BRB No. 00-0307 BLA

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

Appeal of the Decision and Order of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Michelle S. Gerdano (Henry L. Solano, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (98-BLA-0764) of Administrative Law Judge Robert L. Hillyard denying benefits on a duplicate claim filed pursuant

[1]Claimant's initial claim was filed on January 10, 1989. Director's Exhibit 14. On October 31, 1991, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order denying benefits. *Id*. The basis of Judge Roketenetz's denial was claimant's failure to establish the existence of pneumoconiosis. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant's most recent claim was filed on October 25, 1994. Director's Exhibit 1.

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 administrative law judge credited claimant with six years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Consequently, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's application of the standard in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), for determining whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Claimant also challenges the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order.

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).

Initially, claimant contends that the administrative law judge erroneously applied the standard in *Ross* for determining whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309. Specifically, claimant asserts, and the Director agrees, that the administrative law judge erred in failing to consider whether the newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c), and thus, is sufficient to

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[2]Inasmuch as the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §718.202(a)(1)-(3) are not challenged on appeal, we affirm these findings. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3]The Director, Office of Workers' Compensation Programs, however, contends that the administrative law judge's error in failing to consider the newly submitted evidence at 20 C.F.R. §718.204(c) is harmless since the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) on the merits.

establish a material change in conditions at 20 C.F.R. §725.309. In *Ross*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). *See Ross, supra*. Hence, an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does not constitute "an element of entitlement previously adjudicated against a claimant." *See Caudill v. Arch of Kentucky, Inc.*, BRB No. 98-1502 BLA, BLR 1- (Sept. 29, 2000)(*en banc*). Moreover, such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 in accordance with *Ross*. *Id*.

Here, claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis, and not because claimant failed to establish total disability. Director's Exhibit 14. Consequently, in order to establish a material change in conditions at 20 C.F.R. §725.309, the newly submitted evidence must support a finding of the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Thus, we reject claimant's assertion that the administrative law judge erroneously applied the standard in *Ross* for determining whether the evidence is sufficient to establish a material change in conditions at 20 C.F.R. §725.309 since he did not consider whether the newly submitted evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c).

Next, claimant contends that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge observed that "[t]he only medical opinion in the record subsequent to the prior denial is that of Dr. Baker." Decision and Order at 7. Dr. Baker, in a report dated April 15, 1994, diagnosed chronic obstructive pulmonary disease related to cigarette smoking and coal dust exposure. Director's Exhibit 6. In a subsequent report dated December 23, 1994, Dr. Baker opined that "[i]f [claimant] only has approximately 2 years of coal mining employment, and with his long history of

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[4]Under the "one-element standard" adopted by the United States Court of Appeals for the Sixth Circuit in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), a miner is provided an opportunity to establish a material change in conditions by proving any element of entitlement *previously adjudicated against him*. Hence, the focus of the material change in conditions standard in *Ross* is on specific findings made against the claimant in the prior claim.

cigarette smoking, I would attribute his impairment to that cigarette smoking history, with minimal or no contribution from his coal mining employment." Director's Exhibit 7. Dr. Baker stated, "I do not feel that it is likely that he has pneumoconiosis." *Id*. The administrative law judge permissibly discredited Dr. Baker's April 15, 1994 opinion because he found it to be based on an inaccurate smoking history. *See Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Claimant asserts that Dr. Baker's December 23, 1994 opinion supports a finding of the existence of pneumoconiosis. Contrary to claimant's assertion, Dr. Baker's opinion that claimant's impairment is due to cigarette smoking "with minimal or no contribution from his coal mining employment" is not sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). 20 C.F.R. §718.202(a)(4); Director's Exhibit 7. The pertinent regulation provides that "[f]or purposes of this definition, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease resulting in respiratory or pulmonary impairment *significantly* related to, or *substantially* aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201 (emphasis added). Thus, inasmuch as the administrative law judge permissibly discredited the only newly submitted opinion of record that could support a finding of the existence of pneumoconiosis, namely the April 15, 1994 opinion by Dr. Baker, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Since the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), we hold that substantial evidence supports the administrative law judge's finding that claimant failed to establish a material change in conditions at 20 C.F.R. §725.309. *See Ross, supra*. Therefore, we affirm the administrative law judge's denial of benefits.

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[5]The administrative law judge stated, "I have found that six years of coal mine employment have been established." Decision and Order at 7. The administrative law judge also stated, "I find that Dr. Baker's original opinion based on 18 years of coal mine employment is entitled to less weight because of the erroneous employment history on which it is based." *Id*. Additionally, the administrative law judge observed that Dr. Baker's "second opinion is based on only two years of coal mine employment." *Id*. The administrative law judge therefore stated that "[t]his is more in accord with my finding of six years of coal mine employment." *Id*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge