the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Director's Exhibits 8, 12, 13. Pursuant to Section 718.204(c)(4), all of the physicians who addressed disability since the previous denial opined that claimant retained the respiratory pulmonary capacity to perform his usual coal mine employment. Director's Exhibit 9; Employer's Exhibits 1, 2. Dr. Sundaram identified a "respiratory impairment," but did not quantify its severity, nor did he provide an assessment of claimant's physical limitations, if any.[3] Director's Exhibit 11; *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon*., 9 BLR 1-104 (1986)(*en banc*). Moreover, review of the entire record reveals no medical evidence, old or new, of disability causation pursuant to Section 718.204(b). Under these circumstances, the administrative law judge's

[2] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[3] Dr. Sundaram's CM-988 physical examination form expressly indicates that the shortness of breath symptoms listed are claimant's own description of his physical complaints. Director's Exhibit 10 at 2.

omission constitutes harmless error. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Therefore, we need not remand this case for consideration of the new evidence pursuant to Section 718.204(c).

Accordingly, the administrative law judge's Decision and Order 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