BRB No. 00-1016 BLA

J. C. LAWSON Claimant-Petitioner v. GIVENS COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- 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 Denying Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer;

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0952) of Administrative Law Judge Robert L. Hillyard rendered on a duplicate 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 employer conceded, that claimant established eleven and one-half 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 4. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability, elements previously adjudicated against claimant, and thus, found that a material change in conditions was not established. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.[3]

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[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 65 Fed. Reg. 80,045-80, 107 (2000)(to be codified at 20 C.F.R. parts 718, 722,725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's first claim for benefits was denied on July 27, 1995 by Administrative Law Judge Daniel J. Roketenetz because claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 32-1.

[3] Referring to a letter from claimant dated September 16, 1998, in which claimant asserts that his former attorney had led him to believe that Judge Roketenetz's denial had been appealed in 1995, Administrative Law Judge Robert L. Hillyard notes that even if this claim had been treated as a request for modification, benefits would have been denied as the

On appeal, claimant contends that the newly submitted evidence of record is sufficient to establish the existence of pneumoconiosis and total disability and thus, sufficient to establish a material change in conditions. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which all parties have responded. Claimant contends that the new regulations will affect the outcome of this case and therefore urges the adjudication of this claim using the new regulations. Specifically, claimant contends that 20 C.F.R. §718.104(d), relating to the weighing of treating physicians, 20 C.F.R. §718.201(a)(2), relating to the definition of pneumoconiosis, 20 C.F.R. §718.201(c), relating to the progressivity of pneumoconiosis, and 20 C.F.R. §718.204(a), relating to the affect of non-respiratory disabilities, as revised, will affect the outcome of this case. Employer and Director contend that the regulations at issue will not affect the outcome of this case. Having considered the responses of the parties and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations. Contrary to claimant's contentions, the regulation as revised at Section 718.104 applies only to evidence developed after January 19, 2001. Regarding Section 718.201, relating to the definition of pneumoconiosis, we note that the regulation as revised, broadening the definition of pneumoconiosis to include both "clinical" and "legal" pneumoconiosis and recognizing the progressive nature of pneumoconiosis, merely codifies existing circuit law, *see Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 304, (6th Cir. 1987); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 442 (6th Cir. 1989); *Crace v. Kentland Elkhorn Coal Co.*, 109 F.3d 1163, 1167

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evidence of record did not establish a change in conditions or a mistake in a determination of fact in the prior denial. Decision and Order at 7 n.6. This finding has not been challenged on appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(6th Cir. 1997). Additionally, contrary to claimant's argument, the revised regulation at Section 718.204(a) does not affect this case as there is no evidence that claimant's total disability is non-respiratory or pulmonary. In addition, we conclude that none of the other challenged regulations affect the outcome of this case based on our review. Therefore, we will proceed to adjudicate the merits of this appeal.

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 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 establish 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 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*).

Claimant contends that the administrative law judge should have found the existence of pneumoconiosis established based on the positive x-ray reading by Dr. Baker, a B-reader, of the September 27, 1993 x-ray,[4] Dr. Moore's diagnosis of pneumoconiosis,[5] and the most recent x-ray of record taken December 17, 1998 which was read positive by Dr. Alexander, a Board-certified radiologist and B-reader.

There are six interpretations of the newly submitted x-rays dated December 17, 1998 and November 17, 1998. The November 17, 1998 x-ray was read as positive by Dr. Baker , a B-reader, and Dr. Sargent, a B reader and board certified radiologist. Director's Exhibit 15. The December 17, 1998 x-ray was read as negative by Drs. Scott and Wheeler, both B-readers and board certified radiologists, as negative by Dr. Dahhan, a B reader, and as

[4] This 1993 x-ray was part of the record prior to the 1995 denial and cannot therefore establish a material change in conditions. *See Ross, supra*.

[5] Claimant's general allegation that claimant's treating physician, Dr. Moore, had been treating claimant for coal worker's pneumoconiosis and had found him totally disabled due to pneumoconiosis is a mere recitation of evidence favorable to claimant and as such is insufficient to establish a challenge to the administrative law judge's finding that the newly submitted opinions failed to establish the existence of pneumoconiosis and total disability. 20 C.F.R. §§718.202(a)(4), 718.204(b)(2)(iv); *Cox, supra*. Moreover, Dr. Moore's 1993 opinion is not one of the newly submitted opinions. *See Ross, supra*.

positive by Dr. Alexander, a B-reader and board certified radiologist. Employer's Exhibit 2.

The administrative law judge permissibly found that the positive readings by Drs. Baker and Sargent did not support a material change in conditions as these physicians read earlier x-rays as positive for pneumoconiosis. *See Stewart v. Wampler Bros. Coal Co.*, 22 BLR 1-80 (*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting). The administrative law judge found that the existence of pneumoconiosis was not established based on the readings of the December 17, 1998 x-ray by Drs. Dahhan, Scott and Wheeler. This was rational. Decision and Order at 8; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, and a material change in conditions on that basis. 20 C.F.R. §718.202(a)(1); *Ross, supra*.[6]

We will not address claimant's general contention that the evidence establishes total disability as it is not sufficiently briefed. *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). Claimant alleges generally that the administrative law judge erred because he failed to consider the nature of claimant's usual coal mine employment in conjunction with his assessment that claimant was not totally disabled. However, where, as here, the administrative law judge noted that the pulmonary function study and blood gas study evidence did not establish total disability, and the medical opinions found that claimant could perform his coal mine employment and claimant has not otherwise challenged these findings, they must be affirmed. *Cox*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, claimant's general contention that his condition precludes him from further exposure to coal dust is insufficient to establish a totally disabling respiratory impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Nor, do we need to address claimant's general contention that having established the existence of pneumoconiosis, he is entitled to the presumption that his pneumoconiosis arose out of coal mine employment, as the existence of

[6] The administrative law judge's findings pursuant to Sections 718.202(a)(2), (3) and 718.204(c)(1)-(3) are affirmed as unchallenged on appeal. *Skrack*, *supra*; *see* 20 C.F.R. §718.202(a)(2), (3), 718.204(b)(2)(i)-(iii).

pneumoconiosis was not established. 20 C.F.R. §718.203(b).

As the administrative law judge rationally found that the newly submitted evidence failed to establish either the existence of pneumoconiosis or total disability, we affirm the administrative law judge's finding that claimant has failed to establish a material change in conditions and must affirm the denial of benefits. *Ross, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge