BRB No. 97-1104 BLA

JOHN W. SATIFKA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VESTA MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 - Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Michelle S. Gerdano (Marvin Krislov, Deputy Solicitor for National Operations; 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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (90-BLA-1204) of Administrative Law Judge Thomas M. Burke 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). This claim has been before the Board previously.[1] In its last Decision and Order, the Board vacated the administrative law judge's award of

[1]The relevant procedural history of this case is set forth in the Board's prior decisions. *See Satifka v. Vesta Mining Co.,* BRB No. 95-1959 BLA (Dec. 19, 1996)(unpub.); *Satifka v. Vesta Mining Co.,* BRB No. 91-1819 BLA (Feb. 27, 1995)(unpub.).

benefits under 20 C.F.R. Part 718, in light of the decision of the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). The Board remanded the case to the administrative law judge for a finding of whether claimant could establish a material change in conditions under 20 C.F.R. §725.309 pursuant to *Swarrow*. The Board instructed the administrative law judge to reconsider the entire record on the merits if he found a material change in conditions established. On remand, applying *Swarrow,* the administrative law judge found that claimant demonstrated a material change in conditions under Section 725.309. He then reweighed the entire record and found the existence of pneumoconiosis established under 20 C.F.R. §718.202(a)(1), (a)(4). Additionally, the administrative law judge found the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge also found the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c), and total disability causation under 20 C.F.R. §718.204(b). Accordingly, he awarded benefits. Employer appeals, arguing that the administrative law judge made several errors in his findings of fact and his application of the law in awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), responds to several specific arguments raised by employer, and argues that the administrative law judge's decision is supported by substantial evidence and should be affirmed. Employer replies, reiterating its arguments and contending that recent case law from the United States Supreme Court invalidates the Third Circuit's opinion in *Swarrow*. Claimant has not responded to employer's 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 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 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. 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,* 9 BLR 1-1 (1986)(*en banc*).

Initially, employer argues that the recent decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo II],* 117 S.Ct. 1953, 31 BRBS 54 (CRT) (1997), requires remand to the administrative law judge for consideration of whether the miner may pursue his duplicate claim inasmuch as he has had no additional coal dust exposure since the previous denial of benefits. Employer argues that neither the Longshore Act nor the Black Lung Act provides statutory authority for the adjudication of duplicate claims when the original claim has been denied for more than one year and the miner has not had subsequent exposure to coal dust. We disagree. Contrary to employer's contention, *Rambo II* does not bar the filing of the instant duplicate claim.

Rambo II, in which modification was at issue, is inapposite to a consideration of the instant case involving a duplicate claim. The issue in *Rambo II* was whether a longshoreman who was experiencing no present, post-work injury reduction in wage-earning capacity, could nonetheless be entitled to nominal benefits so as to toll the one year time limitation for filing for modification. The Supreme Court did not indicate in *Rambo II* that its holding had any bearing whatsoever on duplicate black lung claims. Employer's first assignment of error is therefore rejected. *See also Swarrow, supra*.

Employer also contends that the one-element standard adopted by the Third Circuit in *Swarrow* for establishing a material change in conditions at Section 725.309 is invalid in view of *Rambo II*. Employer argues that, under the *Swarrow* standard, once a claimant proves a change in his claim as to some element of entitlement, the claimant benefits from an "irrebuttable presumption" that the change is material. Employer argues that this presumption violates *Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994), *Rambo II* and Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated by 30 U.S.C. §932(a), all of which require that claimant prove a material change in conditions by a preponderance of the evidence. We disagree. The Court in *Rambo II* addressed the issue of a longshoreman's potential future decline in earning capacity, and did not address what proof was necessary to establish a material change in conditions in a black lung duplicate claim. The Court's decision in *Rambo II* does not alter *Swarrow* and the other cases adopting the one-element standard. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-115 (7th Cir. 1997).

Next, employer contends in the alternative that even under *Swarrow*, the administrative law judge erred by finding a material change in conditions. Employer argues that *Swarrow* mandates that, in addition to determining whether the newly submitted evidence establishes one new element of entitlement, the administrative law judge must analyze whether the newly submitted evidence differs qualitatively from the previously submitted evidence. Employer contends that the administrative law judge failed to perform this latter task. We reject this contention. The administrative law judge considered the evidence of record and found a "continuing deterioration" in claimant's condition based on the newer evidence. Decision and Order at 13-14. Furthermore, although the administrative law judge erred in finding a material change in conditions on the basis of one qualifying blood gas study, the error is harmless in light of the administrative law judge's full weighing of the evidence on the merits. As the Director contends, the administrative law judge reweighed the entire record in finding entitlement on the merits, and found that claimant established the existence of a totally disabling respiratory or pulmonary impairment based on the newly submitted blood gas study and the newly submitted medical reports of Drs. Levine and Silverman. Decision and Order at 13-14. Employer's contention, therefore, that the administrative law judge erred in finding a material change in conditions, is rejected.

Next, employer argues that on remand the administrative law judge erred in refusing to allow it to supplement the record in light of *Swarrow.* The Director disagrees with employer's contention, agreeing with the administrative law judge's holding that supplementation of the record was unwarranted because *Swarrow* did not change the burden of proof on employers. The Director is correct. The decision to reopen the record on remand is a matter within the discretion of the administrative law judge. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989). Here, the administrative law judge found that because *Swarrow* made it more difficult for claimants to prosecute duplicate claims, and did not change the standard for employers, due process did not require that employer be given the opportunity to submit additional evidence. Inasmuch as the administrative law judge found that the burden on employer had not changed, his exercise of discretion was not unreasonable, and is hereby affirmed. *See Lynn*, *supra; see also Harlan Bell Coal Co. v. Lemar,* 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).

Turning to employer's arguments on the merits, employer raises several contentions regarding the administrative law judge's weighing of the medical evidence under 20 C.F.R. §§718.202(a)(1), (a)(4), 718.203, 718.204(b) and (c). Employer's contentions, on the whole, amount to little more than a request to reweigh the evidence of record, a task we may not perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We decline to address, therefore, each specific allegation raised by employer. Nevertheless, employer raises two arguments regarding the administrative law judge's finding of the existence of pneumoconiosis at Section 718.202(a)(1) and (a)(4), and a general contention regarding the administrative law judge's findings under Section 718.204(b) and (c), that merit specific consideration.

Initially, employer argues that the administrative law judge erred in reweighing the x-ray readings under Section 718.202(a)(1) after the issuance of *Ondecko,* because he had already found them in equipoise, and therefore should have merely found that claimant failed to carry his burden. We disagree that the administrative law judge was barred from reweighing the x-ray evidence. In *Ondecko* itself, the Supreme Court, after invalidating the "true doubt" rule, remanded the case for further weighing of the evidence previously found in equipoise. *See also Consolidation Coal Co. v. Sisson*, 54 F.3d 434 (7th Cir. 1995)(holding that the administrative law judge must reweigh the evidence without the "benefit of the true-doubt rule").

Additionally, employer argues that in finding the existence of pneumoconiosis under Section 718.202(a)(4), the administrative law judge improperly used the x-ray evidence and blood gas study evidence to support his finding of pneumoconiosis based on the medical opinion evidence. We disagree that the administrative law judge's findings constitute reversible error. The administrative law judge weighed the evidence under each subsection of Section 718.202(a). At Section 718.202(a)(4), he noted that the positive x-rays and the qualifying blood gas study supported (as opposed to detracted from) the medical opinions finding pneumoconiosis. Decision and Order at 10-11. This case arises within the

jurisdiction of the United States Court of Appeals for the Third Circuit which recently held in *Penn Allegheny Coal Co. v. Williams,* 114 F.3d 22*,* 21 BLR 2-104 (3d Cir. 1997)*,* that the administrative law judge must weigh all the relevant evidence together in finding the existence of pneumoconiosis under Section 718.202. We hold, therefore, that the administrative law judge's findings comport with *Williams* and we affirm his finding that the existence of pneumoconiosis is established at Section 718.202(a).

Next, employer argues that the administrative law judge erred in finding the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c), and finding that pneumoconiosis is the cause of claimant's total disability under Section 718.204(b). Employer contends, *inter alia*, that the administrative law judge erred in failing to credit Dr. Wald's opinion, finding no significant ventilatory impairment. Moreover, citing to the decisions of the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster,* 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna,* 22 F.3d 1388, 18 BLR 1-215 (7th Cir. 1994), employer argues that the administrative law judge erred in awarding benefits, because claimant is totally disabled by a shoulder injury, not by pneumoconiosis. We reject employer's arguments. First, substantial evidence supports the administrative law judge's weighing of the medical opinion evidence. *See O'Keeffe, supra*. We affirm the administrative law judge's decision to accord diminished weight to Dr. Wald's opinion because he found that Dr. Wald failed to explain his opinion adequately. *See Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)*(en banc)*. We also affirm the administrative law judge's decision to credit the opinions of Drs. Silverman and Levine, both of whom found claimant to be totally disabled due to pneumoconiosis, because their opinions were based on a more thorough picture of claimant's condition, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and were better supported by the objective evidence. *See Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Additionally, we reject employer's contention that claimant is totally disabled by a shoulder injury, and that the administrative law judge erred in finding him eligible for Black Lung benefits. Both *Foster* and *Vigna* are cases arising under 20 C.F.R. Part 727 in the Seventh Circuit, and both are distinguishable from the case at hand. In *Foster,* the miner was not totally disabled by pneumoconiosis, and in *Vigna,* the miner was totally disabled by a stroke eight years prior to the production of any evidence of respiratory problems. As the Director stated, outside the jurisdiction of the United States Court of Appeals for the Seventh Circuit, a pre-existing disability does not defeat entitlement if the claimant can establish total disability due to pneumoconiosis. *See e.g., Cross Mountain Coal Co. v. Ward*, 93 F.3d 211, 20 BLR 2-362 (6th Cir. 1996). Furthermore, notwithstanding notations in an early medical opinion, and on claimant's employment history form, that claimant ceased working after a shoulder injury, employer has presented no medical evidence of total disability due to his shoulder problem. *See* Director's Exhibit 3, 24. Accordingly, employer's several challenges to the administrative law judge's weighing of the medical evidence on the merits of entitlement under Part 718 are rejected, and we affirm the administrative law judge's award of benefits.

Next, employer contends that the administrative law judge erred in setting the filing

date as the date from which benefits commence. Employer argues that because the administrative law judge found that the x-ray evidence does not establish the existence of pneumoconiosis until July, 1990, benefits should not commence until then. We disagree. The administrative law judge found the medical evidence of record insufficient to establish a specific date of onset of disability, and, therefore, found claimant entitled to benefits from January, 1988, the month in which he filed his third application. Decision and Order at 15. The United States Court of Appeals for the Third Circuit, in *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989), held that benefits are not payable from the date the application was filed when the evidence of record establishes a basis for determining the time when the miner became totally disabled. Contrary to employer's contention, the administrative law judge did not find that the miner did not suffer from pneumoconiosis until 1990, he merely noted that by 1990 there was a preponderance of x-ray evidence demonstrating pneumoconiosis. Decision and Order at 7. Moreover, the administrative law judge credited Dr. Silverman's 1986 opinion in finding the existence of pneumoconiosis, total disability and total disability causation.[2] Lastly, a review of the record indicates that there is no evidence, credited by the administrative law judge, which would establish that claimant was not totally disabled at a time subsequent to January, 1988. Consequently, in light of the administrative law judge's full discussion of the relevant medical evidence of record, we affirm his finding that the record does not establish a definitive date when claimant's pneumoconiosis progressed to the point of rendering claimant totally disabled, and therefore affirm his setting of the filing date as the date from which benefits commence. *See Krecota, supra; Lykins v. Director, OWCP,* 12 BLR 1-181 (1989); 20 C.F.R. §725.503(b).

Finally, employer argues that in awarding fees to claimant's attorney, the administrative law judge erred in awarding the costs to obtain documentary evidence. The Board has rejected this argument, and its holding is now the law of the case and will not be revisited. *See Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Satifka,* BRB No. 91-1819 BLA, *supra* at 8-9.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[2]We reject employer's argument that the administrative law judge erred in crediting Dr. Silverman's opinion in finding the existence of a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c)(4). Contrary to employer's contention, Dr. Silverman's opinion that claimant is totally disabled is not equivocal. *Cf. Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 13-14.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge