BRB No. 01-0143 BLA

CARL HENSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
WHITAKER COAL CORPORATION	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order On Modification - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan and Edmond Collett, Hyden, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order On Modification - Denial of Benefits (99-BLA-1370) of Administrative Law Judge Robert L. Hillyard 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 administrative law judge previously considered the claim in his April 10, 1997 Decision and Order wherein he denied benefits. Director's Exhibit 24. In that Decision and Order, the administrative law judge credited claimant with twenty-six years of coal mine employment. On the merits of the claim, he found that claimant established the existence of pneumoconiosis by x-ray evidence at 20 C.F.R. §718.202(a)(1) (2000) and that it arose out of claimant's coal mine employment under 20 C.F.R. §718.203(b) (2000). The administrative law judge also found that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(1) - (4) (2000). Lastly, the administrative law judge determined that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304 (2000). Accordingly, benefits were denied. *Id*. Claimant appealed from the administrative law judge's decision. Director's Exhibit 25.

The Board, in *Henson v. Whitaker Coal Corp.*, BRB No. 97-1005 BLA (Mar. 24, 1998)(unpublished), affirmed the administrative law judge's findings at 20 C.F.R. §718.204(c)(4) (2000) and 20 C.F.R. §718.304 (2000). The Board further affirmed, as unchallenged on appeal, the administrative law judge's findings of twenty-six years of coal mine employment; that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §718.202(a)(1) (2000) and 20 C.F.R. §718.203(b) (2000), respectively; and that the evidence failed to establish total disability under 20 C.F.R.

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[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, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001).

[2]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), while the 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).

§718.204(c) (2000). Based on claimant's failure to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c) (2000), the Board affirmed the administrative law judge's denial of benefits. Director's Exhibit 30.

Claimant timely requested modification of the Board's Decision and Order, Director's Exhibit 31, and submitted new evidence in support of his request. *Id.;* Director's Exhibits 38, 39. The district director denied claimant's request for modification, Director's Exhibit 42, and transferred the case for a hearing pursuant to claimant's request. Director's Exhibits 23, 24. A hearing was held on April 26, 2000 before the administrative law judge.

In his decision and order, which is the subject of the instant appeal, the administrative law judge found that the newly submitted evidence failed to support a finding of total disability under 20 C.F.R. §718.204(c) (2000). The administrative law judge thus determined that claimant failed to establish a change in conditions since the prior denial under 20 C.F.R. §725.310 (2000). The administrative law judge also found that there was no mistake in a determination of fact in the prior denial of benefits under 20 C.F.R. §725.310 (2000), as there was no mistake made in his prior determination of the issues of the existence of pneumoconiosis, etiology, and total disability. Specifically, the administrative law judge, considering the newly submitted evidence in conjunction with the old evidence, found that the evidence established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and (a)(4) (2000) and that the disease arose out of claimant's coal mine employment under 20 C.F.R. §718.203(b) (2000), but that it was, however, insufficient to establish total disability under 20 C.F.R. §718.204(c) (2000). The administrative law judge thus denied claimant's request for modification and denied the claim.

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[3]While 20 C.F.R. §725.310 (2000) was recently amended, the new regulation does not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80, 057.

[4]On original consideration, the administrative law judge found the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(1) (2000) and did not consider the evidence at 20 C.F.R. §718.202(a)(1)-(4) (2000). The fact that the administrative law judge, in considering claimant's request for modification, found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1) *and* (a)(4) (2000) does not assist claimant in his burden to show either a change in conditions since the prior denial or a mistake in a determination of fact under 20 C.F.R. §725.310 (2000). The basis of the prior denial was claimant's failure to establish total disability. Thus, the administrative law judge on original consideration, having found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(1) (2000), was not required to address the evidence under 20 C.F.R. §718.202(a)(2)- (4) (2000), as these are alternative methods of establishing the presence of the disease in this case which arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). *See Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985).

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence failed to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(4) (2000). Employer responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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).

Claimant contends that the rationales provided by the administrative law judge for according less weight to the medical opinions of Drs. Baker and Myers, were inadequate. Employer argues that these reports were previously considered by the administrative law judge in his 1997 decision and order, which decision was affirmed by the Board in *Henson*, and thus they cannot demonstrate a mistake in a determination of fact or a change in conditions.

We reject claimant's challenge to the administrative law judge's weighing of the medical reports of Drs. Myers and Baker in finding that the newly submitted medical opinions, considered in conjunction with the old evidence, failed to establish a change in conditions or a mistake in a determination of fact in the prior denial of benefits. Claimant's reliance on the medical opinions of Drs. Myers and Baker is misplaced. As employer correctly argues, these reports were previously considered by the administrative law judge on original consideration of the claim, and inasmuch as these reports constitute old evidence, they cannot support claimant's burden to establish a change in conditions under 20 C.F.R. §725.310 (2000). *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). Furthermore, the Board in *Henson* held that the administrative law judge properly determined that claimant failed to establish total disability based on the medical opinions under 20 C.F.R. §718.204(c)(4) (2000) and affirmed that finding, as well as the administrative law judge's finding that claimant failed to establish total disability based on the evidence as a whole under 20 C.F.R. §718.204(c) (2000). Director's Exhibit 30 at 3. Critically, the Board previously affirmed the administrative law judge's denial of benefits based on his finding that claimant failed to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c) (2000). *Id.* at 3-4. Thus, we hold that the opinions of Drs. Myers and Baker do not establish a mistake in a determination of fact in the prior denial. 20

[5]We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted evidence, considered in conjunction with the old evidence, failed to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(1) - (3) (2000). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

C.F.R. §725.310 (2000). Further, claimant does not challenge the administrative law judge's finding that the two newly submitted medical opinions, namely the 1998 opinions of Drs. Bushy and Broudy, Director's Exhibits 31, 37, do not support a finding of total disability, Decision and Order at 11, 13.

Claimant next asserts that while the administrative law judge discussed claimant's testimony that he worked as an equipment operator at a surface coal mine, Decision and Order at 14, *see* 2000 Hearing Transcript at 9, he did not adequately consider the exertional requirements of this work in reaching his determination that claimant failed to establish total disability.

We affirm the administrative law judge's determination that the medical opinion evidence is insufficient to meet claimant's burden to establish total disability under 20 C.F.R. §718.204(c)(4), as it is rational, supported by substantial evidence and consistent with applicable law. In his 1995 report, Dr. Baker found a mild impairment with decreased FEV1, chronic bronchitis and coal workers' pneumoconiosis. Director's Exhibit 8. The administrative law judge found:

> The pulmonary function and arterial blood gas studies relied on by Dr. Baker yielded nonqualifying values. Based on the Claimant's description of his last coal mine work as a surface mine equipment operator ([Hearing] Tr. [at] 9), I find that Dr. Baker's opinion as to the degree of impairment fails to support the existence of a totally disabling respiratory impairment.

Decision and Order at 14. Given the evidence describing the exertional requirements of claimant's coal mine employment and claimant's relevant testimony, as well as the fact that Dr. Baker recognized claimant's last coal mine work as a dozer operator at a surface coal mine, the administrative law judge rationally determined that Dr. Baker's opinion as to the degree of claimant's impairment failed to support a finding of a totally disabling respiratory impairment under 20 C.F.R. §718.204(c)(4) (2000).

Dr. Broudy opined, in his 1998 report, that claimant was not totally disabled due to his coal workers' pneumoconiosis and retained the respiratory capacity to perform other types of gainful employment, including manual labor. Director's Exhibit 37. In his 1995 report, Dr.

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[6]Claimant discussed his usual coal mine work as a heavy equipment operator at both the 1996 and 2000 hearings before the administrative law judge. *See* Director's Exhibit 23 at 14, 20 (1996 Hearing Transcript); 2000 Hearing Transcript at 9. The only other evidence detailing the exertional requirements of claimant's work is contained at Director's Exhibit 4. This exhibit indicates that claimant was required to sit nine hours per day and to stand one-half hour per day while he operated equipment to move rock off coal, with no crawling, lifting or carrying required. Director's Exhibit 4.

Broudy opined that claimant retained the respiratory capacity to perform the work of an underground miner or similarly arduous manual labor. Director's Exhibit 21. The administrative law judge properly found that Dr. Broudy's opinion was entitled to substantial weight as it was consistent, well reasoned and documented, and supported by the objective evidence. Decision and Order at 11; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see also Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

In his 1998 report, Dr. Bushey did not make any finding relevant to any impairment. Director's Exhibit 31. The administrative law judge so noted and properly found that Dr. Bushey's opinion failed to support a finding of total disability. Decision and Order at 11, 13.

In his 1994 report, Dr. Myers indicated that claimant was physically able, from a pulmonary standpoint, to perform his usual coal mine employment or comparable and gainful work in a dust free environment. Dr. Myers explained, "However, this patient should avoid further dust exposure with his advanced degree of disease and should have further testing to rule out associated tuberculosis." Director's Exhibit 19 (Claimant's Exhibit 2). The administrative law judge properly found that Dr. Myers' warning against further exposure to dust failed to support a finding of total disability. Decision and Order at 14; *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). In his 1994 report, Dr. Anderson indicated that claimant retained the physical ability, from a pulmonary standpoint, to perform his usual coal mine employment or comparable and gainful work in a dust-free environment. Dr. Anderson explained, "Does retain sufficient pulmonary functional capacity to do so, however with Category 3/2 an irrebuttable presumption of disability." [sic] Director's Exhibit 19, Claimant's Exhibit 1. The administrative law judge properly found that Dr. Anderson's opinion that claimant retains the respiratory capacity to perform his usual coal mine employment or comparable and gainful work was entitled to substantial weight as it was well reasoned and documented and was supported by its underlying evidence, including the pulmonary function study. *Clark, supra; Fields, supra*.

Based on the foregoing, we affirm the administrative law judge's weighing of the medical reports pursuant to 20 C.F.R. §718.204(c)(4) (2000) and reject claimant's challenge thereto.

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[7]Dr. Anderson did not explain his qualifier that "... however, with Category 3/2 an irrebuttable presumption of disability." [sic] Director's Exhibit 19, Claimant's Exhibit 1.

[8]On September 7, 2000, shortly before the administrative law judge issued his September 26, 2000 Decision and Order, the Sixth Circuit held in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) that it was error for the administrative law judge not to consider that even a mild respiratory impairment may preclude the performance of a miner's usual employment duties, depending on the exertional requirements of his usual coal mine employment. Dr. Baker's opinion includes a diagnosis of a mild impairment and is the only medical opinion of record which would

Claimant next asserts that claimant's ability to obtain gainful employment outside the coal mine industry would be prevented due to his disability, age, limited education and limited work experience, and states that the administrative law judge made no mention of claimant's age, education or work experience in determining that the evidence failed to establish claimant's total disability. Claimant's contention lacks merit. Claimant's assertion of vocational disability based on his age and his limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act. *See* 20 C.F.R. §718.204(b); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Lastly, claimant argues that, inasmuch as pneumoconiosis is a progressive and irreversible disease, it can be concluded that claimant's pneumoconiosis has worsened since it was initially diagnosed and thus, has adversely affected claimant's ability to perform his usual coal mine employment. The revised regulation at 20 C.F.R. §718.201(c) recognizes pneumoconiosis as a latent and progressive disease. Claimant's assertion that *his* pneumoconiosis has worsened over time, however, is unsupported by any evidence and thus, we decline to address it further.

Based on the foregoing, we affirm the administrative law judge's denial of claimant's request for modification based on claimant's failure to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(4) (2000); *see* 20 C.F.R. §718.204(b); or, thereby, to establish a change in conditions under 20 C.F.R. §725.310 (2000). We further affirm the administrative law judge's finding that claimant failed to establish a mistake in a determination of fact under 20 C.F.R. §725.310 (2000). Consequently, we affirm the administrative law judge's denial of claimant's request for modification and the claim.

Accordingly, the administrative law judge's Decision and Order On Modification - Denial of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

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require the administrative law judge's consideration of the exertional requirements of claimant's usual coal mine employment pursuant to *Cornett*. The administrative law judge specifically considered claimant's description of his last coal mine work as a surface mine equipment operator in finding that Dr. Baker's opinion as to the degree of claimant's impairment failed to support a finding of a totally disabling respiratory impairment. *See* Decision and Order at 14. The administrative law judge's weighing of Dr. Baker's report is thus consistent with *Cornett.*

Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge