BRB No. 99-0143 BLA

RONNY E. HOWARD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STRAIGHT CREEK MINING COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Bonnie Hoskins (Stoll, Keenon & Park, LLP), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (97-BLA-1533) of Administrative Law Judge Robert L. Hillyard 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 nineteen years of coal mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. The instant claim is a request for modification of a denial of a duplicate claim.[1] The administrative law judge found that the issue before him was whether

[1] Claimant filed his initial claim for benefits on May 17, 1993, which was denied by the district director on October 15, 1993. Claimant filed the instant claim on September 21,

the evidence was sufficient to establish modification of the district director's February 20, 1996 denial of claimant's September 21, 1995 duplicate claim. The administrative law judge found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to Section 718.202(a) and 718.204(c), and thus, insufficient to establish a change in conditions pursuant to Section 725.310. The administrative law judge further found, after consideration of all the evidence of record, that the evidence was insufficient to establish a mistake in fact pursuant to Section 725.310. The administrative law judge concluded therefore that the evidence of record was insufficient to establish modification pursuant to 20 C.F.R. §725.310. Accordingly, benefits were denied. On appeal, claimant contends that the evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) and total disability pursuant to 20 C.F.R. §718.204(c). The employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational , and is in accordance with law. 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).[2]

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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 of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry*

1995 which was denied by the district director on February 20, 1996. Director's Exhibits 1, 14. Claimant filed a request for modification on July 24, 1996, which was denied by the district director on April 16, 1997. Director's Exhibit 29.

[2] The administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(2)-(a)(3) and 718.204(c)(1)-(c)(3) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

v. Director, OWCP, 9 BLR 1-1 (1986)(*en banc*).

In considering the instant claim, the administrative law judge should have considered whether the newly submitted evidence was sufficient to establish a material change in conditions pursuant to Section 725.309, rather than determining whether claimant established a basis for modification of the district director's denial of claimant's 1995 duplicate claim. *Hess v. Director, OWCP*, 21 BLR 1-141 (1998).[3] This error is harmless, however, in view of the administrative law judge's proper determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c).[4] *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[3] The Board has held that any party dissatisfied with a district director's determination on a duplicate claim is entitled to have the matter considered by the Office of the Administrative Law Judges. *See Rice v. Sahara Coal Co.*, 15 BLR 1-19 (1991)(en banc). Moreover, an administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions.

[4] The United States Court of Appeal for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that when determining whether a material change in conditions has been established, an administrative law judge must consider all the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The district director denied claimant's 1995

Considering the newly submitted evidence, the administrative law judge permissibly found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge rationally found that claimant failed to carry his burden of establishing the existence of pneumoconiosis as the two newly submitted x-rays were in equipoise, *i.e.*, one was read as negative and one was read as positive. *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). Further, contrary to claimant's contention, the administrative law judge permissibly discredited Dr. Bushey's opinion as he found it was merely a restatement of a positive x-ray reading. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985). In addition, the administrative law judge permissibly found that Dr. Bushey's finding of pneumoconiosis was not reasoned and was outweighed by the contrary opinions of Drs. Dahhan and Fino. Director's Exhibits 9, 25, 27, 28; Employer's Exhibit 1; Decision and Order at 9; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Accordingly, the administrative law judge's finding that the new evidence did not establish the existence of pneumoconiosis at Section 718.202(a)(1) and (4) is affirmed.

The administrative law judge, in the instant case, also permissibly determined that the newly submitted evidence of record was insufficient to establish total disability pursuant to Section 718.204(c)(4), as Drs. Dahhan and Fino found claimant able to perform his usual coal mine employment, Director's Exhibits 9, 27, 28; Employer's Exhibit 1, and Dr. Bushey did not address total disability. Director's Exhibit 25. Contrary to claimant's contention, the administrative law judge permissibly found the new evidence insufficient to establish total disability as none of the physicians found claimant totally disabled. Decision and Order at 10; *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Wright v. Director, OWCP*, 8 BLR 1-245 (1985); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). Further, contrary to claimant's

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claim finding that the evidence was insufficient to establish the existence of pneumoconiosis or a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(c). Consequently, in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, the newly submitted evidence must support a finding of pneumoconiosis pursuant to Section 718.202(a) or total disability pursuant to Section 718.204(c).

argument, the newly submitted physicians' opinions did not provide a basis from which the administrative law judge could infer a finding of total disability. *See Zimmerman, supra*; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Wright, supra*. Nor, contrary to claimant's argument, does a physician's diagnosis of pneumoconiosis establish total disability without supporting medical evidence. *See Ondecko, supra*; *Trent, supra*; *Gee, supra*; *Perry, supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*. Consequently, we affirm that administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis and total disability pursuant to Sections 718.202(a) and 718.204(c) as it is supported by substantial evidence and is in accordance with law.

Inasmuch as the newly submitted evidence is insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309. *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Hess, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge