BRB No. 00-0502 BLA

WILLIE CALLAHAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WILLIE CALLAHAN TRUCKING	)	DATE ISSUED: _____
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
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 - Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

J. Logan Griffith (Wells, Porter, Schmitt & Jones), Paintsville, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0156) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) denying

benefits on a duplicate claim[1] filed pursuant to the provisions of Title IV of the Federal Coal

[1]Claimant filed the instant claim on October 24, 1997. Director's Exhibit 1. Claimant's prior claim, filed on February 14, 1984, was denied by Administrative Law Judge Richard D. Mills on November 8, 1988. Director's Exhibit 30 at 223, 558. Judge Mills credited claimant with 18 years of coal mine employment, and found, under 20 C.F.R. Part 718, that claimant established the existence of occupational pneumoconiosis. Judge Mills found, however, that claimant failed to establish total disability due to a respiratory or pulmonary impairment. Accordingly, benefits were denied. Judge Mills later denied claimant's request for reconsideration. Director's Exhibit 30 at 204. Claimant also filed a request for modification with the district director and an appeal with the Board. The Board dismissed claimant's appeal and remanded the case to the district director for consideration of claimant's request for modification. Director's Exhibit 30 at 186. Subsequent to the district director's denial of claimant's request for modification, a hearing was held before Administrative Law Judge Donald B. Jarvis on April 21, 1992. Director's Exhibit 30 at 106. In his ensuing Decision and Order dated March 16, 1993,

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] The administrative law judge found that the evidence submitted subsequent to Administrative Law Judge Donald B. Jarvis' denial of claimant's request for modification in his prior claim, was insufficient to establish total respiratory or pulmonary disability under 20 C.F.R. §718.204(c)(2000). The administrative law judge thus determined that the new evidence was insufficient to establish a material change in conditions under 20 C.F.R. §725.309(d)(2000) pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted medical opinion evidence fails to establish total respiratory or pulmonary disability. Employer responds, and urges the Board to affirm 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

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Judge Jarvis determined that the record did not support modification of the prior denial under 20 C.F.R. §725.310(2000). Judge Jarvis specifically found, *inter alia*, that the evidence failed to establish total respiratory or pulmonary disability. Claimant then filed an appeal with the Board, which was dismissed as abandoned on December 6, 1994. Director's Exhibit 30 at 1. Claimant did not further pursue his prior claim.

[2]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.

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).

In order to establish entitlement to benefits under 20 C. F. R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose from his coal mine employment, and that he is totally disabled by the disease. 20 C.F.R. §§718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to establish any element of entitlement will result in the denial of benefits.

In the instant duplicate claim, it is claimant's initial burden to establish, based on the evidence submitted since Judge Jarvis' 1993 denial of the prior claim, one of the elements of entitlement previously adjudicated against him. *Ross, supra.* If claimant proves one of these elements of entitlement, then claimant will have established a material change in conditions under Section 725.309(d)(2000) as a matter of law. The administrative law judge must then consider all the evidence of record, including that evidence submitted with the prior claim, to determine claimant's entitlement to benefits on the merits of the claim. *Id.* In the instant case, the administrative law judge correctly determined that the prior denial was based on claimant's failure to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 30 at 20. Decision and Order at 5.

In challenging the administrative law judge's determination that the newly submitted medical opinion evidence fails to establish a totally disabling respiratory or pulmonary impairment, claimant argues:

> The claimant stated that his usual coal mine employment included being a truck driver, coal loader and a drill operator. It can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to concluded that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis. Judge Roketenetz made no mention of the claimant's usual coal mine work in conjunction with his assessment that the claimant was not disabled.

Claimant's Brief at 4-5.[3] Claimant also asserts that the administrative law judge did not

[3]Administrative Law Judge Mills found that claimant's usual coal mine employment was as a truck driver hauling coal. Director's Exhibit 30 at 225, 230. Administrative Law Judge Jarvis noted claimant's usual coal mine employment as "Driving coal trucks and loading with an end loader in the strip pits." *Id.* at 22. The exertional requirements

discuss his age and limited education and work experience in finding that claimant is not totally disabled. Lastly, claimant asserts that, given the amount of time that has passed since his initial diagnosis of pneumoconiosis, claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work.[4]

As an initial matter, we note that the provision pertaining to total respiratory or pulmonary disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b). Notwithstanding claimant's contentions, we affirm the administrative law judge's finding that the medical opinion evidence fails to establish total respiratory or pulmonary disability in the instant case. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), held, in *Cornett v. Benham Coal Co.*, 227 F.3d 569, BLR (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. In his Decision and Order in the instant case, which was issued approximately nine months prior to *Cornett*, the administrative law judge did not discuss the exertional requirements of claimant's usual coal mine employment. The administrative law judge properly determined, however, that there is no newly submitted medical opinion which suggests that claimant is totally disabled.

Specifically, the record contains the following newly submitted medical opinions: Dr. Wicker examined claimant in 1997, and opined that claimant's respiratory capacity could not be determined due to his failure to comply with the testing protocol. Director's Exhibit 9.

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of claimant's usual coal mine employment are contained in Director's Exhibit 3.

[4]We affirm, as unchallenged on appeal, the administrative law judge's findings that, (1) claimant failed to establish total disability based on the newly submitted pulmonary function studies and blood gas studies, which each resulted in non-qualifying values, and (2) that there is no evidence showing that claimant suffers from cor pulmonale with right sided congestive heart failure. *See* 20 C.F.R. §718.204(b)(2)(i)-(iii); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Dr. Wicker subsequently indicated that his findings were normal and that claimant has no respiratory impairment which would prevent him from performing his usual coal mine work. Director's Exhibit 10. Dr. Bushey examined claimant in 1997, and diagnosed a chronic lung disease with pulmonary fibrosis compatible with coal workers' pneumoconiosis 2/2 q/p. Dr. Bushey did not address whether claimant had any impairment. Director's Exhibit 13. Dr. Broudy examined claimant in 1998, and opined that claimant retains the respiratory capacity to perform the work of an underground coal miner or to do similarly arduous work. Dr. Broudy added, "I do not believe that there has been any significant pulmonary disease or respiratory impairment which has arisen from this man's occupation as a coal worker. The results of the spirometry and blood gases suggest that the dyspnea is nonpulmonary in origin. I have reviewed some outside medical records... The additional records do not cause me to change my opinion in any way. I notice that his spirometric studies were similar when tested by Dr. Harold Bushey on June 10, 1997." Director's Exhibit 23. None of these three physicians discussed the exertional requirements of claimant's usual coal mine employment. *See Cornett, supra*. Despite this deficiency and given the findings of Drs. Wicker and Broudy relevant to the issue of whether claimant has a totally disabling respiratory or pulmonary impairment, and in light of the fact that Dr. Bushey did not offer an opinion on this issue, we hold that the administrative law judge properly determined that these medical opinions do not support a finding of total disability and thus do not support claimant's burden to establish total respiratory or pulmonary disability. 20 C.F.R. §718.204(b)(iv). Because the medical opinion evidence in the instant claim is insufficient to meet claimant's burden to establish total disability under the Act, remand pursuant to *Cornett* is unnecessary.

Further, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act. *See Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

We, therefore, affirm the administrative law judge's determination that the newly submitted medical opinion evidence is insufficient to meet claimant's burden to establish a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(iv); *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). In light of the foregoing, we further affirm the administrative law judge's finding that claimant failed to establish total respiratory or pulmonary disability in the instant case. 20 C.F.R. §718.204(b).

We thus affirm the administrative law judge's finding that claimant failed to establish a material change in conditions under Section 725.309(d)(2000) pursuant to *Ross*, and we affirm the administrative law judge's denial of benefits in the instant duplicate claim.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge