

BRB No. 99-0749 BLA

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

Appeal of the Decision and Order - Denying Benefits Upon Modification of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Carolyn M. Marconis, Pottsville, Pennsylvania, for claimant.

Jeffrey S. Goldberg (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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Modification (98-BLA-1046) of Administrative Law Judge Ainsworth H. Brown 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). The administrative law judge found that the parties stipulated to 9.23 years of coal mine employment, and based on the filing date of the claim applied the regulations found at 20 C.F.R. Part 718. In his initial Decision and Order, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and denied benefits. Director's Exhibit 31. Claimant appealed, and in *Hooper v. Director, OWCP*, BRB No. 92-1624 BLA (April 26, 1994)(unpub.), the Board vacated the Decision and Order - Denying Benefits and remanded the case for reconsideration at 20 C.F.R. §718.202(a)(1) and (a)(4). Director's Exhibit 32.

On August 15, 1994, the administrative law judge again found that claimant failed to establish the existence of pneumoconiosis and denied benefits. Director's Exhibit 33. On appeal, in *Hooper v. Director, OWCP*, BRB No. 95-0126 BLA (June 29, 1995)(unpub.), the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established at Section 718.202(a)(1), but remanded the case for reconsideration of the evidence at Section 718.202(a)(4). Director's Exhibit 34. On remand, the administrative law judge found that the existence of pneumoconiosis was not established at Section 718.202(a)(4) and denied benefits. Director's Exhibit 35. Claimant appealed, and in *Hooper v. Director, OWCP*, BRB No. 96-0291 BLA (Dec. 20, 1996)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 36. On July 28, 1997, claimant filed a request for modification, accompanied by new evidence, which was denied by the district director on May 21, 1998. Director's Exhibits 37, 47. The administrative law judge considered the modification request pursuant to 20 C.F.R. §725.310 and found that the newly submitted evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) and (4), and therefore failed to establish a change in conditions.¹ Accordingly, the administrative law judge denied claimant's request for modification and denied benefits. Claimant appeals, contending that the administrative law judge erred in failing to find that the newly submitted evidence establishes the existence of pneumoconiosis at Section 718.202(a)(1) and (4). The Director, Office of Workers' Compensation Programs (the Director), responds, conceding the existence of a material change in conditions under Section 725.309 and urging remand of the case for a determination on the merits.

The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ As the administrative law judge determined that claimant failed to establish the presence of pneumoconiosis, he did not make any findings regarding the cause of pneumoconiosis at 20 C.F.R. §718.203(c) or total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c).

Claimant contends that the administrative law judge erred in his consideration of the x-ray and medical opinion evidence in the instant case. 20 C.F.R. §718.202(a)(1) and (4). Director's Brief 16-17. In his response brief, the Director contends that the administrative law judge should have treated this claim as a duplicate claim and considered whether the newly submitted evidence was sufficient to establish a material change in conditions rather than determining whether claimant established a basis for modification pursuant to *Hess v. Director, OWCP*, 21 BLR 1-141 (1998).² In any case, however, the Director states that he now concedes that a material change in conditions has been established pursuant to *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), Director's Brief at 17. Thus, the Director argues that the case must now be remanded for consideration on the merits.³ We therefore vacate the administrative law judge's denial of benefits and remand this case to the administrative law judge to review all the evidence of record, both old and new, to make a determination as to whether claimant has established the elements of entitlement. 20 C.F.R. §§718.202(a); 718.203; 718.204(b), (c); *Swarrow, supra*; *Trent, supra*; *Gee, supra*; *Perry, supra*.

² As the Director contends, and the record reflects, this case is a duplicate claim. Claimant filed at least three previous claims for benefits which were denied. (Director's Exhibits 1, 22, 23). Claimant did not seek modification within one year of these previous denials, 20 C.F.R. §725.310, nor did he appeal any of these previous denials.

³ 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*); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*).

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Modification is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge