

BRB No. 97-0743 BLA

FRED JUNIOR PLEASANT)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
STERLING 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 of Frederick D. Neusner, United States Department of Labor.

Fred Junior Pleasant, Big Stone Gap, Virginia, *pro se*.¹

Cathryn Celeste Helm (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor of Labor; 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, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested on behalf of claimant that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal, *Pleasant v. Sterling Mining Co.*, BRB No. 97-0743 BLA (Mar. 18, 1997) (Order). See *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Claimant, without legal representation, appeals the Decision and Order (96-BLA-1287) of Administrative Law Judge Frederick D. Neusner denying benefits on a duplicate claim² 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.* After crediting claimant with not less than thirteen years of coal mine employment, the administrative law judge found the newly submitted medical evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The administrative law judge, therefore, concluded that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied. On appeal, claimant generally challenges the administrative law judge's denial of 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. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable 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 Claimant filed an initial claim on January 19, 1993. Director's Exhibit (DX) 25. The district director denied benefits on May 13, 1993, finding that claimant failed to establish the existence of pneumoconiosis and total disability. *Id.* Claimant took no further action with regard to the denial of his 1993 claim until he filed the instant claim on May 1, 1995. Director's Exhibit 1.

Because this case involves a duplicate claim under 20 C.F.R. §725.309(d), claimant must establish a material change in conditions since the denial of his last claim. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises,³ has held that an administrative law judge must consider all of the newly submitted evidence, favorable and unfavorable, to determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996). If the miner establishes the existence of that element, he has demonstrated a material change. *Id.* The administrative law judge must then consider whether all of the record evidence, including that submitted with the previous claim, supports an award of benefits. *Id.* Inasmuch as claimant's 1993 claim was denied based upon his failure to establish both the existence of pneumoconiosis and total respiratory disability, Director's Exhibit 25, claimant may establish a material change in conditions by satisfying at least one of the two elements.

We affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis based on the newly submitted evidence. Under Section 718.202(a)(1), the administrative law judge properly found that there was only one x-ray taken in conjunction with claimant's duplicate claim, which is negative for pneumoconiosis.⁴ Decision and Order (D&O) at 3. Because there is no autopsy or biopsy evidence of record, claimant is unable to establish the existence of pneumoconiosis at Section 718.202(a)(2). Furthermore, claimant is unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(3) as he is not eligible for the presumptions described therein. *See* 20 C.F.R. §§718.304, 718.305 and 718.306.

With respect to Section 718.202(a)(4), the administrative law judge found that Dr. Paranthaman administered the only newly submitted physical examination of record. D&O at 4. As noted by the administrative law judge, Dr. Paranthaman diagnosed that claimant has chronic bronchitis due to heavy smoking. D&O at 3; DX 8. The doctor further opined that, insofar as claimant's symptoms began some ten years after he left coal mine employment, it was unlikely that claimant's chronic bronchitis was significantly related to coal dust exposure. D&O at 4; DX 8. Because Dr. Paranthaman's opinion is insufficient to support claimant's burden of proof, the administrative law judge's finding that claimant failed to establish pneumoconiosis pursuant to Section 718.202(a)(4) based on the newly submitted evidence is affirmed.⁵

³ When a miner's work occurred exclusively within the jurisdiction of a single circuit, the Board will apply the law of that circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

⁴ The May 26, 1995 film was interpreted as negative by Dr. Subramanian, a Board-certified radiologist, and Dr. Franche, a Board-certified radiologist and B-reader. DXs 10, 11.

⁵ Claimant testified that he was treated by Dr. Fleenor for breathing problems, and that the doctor told him he had "black lung." Hearing Transcript at 15-16. The

Additionally, although the administrative law judge did not specifically conclude that claimant failed to establish total disability under 20 C.F.R. §718.204(c), he properly noted that the May 26, 1995 objective studies administered by Dr. Paranthaman were non-qualifying under 20 C.F.R. §§718.204(c)(1) and (c)(2). D&O at 3; Director's Exhibits 7, 9. The administrative law judge also correctly noted that Dr. Paranthaman provided the only new physical examination of record, and that the doctor concluded that claimant has the residual capacity to perform the usual tasks of his coal mine employment. *Id.* at 4; DX-8. Consequently, Dr. Paranthaman's opinion is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) as a matter of law. Thus, because the newly submitted evidence does not support a finding of either the existence of pneumoconiosis or total respiratory disability, claimant has failed to establish a material change in conditions under 20 C.F.R. §725.309(d). *See Rutter, supra.*

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

REGINA C. McGRANERY
Administrative Appeals Judge

administrative law judge properly found claimant's testimony unreliable to serve as proof of the medical findings and conclusions of the doctor. Decision and Order at 4, n.7.