BRB No. 98-1094 BLA

ISAAC JOSEPH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GLENN'S TRUCKING COMPANY, INCORPORATED	)	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 Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Donna Roark (Law Offices of Phillip Lewis), Hyden, Kentucky, for claimant.

William P. Swain and Phillip J. Reverman, Jr. (Boehl, Stopher & Graves), Louisville, Kentucky, for employer.

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

PER CURIAM:

Claimant,[1] appeals the Decision and Order Denying Benefits (97-BLA-1644) of

[1] Claimant is Isaac Joseph, the miner, who filed three applications for benefits with the Department of Labor (DOL). The first claim, filed on January 22, 1981, was administratively denied on March 27, 1981. Director's Exhibit 25. Claimant took no further action and this denial became final. *Id*. The second claim was filed with DOL on October 5, 1982, and was administratively denied on March 10, 1983. Director's

Administrative Law Judge Thomas F. Phalen, Jr. 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 administrative law judge concluded that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(c) because it was insufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4) and therefore had failed to show a material worsening of claimant's condition since the prior denial. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997).

Claimant contends generally that the administrative law judge erred when he found that a material change in conditions was not established in light of the fact that claimant established that his pneumoconiosis arose out of coal mine employment and that he was totally disabled, elements which were not established previously. Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish entitlement is supported by substantial evidence, and accordingly, urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in the instant appeal.[2]

Exhibit 26. Again, claimant took no further action and this denial became final. *Id*. Claimant then filed a third claim, the instant duplicate claim, on July 6, 1996. Director's Exhibit 1.

[2] Inasmuch as no party challenges the administrative law judge's findings that claimant established 15 years of qualifying coal mine employment, that employer is the putative responsible operator, that the evidence establishes that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is total disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R.§§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Ross*, *supra*. However, in determining whether a material change in conditions has been established, the administrative law judge must find that claimant has shown "a worsening in his physical condition in order to have his claim reconsidered on the merits more than one year after the prior final denial." *Flynn*, at 1-43; *Ross*, *supra*. If the administrative law judge finds a material change in conditions, he then considers whether all of the evidence establishes entitlement to benefits. *Ross*, *supra*.

In the instant case, the administrative law judge correctly noted that although claimant had established the existence of pneumoconiosis in his previous claim, and now established that his pneumoconiosis arose out of coal mine employment, an element not established previously, claimant had not established a material change in conditions as he still had not shown that his physical condition had worsened since the prior denial. The administrative law judge held that establishing that claimant's pneumoconiosis arose out of coal mine employment, especially here where this element was established based on ten years of coal mine employment and invocation of the Section 718.203(b) presumption, did not show a worsening in claimant's condition. Director's Exhibit 26; Decision and Order at 8; *see Flynn*, *supra*. Thus, turning to the newly submitted evidence on total disability, the

administrative law judge properly found that it failed to establish total disability and therefore failed to show a worsening in claimant's physical condition since the prior denial. Decision and Order at 10.

In addressing the evidence, the administrative law judge properly found that total disability was not established at Section 718.204(c)(1)-(3) as the new pulmonary function studies and blood gas studies were non-qualifying and there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(c)(1)-(3). In considering the newly submitted doctor's opinions, the administrative law judge properly accorded greater weight to the opinions of Drs. Wicker and Powell who stated that claimant could perform his usual coal mine employment from a respiratory standpoint, Director's Exhibits 11, 16; Decision and Order at 10, than to Dr. Yalamanchi's opinion, which did not even assess the severity of claimant's impairment, Director's Exhibit 23; Decision and Order at 10, as they were better documented and reasoned. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985). As the administrative law judge's finding that these medical opinions are legally insufficient to sustain claimant's burden of establishing a total respiratory disability at Section 718.204(c)(4) is supported by substantial evidence, we affirm his finding thereunder. *See Beatty v. Danri Corp.*, 16 BLR 1-11 (1991); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986). We affirm, therefore, the administrative law judge's finding that the new evidence is insufficient to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4), and affirm his finding that claimant has failed to establish a material change in conditions by showing a "worsening" of his physical condition. *Ross*, *supra*; *Flynn*, *supra*; *see Anderson*, *supra*; *Trent*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge