BRB No. 01-0263 BLA

PAUL DRUTAROVSKY	)	
	)	
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 Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Paul Drutarovsky, Olyphant, Pennsylvania, *pro se*.

Barry H. Joyner (Howard M. Radzely, 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: HALL, Chief Administrative Appeals Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (2000-BLA-00287) of Administrative Law Judge Robert D. Kaplan denying benefits on a duplicate 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

[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 (2001).

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive

found eight and one-quarter 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 3. After determining that the instant claim was a duplicate claim,[2] the administrative law judge noted

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relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001).

[2]Claimant filed his initial claim for benefits on September 7, 1972, which was finally denied on March 5, 1986. Director's Exhibit 11. Claimant filed a second claim on February 9, 1993, in which Administrative Law Judge Ainsworth H. Brown denied benefits as claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 11. The Benefits Review Board, on September 29, 1995, affirmed this denial on the basis that claimant failed to establish a totally disabling respiratory impairment. Director's Exhibit 11. Claimant filed the instant claim on May 24, 1999, which was denied by the District Director on October 15, 1999. Director's Exhibits 1, 9.

the proper standard and found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). Decision and Order at 2-9. Consequently, the administrative law judge concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order at 9. Accordingly, benefits were denied. On appeal, claimant generally contends that the administrative law judge erred in failing to award benefits. The Director, Office of Workers' Compensation Programs, responds urging affirmance of the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and consistent with applicable law. 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 in a living miner's claim filed pursuant to 20 C.F.R. 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. Considering the newly submitted evidence, the administrative law judge rationally found that claimant failed to establish a material change in conditions pursuant to Section 725.309 (2000). *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

The United States Court of Appeals for the Third Circuit has held that in assessing whether the evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.[3] *See Labelle*

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit as the miner was employed in the coal mine industry in the Commonwealth of Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

Processing Co. v. Swarrow, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995). Thus, an element of entitlement which was not explicitly addressed in the denial of the prior claim does not constitute "an element of entitlement previously adjudicated against a claimant." *See Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97 (2000)(*en banc*). Moreover, such an element may not be considered in determining whether the newly submitted evidence is sufficient to establish a material change in conditions at Section 725.309 (2000) in accordance with *Swarrow*.[4] *Caudill, supra*.

[4]Under the "one-element standard" adopted by the United States Court of Appeals for the Third Circuit in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), a miner is provided an opportunity to establish a material change in conditions by proving any element of entitlement *previously adjudicated against him*. Hence, the focus of the material change in conditions standard in *Swarrow* is on specific findings made against the claimant in the prior claim.

Here, claimant's previous claim was finally denied by the Benefits Review Board because claimant failed to establish the existence of a totally disabling respiratory or pulmonary impairment, and not because claimant failed to establish the existence of pneumoconiosis.[5] Director's Exhibit 11. Consequently, in order to establish a material change in conditions at Section 725.309 (2000), the newly submitted evidence must support a finding that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204. Thus, any error by the administrative law judge in determining if the newly submitted evidence was sufficient to establish the existence of pneumoconiosis is harmless as the administrative law judge also fully considered the newly submitted evidence to determine if it was sufficient to establish total disability pursuant to Section 718.204(c) (2000). *Swarrow*, *supra*; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order at 8-9.

[5]Although Administrative Law Judge Ainsworth H. Brown denied the claim as claimant failed to establish the existence of pneumoconiosis and total disability, the Benefits Review Board affirmed the denial solely on the basis that claimant failed to establish a totally disabling respiratory or pulmonary impairment, an essential element of entitlement. Director's Exhibit 11; *Drutarovsky v. Director, OWCP*, BRB No. 95-1055 BLA (September 29, 1995)(unpublished).

Considering the newly submitted evidence of record to determine if a material change in conditions was established, the administrative law judge, in the instant case, considered the entirety of the relevant medical evidence and acted within his discretion in concluding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c) (2000). *Piccin, supra*; Decision and Order at 8-9. The administrative law judge properly found that total disability pursuant to 20 C.F.R. §718.204(c)(1)-(2) (2000) had not been established, since all of the valid pulmonary function and blood gas study evidence of record produced non-qualifying values.[6] Decision and Order at 8; Director's Exhibits 3, 5, 14. The administrative law judge properly noted that the pulmonary function study conducted by Dr. Levinson on September 9, 1999 was non-qualifying.[7] Decision and Order at 7-8; Director's Exhibit 3. The administrative law judge rationally determined that the remaining pulmonary function study of record, dated April 14, 2000, was invalid as the administering physician, Dr. Levinson, questioned the reliability of the study as claimant's effort was inconsistent and as Dr. Cander, who reviewed the study, concluded that it was invalid. *See* Decision and Order at 8; Director's Exhibit 14; *Trent, supra*; *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). We therefore affirm the administrative law judge's finding that the objective studies of record are insufficient to establish total disability as it is supported by substantial evidence and is in accordance with law.[8]

With respect to Section 718.204(c)(4) (2000), the administrative law judge properly

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[6]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, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000).

[7]Claimant was 73 years old when this pulmonary function study was performed. Director's Exhibit 3. The table for qualifying values at 20 C.F.R. Part 718, Appendix B stops at age 71. It appears, therefore, that the administrative law judge applied table values for claimant beyond the table ages. Decision and Order at 7-8. The administrative law judge could rationally apply the table values for a claimant beyond the age of the table values. *See generally O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985). Moreover, as the September 1999 study is not qualifying for age 71, these values will not qualify for later ages. Director's Exhibit 3.

[8]The administrative law judge properly found that the record indicates that no physician diagnosed cor pulmonale with right sided congestive heart failure and therefore total disability is precluded pursuant to 20 C.F.R. §718.204(c)(3) (2000). Decision and Order at 9; *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989).

considered the entirety of the newly submitted medical opinion evidence of record and rationally concluded that the medical opinion evidence did not support a finding that claimant is totally disabled from a respiratory or pulmonary impairment. *Perry, supra*; *Piccin, supra*; Decision and Order at 9. The administrative law judge rationally considered the newly submitted opinions of Drs. Levinson and Gratz and permissibly found that the opinions were insufficient to establish claimant's burden of proof as neither physician opined that claimant was totally disabled.[9] Decision and Order at 9; Director's Exhibits 4, 10, 14; *Budash v. Bethlehem Mines Corp*., 9 BLR 1-48 (1986) (*en banc*), *aff'd on recon. en banc*, 9 BLR 1-104 (1986); *Gee, supra*; *Perry, supra*.

Claimant has the general burden of establishing entitlement and bears the risk of non-persuasion if his evidence is found insufficient to establish a crucial element. *See Trent, supra*; *Perry, supra*; *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *White v. Director, OWCP*, 6 BLR 1-368 (1983). As the administrative law judge permissibly concluded that the newly submitted evidence does not establish that claimant is totally disabled, claimant has not met his burden of proof on all the elements of entitlement. *Swarrow, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trent, 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 v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Furthermore, since the determination of whether claimant has a totally disabling respiratory impairment is primarily a medical determination, claimant's testimony alone, under the circumstances of this case, could not alter the administrative law judge's finding. *Anderson, supra*. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish total disability pursuant to Section 718.204(c) (2000) as it is supported by substantial evidence and is in accordance with law. Inasmuch as claimant has failed to establish a material change in conditions pursuant to Section 725.309 (2000), we affirm the denial of benefits. *Swarrow, supra*.

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

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[9]The administrative law judge properly noted that Dr. Gratz had been claimant's treating physician since 1997 but did not offer an opinion as to the existence of a totally disabling pulmonary impairment. *See* Decision and Order at 8; Director's Exhibit 10.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge