BRB No. 01-0134 BLA

HARLEN ROWE	)	
	)	
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John C. Collins (Collins, Allen & McFarland), Salyersville, Kentucky, for claimant.

Helen H. Cox (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (99-BLA-0705) of Administrative Law Judge Joseph E. Kane denying benefits on a miner's 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 credited the miner with ten months and

[1]Claimant is Harlen Rowe, the miner, who filed his present claim for benefits on August 31, 1998. Director's Exhibit 1. Claimant's first claim for benefits, filed on March 15, 1984, was finally denied on May 31, 1984 by reason of abandonment. Director's Exhibits 18-1, 18-5.

[2]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

twenty-six days of coal mine employment. Decision and Order at 9. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence to be insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000). Decision and Order at 11-13. Therefore, the administrative law judge, citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), found the new evidence insufficient to establish a material change in conditions. Decision and Order at 10-11, 13. Accordingly, benefits were denied.

On appeal, claimant contends that his testimony at the hearing establishes that he is disabled from coal workers' pneumoconiosis. Claimant's Brief at 2. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the denial of benefits.

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

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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.

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 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. 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*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). Accordingly, on August 10, 2001, the Board issued a second order in which it rescinded its earlier order requesting supplemental briefing.

[3]As the administrative law judge noted, no medical evidence was developed in connection with the miner's first claim for benefits. Decision and Order at 9 n.2.

[4]We affirm the administrative law judge's findings regarding length of coal mine employment, that a material change in conditions is not established and that the existence of pneumoconiosis is not established pursuant to Section 718.202(a)(1)-(a)(4) (2000) as they are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 challenging the administrative law judge's finding regarding total respiratory disability, claimant asserts that the administrative law judge erred in not finding claimant disabled due to pneumoconiosis based on his testimony regarding his physical symptoms and limitations. Claimant's Brief at 2. Claimant does not challenge the administrative law judge's analysis of the medical evidence at Section 718.204(c)(1)-(c)(4) (2000) or his conclusions that claimant has failed to demonstrate total respiratory disability pursuant to any of the relevant subsections as none of the evidence supports a finding of total disability. Accordingly, we affirm as unchallenged on appeal the administrative law judge's finding that claimant failed to establish a material change in conditions at Section 718.204(c)(1)-(c)(4) (2000) based on the medical evidence. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Regarding testimony offered by claimant in his living miner's claim, the Board has held that "lay testimony is generally insufficient to establish total respiratory disability unless it is corroborated by at least a quantum of medical evidence." *Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999); *see also Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Because we affirm the administrative law judge's finding that there is no medical evidence of total disability submitted in support of this duplicate claim, claimant's testimony alone is insufficient to carry his burden of proof in establishing total respiratory disability. *See* 20 C.F.R. §718.204(d)(5); *Madden, supra*; *Trent, supra*. Therefore, we affirm the administrative law judge's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *See Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge