BRB No. 02-0773 BLA

JEFFREY ASHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BLUE DIAMOND COAL COMPANY, INCORPORATED	)	DATE ISSUED: _____
	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

Francesca L. Maggard (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (01-BLA-0852) of Administrative Law Judge Daniel J. Roketenetz (the administrative law

judge) on a duplicate claim[1] 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).[2] The administrative law judge found that claimant established thirty years of coal mine employment. Noting that the prior claim was denied based on claimant's failure to establish the existence of pneumoconiosis, the administrative law judge found that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309 (2000).[3] Specifically, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202. Accordingly, benefits were denied. On appeal, claimant relies on the opinion of his treating physician, Dr. Cornett, and the opinion of Dr. Younes in arguing that the evidence establishes that he is totally disabled due to pneumoconiosis. Employer/carrier (employer) responds, and urges the Board to affirm the decision below as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in the appeal.

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).

The regulation at 20 C.F.R. §725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. §725.309 (2000). The United States Court of Appeals for the

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[1] Claimant filed the instant claim on June 23, 2000. Director's Exhibit 1. Claimant's original claim, filed on August 26, 1991, was denied by Administrative Law Judge Frank D. Marden by Decision and Order dated May 25, 1994 based on claimant's failure to establish the existence of pneumoconiosis under 20 C.F.R. §718.202. Director's Exhibit 36. The Board affirmed the denial of benefits in *Asher v. Blue Diamond Coal Co.*, BRB No. 94-2571 BLA (Mar. 20, 1995)(unpublished). *Id*.

[2] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2; 65 Fed. Reg. 80,057.

Sixth Circuit, within whose jurisdiction this claim arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), has held that in assessing whether a material change in conditions has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). In the instant case, claimant's original claim was denied because the evidence failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202 (2000). Director's Exhibit 36. Consequently, the newly submitted evidence must establish the existence of pneumoconiosis in order to establish a material change in conditions under 20 C.F.R. §725.309 (2000).

Claimant contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4).[4] Specifically, claimant argues that the administrative law judge erred by not according greater weight to the medical opinion of his treating physician, Dr. Cornett. Dr. Cornett opined that claimant is totally and permanently disabled due to chronic obstructive pulmonary disease that is based, in substantial part, on claimant's coal dust exposure. Director's Exhibit 27. Although the administrative law judge recognized Dr. Cornett's status as claimant's treating physician, he found that Dr. Cornett's opinion is entitled to little weight because her report is neither well reasoned nor well documented. Specifically, the administrative law judge noted that the first of Dr. Cornett's two reports is "almost completely illegible" while the second is a two-paragraph letter in which Dr. Cornett "fails to state the specific results of any test or x-ray she has conducted or reviewed or the findings of any clinical examination she or any other physician has conducted." Decision and Order at 13; Director's Exhibit 28. The administrative law judge also found that Dr. Cornett failed to demonstrate any understanding of the exertional requirements of claimant's usual coal mine employment or to discuss claimant's "lengthy smoking history or [to] address what effect that habit has had on his respiratory condition." Decision and Order at 13.

Claimant asserts that Dr. Cornett's medical opinion "is confirmed by numerous other medical reports and x-ray interpretations in the record" and "was based on treatment over a period of time." Claimant's Brief at 3. Claimant thus argues that Dr. Cornett, due to her prolonged contact with claimant, is in a better

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence fails to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) - (3). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

position to assess claimant's condition than Dr. Fino who never examined claimant and provided a one-time consulting report.

Claimant's contentions lack merit. Contrary to claimant's contention, the administrative law judge did not err when he accorded less weight to Dr. Cornett's medical opinion. The administrative law judge properly provided several reasons in support of his finding that Dr. Cornett's opinion is neither well reasoned nor well documented. *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 123 S.Ct. 865 (U.S. Jan. 13, 2003). Specifically, the administrative law judge properly found that Dr. Cornett failed to cite the results of any objective test or physical examination in support of her opinion, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and failed to discuss claimant's lengthy smoking history or to address what effect claimant's smoking habit had on his respiratory condition, *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). The administrative law judge, therefore, properly discredited Dr. Cornett's opinion.

Further, claimant's remaining statements, regarding the administrative law judge's consideration of whether the newly submitted evidence is sufficient to establish a material change in conditions, amount to no more than a request that the Board reweigh the evidence. 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).

Because substantial evidence supports the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4), we affirm that finding. We also affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish a material change in conditions at 20 C.F.R. §725.309 (2000) pursuant to *Ross*, and the administrative law judge's denial of benefits.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge