

BRB No. 94-2671 BLA

JOHN RADOCHIO)
)
 Claimant-Petitioner)
)
 v.)
)
) DATE ISSUED:
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Revised Decision and Order of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Jack E. McVey, Midway, West Virginia, for claimant.

Before: , , and , Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, with the assistance of a lay representative, the Decision and Order (93-BLA-1643) of Administrative Law Judge Joel R. Williams denying benefits 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). This case involves a duplicate claim. Claimant filed his first claim for benefits on January 22, 1970 and it was denied on April 26, 1979. Claimant filed his second claim for benefits on March 16, 1976 and it was denied by Administrative Law Judge Richard L. Sippel in a Decision and Order dated November 13, 1985. Claimant filed

a third claim for benefits on February 23, 1990, which was denied on August 15, 1990 as claimant failed to establish the existence of pneumoconiosis, total disability and a material change in conditions. The present claim was filed on September 23, 1992. Upon considering this claim as a duplicate claim pursuant to 20 C.F.R. §725.309, Administrative Law Judge Williams considered the evidence submitted subsequent to the August 15, 1990 denial and found that claimant failed to establish a material change in conditions. Accordingly, benefits were denied. On appeal, claimant, through his lay representative, contends that the administrative law judge erred in finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204. The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

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).

Upon considering the newly submitted evidence of record, the administrative law judge determined that none of the evidence would establish a respiratory or pulmonary disability pursuant to Section 718.204 and, thus, that claimant failed to

establish a material change in conditions pursuant to Section 725.309. See Decision and Order at 4. The administrative law judge's finding of no material change in conditions is in error, however, as the record contains x-ray evidence which, if fully credited, could change the prior administrative result. See Claimant's Exhibit 2; *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *Rice v. Sahara Coal Co., Inc.*, 15 BLR 1-19 (1990). However, any error is harmless as the record contains no evidence that would support a finding of total disability pursuant to Section 718.204(c). See Director's Exhibits 5-9, 17, 18; Claimant's Exhibit 1; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, as claimant has failed to establish the existence of a totally disabling respiratory or pulmonary impairment, a requisite element of entitlement under 20 C.F.R. Part 718, the administrative law judge's denial of benefits is affirmed. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge