BRB No. 99-0948 BLA

KELLY HENSLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1998-BLA-1157) of Administrative Law Judge Thomas F. Phalen, Jr. 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). At the most recent hearing, the parties stipulated to at least sixteen years of coal mine employment. In this duplicate claim, the administrative law judge determined that claimant's prior claim had been finally denied on June 22, 1995, and that claimant previously failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment.[1] The administrative law judge reviewed the newly submitted

[1] This case involves a long procedural history. Claimant initially notified the Social Security Administration (SSA) of an intent to file an application for benefits under the Act on

evidence under the regulations at 20 C.F.R. Part 718, and found this evidence insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. The administrative law judge, thus, concluded that claimant did not establish a material change in

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March 4, 1970. Director's Exhibit 18 at 213. Following claimant's formal application for benefits, SSA denied his claim on December 21, 1970, January 10, 1972, and August 27, 1973, on November 29, 1974 after a hearing before an administrative law judge, and on February 3, 1975 after review by the Appeals Council. *Id*. at 204, 206, 213, 253. On May 19, 1975, claimant filed an application for benefits with the Department of Labor (DOL). *Id*. at 284. In 1978, claimant elected SSA review of his claim under the 1977 Amendments to the Act. *Id*. at 203. SSA denied the claim on May 29, 1979 on the ground claimant did not have pneumoconiosis. *Id*. at 202. DOL also reviewed the claim under the 1977 amendments, and denied the claim on January 30, 1980. *Id*. at 259. Following a hearing on the merits, Administrative Law Judge Bernard J. Gilday, Jr. found the evidence of record insufficient to invoke the interim presumptions at 20 C.F.R. §§410.490, 727.203(a)(1)-(4), or to establish entitlement pursuant 20 C.F.R. Part 410, Subpart D. Accordingly benefits were denied. *Id*. at 142. On appeal, the Board affirmed the administrative law judge's denial of benefits. *See Hensley v. Director, OWCP*, BRB No.85-2790 BLA (Aug 10, 1987) (unpub.). *Id*. at 134. Claimant took no further action.

Claimant filed his second application for benefits on July 17, 1989, which the district director denied on January 3, 1990 because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory impairment. *Id*. at 334, 378. Claimant requested modification on March 20, 1990 which the district director denied on June 8, 1990 and September 10, 1990 because the new evidence did not show a mistake in a determination of fact or a change in conditions as claimant did not show the existence of pneumoconiosis or a totally disabling respiratory impairment. *Id*. at 289, 327, 333. Following a hearing, Administrative Law Judge C. Richard Avery denied benefits because he concluded that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 after determining that the newly submitted evidence failed to demonstrate the presence of a totally disabling respiratory impairment. *Id*. at 49. On appeal, the Board affirmed Judge Avery's findings at 20 C.F.R. §718.204(c)(1)-(3), but vacated his findings at 20 C.F.R. §§718.204(c)(4) and 725.310 and remanded this case for further findings. *See Hensley v. Director, OWCP*, BRB No. 92-2401 BLA (Dec. 28, 1993)(unpub.). *Id*. at 43. On remand, Judge Avery found the medical opinion evidence insufficient to demonstrate the presence of a totally disabling respiratory impairment at Section 718.204(c)(4) and denied modification. *Id*. at 36. On appeal, the Board affirmed Judge Avery's findings. *See Hensley v. Director, OWCP*, BRB No. 94-3734 BLA (June 22, 1995)(unpub.). *Id*. at 1. Claimant took no further action until he filed the present claim on November 21, 1997. Director's Exhibit 1.

conditions at 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant challenges the findings of the administrative law judge on the existence of pneumoconiosis and the presence of a totally disabling respiratory impairment. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

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).

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*).

In the present case, claimant asserts that the newly submitted evidence demonstrates a material change in conditions at Section 725.309. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly considered this case in light of *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In *Ross*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. *Id.*

The administrative law judge properly concluded that claimant's prior claim was denied because the evidence of record failed to show the existence of pneumoconiosis or the presence of a totally disabling respiratory impairment. *See* Decision and Order at 5. The administrative law judge correctly considered claimant's newly submitted medical evidence which included six x-rays, two pulmonary function studies, twelve blood gas studies, and medical reports from Drs. Wicker and Todd at St. Joseph's Hospital, and Dr. Varghese at Mary Breckenridge Hospital. Director's Exhibits 3-7, 14-16. Based on his review of the newly submitted evidence, and contrary to claimant's assertion that he deferred solely to the x-ray interpretations of the most qualified readers and the numerical weight of the x-ray evidence, the administrative law judge properly found that the existence of pneumoconiosis was not established at Section 718.202(a)(1) as the newly submitted x-ray evidence was unanimously negative for pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *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).[2]

[2] The administrative law judge also determined that since the record contained no biopsy or autopsy evidence, claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), and that claimant, a living miner, was not entitled to the presumptions at Section 718.202 (a)(3) as this claim was filed after January 1, 1982 and the record does not contain any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2)-(3), 718.304, 718.305(e), 718.306. These findings are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis, the administrative law judge permissibly accorded greater weight to the medical opinion of Dr. Wicker, which did not diagnose clinical or legal pneumoconiosis, because the report was more credible than the opinions of Drs. Todd and Varghese. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400 (1982).[3] Further, the administrative law judge did not err when he declined to accord determinative weight to the medical opinions of Drs. Todd and Varghese solely because they were claimant's treating physicians. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). We, therefore, affirm the finding of the administrative law judge that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a) and thus, a material change in conditions at Section 725.309 as it is supported by substantial evidence.

At 20 C.F.R. §718.204(c)(2), contrary to claimant's contention, the administrative law judge properly determined that although the record contained two new blood gas studies which met the regulatory disability standards, the weight of the newly submitted blood gas study evidence was non-qualifying under the regulatory criteria, and thus, insufficient to establish the presence of a totally disabling respiratory impairment. *See* 20 C.F.R.

[3] Contrary to claimant's assertion that Dr. Todd's diagnosis of black lung with chronic obstructive pulmonary disease (COPD) is based on physical examinations, pulmonary function studies, work history and a review of claimant's medical records, the report of Dr. Todd indicates that Dr. Todd treated claimant during his June 1997 hospitalization for renal insufficiency. *See* Director's Exhibit 16. At this time, Dr. Todd performed a physical examination and testing related to claimant's renal problem. *Id*. These records also reflect that Dr. Todd knew that claimant was a retired miner and a nonsmoker, and that black lung and COPD were listed as medical conditions of the miner. *Id*.

§718.204(c)(2); *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).[4]

[4] The administrative law judge's findings at Section 718.204(c)(1) and (3) are affirmed as they are unchallenged on appeal. *Skrack*, *supra*.

Likewise, at Section 718.204(c)(4), contrary to claimant's argument, the administrative law judge properly found that based on the newly submitted medical opinion evidence, claimant did not meet his burden of proof as the evidence did not establish the presence of a totally disabling respiratory impairment. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-139 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991); *Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). In so doing, the administrative law judge properly found that the medical opinions of Drs. Todd and Varghese did not establish total disability because they did not discuss the presence of a disabling respiratory impairment,[5] and that Dr. Wicker's opinion that claimant's respiratory capacity was adequate to perform his usual coal mine employment was supported by its underlying documentation. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic*, *supra*; *Kendrick v. Kentland-Elkhorn Coal Corp.*, 5 BLR 1-730 (1983). Finally, at Section 718.204(c), the administrative law judge properly weighed all the evidence supportive of claimant's burden of proof against the contrary probative evidence and permissibly concluded that the newly submitted evidence was insufficient to demonstrate the presence of a totally disabling respiratory impairment, and thus, insufficient to establish a material change in conditions at Section 725.309. *See Ross*, *supra*; *Fields*, *supra*; *Shedlock v. Bethlehem Mines Corp.* 9 BLR 10195 (1986); *aff'd on recon*. 9 BLR 1-236 (1987)(*en banc*). We, therefore, affirm the findings of the administrative law judge that the newly submitted evidence did not demonstrate the presence of a totally disabling respiratory impairment or a material change in conditions as it is supported by substantial evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[5] Because these medical opinions did not diagnose a pulmonary or respiratory disability or otherwise assess the severity of a pulmonary or respiratory impairment, the administrative law judge was not required, as claimant asserts, to consider the exertional requirements of claimant's usual coal mine employment and compare these findings to the physicians' disability diagnoses. *Gee*, *supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge