BRB No. 05-0844 BLA

JIMMY ELDRIDGE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELDRIDGE COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 06/20/2006
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Before: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-0008) 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).[1] This case involves claimant's request for modification of a duplicate claim filed on January 16, 1998.[2] In the initial consideration of claimant's 1998 duplicate claim, Administrative Law Judge Donald W. Mosser found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibit 68. Judge Mosser, therefore, found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* Accordingly, Judge Mosser denied benefits. *Id.* By Decision and Order dated March 6, 2002, the Board affirmed Judge Mosser's finding that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Eldridge v. Eldridge Coal Co.*, BRB No. 01-0654 BLA (Mar. 6, 2002)(unpublished). The Board, therefore, affirmed Judge Mosser's denial of benefits. *Id.*

Claimant filed a request for modification on August 22, 2002. Director's Exhibit 76. *Id*. Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and was, therefore, insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in finding that claimant was not totally disabled due to pneumoconiosis. 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.[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on June 26, 1991. Director's Exhibit 45. The district director denied benefits on December 10, 1991, because he found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. *Id.* There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a second claim on January 16, 1998. Director's Exhibit 1.

[3]Because no party challenges the administrative law judge's determination that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant generally contends that the administrative law judge erred in finding that claimant was not totally disabled due to pneumoconiosis. The Board has held that in considering whether a claimant has established a change in conditions pursuant to 20 C.F.R. §725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). In the prior decision, Judge Mosser denied benefits because he found that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Director's Exhibit 68. The Board subsequently affirmed Judge Mosser's finding pursuant to 20 C.F.R. §725.309 (2000). *Eldridge, supra*.

An administrative law judge, in considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), should initially address whether the newly submitted evidence alone is sufficient to support a material change in conditions. *See Nataloni*, *supra*; *Kovac*, *supra*. If it is sufficient to do so, claimant will have established a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[4] The administrative law judge would next be required to address whether all of the evidence submitted since the denial of the previous claim is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). If the evidence is sufficient to establish a material change in conditions, the administrative law judge would proceed to the merits of the duplicate claim.

The relevant issue before the administrative law judge was whether the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser's denial of claimant's 1998 duplicate claim) was sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). In order to establish a material change in conditions, the newly submitted evidence must support a finding of total disability.[5] Thus, in order to

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[4]Although Sections 725.309 and 725.310 have been revised, these revisions apply only to claims filed after January 19, 2001.

[5]Claimant's 1991 claim was denied because the district director found that the

establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser's denial of the miner's 1998 duplicate claim) must support a finding of total disability pursuant to 20 C.F.R. §718.204(b).[6]

The administrative law judge found that the newly submitted evidence (*i.e.*, the evidence submitted subsequent to Judge Mosser's denial of benefits) was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Decision and Order at 8-9. The administrative law judge found that the only relevant newly submitted evidence was a September 30, 1992 pulmonary function study conducted by Dr. Mandviwala. Decision and Order at 8; Director's Exhibit 83. Because this pulmonary function study is non-qualifying, the administrative law judge properly found that it is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge also found that there was no newly submitted evidence supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iv). Claimant's statements neither raise any substantive issue nor identify any specific error on the part of the administrative law judge in determining that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).[7] We, therefore, affirm the administrative law judge's findings that the

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evidence was insufficient to establish that the miner's total disability was due to pneumoconiosis. Director's Exhibit 45. In denying claimant's 1991 claim, the district director did not clearly delineate whether the denial was based upon a finding that the evidence was insufficient to establish the existence of a totally disabling respiratory impairment, a finding that the evidence was insufficient to establish that the miner's totally disabling respiratory impairment was due to pneumoconiosis, or both. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), the newly submitted evidence must support a finding of total disability. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). If the newly submitted evidence is insufficient to support a finding of total disability, a finding of total disability due to pneumoconiosis is necessarily precluded.

[6]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b) while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[7]Claimant argues that "Judge Phalen" erred in finding that claimant was not totally disabled due to pneumoconiosis. *See* Claimant's Brief at 2, 4. We note that there is no evidence that "Judge Phalen" is involved in this case.

newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *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).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish total disability, *see* 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).

Although claimant generally argues that the administrative law judge erred in his consideration of the medical opinion evidence, claimant fails to identify any specific medical opinion evidence. Moreover, we note that the administrative law judge properly found that the record does not contain any newly submitted medical opinion evidence.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge