BRB No. 00-0895 BLA

JIMMY D. OWENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
HARMAN MINING CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Party-in-Interest		

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

Jimmy D. Owens, Mouthcard, Kentucky, *pro se.*

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Jennifer U. Toth and Mary Forrest-Doyle (Judith E. Kramer, Acting 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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denial of Benefits (99-BLA-0743) of Administrative Law Judge Daniel J. Roketenetz 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 determined that this case involves a request for modification, pursuant to 20 C.F.R. §725.310 (2000), of the denial of claimant's duplicate claim by Administrative Law Judge Daniel A. Sarno, Jr., in a Decision and Order issued on July 13, 1998.[2] Initially, the administrative law

[1] Ron Carson, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant filed his initial application for benefits on December 22, 1987, which was denied by the district director on July 27, 1988. Director's Exhibit 26 at 590, 658. Following a formal hearing, Administrative Law Judge Robert L. Hillyard denied benefits in a Decision and Order issued on March 29, 1991, finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) as well as a total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000), Director's Exhibit 26 at 56, which the Board affirmed in a Decision and Order dated August 25, 1992. *Owens v. Harman Mining Corp.*, BRB No. 91-1158 BLA (Aug. 25, 1992)(unpub.); Director's Exhibit 26 at 1. No further action was taken on this claim.

Claimant filed a second application for benefits on January 25, 1994, which was denied by the district director on October 4, 1994. Director's Exhibits 1, 14. Following the transfer of the case to the Office of Administrative Law Judges and by Decision and Order dated February 18, 1997, Administrative Law Judge Daniel A. Sarno, Jr. denied benefits, finding the medical evidence of record insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Specifically, the administrative law judge found the newly submitted medical evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). Accordingly, Judge Sarno denied benefits. Director's Exhibit 47.

judge credited claimant with thirty-four years of coal mine employment and adjudicated the case pursuant to 20 C.F.R. Part 718 (2000).[3] In considering claimant's request for modification, the administrative law judge found the newly submitted medical evidence of record insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000). The administrative law judge further found the newly submitted medical evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c) (2000). Therefore, the administrative law judge found the new evidence insufficient to establish a change in conditions pursuant to Section 725.310 (2000). Additionally, the administrative law judge found that the record does not support a finding of a mistake in a determination of fact. Accordingly,

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On appeal, the Board vacated the administrative law judge's denial of claimant's duplicate claim. *Owens v. Harman Mining Corp.*, BRB No. 97-0864 BLA (Mar. 17, 1998)(unpub.); Director's Exhibit 53. Initially, the Board affirmed Judge Sarno's determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *Id*. However, the Board vacated Judge Sarno's finding that claimant failed to establish a material change in conditions pursuant to Section 725.309(d) (2000) inasmuch as Judge Sarno did not consider whether the newly submitted evidence was sufficient to establish a total respiratory disability pursuant to Section 718.204(c) (2000), the other element of entitlement previously adjudicated against claimant. *Id*. Consequently, the Board remanded the case for further consideration of claimant's duplicate claim.

On remand, Judge Sarno found the newly submitted evidence insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000). Therefore, Judge Sarno determined that claimant failed to establish a material change in conditions pursuant to Section 725.309 (2000) and denied benefits. Director's Exhibit 55.

Claimant thereafter filed his request for modification on September 21, 1998. Director's Exhibit 56.

[3] 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, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

the administrative law judge denied claimant's request for modification. In response to claimant's appeal, employer urges affirmance of the administrative law judge's denial of claimant's request for modification. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in this appeal.[4]

[4] The parties do not challenge the administrative law judge's decision to credit claimant with thirty-four years of coal mine employment. Inasmuch as this finding is not adverse to claimant, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the amended regulations at issue in the lawsuit will 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). In the present case, the Board established a briefing schedule by order issued on May 23, 2001, to which employer and the Director have responded, asserting that the amended regulations do not affect the outcome of this case. Claimant has not responded to this Order.[5] Based on the briefs submitted by the parties, and our review of the record, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under Part 718, 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 (2000); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any one of these elements precludes entitlement. *Id.*

[5] Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on May 23, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

Claimant's original claim, filed in December 1987, was denied because claimant failed to establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 47. Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000),[6] the newly submitted evidence must support a finding of either the existence of pneumoconiosis or total respiratory disability. *Lisa Lee Mines v. Director, OWCP* [*Rutter II*], 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). Therefore, the relevant issue before the administrative law judge, in this request for modification, is whether the newly submitted evidence, that evidence submitted subsequent to Judge Sarno's July 1998 denial of claimant's duplicate claim, is sufficient to establish a material change in condition pursuant to 20 C.F.R. §725.309 (2000), thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *See Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *Nataloni v. Director,* OWCP, 17 BLR 1-82 (1993); *see also Rutter II, supra*.

After consideration of the administrative law judge's Decision and Order and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's denial of claimant's request for modification under Section 725.310 (2000). In determining whether claimant established a change in conditions, the administrative law judge properly found that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis inasmuch as both of the x-ray interpretations submitted with the new claim were read as negative for the existence of pneumoconiosis.[7] Decision and Order at 6, 8; Employer's Exhibits 1, 4; 20 C.F.R. §718.202(a)(1) (2000); *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984), *aff'd*, 806 F.2d 258 (4th Cir. 1986)(table); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Moreover, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis under Section 718.202(a)(2) (2000) as there is no biopsy evidence of record. Decision and Order at 8; 20

[6] Although the Department of Labor has made substantive revisions to 20 C.F.R. §§725.309 and 725.310, these revisions only apply to claims filed after January 19, 2001.

[7] The newly submitted x-ray evidence consists of two interpretations of the June 10, 1999 x-ray film, both of which are negative for the existence of pneumoconiosis. Employer's Exhibits 1, 4.

C.F.R. §718.202(a)(2) (2000). Likewise, the administrative law judge rationally found that claimant is not entitled to the presumptions set forth under Section 718.202(a)(3) (2000), *i.e.*, there is no evidence of complicated pneumoconiosis, *see* 20 C.F.R. §718.304 (2000); the claim was not filed prior to January 1, 1982, *see* 20 C.F.R. §718.305(e) (2000); and the instant case involves a living miner's claim, *see* 20 C.F.R. §718.306(a) (2000). Decision and Order at 8-9; 20 C.F.R. §718.202(a)(3) (2000).

In addition, we affirm the administrative law judge's finding that the new medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), inasmuch as none of the newly submitted medical opinions of record supports a finding of pneumoconiosis. Decision and Order at 7, 9. As the administrative law judge properly found, there are two newly submitted medical opinions relevant to the issue of the existence of pneumoconiosis. Drs. Dahhan and Fino both concluded that claimant did not suffer from coal workers' pneumoconiosis or a pulmonary condition related to his coal mine employment. Decision and Order at 9; *see* Employer's Exhibits 1, 3, 4; 20 C.F.R. §§718.201, 718.202(a)(4) (2000); *see Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *Perry, supra*; *see also Handy v. Director, OWCP*, 16 BLR 1-73 (1990). Consequently, we affirm the administrative law judge's finding that the newly submitted medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *See Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *see generally Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000).

With regard to the existence of a totally disabling respiratory or pulmonary impairment under Section 718.204(c) (2000), we affirm the administrative law judge's finding that the newly submitted medical evidence was insufficient to establish that claimant is totally disabled under 20 C.F.R. §718.204(c)(1)-(4) (2000). Decision and Order at 9-11. The administrative law judge reasonably found that the pulmonary function study evidence was insufficient to demonstrate total disability inasmuch as the newly submitted pulmonary function studies, while producing qualifying values, were found to be invalid by all the physicians who reviewed the studies and, therefore, the administrative law judge reasonably found that these studies were unreliable.[8] Decision and Order at 6-7, 10;

[8] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C (2000), respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

Director's Exhibit 56; Claimant's Exhibits 1, 2; Employer's Exhibits 3, 4; 20 C.F.R. §718.204(c)(1) (2000); *see Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(Brown, J. dissenting); *see generally Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

The administrative law judge also properly found that the newly submitted blood gas studies, dated April 15, 1998 and June 10, 1999, were non-qualifying and, thus, insufficient to demonstrate total disability. Decision and Order at 7, 10; Director's Exhibit 56; Employer's Exhibit 1; 20 C.F.R. §718.204(c)(2) (2000). In addition, the record contains no evidence of cor pulmonale with right sided congestive heart failure and, therefore, the administrative law judge properly found that total disability was not demonstrated pursuant to Section 718.204(c)(3) (2000). Decision and Order at 9-10; 20 C.F.R. §718.204(c)(3) (2000); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

Furthermore, the administrative law judge properly found that total disability was not demonstrated at Section 718.204(c)(4) (2000), as the newly submitted medical opinions of record were insufficient to demonstrate total respiratory or pulmonary disability. Decision and Order at 7-8, 10-11; Employer's Exhibits 1, 3, 4; 20 C.F.R. §718.204(c)(4) (2000); *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991)*; Carson v. Westmoreland Coal Co.*, 19 BLR 1-16 (1994); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

Inasmuch as the administrative law judge rationally found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis or establish that claimant was totally disabled, the elements of entitlement previously adjudicated against claimant, we affirm the administrative law judge's finding that the newly submitted medical evidence is insufficient to establish a change in conditions. 20 C.F.R. §725.310 (2000); *Jessee*, *supra*; *Nataloni, supra*.

Moreover, we affirm the administrative law judge's finding that a review of the entire record establishes that there was no mistake in a determination of fact in the previous decisions. Decision and Order at 5-6. As the administrative law judge correctly determined, the record does not support a finding of the existence of pneumoconiosis or that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204 (2000). *See* Decision and Order at 5-6. Consequently, we affirm the administrative law judge's finding that there was no mistake in a determination of fact, including the ultimate fact of entitlement, in the previous decisions. Decision and Order at 5-6; 20 C.F.R. §725.310 (2000);

Jessee, supra; *see also Aerojet-General Shipyards, Inc. v. O'Keeffe*, 404 U.S. 254 (1971); *Nataloni, supra*.

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge