

BRB No. 00-0768 BLA

MALCOLM MORGAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER 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 on Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Judith E. Kramer, Acting 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 on Remand (96-BLA-1842 and 99-BLA-0698) of Administrative Law Judge Robert L. Hillyard (the administrative law

judge) 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 is before the Board for the second time. In a Decision and Order dated December 30, 1997, the administrative law judge credited claimant with seventeen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718.² The administrative law judge found the evidence sufficient to establish a mistake in a determination of fact with respect to Administrative Law Judge George A. Fath's prior finding that the onset date of disability was January 1989. The administrative law judge also found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). Consequently, the administrative law judge found the evidence sufficient to establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).³ Further, although the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), he found the evidence insufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).⁴ Accordingly, the administrative law judge denied benefits. In a subsequent order, the administrative law judge denied claimant's request for reconsideration.

¹The 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.

²Claimant filed a claim for benefits on February 13, 1990. Director's Exhibit 1. On April 28, 1993, Administrative Law Judge George A. Fath issued a Decision and Order awarding benefits. Judge Fath found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(2), (a)(4) (2000) and 718.203(b) (2000). Judge Fath also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1) and (c)(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge Fath ordered benefits to commence as of January 1989. Employer filed a request for modification on August 3, 1993. Director's Exhibit 48.

³The revisions to the regulations at 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001.

⁴The 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) while 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).

In response to claimant's appeal, the Board affirmed the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), (a)(2) and (a)(3) (2000). However, the Board vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) (2000), and remanded the case for further consideration of the evidence. The Board also instructed the administrative law judge to reconsider his finding with respect to the issue of total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000) if he found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). *Morgan v. Whitaker Coal Co.*, BRB No. 98-0908 BLA (July 15, 1999)(unpub.)(J. McGranery dissenting). On remand, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Accordingly, the administrative law judge again granted employer's request for modification and denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). Claimant also contends that the evidence is sufficient to establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c). Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs (the Director), did not file a brief in response to claimant's appeal.

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 Ass'n 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 claimant, employer and the Director have responded.

In a brief dated March 26, 2001, employer asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. In a brief dated March 20, 2001, the Director asserted that the regulations at issue in the lawsuit do not affect the outcome of the case. However, in a brief dated March 9, 2001, claimant asserted that the amended regulations at 20 C.F.R. §§718.104(d), 718.201(a)(2), (c) and 718.204(a) and (c) would affect the outcome of the case.

The revisions to the regulation at 20 C.F.R. §718.104(d) apply to claims filed after January 19, 2001. Consequently, the provision requiring that special consideration be accorded to the report of a treating physician does not apply to the instant claim.

Additionally, application of the revised definition of pneumoconiosis would not alter the outcome of the instant case inasmuch as there is no evidence which pertains to the revisions at 20 C.F.R. §718.201(a)(1) and (c). Further, no substantive revisions have been made to the regulations which are relevant to the issue of the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

In addition, since the issue of total disability was not before the administrative law judge on remand, the revisions to the regulations at 20 C.F.R. §718.204(a) and (c) would not alter the outcome in the instant case. Moreover, the revisions to the regulation at 20 C.F.R. §725.310 apply to claims filed after January 19, 2001. Consequently, the revisions to the provision governing modification of claims do not apply to the instant claim. Finally, the revisions to the regulations do not affect the holdings in *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), and *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Based on the briefs submitted by the parties, 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.

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 into the Act 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 the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000). However, claimant does not delineate how the administrative law judge erred in his analysis of the evidence at 20 C.F.R. §718.202(a)(4) (2000). Claimant merely asserts that he has met his burden of establishing the existence of pneumoconiosis. Thus, claimant has failed to allege any specific error in the administrative law judge's findings or legal conclusions, and as such, claimant fails to provide a basis upon which the Board may review the administrative law judge's findings. See *Cox, supra*; *Sarf, supra*; *Fish, supra*. Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(4).

Furthermore, since claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we hold that the administrative law judge

properly granted employer's request for modification at 20 C.F.R. §725.310.⁵ See *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁵In view of our disposition of the case at 20 C.F.R. §725.310 (2000), we decline to address claimant's assertions with regard to the issue of total disability due to pneumoconiosis. See 20 C.F.R. §718.204(c); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994).