BRB No. 02-0524 BLA

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

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

Tracey E. Burkett (Appalachian Research & Defense Fund of Kentucky, Incorporated), Richmond Kentucky, for claimant.

Mary Forrest-Doyle (Eugene Scalia, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (01-BLA-0560) of Administrative Law Judge Rudolf L. Jansen denying benefits 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).[1] The administrative law judge found, based in part on the stipulation of the parties, sixteen years of coal mine employment established. Noting that the instant claim was a duplicate claim, the administrative law judge stated that he must review the evidence

[1] 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 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

submitted subsequent to December 18, 1998, "the date of the final prior denial by the Benefits Review Board,"[2] to determine whether claimant had established a material change in conditions. Considering the newly submitted evidence, the administrative law judge found

[2] Claimant originally filed a claim on June 25, 1993, which was denied in a Decision and Order issued on November 21, 1997, by Administrative Law Judge Daniel J. Roketenetz, Director's Exhibit 22. Judge Roketenetz found seventeen years of coal mine employment established, that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(4), and that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000), now 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly, benefits were denied. Claimant appealed. The Board affirmed Judge Roketenetz's finding that the existence of pneumoconiosis was not established and, therefore, affirmed the denial of benefits. *Jones v. Director, OWCP*, BRB No. 98-0485 BLA (Dec. 18, 1998)(unpub.)-Director's Exhibit 22. On February 18, 1999, claimant filed a petition for review of the Board's Decision and Order to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. On September 20, 1999, the Sixth Circuit issued an order dismissing claimant's petition for review for lack of jurisdiction because claimant's petition for review was late. *Jones v. Director, OWCP*, No. 99-3204 (6th Cir., Sep. 20, 1999)(unpub. order). Director's Exhibit 22. Claimant filed a petition for rehearing with the Sixth Circuit, which was denied in an order issued on January 3, 2000. *Jones v. Director, OWCP*, No. 99-3204 (6th Cir., Jan. 3, 2000)(unpub. order). Claimant filed a second claim on March 22, 2000. Director's Exhibit 1.

that it did not establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), elements of entitlement previously decided against claimant. The administrative law judge, therefore, found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in treating the instant claim as a duplicate claim pursuant to 20 C.F.R. §725.309 (2000), rather than as a request for modification pursuant to 20 C.F.R. §725.310 (2000), and contends generally that the administrative law judge failed to properly weigh the medical opinion of claimant's treating physician. The Director, Office of Workers' Compensation Programs (the Director), responds, urging that the administrative law judge's Decision and Order denying benefits be affirmed.

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).

In order to establish entitlement to benefits under Part 718 in this living miner's claim, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*.

Claimant contends that the administrative law judge erred in failing to explain why he treated the instant claim as a duplicate claim rather than a request for modification. Specifically, claimant contends that the administrative law judge erred when he used the date of the Board's December 18, 1998 decision, affirming the denial of benefits on claimant's original claim, as the date of the final decision in this case instead of the date of the Sixth Circuit's Order of September 20, 1999, ruling that it lacked jurisdiction to hear the case or the court's January 3, 2000 order denying claimant's *pro se* petition for rehearing. Claimant contends that nothing in the regulations at 20 C.F.R. §§725.309(c) or 725.310 (2000) state that the Court of Appeals must hear a case on the merits before its order can be considered a final order, and that there was no way he could know his attempt at an appeal of the Board's denial failed until he received the court's order dated September 20, 1999, dismissing his petition for review for lack of jurisdiction because it was filed late. Thus, claimant contends that his new claim, filed on March 22, 2000, was filed within one year of the court's order dismissing his appeal, and should have been treated as a request for modification, rather than

a duplicate claim. In response, the Director contends that the Board should reaffirm the administrative law judge's finding that claimant's March 22, 2000 claim is a duplicate claim inasmuch as claimant did not timely appeal the Board's January 18, 1998 decision or seek reconsideration of that decision. The Director argues that the Board should reject claimant's contention that, in effect, claimant's untimely petition to the Sixth Circuit for review of the Board's decision affirming the administrative law judge's denial, tolls the one-year period provided for requesting modification. The Director contends that the adoption of such a view would render the one-year period for seeking modification meaningless, as a claimant could file an untimely petition for review years after a Board's decision, and take advantage of modification proceedings once the appeal was dismissed by the court of appeals as untimely. In any event, the Director also notes that when the Sixth Circuit originally dismissed claimant's petition for review as untimely on September 20, 1999, Director's Exhibit 22-*Jones v. Director, OWCP*, No. 99-3204 (6th Cir., Jan. 3, 2000)(unpub. order), claimant still had the opportunity at that time to file a timely request for modification of the Board's final decision, but instead chose to file a petition for rehearing with the Sixth Circuit. In response, claimant contends it is unlikely that the court of appeals would allow itself to be used in such a manner and contends that claimant would request modification, rather than wait years to file untimely appeals with a court of appeals.

We reject claimant's contention that his March 22, 2000 claim should have been treated as a request for modification, rather than a duplicate claim. A request for modification may be filed "at any time prior to one year after the rejection of a claim . . . ." 33 U.S.C. §922; *see also* 20 C.F.R. §725.310(a)(2000). A claim is rejected when the denial becomes "final." *See* 33 U.S.C. §921(c); *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 951, 22 BLR at 2-46, 2-60 (6th Cir. 1999); *see also Stanley v. Betty B Coal Co.*, 13 BLR 1-72, 1-76 (1990)(a party has "one year from a final decision" to request modification), *aff'd sub nom. Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). A Board decision "become[s] final 60 days after the issuance of such decision unless a written petition for review . . . is filed in the appropriate U.S. court of appeals prior to the expiration of the 60-day period . . . or . . . a timely request for reconsideration by the Board has been filed . . . ." 20 C.F.R. §802.406, *see also* 33 U.S.C. §921(c), as incorporated into the Act by 30 U.S.C. §932(g). To be timely, a motion for reconsideration must be filed within thirty days from the filing of the Board's decision, *see* 20 C.F.R. §802.407(a), and a petition for review must be filed within sixty days of the Board's decision, *see* 20 C.F.R. §802.410(a).

The Board's decision affirming the administrative law judge's denial of benefits on claimant's first claim was filed on December 18, 1998. Director's Exhibit 22-*Jones v. Director, OWCP*, BRB No. 98-0485 BLA (Dec. 18, 1998)(unpub.). Claimant did not file a timely motion for reconsideration with the Board, but instead filed an untimely petition for review with the Sixth Circuit more than sixty days after the date of the Board's denial.

Director's Exhibit 22. Thus, because claimant did not file a timely motion for reconsideration or timely appeal the Board's decision, the Board's decision became final. Claimant's second claim filed March 22, 2000, was, therefore, filed more than one year after the Board's December 18, 1998 decision became final, Director's Exhibit 1, and thus, more than one year after the "rejection" of his claim, *see* 33 U.S.C. §922. Consequently, claimant's second claim cannot be considered a request for modification because it was filed more than a year after the final denial of claimant's original claim. *See* 33 U.S.C. §922; 20 C.F.R. §725.310 (2000); Director's Exhibits 1, 22.[3]

Next, claimant states that the administrative law judge failed to properly weigh the medical opinion of claimant's treating physician, but does not raise any specific allegations of legal or factual error committed by the administrative law judge in finding that the newly submitted evidence did not establish the existence of pneumoconiosis or total disability.

Claimant submitted new medical reports from Dr. Baker, claimant's treating physician. Director's Exhibits 9, 12, 18, 22. Pursuant to Section 718.202(a)(4), the administrative law judge found Dr. Baker's newly submitted opinion that claimant suffered from pneumoconiosis to be inconsistent, equivocal and not well-documented or well-

[3] Claimant's reliance on the Sixth Circuit's decision in *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999) is misplaced. In *Milliken*, the Sixth Circuit had to determine when its decision became final for purposes of starting the one-year modification period precisely because "[n]either the statute nor the regulations . . . elucidate[d] when a court of appeals's decision . . . becomes 'final'. . . ." *Milliken*, 200 F.3d at 951, 22 BLR at 2-61. Here, by contrast, the regulations expressly define when an order of the Board becomes final. *See* 20 C.F.R. §802.406.

Claimant contends that there is no way he knew his attempt at an appeal failed until the date of the court's order dismissing his appeal. Claimant did, however, know when he was required to file a petition for review from a Board's decision, *see* 20 C.F.R. §802.410(a).

reasoned. Decision and Order at 9. In addition, the administrative law judge found Dr. Baker's opinion to be similar to, if not identical to, Dr. Baker's opinions in claimant's original claim and noted that the Board had affirmed the finding by Administrative Law Judge Daniel J. Roketenetz that Dr. Baker's previously submitted opinions were unreasoned. *See* Director's Exhibit 22-*Jones*, BRB No. 98-0485 BLA. Finally, pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that Dr. Baker did not find that claimant was totally disabled in his newly submitted opinions. Decision and Order at 11.

While the opinions of a treating physician "should be '[g]iven their proper deference,'" where an administrative law judge finds that a treating physician's opinion is unreasoned the administrative law judge need not accord additional weight to the treating physician's opinion. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, BLR (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, BLR (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-327 (6th Cir. 2002), *quoting Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-87, 19 BLR 2-111, 2-117 (6th Cir.1995); *see also* 20 C.F.R. §718.104(d)(5). Moreover, claimant's mere recitation of evidence of record which is favorable to his position does not sufficiently identify error by the administrative law judge with sufficient specificity to provide a basis for review of the administrative law judge's findings. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We must, therefore, affirm the administrative law judge's findings. Further, because the administrative law judge's findings that the new evidence, dated subsequent to the final denial of claimant's original claim, was insufficient to establish the existence of pneumoconiosis or total disability are rational, supported by substantial evidence and, otherwise, unchallenged by claimant on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), they are affirmed.

Consequently, because we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis or total disability, the requisite elements of entitlement that were the basis of the prior denial, we affirm the administrative law judge's finding that a material change in conditions was not established. 20 C.F.R. §725.309(d) (2000); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *see also Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), and that entitlement under Part 718 is precluded, *see Trent*, *supra*; *Perry*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge