BRB No. 98-1326 BLA

TROY 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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Gregory S. Feder (Arter & Hadden LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (97-BLA-0866) of Administrative Law Judge Daniel J. Roketenetz 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 instant case involves a duplicate claim filed on April 9, 1996.[1] The administrative law judge found the evidence

[1]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on September 22, 1987. Director's Exhibit 26. By Decision and Order dated January 23, 1991, Administrative Law Judge Daniel J.

insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's length of coal mine employment finding. Claimant also contends that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. 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.

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).

Roketenetz found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* Accordingly, Judge Roketenetz denied benefits. *Id.* By Decision and Order dated January 29, 1992, the Board affirmed Judge Roketenetz's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Crum v. Peter Cave Coal Co.*, BRB No. 91-0873 BLA (Jan. 29, 1992) (unpublished). The Board, therefore, affirmed Judge Roketenetz's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1987 claim.

Claimant filed a second claim on April 9, 1996. Director's Exhibit 1.

Claimant initially challenges the administrative law judge's length of coal mine employment finding. After finding that claimant worked as a coal miner from August 24, 1976 through March 28, 1986, the administrative law judge credited claimant with nine years and eleven months of coal mine employment. Decision and Order at 6. Claimant, however, argues that the administrative law judge erred in not crediting him with one year of coal mine employment for each calendar year in which he worked for 125 days or more in a coal mine. We disagree. Because the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly recognized that the 125 day rule set out at 20 C.F.R. §718.301(b) does not mandate that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment. *See Croucher v. Director, OWCP*, 20 BLR 1-67 (1996) (*en banc)*.[2] We, therefore, affirm the administrative law judge's finding of nine years and eleven months of coal mine employment.

Claimant next contends that the administrative law judge erred in finding the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309. The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Decision and Order at 8-14. The administrative law judge, therefore, found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Id.* at 14. Claimant argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and

[2]In *Croucher v. Director, OWCP*, 20 BLR 1-67 (1996) (*en banc),* the Board held that the 125 day rule set out at 20 C.F.R. §718.301 has no applicability unless an administrative law judge initially determines that a miner has established a calendar year of coal mine employment. Once a miner establishes a calendar year of coal mine employment, the party opposing entitlement is provided an opportunity to establish that the miner's employment was not regular by proving that the miner was not employed in or around a coal mine for a period of at least 125 working days during the year. The Board noted its disagreement with the decisions of the United States Court of Appeals for the Seventh and Eighth Circuits in *Landes v. Director, OWCP*, 997 F.2d 1192, 17 BLR 2-172 (7th Cir. 1993) and *Yauk v. Director, OWCP*, 912 F.2d 192, 12 BLR 2-339 (8th Cir. 1989). In *Landes* and *Yauk*, the courts held that the 125 day rule requires that a miner who establishes at least 125 working days of coal mine employment in a calendar year be credited with one year of coal mine employment.

(a)(4).[3]

We initially note that claimant's brief neither raises any substantive issues nor identifies any specific error on the part of the administrative law judge in determining that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant's statements regarding this finding merely point to evidence favorable to his position and amount to no more than a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Claimant contends that the administrative law judge committed numerous errors in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). In finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge credited the opinions of Drs. Dahhan, Fino and Castle that claimant did not suffer from pneumoconiosis over the contrary opinions of Drs. Younes and Rasmussen. Decision and Order at 11-14; Director's Exhibits 10, 11; Claimant's Exhibit 5; Employer's Exhibits 1, 4, 5.

[3]Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (a)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that the opinions of Drs. Fino and Castle should have been accorded less weight because these physicians did not examine claimant.[4] We disagree. The Board has held that an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may properly take into consideration the fact that a physician has not personally examined the miner, but he is not required to discredit the opinion on that basis.[5] *See Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984).

Claimant also argues that Dr. Castle's opinion is directly contrary to the applicable regulations. Claimant notes that Dr. Castle indicated that pneumoconiosis cannot be diagnosed in the absence of a positive chest x-ray. Contrary to claimant's characterization, Dr. Castle merely indicated that "[w]hen coal workers' pneumoconiosis causes *significant lung disease* it does so in the presence of an abnormal chest x-ray, indicating small, round, regular opacities." Employer's Exhibit 5 (emphasis added). Dr. Castle provided a detailed explanation for his finding that claimant suffered from a tobacco smoke induced lung disease rather than one attributable to his coal dust exposure. *Id.*

Claimant finally argues that he is entitled to a presumption that his chronic bronchitis and chronic obstructive lung disease are substantially related to or aggravated by the presence of pneumoconiosis. In support of his argument, claimant references *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). In *Stiltner*, the United States Court of Appeals for the Fourth Circuit, in a medical benefits only case, held that a miner meets his burden of showing that his medical expenses were necessary to treat pneumoconiosis if his treatment relates to any pulmonary condition resulting from or substantially

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[4]Claimant also contends that Drs. Fino and Castle based their opinions "upon evidence which is not of record." Claimant's Brief at 17. However, because claimant fails to identify any such evidence, we reject this contention.

[5]We note that the opinions of Drs. Fino and Castle corroborate the opinion of an examining physician, Dr. Dahhan. *See* Employer's Exhibit 1.

aggravated by the miner's pneumoconiosis. Since most pulmonary disorders are going to be related to or at least aggravated by the presence of pneumoconiosis, the court held that when a miner receives treatment for a pulmonary disorder, a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis, making the employer liable for the medical costs. *Id.* Such a holding has no relevance to the facts of the instant case.

We note that claimant does not challenge the administrative law judge's findings that the opinions of Drs. Younes and Rasmussen are not sufficiently reasoned. Decision and Order at 14. Claimant also does not challenge the administrative law judge's finding that the opinions of Drs. Dahhan, Fino and Castle that claimant does not suffer from pneumoconiosis are better reasoned than the contrary opinions of Drs. Younes and Rasmussen. *Id.* We, therefore, affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant next argues that the administrative law judge erred in not considering whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). We agree. Because the issue of total disability was not previously adjudicated in claimant's favor, the administrative law judge should have also considered whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Consequently, we remand the case to the administrative law judge to consider whether the newly submitted medical evidence is sufficient to establish total disability.

Should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309, he must consider claimant's 1996 claim on the merits. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge