BRB No. 00-0635 BLA

JAMES D. PENNINGTON	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0070) 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] Initially, claimant filed a claim for benefits in April 1993. Director's Exhibit 27-307. On May 24, 1995, Administrative Law Judge J. Michael O'Neill granted employer's motion to dismiss the claim on the grounds that claimant did not state his reason for rejecting the district director's denial of

[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.

benefits. Director's Exhibit 27-1. The district director found that the evidence did not show that claimant had pneumoconiosis, did not show that the disease was caused at least in part by coal mine work, and did not show that claimant was totally disabled by the disease. Director's Exhibit 27-215.

Claimant filed a second claim on October 7, 1996. Director's Exhibit 1. Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) found that claimant demonstrated at least twenty-three years of coal mine employment. Decision and Order at 4. The administrative law judge dismissed employer from the proceeding. Decision and Order at 6. Next, the administrative law judge considered the case at 20 C.F.R. §725.310 (2000), and stated that he did not find that any mistake in a determination of fact was made by the district director in his denial of the claim or by the dismissal of the claim by Judge O'Neill. Decision and Order at 7; *see* 20 C.F.R. §725.310(a)(2000). Further, the administrative law judge found that claimant failed to demonstrate the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4)(2000). Decision and Order at 8-9. The administrative law judge concluded that claimant did not demonstrate a change in condition from his earlier claim. Decision and Order at 9. In addition, with respect to total disability, the administrative law judge found, initially, that the presumption at 20 C.F.R. §718.304(2000) was not invoked. Decision and Order at 9. Further, the administrative law judge found that, with respect to 20 C.F.R. §718.204(c)(1)(2000), the two newly submitted pulmonary function studies did not establish total disability. With regard to 20 C.F.R. §718.204(c)(2)(2000), the administrative law judge found that the two newly submitted blood gas studies did not establish total disability. The administrative law judge found that 20 C.F.R. §718.204(c)(3)(2000) was inapplicable. With respect to 20 C.F.R. §718.204(c)(4)(2000), the administrative law judge found that the newly submitted medical opinion evidence did not establish total disability. Decision and Order at 10. The administrative law judge concluded that claimant did not establish a mistake in a determination of fact or change in conditions. Accordingly, benefits were denied. Decision and Order at 11.

Claimant appeals, arguing that the administrative law judge erred in finding that the x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis, and that the administrative law judge erred in finding that claimant was not totally disabled. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, arguing that claimant did not establish a material change in condition under 20 C.F.R. §725.309(2000), and that the administrative law judge's denial of benefits must be affirmed on that basis.[2]

[2] Employer filed a motion to be dismissed as a party to the case, which the Board granted by Order dated June 20, 2000.

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 February 21, 2001, to which only the Director has responded.[3] Based on the brief submitted by the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

We first address whether claimant's second claim is a request for modification pursuant to Section 725.310 (2000) or a duplicate claim under Section 725.309 (2000).[4] The Director argues that the administrative law judge erred in considering claimant's 1996 application as a request for modification under 20 C.F.R. §725.310 (2000). The Director correctly points out that claimant filed his second application more than one year after the denial of the prior claim. Director's Brief at 3; Director's Exhibit 1; Director's Exhibit 27-1. Thus, claimant's 1996 application was a duplicate claim under 20 C.F.R. §725.309 (2000), rather than a modification request under Section 725.310 (2000).

Under Section 725.309(d)(2000), if the earlier miner's claim has been finally denied, the later claim shall also be denied, on the grounds of the prior denial, unless there has been a material change in conditions. In *Sharondale Corp. v. Ross*, 42 F.2d 993, 19 BLR 2-10 (6th Cir. 1994), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, articulated the standard to be followed in determining whether a miner has established a material change in conditions in the context of a duplicate claim. According to *Ross*, the 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. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Ross*, 42 F.3d at 997-998, 19 BLR at 2-18-19.

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out

[3] The Director's brief, dated March 2, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. No response has been received from claimant. Pursuant to the Board's instructions, the failure of a party to submit a brief within twenty days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

[4] While there are new regulations at 20 C.F.R. §§725.309 and 725.310, they only apply to claims filed after January 19, 2001.

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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

We first address the issue of the existence of pneumoconiosis. With regard to the x-ray evidence of record,[5] claimant argues that the administrative law judge erred by basing his decision on the numerical superiority of x-ray interpretations. Claimant's Brief at 4. Claimant's argument is without merit. The administrative law judge found that the existence of pneumoconiosis was not established by x-ray because there was no newly submitted positive x-ray evidence of record. Decision and Order at 8. Therefore, the administrative law judge did not base his decision on numerical superiority. Further, the administrative law judge noted the qualifications of the doctors who read the x-rays. *See generally Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-279-281 (6th Cir. 1995). Inasmuch as claimant raises no other arguments pertaining to the x-ray evidence of record, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established by the newly submitted x-rays. *See* 20 C.F.R. §718.202(a)(1); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

With respect to the medical reports of record, claimant avers that the administrative law judge may have selectively analyzed them. Claimant's Brief at 4. Claimant provides no support for his contention, however, and the administrative law judge's Decision and Order reflects that he properly considered all of the medical evidence without engaging in a selective analysis. Decision and Order at 9. Thus, we reject claimant's suggestion. In fact, neither of the two doctors who authored a new medical opinion, namely Drs. Wicker and Dineen, diagnosed pneumoconiosis. Director's Exhibits 7, 8. Since claimant raises no other arguments regarding the medical opinion evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence was not sufficient to establish the existence of pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4); *Skrack*, *supra*.

[5] We affirm the administrative law judge's findings that 20 C.F.R. §718.202(a)(2)(2000) and 20 C.F.R. §718.202(a)(3)(2000) are inapplicable, inasmuch as these findings are not contested on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We next address the issue of total respiratory disability. Claimant contends that total disability is a legal determination to be made by an administrative law judge through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with a doctor's opinion regarding the miner's physical abilities.[6] Claimant contends that the administrative law judge must identify the exertional requirements of claimant's usual coal mine employment and compare said requirements to the medical reports assessing a disability. Claimant's Brief at 5. Claimant avers that the administrative law judge made no mention of claimant's usual coal mine work in finding that claimant was not disabled.[7] Claimant's Brief at 6.

Notwithstanding claimant's contentions, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence fails to establish a total respiratory or pulmonary disability in the instant case. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held, in *Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR (6th Cir. 2000), that it was error for the administrative law judge not to consider that even a mild respiratory impairment may preclude the performance of a miner's usual employment duties, depending on the exertional requirements of his usual coal mine employment. In his Decision and Order in the instant case, which was issued approximately six months prior to *Cornett*, the administrative law judge did not discuss the exertional requirements of claimant's usual coal mine employment. The administrative law judge properly determined, however, that there is no newly submitted medical opinion which suggests that claimant is totally disabled. Specifically, the administrative law judge found that there were two new medical reports to be considered. Decision and Order at 9, 10. These reports were submitted by Dr. Wicker, Director's Exhibit 7, and Dr. Dineen, Director's Exhibit 8. Dr. Wicker found that

[6] We note that the provision pertaining to total respiratory or pulmonary disability, previously set forth at 20 C.F.R. §718.204(c)(2000), is now found at 20 C.F.R. §718.204(b). We affirm the administrative law judge's findings that the new evidence was insufficient to establish total disability by means of the pulmonary function studies and blood gas studies, and that claimant failed to present evidence of cor pulmonale with right-sided congestive heart failure, inasmuch as these findings are not contested on appeal. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The administrative law judge's finding that the presumption of complicated pneumoconiosis was not invoked is also not contested on appeal, and therefore we affirm this finding. *See* 20 C.F.R. §718.304; *Skrack, supra*.

[7] Claimant contends that his usual coal mine employment included being a belt machine operator, a scoop operator and a truck driver. Claimant maintains that it can be reasonably concluded that such duties exposed claimant to heavy concentrations of dust on a daily basis. Claimant contends that it is rational to conclude that claimant's condition prevents him from engaging in his usual coal mine employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Claimant's Brief at 6. At best, claimant is arguing that continued coal mine employment is contraindicated. The Board has held that even a finding by a doctor that coal mine employment is contraindicated does not support a finding of total disability. *See Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-88 (1988).

claimant's respiratory capacity appears to be adequate to perform his previous occupation in the coal mining industry. Dr. Dineen found that claimant has no respiratory impairment and that he retains the pulmonary capacity to perform his former duties as a coal miner. Neither of these physicians explicitly discussed the exertional requirements of claimant's usual coal mine employment. *See Cornett, supra*. Nonetheless, given that the findings of Drs. Wicker and Dineen do not support claimant's burden to establish total disability, and given the absence of any contrary medical reports, *see* 20 C.F.R. §718.204(b)(2)(iv), we hold that remand pursuant to *Cornett* is unnecessary.

Finally, claimant argues that pneumoconiosis is a progressive and irreversible disease, and that this fact supports a finding of total disability. Claimant's Brief at 7. There is no newly submitted medical evidence of total disability. Thus, claimant's contention of total disability is unsupported by the record. Since claimant makes no further argument regarding this subsection, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 10.[8]

Inasmuch as claimant has identified no reversible error by the administrative law judge, we hold, as a matter of law, that claimant has not established a material change in conditions under Section 725.309 (2000). *See Ross*, *supra*; *Skrack*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[8] While claimant further argues that the administrative law judge erred in making no mention of claimant's age, education or work experience in conjunction with his assessment that claimant was not totally disabled, Claimant's Brief at 6, those factors are not relevant to establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge