BRB No. 03-0133 BLA

BOBBY DENNIS SHEPHERD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SWITCH ENERGY CORPORATION	)	DATE ISSUED: 07/21/2003
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS INSURANCE FUND	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Bobby Dennis Shepherd, Cornettsville, Kentucky, *pro se*.

John T. Chafin (Kazee, Kinner & Chafin), Prestonsburg, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2001-BLA-0146) of Administrative Law Judge Daniel J. Roketenetz denying a request for

modification of the denial of benefits in a duplicate claim[1] 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 Board affirmed the administrative law judge=s previous Decision and Order denying benefits in a duplicate claim on the basis that the evidence was insufficient to demonstrate a material change in conditions pursuant to 20 C.F.R. '725.309. *Shepherd v. Switch Energy Corp.*, BRB No. 99-0622 BLA (March 8, 2000) (unpublished). Claimant filed a timely Motion for Reconsideration, which the Board summarily denied in an Order dated June 22, 2000. *Shepherd v. Switch Energy Corp.*, BRB No. 99-0622 BLA (June 22, 2000) (unpublished Order on Motion for Reconsideration).

Claimant=s letter, received on July 5, 2000 by the district director, was considered a request for modification of the denial of benefits. Director=s Exhibit 51. On November 8, 2000, the case was referred to the administrative law judge for a formal hearing, but at claimant=s request, the case was decided on the record. The administrative law judge found that claimant failed to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. '725.310. On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. The Director, Office of Workers= Compensation Programs, has filed a letter indicating that he will not respond in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We 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).

In order to establish entitlement to benefits under Part 718 in a living miner=s claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. ''718.3, 718.202, 718.203, 718.204. Failure to establish 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*).

[1]The prior procedural history is set forth in the Board=s Decision and Order of March 8, 2000. *Shepherd v. Switch Energy Corp.*, BRB No. 99-0622 BLA (March 8, 2000) (unpublished).

This case involves a request for modification of the denial of benefits in a duplicate claim. Claimant may establish modification by establishing either that a change in conditions has occurred since the issuance of a previous decision or that the previous decision contains a mistake in a determination of fact. 20 C.F.R. ' 725.310(a) (2000). The Board has held that, in considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one of the elements that defeated entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a claimant need not allege a specific error in order for an administrative law judge to find modification based upon a mistake in fact, because the administrative law judge has broad discretion to correct mistakes of fact, including the ultimate fact of entitlement to benefits. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

Section 725.309 (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial unless there is a determination of a material change in conditions since the denial of the prior claim. 20 C.F.R. ' 725.309 (2000). The United States Court of Appeals for the Sixth Circuit has held in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), that in addressing whether the material change in conditions requirement of Section 725.309(d) (2000) has been satisfied, an administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

After consideration of the administrative law judge=s Decision and Order, the issues on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and contains no reversible error. The administrative law judge found that the only newly submitted evidence consisted of Dr. Sandlin=s treatment notes from September 16, 1996 through March 4, 1999, diagnosing ACOPD@ and Ablack lung.@ Decision and Order at 6, 7; Claimant=s Exhibit 1. The administrative law judge acknowledged Dr. Sandlin=s status as claimant=s treating physician, but found his notes failed to establish the existence of pneumoconiosis and or total disability due to pneumoconiosis -- the elements of entitlement previously adjudicated against claimant. Decision and Order at 6, 7. Specifically, the administrative law judge found that while Dr. Sandlin claimed that the x-ray evidence is positive for pneumoconiosis, he failed to identify the chest x-ray upon which he relied. Decision and Order at 7.

The administrative law judge rationally found that Dr. Sandlin=s diagnoses are Aconclusions without any basis,@ and are not documented or reasoned as his finding that Athe record does not contain any documentary evidence which supports his medical diagnoses,@ is supported by the record. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Co.*, 10 BLR 1-19 (1987); Decision and Order at 7; Claimant=s Exhibit 1. Moreover, although Dr. Sandlin diagnosed ACOPD@ and Ablack lung,@ he did not offer an opinion as to whether claimant had a totally disabling respiratory or pulmonary impairment. *Id.* We affirm, therefore, the administrative law judge=s finding that claimant has not established a change in conditions under Section 725.310 (2000). We also affirm the administrative law judge=s finding, Abased upon a review of the entire record,@ that the prior denial does not contain a mistake in a determination of fact, as it is rational and supported by substantial evidence. *Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994); *see Shepherd*, slip op at 4-6; Decision and Order at 7.

Accordingly, the administrative law judge=s Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge