

BRB No. 99-0701 BLA

HUBERT BARGER)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED:
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Respondent)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Helen H. Cox (Henry L. Solano, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (97-BLA-0491) of Administrative Law Judge Clement J. Kichuk denying benefits 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). In the initial Decision and Order, Administrative Law Judge Bernard J. Gilday, Jr., after crediting claimant with thirty-four and one quarter years of coal mine employment, found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Judge Gilday also found that the medical opinion evidence was insufficient to establish total disability. Accordingly, Judge Gilday denied benefits.

By Decision and Order dated June 14, 1995, the Board affirmed Judge Gilday's findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Barger v. Shamrock Coal Co.*, BRB No. 94-4006 BLA (June 14, 1995) (unpublished). The Board, therefore, affirmed Judge's Gilday's denial of benefits. *Id.*

Claimant subsequently requested modification of his denied claim. Finding that claimant failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, Administrative Law Judge George P. Morin denied claimant's request for modification. By Decision and Order dated July 14, 1998, the Board affirmed Judge Morin's findings that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 and that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3) and total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3). *Barger v. Shamrock Coal Co.*, BRB No. 97-1424 BLA (July 14, 1998) (unpublished). The Board, however, vacated Judge Morin's findings that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability pursuant to 20 C.F.R. §718.204(c)(4) and remanded the case for further consideration. *Id.*

Due to Judge Morin's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). In addition, the administrative law judge considered all of the medical opinion evidence of record and found that the medical opinion evidence, in its entirety, was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). Accordingly, the administrative law judge denied claimant's request for modification. On appeal, claimant challenges the administrative law judge's finding that the newly submitted medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant also contends that the administrative law judge erred in finding that the newly submitted medical opinion evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). The Director, Office of Workers' Compensation Programs, responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are

supported by substantial evidence, are rational, and are 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).

Claimant argues that the administrative law judge erred in finding the newly submitted medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The record contains two newly submitted medical opinions; Dr. Clarke's August 8, 1995 report and Dr. Baker's March 28, 1996 report.¹ Director's Exhibits 52, 63. The Board previously held that Judge Morin properly discounted Dr. Clarke's diagnosis of pneumoconiosis because the x-ray that Dr. Clarke relied upon to diagnose pneumoconiosis was reread as negative by two physicians with superior radiological qualifications. *Barger v. Shamrock Coal Co.*, BRB No. 97-1424 BLA (July 14, 1998) (unpublished). Similarly, the Board held that Judge Morin properly discounted Dr. Baker's diagnosis of clinical pneumoconiosis because the x-ray that Dr. Baker relied upon to diagnose pneumoconiosis was also reread as negative by two physicians with superior radiological qualifications. *Id.* The Board, however, held that Judge Morin erred in failing to consider whether Dr. Baker's diagnosis of chronic bronchitis which he attributed in part to coal dust exposure was sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Claimant initially argues that the administrative law judge, on remand, erred in not reconsidering Dr. Clarke's opinion. We disagree. The Board's previous holding that Judge Morin properly discredited Dr. Clarke's diagnosis of pneumoconiosis constitutes the law of the case and governs our determination herein. *See Bridges*

¹Dr. Clarke examined claimant on August 8, 1995. In a report dated August 8, 1995, Dr. Clarke diagnosed coal workers' pneumoconiosis. Director's Exhibit 52.

Dr. Baker examined claimant on March 28, 1996. In a report dated March 28, 1996, Dr. Baker diagnosed coal workers' pneumoconiosis. Director's Exhibit 63. Dr. Baker also diagnosed chronic bronchitis which he attributed to claimant's coal dust exposure and cigarette smoking. *Id.*

v. Director, OWCP, 6 BLR 1-988 (1984); *Barger v. Shamrock Coal Co.*, BRB No. 97-1424 BLA (July 14, 1998) (unpublished).

We also reject claimant's contention that the administrative law judge erred in finding that Dr. Baker's opinion was not sufficiently reasoned. The administrative law judge acted within his discretion in according less weight to Dr. Baker's opinion because Dr. Baker failed to provide an explanation for his opinion that claimant's chronic bronchitis was attributable in part to his coal dust exposure. See *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 8-9; Director's Exhibit 63. We, therefore, affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In light of our affirmance of the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis, we affirm the administrative law judge's implicit finding that claimant failed to establish a change in conditions pursuant to 20 C.F.R. §725.310.²

²Claimant could also arguably demonstrate a change in conditions pursuant to 20 C.F.R. §725.310 by establishing that the newly submitted evidence is sufficient to

See 20 C.F.R. §718.202(a)(4).

establish total disability pursuant to 20 C.F.R. §718.204(c). See *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). However, the Board previously affirmed Judge Gilday's findings that the evidence of record was insufficient to establish the existence of pneumoconiosis. Inasmuch as the Board has now affirmed the findings of Judge Morin and Judge Kichuk that the newly submitted medical evidence is insufficient to establish the existence of pneumoconiosis, claimant has failed to establish the existence of pneumoconiosis, a necessary element of entitlement. See *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*). Consequently, the Board need not address claimant's contentions regarding the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The Board previously affirmed Judge Morin's finding that claimant did not establish a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. *Barger v. Shamrock Coal Co.*, BRB No. 97-1424 BLA (July 14, 1998) (unpublished).

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