BRB No. 00-0848 BLA

RUSSELL T. FISHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
	)	
COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order On Remand - Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Ronald E. Archer, Houtzdale, Pennsylvania, for claimant.

Jennifer U. Toth (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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order On Remand - Denying Benefits (85-BLA-6319) of Administrative Law Judge Richard K. Malamphy rendered 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 duplicate claim is before the Board for a

[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, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

fifth time. Pursuant to the most recent appeal of this case, we affirmed the findings of the administrative law judge at 20 C.F.R. §718.202(a)(4)(2000) and his finding that the newly submitted evidence did not establish a material change in conditions by establishing the existence of pneumoconiosis. However, we remanded this case for the administrative law judge to determine if the newly submitted evidence established a totally disabling respiratory impairment, and thus, a material change in conditions on that basis. *Fisher v. Director, OWCP*, BRB No. 99-0313 BLA (Dec. 15, 1999)(unpub.). On remand, the administrative law judge considered the newly submitted evidence, found that it was insufficient to demonstrate the presence of a totally disabling respiratory impairment, and, therefore, concluded that claimant had not established a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant challenges the findings of the administrative law judge at Sections 725.309 (2000) and 718.204(c)(4)(2000). Claimant also contends that he is entitled to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United 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 claims, 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 9, 2001, to which claimant and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. 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 and 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out 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 establish any one

of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

As this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit, the administrative law judge properly applied the standard enunciated in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) for deciding whether claimant demonstrated a material change in conditions. In *Swarrow*, the court held that in ascertaining whether a claimant established a material change in conditions, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In his most recent Decision and Order on Remand, the administrative law judge reviewed, as directed, the newly submitted evidence relevant to determining whether claimant demonstrated the presence of a totally disabling respiratory impairment, and hence, a material change in conditions. *See* Decision and Order at 2-5; *Swarrow, supra*.

Claimant argues that he has established a material change in conditions as the medical report of Dr. Goldstein which shows that claimant can now walk only two or three blocks, climb one flight of stairs, and do the treadmill test for 1.5 minutes at 1.7 miles per hour establishes that his condition has worsened since the prior denial.[2] Claimant's argument is without merit, however, inasmuch as *Swarrow* requires that claimant establish a totally disabling respiratory impairment after consideration of all the newly submitted evidence. *See Swarrow, supra*. As the Director correctly contends, "worsened health" is insufficient under *Swarrow*, 72 F.3d at 317, 20 BLR at 2-91. Brief for Director at 8. In deciding that the newly submitted evidence did not establish the presence of a totally disabling respiratory impairment, the administrative law judge correctly concluded that the newly submitted pulmonary function studies were nonqualifying under the regulatory criteria and that the newly submitted blood gas study results were nonqualifying under the regulatory criteria. Director's Exhibits 11, 23, 44. Thus, the administrative law judge rationally found the newly submitted pulmonary function and blood gas study evidence was insufficient to meet claimant's burden of proving the presence of a totally disabling respiratory impairment, and consequently, insufficient to establish a material change in conditions. Likewise, the administrative law judge properly concluded that total disability was not established, as the record did not contain any evidence of cor pulmonale with right sided congestive heart failure. We, therefore, affirm the findings of the administrative law judge that claimant did

[2] Claimant does not purport to rely upon either of the other medical reports in the duplicate claim to establish total disability. Both Dr. Solic in his 1988 report and Dr. Catz in his 1985 report diagnosed no disabilities. Director's Exhibits 41, 44.

not establish a totally disabling respiratory impairment at Section 718.204(c)(1)-(c)(3)(2000) and his conclusion that claimant did not meet his burden of proving a material change in conditions based on this evidence.

Considering this evidence along with the newly submitted medical opinions, the administrative law judge also properly found that the opinion of Dr. Goldstein was insufficient to establish the presence of a totally disabling respiratory impairment. This was correct. *See* Decision and Order at 5; Director's Exhibits 22, 41, 45; 20 C.F.R. §718.204(b)(2)(iv); *Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d 1995), *aff'g* 16 BLR 1-11 (1991); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Director's Exhibit 22. Consequently, the administrative law judged properly found the newly submitted medical opinion evidence insufficient to establish a material change in conditions. *See* 20 C.F.R. §725.309; *Swarrow*, *supra*. We, therefore, affirm the findings of the administrative law judge that the newly submitted evidence is insufficient to demonstrate the presence of a totally disabling respiratory impairment, and that claimant failed to meet his burden of proving a material change in conditions as they are supported by substantial evidence. Because claimant has failed to establish a material change in conditions since his prior denial, he is not entitled to a finding on the merits. *See Swarrow*, *supra*.

Accordingly, the administrative law judge's Decision and Order On Remand - Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY

Administrative Appeals Judge