BRB No. 99-1153 BLA

GLEN SURBER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CANNELTON INDUSTRIES, INCORPORATED	)	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-Denying Benefits of Lawrence P. Donnelly, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (99-BLA-332) of Administrative Law Judge Lawrence P. Donnelly 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 that the instant claim constituted a duplicate claim,[1] and found that claimant established

[1]Claimant filed has three other claims all of which were denied by the district director

a coal mine employment history of thirty-four years. The administrative law judge further found that employer conceded the existence of simple coal workers' pneumoconiosis, that claimant conceded that he was unable to establish total disability, and that the newly submitted evidence failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge therefore found that claimant failed to establish a material change in conditions subsequent to the previous denial, and, accordingly, denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence of record failed to establish the presence of complicated pneumoconiosis. Employer, in response, urges that the Decision and Order denying benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief.[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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

Claimant contends that while employer's physicians agreed that the x-ray evidence failed to establish the presence of complicated pneumoconiosis, these physicians were unable to agree upon exactly what claimant was suffering from.

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on the basis of claimant having failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibits 18-20.

[2]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, as well as his findings that the evidence established the existence of simple coal workers' pneumoconiosis, and that the evidence failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant further asserts that it was "significant" that several of employer's physicians agreed that CT scans would be necessary to determine claimant's specific physical status. Claimant's Brief at p. 8 (unpaginated).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction arises, has held that in order to establish a material change in conditions pursuant to 20 C.F.R. §725.309, a claimant must establish at least one of the elements previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert. denied*, 117 S.Ct. 763 (1997). Claimant's previous claims were denied because claimant failed to establish the presence of a totally disabling respiratory impairment. *See* Director's Exhibits 18-20. A claimant need not independently establish the presence of a totally disabling respiratory impairment if he can demonstrate the presence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304(a)-(c). Once the presence of complicated pneumoconiosis is established, a claimant is entitled to an irrebutable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §718.304. In order to establish invocation of the irrebutable presumption of total disability due to pneumoconiosis at Section 718.304, an administrative law judge must consider evidence, if any, found at each subsection pursuant to Section 718.304(a)-(c), and then weigh together such evidence prior to invocation of the presumption. *See Lester v. Director, OWCP,* 993 F.2d 1143, 17 BLR 2-114 (4th Cir.1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*).

In finding that claimant was unable to establish the existence of complicated pneumoconiosis through the newly submitted evidence, the administrative law judge found that while both Drs. Navani and Gaziano concluded that the April 15, 1998 x-ray demonstrated complicated pneumoconiosis, Director's Exhibit 7, the other readings of this x-ray by Drs. Wheeler, Scott, and Castle, failed to diagnose the presence of the disease, Employer's Exhibit 8. The administrative law judge further found that a subsequent x-ray dated November 4, 1998, and reviewed by Drs. Scott, Wheeler, Spitz, and Castle, failed to show the "large opacity/mass" upon which Drs. Navani and Gaziano based their findings of complicated pneumoconiosis. The administrative law judge thus found the readings of Drs. Navani and Gaziano of the April 15, 1998 x-ray outweighed by the other readings of this x-ray and the readings of a subsequent x-ray and not therefore supportive of a finding of complicated pneumoconiosis. Decision and Order at 12. Accordingly, the administrative law judge found that the newly submitted evidence failed to establish the presence of complicated pneumoconiosis.

Contrary to claimant's assertion, the burden of demonstrating the presence of complicated pneumoconiosis rests affirmatively with claimant. *See 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).

In the instant case, the administrative law judge reviewed all the relevant evidence of record,[3] and permissibly concluded that the weight of the newly submitted x-ray evidence failed to affirmatively demonstrate complicated pneumoconiosis. *See Ondecko*, *supra*; *Lester*, *supra; Melnick*, *supra*. We thus reject claimant's assertion that the administrative law judge erred in allowing the employer's physicians to "define" complicated pneumoconiosis. Claimant's Brief at p.9 (unpaginated). Accordingly, we affirm the administrative law judge's finding that the newly submitted evidence failed to establish a material change in conditions, *see Rutter*, *supra*, and we must, therefore, affirm the denial of benefits.

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[3]There record is devoid of autopsy, biopsy or CT scan evidence. *See* 20 C.F.R. §718.304(b), (c).