BRB No. 98-1089 BLA

JOHNNY TURNER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD 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 Denying Benefits of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard and Moise), Abingdon, Virginia, for claimant.

Ramesh Murthy (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits (92-BLA-1753) of Administrative Law Judge Daniel L. Stewart 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). Claimant's initial claim was filed in February 1981, and denied by the district director in July 1981. No further action was taken by claimant until September 1984, when he filed the instant claim. In September 1987, Administrative Law Judge Joel A. Harmatz issued a Decision and Order - Denying Benefits. Judge Harmatz found that claimant failed to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) and denied benefits. Claimant appealed, and, in August 1990, the Benefits Review Board issued a Decision and Order affirming the administrative law judge's denial of benefits. *Turner v. Clinchfield Coal Co.*, BRB No. 87-2644 BLA (Aug. 31, 1990)(unpublished). Claimant's appeal to the United States Court of Appeals for the Fourth Circuit was dismissed as untimely filed. *Turner v. Clinchfield Coal Co.*, No. 90-1145

(4th Cir. June 28, 1991)(unpublished). In August 1991, claimant filed a modification request. In December 1993, Administrative Law Judge Joel R. Williams issued a Decision and Order - Award of Benefits. Judge Williams found that the new evidence established a material change in conditions in that claimant was totally disabled due to pneumoconiosis. In February 1994, Judge Williams issued a Decision and Order on Reconsideration - Award of Benefits, denying employer's request for reconsideration. Employer appealed, and in January 1996, the Board issued a Decision and Order vacating in part and affirming in part, and remanding the case to the Office of Administrative Law Judges. *Turner v. Clinchfield Coal Co.*, BRB No. 94-1422 BLA (Jan. 31, 1996)(unpublished). The Board held that Judge Williams erred in failing to consider Dr. Byers's opinion as a whole. The Board also instructed the fact-finder to consider whether the evidence established a mistake in fact under *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). In September 1996, the administrative law judge issued a Decision and Order on Remand Denying Benefits. The administrative law judge found that because claimant failed to establish the existence of pneumoconiosis, a change in conditions was not established. Claimant appealed, and in October 1997, the Board issued a Decision and Order vacating and remanding the case to the administrative law judge. *Turner v. Clinchfield Coal Co.*, BRB No. 97-0280 BLA (Oct. 28, 1997)(unpublished). The Board held that the administrative law judge erred in failing to consider the previously submitted evidence and erred in failing to make a mistake in fact finding. The Board also vacated its prior affirmance of the treatment of the opinions of Drs. Dahhan, Fino, and Branscomb in light of *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). In April 1998, the administrative law judge issued a Decision and Order on Remand Denying Benefits. The administrative law judge found that after weighing all of the medical evidence, both old and new, the evidence was insufficient to establish that claimant suffers from pneumoconiosis under Section 718.202(a)(1)-(4). Claimant appeals, arguing that the administrative law judge erred in denying benefits. Employer has submitted a response brief supporting affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has submitted a letter stating that he will not participate in this appeal unless specifically requested to do so by the Board.[1]

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 the 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).

[1] We affirm the administrative law judge's findings that the evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(3) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of 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 prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in failing to consider Dr. Sargent's deposition testimony, which was excluded by Judge Harmatz pursuant to 20 C.F.R. §725.456(b). Claimant specifically contends that the administrative law judge should have considered Dr. Sargent's testimony because Dr. Sargent was a treating pulmonologist and the deposition was taken by employer's counsel and then "for obvious reason [sic]" not offered at the hearing. Claimant's Brief at 1. Claimant also avers that the twenty-day rule under Section 725.456(b) applies to reports, not depositions taken in advance of the hearing with proper notice to all parties. *Id.* at 1-2. We reject claimant's contention that the twenty-day rule does not apply to the exchange of depositions between the parties. 20 C.F.R. §725.456(b); *see generally Luketich v. Director, OWCP*, 8 BLR 1-477 (1986). Moreover, the Board has already considered and disposed of this issue twice previously. In its 1990 Decision and Order, the Board affirmed Judge Harmatz's finding that claimant did not demonstrate good cause for his failure to comply with the twenty-day rule. *Turner v. Clinchfield Coal Co.*, BRB No. 87-2644 BLA (Aug. 31, 1990)(unpublished). This holding, as the Board noted in its 1997 Decision and Order, is the law of the case, *see Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991), and as claimant has identified no exception to the law of the case doctrine, we decline to disturb Judge Harmatz's decision to exclude Dr. Sargent's deposition.

Next, claimant avers that the administrative law judge erred in giving diminished weight to the report of Dr. Robinette. Claimant states that, in his 1996 Decision and Order, the administrative law judge found that Dr. Robinette's report was equally probative with Dr. Byers's report. Claimant states that, in his 1996 decision, the administrative law judge rejected employer's argument that Dr. Robinette had relied on an inaccurate smoking history, but in his 1998 decision the administrative law judge makes the opposite conclusion. In his 1996 decision, the administrative law judge noted that Dr. Robinette was aware that claimant had a forty pack year history and that no persuasive evidence had been presented to show that claimant had a longer smoking history. 1996 Decision and Order at 9. In reconsidering all of the evidence on remand, the administrative law judge noted that Dr. Robinette assumed that claimant only had a forty pack year history and that claimant told Dr. Dahhan that he had a 63 pack year history. 1998 Decision and Order at 29-30. The administrative law judge accorded less weight to Dr. Robinette's opinion on the ground that he was unaware of claimant's more extensive history of cigarette smoking. *Id.* at 31. We reject claimant's assertion that the administrative law judge acted improperly in reconsidering Dr. Robinette's opinion on remand.[2] Moreover, the

[2] Further, because of the abolition of the true doubt rule, claimant can no longer prevail on

administrative law judge acted within his discretion in discounting Dr. Robinette's opinion on the basis that his finding with regard to claimant's smoking history was inaccurate in light of Dr. Dahhan's testimony that claimant admitted that he had approximately a 63 pack year history. *See Gouge v. Director, OWCP*, 8 BLR 1-307 (1985). Inasmuch as claimant raises no further assertions of error, we affirm the administrative law judge's finding that the medical evidence of record is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, claimant states that modification "should have been granted on the fact that the new and old evidence clearly establish pulmonary disability." Claimant's Brief at 2. As claimant has failed to establish the existence of pneumoconiosis under Section 718.202(a), a requisite element of entitlement, *see Perry*, *supra*, benefits are precluded. Thus, any error in the administrative law judge's consideration of whether claimant established modification is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

JAMES F. BROWN
Administrative Appeals Judge

---

the basis of equally probative evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).