BRB No. 03-0605 BLA

RAYMOND BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTOVER MINING COMPANY	)	
	)	DATE ISSUED: 05/26/2004
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 – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order – Denying Benefits (01-BLA-0123) of Administrative Law Judge Rudolf L. Jansen on a miner's duplicate claim filed pursuant

[1]Claimant is Raymond Bowling, the miner, who has filed numerous claims for benefits. The miner filed four claims in 1973, 1975, and 1977. Director's Exhibit 26. These four claims were merged together and were finally denied by the Board on January 31, 1985. *Id.* Claimant filed a claim on September 15, 1986, which was finally denied by the Board on December 30, 1993. Director's Exhibits 26, 27. Claimant's April 8, 1994 claim was treated as a request for modification and was finally denied by Administrative Law Judge Steven E. Halpern on April 14, 1995. *Id.* Thereafter, claimant

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).[2] The administrative law judge credited the miner with fifteen years of coal mine employment pursuant to the parties' stipulation, 2002 Hearing Transcript at 11-12. Decision and Order at 3. The administrative law judge found Eastover Mining Company to be properly designated as the responsible operator in this case. *Id.* at 9. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 14-18. Therefore, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000).[3] *Id.* at 18. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis arising out of coal mine employment. Claimant's Brief at 5-6. Claimant additionally asserts that the administrative law judge erred in failing to find total respiratory disability "due to pneumoconiosis." Claimant's Brief at 7-11. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[4]

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filed another claim on April 30, 1996, which was finally denied by the district director on October 15, 1997. Director's Exhibit 28. Claimant's next claim, filed on November 4, 1998, was finally denied by a claims examiner for the Department of Labor on February 18, 1999. Director's Exhibit 29 at 12, 42. Claimant filed his present claim on March 16, 2000. Director's Exhibit 1. On October 2, 2000, the district director determined that claimant was eligible for benefits, the responsible operator contested that determination, and the case was referred to the Office of Administrative Law Judges.

[2]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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]Although the Department of Labor has made substantive revisions to 20 C.F.R. §725.309 in the amended regulations, these revisions only apply to claims filed after January 19, 2001.

[4]We affirm the administrative law judge's findings regarding the length of coal mine employment and his findings that, based on the new evidence, pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2), (a)(3) and total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (b)(2)(iii) because

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

The administrative law judge noted that the miner's previous claim was denied because claimant failed to establish the existence of pneumoconiosis arising out of coal mine employment and total respiratory disability. Director's Exhibit 29 at 12. Because this case involves a duplicate claim, the administrative law judge addressed whether the newly submitted evidence is sufficient to support a material change in conditions. In order to establish a material change in conditions in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge stated, citing *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the new evidence must be sufficient to prove one of the elements of entitlement that formed the basis of the prior denial and substantially more supportive of the claim. Decision and Order at 13-14. Therefore, the administrative law judge considered the new evidence to determine if claimant has established a material change in conditions pursuant to Section 718.202(a) and Section 718.204(b). *Id.* at 14-18.

In his brief, claimant asserts that he has pneumoconiosis arising out coal mine employment and that he is totally disabled "due to pneumoconiosis." Claimant's Brief at 5-11. Claimant refers to seven positive x-ray readings and Dr. Forehand's April 3, 2000 report to support his assertion that he is entitled to benefits. *Id.* at 6-7, 11. Additionally, claimant contends that the administrative law judge erred in accepting Dr. Branscomb's report invalidating Dr. Forehand's April 3, 2000 blood gas study because Dr. Branscomb found that the barometric pressure recorded was impossibly low. *Id.* at 7. Claimant further contends that the administrative law judge erred in accepting Dr. Branscomb's statement, regarding the recorded barometric pressure, to find the April 3, 2000 study to be invalid and to find Dr. Forehand's opinion to be unreasoned. *Id.* at 7-11. Claimant alleges that "Dr. Branscomb's statement is absurd because Dr. Forehand reported 698 mmHg and Dr. Branscomb read 698 millibars," but that Dr. Branscomb failed to consider that 1000 millibars is the equivalent of 750 mmHg. *Id.* at 7-8. Claimant has attached to his brief several pages from the Internet that purportedly support claimant's position in this regard. In fact, claimant's contention, that Dr. Branscomb's invalidation of the April 3, 2000 blood gas study is wrong, is based entirely on evidence that is outside the record. This Internet evidence was not in the record when the case was before the administrative

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these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge and, therefore, constitutes new evidence. Because the Board may not consider new evidence, *i.e.*, evidence which is not a part of the record developed at the hearing before the administrative law judge, 20 C.F.R. §802.301; *Burks v. Hawley Coal Mining Corp.*, 2 BLR 1-323 (1979); *see Sparkman v. Director, OWCP*, 2 BLR 1-488 (1979); *Ellison v. Director, OWCP*, 2 BLR 1-317 (1979), we reject claimant's contention regarding Dr. Branscomb's invalidation report.

Claimant has not stated with specificity any other alleged error made by the administrative law judge in his consideration of the evidence at Section 718.202(a)(1), (a)(4) and Section 718.204(b)(2)(ii), (b)(2)(iv), but merely recites the favorable evidence contained in the record. Since claimant has failed to provide a basis upon which the Board may review the administrative law judge's weighing of the relevant new medical evidence regarding pneumoconiosis and total respiratory disability, we affirm the administrative law judge's findings that claimant failed to establish pneumoconiosis or total respiratory disability pursuant to Section 718.202(a)(1), (a)(4) and Section 718.204(b)(2)(ii), (b)(2)(iv). *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Because we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis or total respiratory disability based on the new medical evidence, *see* discussion, *supra*, we also affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (2000), *Kirk*, 264 F.3d at 609, 22 BLR at 2-300; *Ross*, 42 F.3d at 998-999, 19 BLR at 2-20-21, and affirm his denial of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge