BRB No. 00-1145 BLA

CHARLIE AKERS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WRIGHT COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC 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.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig, LLP) Washington, D.C., for employer.

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-1099) of Administrative Law Judge Daniel J. Roketenetz on a request for modification 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] The administrative law judge found that the

[1] The Department of Labor has amended the regulations implementing the Federal

claimant established a coal mine employment history of twenty-seven years. Decision and Order at 4. The administrative law judge further found that the instant claim constituted a request for modification of a denial of a duplicate claim and in so doing concluded that the evidence of record failed to establish a mistake in a prior determination of fact and that inasmuch as newly submitted evidence failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, a change in conditions was not established. Decision and Order at 5-16. Accordingly, benefits were denied.

On appeal, claimant contends, generally, that the administrative law judge erred in failing to find the existence of pneumoconiosis established by medical opinion evidence and further erred in failing to find total disability established. Claimant further asserts that the administrative law judge erred in failing to accord proper weight to the opinions of his treating physicians, Drs. Johnson and Sundaram. Lastly, claimant asserts that the administrative law judge erred in according greater weight to "employer's physicians who only saw and examined the Claimant on a one time basis." Claimant's Brief at 2 (unpaginated). Employer responds and urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[2]

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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination as well as his finding that there was no mistake in the prior determination of fact pursuant to Section 725.310. *See* 20 C.F.R. §725.310 (2000); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm the findings that the

existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(3) (2000) and total disability was not demonstrated pursuant to Section 718.204(c)(1)-(3)(2000). *See* 20 C.F.R. §§718.202(a)(1)-(3); 718.204(b)(2)(i)-(iii); *Skrack, supra*.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

At the outset, we recognize that the standard of review in the instant case is whether the evidence submitted in support of the duplicate claim and the evidence submitted in support of modification, if any, is sufficient to establish a material change in conditions. *See Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). Where, as here, a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. Here, claimant has timely requested modification of the district director's determination that claimant failed to establish a material change in conditions, thereby invoking the administrative law judge's authority to consider whether there was a change in conditions since the denial of the duplicate claim. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *Hess*, *supra*; *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). However, this in no way diminished claimant's burden to prove a material change in conditions before he is entitled to adjudication of the merits of his claim. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 998, 19 BLR 2-10, 2-20 (6th Cir. 1994). Consequently, the issue before the administrative law judge pursuant to claimant's modification request was whether all of the evidence in the duplicate claim plus that submitted on modification established the requisite material change in conditions. *See Hess*, *supra*.

On appeal, claimant contends, generally, that the administrative law judge erred in failing to find the existence of pneumoconiosis established by medical opinion evidence. We reject claimant's assertion and affirm the administrative law judge's conclusion that the newly submitted medical opinion evidence has failed to establish the existence of pneumoconiosis. In a permissible exercise of his discretion the administrative law judge concluded the newly submitted medical reports of Drs. Broudy, Dahhan and Fino, all of whom opined that claimant did not suffer from pneumoconiosis, Employer's Exhibits 1, 2, 12, 13, 15, were entitled to greatest weight based on these physicians' superior qualifications, *see Gray v. SLC Coal Co.*, 126 F.3d 382, 387, 21 BLR 2-615, 2-625-26 (6th Cir. 1999); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Corp.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1986), and because these physicians provided the best reasoned and documented opinions of record. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge, in a permissible exercise of his discretion, accorded less weight to the medical opinions of the claimant's

treating physicians, Drs. Johnson and Sundaram, Director's Exhibit 93; Claimant's Exhibits 1, 2, because these doctors failed to provide adequate support for their conclusions that claimant suffered from pneumoconiosis. *See Clark, supra*; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Revised Section 718.104(d)(governing the weighing of a treating physician's opinion) of the Code of Federal Regulations is inapplicable to the instant case inasmuch as the treating physician evidence was developed before January 19, 2001. Accordingly, contrary to claimant's assertion, the administrative law judge need not accord greater weight to the opinion of a treating physician merely because of that status. *See* 20 C.F.R. §718.104(d)(2000). Further still, the administrative law judge permissibly accorded less weight to the opinions of Drs. Baker and Fritzhand, both of whom concluded that the claimant suffered from pneumoconiosis, Director's Exhibit 96, inasmuch as both physicians failed to fully explain their conclusions and thus did not present well-documented opinions. *See Clark, supra*; *York, supra*; *Oggero, supra*; *Cooper, supra*. Inasmuch as the administrative law judge has considered all relevant evidence of record and has provided affirmable bases for the weight accorded such evidence, *see Clark, supra*; *Peskie, supra*; *Lucostic, supra*; we reject claimant's general contention and affirm the administrative law judge's finding that the medical opinion evidence failed to support a finding of pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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).

Claimant also makes the general contention that the medical opinion evidence demonstrates the presence of a totally disabling respiratory impairment. In finding that the evidence of record failed to establish the presence of a totally disabling respiratory impairment, the administrative law judge again found that the opinions of Drs. Dahhan, Broudy and Fino, all of whom concluded that the claimant did not suffer from a totally disabling respiratory impairment, were entitled to the greatest weight based on their superior qualifications and their proffer of the best-reasoned and documented opinions of record. Decision and Order at 16. For the same reasons that we affirmed the administrative law judge's weighing of the medical opinion evidence on the existence of pneumoconiosis, *see discussion, supra,* we affirm the administrative law judge's weighing of the medical opinions regarding the presence of a totally disabling respiratory impairment, *see also Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 1-136 (3d Cir. 1995), *aff'g* 16 BLR 1-11 (1991). We therefore affirm the administrative law judge's finding that claimant has failed to establish the presence of a totally disabling respiratory or pulmonary impairment. *See* 20 C.F.R. §718.204(b)(2)(iv). *Beatty, supra*; *see generally Ondecko, supra*.[3]

[3] Moreover, while we have affirmed the administrative law judge's findings regarding the existence of pneumoconiosis and total disability as supported by the evidence of record, we note that other than alleging that the opinions of claimant's treating physicians are

Inasmuch as the newly submitted evidence has failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment, the administrative law judge properly found that claimant failed to establish modification by showing a material change in conditions, *see Ross*, *supra*; *Hess*, *supra*, and claimant is, therefore, precluded from establishing entitlement pursuant to Part 718, *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*).

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entitled to greater weight than the opinions of physicians who saw and examined claimant only once, claimant fails to allege any error in the administrative law judge's consideration of the evidence. This failure would also require affirmance of the administrative law judge's Decision and Order. *See* 20 C.F.R. §§802.211(b); 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

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