BRB No. 97-0943 BLA

VIRGIL POTTER (DECEASED)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:_____
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Decision on Motion for Reconsideration of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Barbara E. Holmes (Blaufeld & Schiller), Pittsburgh, Pennsylvania, for claimant.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant's surviving spouse[1] appeals the Decision and Order and Decision on Motion for Reconsideration (95-BLA-1295) of Administrative Law Judge Rudolf L. Jansen 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). The instant case involves a duplicate claim filed on June 24, 1994.[2] The administrative law judge found the newly submitted evidence

[1]Claimant died on December 21, 1996. Claimant's surviving spouse, Betty Potter, is pursuing the claim.

[2]The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits with the Social Security Administration (SSA) on September 16, 1970. Director's Exhibit 22. The SSA denied the claim on February 22, 1971 and again on May 4, 1973. *Id.* There is no indication in the record that claimant took any further action in regard to his 1970 claim.

Claimant filed a second claim with the Department of Labor on August 7, 1991.

insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) and, therefore, found that claimant failed to establish a material change in condition pursuant to 20 C.F.R. §725.309.[3] Accordingly, the administrative law judge denied benefits. Claimant's surviving spouse

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Director's Exhibit 22. In a Memorandum of Informal Conference dated April 13, 1992, the district director denied the claim. *Id.* There is no evidence that claimant took any further action in regard to his 1991 claim.

Claimant filed a third claim on June 24, 1994. Director's Exhibit 1.

[3] Section 725.309 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(d). The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, 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). Claimant's prior 1991 claim was denied because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 22. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the

subsequently filed a motion for reconsideration, which the administrative law judge denied. On appeal, claimant's surviving spouse contends that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Claimant's surviving spouse also argues that the administrative law judge erred in denying her motion for reconsideration. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[4]

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).

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newly submitted evidence must support a finding of total disability pursuant to 20 C.F.R. §718.204(c).

[4]Inasmuch as no party challenges the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1), (c)(2) and (c)(3), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

After consideration of the administrative law judge's Decision and Order, the issues on appeal, and the evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). In his consideration of the newly submitted medical opinion evidence, the administrative law judge properly accorded the greatest weight to the opinions of Drs. Fino[5] and Tuteur[6] based upon their superior qualifications.[7] *See Dillon v. Peabody*

[5]Although Dr. Fino opined that claimant suffered from a mild respiratory impairment which would make it difficult for claimant to perform continuous heavy manual labor on an eight-hour per day basis, Dr. Fino noted that claimant's last coal mine employment did not require him to perform heavy manual labor on an eight-hour per day basis. Employer's Exhibit 9. Consequently, Dr. Fino opined that claimant was not disabled from his last job. *Id.*

In a "Description of Coal Mine Work and Other Employment" form, claimant acknowledged that he would sit for up to fours a day while performing his duties as a "parts runner." Director's Exhibit 22. Although claimant testified that his most recent employment as a motorman required some lifting, Transcript at 22-25, claimant subsequently admitted, during cross-examination, that he spent most of his time driving the motor. *Id.* at 33.

Coal Co., 11 BLR 1-113 (1988); Decision and Order at 10; Employer's Exhibits 9, 10. Inasmuch as the administrative law judge provided a proper basis for crediting the opinions of Drs. Fino and Tuteur over the opinions of Drs. Long, Canter and Knight, any error made by the administrative law judge in weighing the opinions of Drs. Long, Canter and Knight is harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). In light of our affirmance of the administrative law judge's findings that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

We finally address the contention of claimant's surviving spouse that the administrative law judge erred in denying her motion for reconsideration. In her motion for reconsideration, claimant's surviving spouse did not allege that the administrative law judge committed any error in his evaluation of the evidence before him. Rather, claimant's surviving spouse requested the

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Claimant explained that he drove the motor with hand-operated levers while in a sitting position. *Id.* Dr. Fino, therefore, accurately noted that claimant's last coal mine employment did not require him to perform continuous heavy manual labor on an eight-hour per day basis.

[6]Dr. Tuteur opined that claimant "is not totally disabled as a result of pulmonary or respiratory impairment in general and not totally disabled on account of any illness related to the inhalation of coal mine dust or the development of coal workers' pneumoconiosis." Employer's Exhibit 10.

[7]Drs. Fino and Tuteur are both Board-certified in Internal Medicine and Pulmonary Diseases. Employer's Exhibits 9, 10. Dr. Long is merely Board-eligible in Internal Medicine. Director's Exhibit 13. The qualifications of Drs. Canter and Knight are not found in the record.

administrative law judge to consider additional evidence not previously submitted. Consequently, the motion filed by claimant's surviving spouse, although identified as a request for reconsideration, was a request for modification. The United States Court of Appeals for the Sixth Circuit, wherein appellate jurisdiction in the instant case arises, has held that modification proceedings must be initiated before the district director pursuant to 20 C.F.R. §725.310. *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987). Consequently, the administrative law judge's denial of the motion for reconsideration is affirmed.

Accordingly, the administrative law judge's Decision and Order and Decision on Motion for Reconsideration denying benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge