BRB No. 01-0723 BLA

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

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Dorothy L. Page (Eugene Scalia, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-BLA-0969) of Administrative Law Judge Daniel J. Roketenetz 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).[1] In this duplicate claim, the administrative law judge found that claimant's prior claim was finally denied on January 31,1994. The administrative law judge

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

then considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 under the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). After crediting claimant with seven years of coal mine employment, the administrative law judge found the newly submitted medical evidence insufficient to establish the existence of pneumoconiosis and that, even assuming that claimant had established the existence of pneumoconiosis, claimant would not be entitled to benefits inasmuch as the evidence, examined in its entirety, failed to establish total disability. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding the evidence sufficient to establish the existence of pneumoconiosis and total disability. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence and contends that the new regulations do not affect the outcome of this case.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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 establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant argues that the administrative law judge erred in not finding total disability established. Contrary to claimant's arguments, the administrative law judge properly found that the medical opinion evidence was insufficient to establish total disability inasmuch as the opinion of Dr. Baker, the only newly submitted opinion, could not establish total disability because Dr. Baker stated that he was unable to assess total disability based on the documentation before him, there were no newly submitted pulmonary function studies, the only newly submitted blood gas study was non-qualifying, there was no evidence of cor pulmonale with right-sided congestive heart failure, and the evidence submitted with the prior claim failed to establish total disability. Decision and Order at 9; Director's Exhibit 6; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986). The administrative law judge's finding that claimant failed to

establish a totally disabling respiratory impairment based on the evidence of record is, therefore, affirmed and because we affirm the administrative law judge's finding that the record did not establish total disability, an essential element of entitlement, we need not consider claimant's arguments regarding the existence of pneumoconiosis. *Gee, supra*.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge