BRB No. 99-0840 BLA

SYLVAN H. GROSS	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Jennifer U. Toth (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 (98-BLA-1259) of Administrative Law Judge Thomas F. Phalen, Jr., 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). In considering claimant's petition for modification[1] under 20 C.F.R. §725.310, the

[1]Claimant filed for benefits on May 28, 1987, but withdrew his claim on September 27, 1987. Director's Exhibit 20. The instant claim was filed on March 7, 1994. Director's Exhibit 19. On September 18, 1996, Administrative Law Judge Frank D. Marden issued a decision denying benefits, finding the evidence sufficient to establish the existence of pneumoconiosis, but insufficient to establish total disability. Director's Exhibit 26. The Board affirmed Judge Marden's decision denying benefits. *Gross v. Director, OWCP,* BRB No. 96-1711 BLA (July 14, 1997)(unpub.). On October 27, 1997, claimant submitted additional evidence and requested modification of the prior denial. The district director denied claimant's request for modification on February 13, 1998 and July 24, 1998. Director's Exhibits 35, 38.

administrative law judge accepted the parties' stipulation to twenty years of coal mine employment. The administrative law judge found that claimant did not establish a change in conditions or a mistake in a determination of fact in the prior denial pursuant to Section 725.310. On appeal, claimant alleges that the administrative law judge erred in finding that claimant did not establish total disability pursuant to Section 718.204(c). The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the denial of benefits.[2]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.,* 380 U.S. 359 (1965).

Under Section 718.204(c), claimant argues that the administrative law judge erred because he did not consider claimant's age, education or work experience in his assessment that claimant was not totally disabled. Additionally, claimant notes that because pneumoconiosis is a progressive and irreversible disease, it can be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis "claimant's condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 4. We disagree. Claimant's assertion of vocational disability based on his age, limited education and work experience, does not support a finding of total respiratory or pulmonary disability compensable under the Act. *See Ramey v. Kentland Elkhorn Coal Corp.,* 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985). Further, contrary to claimant's contention, although pneumoconiosis is characterized as a progressive disease, the mere existence of the disease for a period of time does not, in and of itself, establish that the condition is totally disabling. Inasmuch as claimant does not otherwise challenge the administrative law judge's finding that the newly submitted evidence under Section 718.204(c)(1)-(4) does not establish a change in conditions and claimant does not challenge the administrative law judge's finding that there was no mistake of fact in the prior finding of no total disability, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); we affirm the administrative law judge's denial of benefits, as entitlement is precluded. *Trent v. Director, OWCP,* 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1(1986)(*en banc*).

[2]Inasmuch as the parties on appeal do not challenge the administrative law judge's finding of twenty years of coal mine employment, we affirm this finding. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge