BRB No. 00-0685 BLA

TROY CRUM	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

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

Leonard Stayton, Inez, Kentucky, for claimant.

Harold H. Davis, Jr. (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order On Remand - Denial of Benefits (97-BLA-0846) of Administrative Law Judge Daniel J. Roketenetz 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] This case is before the Board for the third time.

[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.

The administrative law judge found that the parties stipulated to nine and one-half years of coal mine employment, and based on the date the claim was filed, September 22, 1987, applied the regulations at 20 C.F.R. Part 718. Director's Exhibit 26. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis and accordingly denied benefits. Claimant appealed, and in *Crum v. Wolf Creek Collieries*, BRB No. 91-0873 BLA (Jan. 29, 1992)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 26. No further appeal of that denial was made. On April 9, 1996, claimant filed a duplicate claim. Director's Exhibit 1. The administrative law judge found the evidence insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 and denied benefits. Claimant appealed, and in *Crum v. Wolf Creek Collieries*, BRB No. 98-1326 BLA (July 9, 1999) (unpub.), the Board affirmed the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis, but remanded the case to determine whether the newly submitted evidence established total disability and, thereby, established a material change in conditions. The Board further held that should the administrative law judge, on remand, find the newly submitted evidence sufficient to establish a material change in conditions, he must then consider claimant's 1996 claim on the merits. On remand, the administrative law judge found that the newly submitted pulmonary function studies and medical opinion evidence established total disability and that claimant had therefore established a material change in conditions. The administrative law judge therefore considered all the evidence of record and found that claimant failed to establish the existence of pneumoconiosis. Accordingly, benefits were denied. Claimant appeals, contending that the administrative law judge erred in failing to find that the x-ray evidence and medical reports establish the existence of pneumoconiosis.[2] Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Appeals, has not filed a brief in this appeal.

[2] We affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3)(2000) as unchallenged on appeal. Likewise, we affirm his finding that total disability and a material change in conditions have been established. 20 C.F.R. §§718.204(b) and 725.309 (2000) as unchallenged as well. Decision and Order on Remand at 4-6; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 March 2, 2001, to which the parties have responded.[3] Based on the responses of the parties and our review, we hold that the outcome of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge are supported by substantial evidence, are rational and 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).

Claimant contends that the administrative law judge erred in failing to find that the x-ray evidence establishes the existence of pneumoconiosis. We disagree. In considering the chronology of the x-ray evidence as well as the qualifications of x-ray readers, the administrative law judge found that the evidence was at best "in equipoise," and since claimant bears the burden of establishing the existence of pneumoconiosis, the x-ray evidence was, therefore, insufficient to establish the existence of pneumoconiosis. This was proper. Decision and Order on Remand at 5; *Director, OWCP v. Greenwich Collieries*

[3] The Director and employer both assert that the regulations at issue in the lawsuit do not affect the outcome of the case. Claimant argues that the challenged regulations do not affect the outcome of this case, asserting that while the challenged regulations "have applicability to the current claim, the enactment of said regulations should not cause any delay in adjudication of the current claim in light of the fact that the currently applicable regulations are merely a codification of the currently existing case law." Claimant's Brief at 9.

[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); *see Staton v. Norfolk & Western Railway Co.*, 65 F.2d 55, 19 BLR 2-271 (6th Cir. 1995). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis. 20 C.F.R. §718.202(a)(1).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of pneumoconiosis. Specifically, claimant contends that the administrative law judge erred in according greater weight to the opinions rendered by Drs. Fino and Castle as they were not examining physicians, they based their opinions, in part, upon evidence not in the record, and failed to state the bases of their opinions. Claimant also contends that the opinions of Drs. Fino and Castle indicating that chronic obstructive pulmonary disease cannot be equated with coal workers' pneumoconiosis are contrary to the Act. Additionally, claimant contends that he is entitled to a presumption that his chronic bronchitis and chronic obstructive pulmonary disease are substantially related to or aggravated by the presence of pneumoconiosis.

As these arguments were previously addressed by the Board in its prior decision, however, we will not revisit them. *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *see Crum v. Wolfe Creek Collieries*, BRB No. 98-1326 BLA (July 9, 1999)(unpub.). Accordingly, as claimant offers no new arguments regarding the administrative law judge's weighing of the medical opinion evidence on the existence of pneumoconiosis, we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established. As claimant has failed to establish the existence of pneumoconiosis, an essential element of entitlement, we must affirm the denial of benefits. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge