

BOBBY THORNTON KING)
)
 Claimant-Petitioner)
)
 v.)
)
 TUG BOAT TRUCKING) DATE ISSUED: _____
)
 and)
)
 FIDELITY and CASUALTY COMPANY)
 of NEW YORK)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

Philip J. Reverman, Jr. (Boehl, Stopher & Graves, LLP), Louisville, Kentucky, for employer.

Before: McGRANERY, HALL, and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-00820) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on claimant's request for modification of the denial of the 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 Claimant filed his first claim for benefits on March 11, 1996. Director's Exhibit 27-1. That claim was denied on August 1, 1996, for failure to establish the existence of pneumoconiosis and total disability. Claimant filed the instant, duplicate claim on March 29, 2000, Director's Exhibit 1, which was denied by the district director on July 17, 2001 for failure to establish the existence of pneumoconiosis and total disability, Director's Exhibit 18. Claimant requested modification of that denial on September 7, 2000, submitting an x-ray interpreted as negative by Dr. Sargent and the results of breathing tests which exceeded the disability standards. The district director denied claimant's request for modification because claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibits 21, 25. A formal hearing was held on February 6, 2002. Subsequent to that hearing, the administrative law judge found twenty-three and one-half years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718 based on the date of filing. Decision and Order at 4. The administrative law judge further found that the evidence failed to establish the existence of pneumoconiosis and a totally disabling respiratory impairment pursuant to Sections 718.202(a) and 718.204(b), elements previously adjudicated against claimant, and thus found that claimant failed to establish a basis for modification. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, is not participating in 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 rational, supported by substantial evidence, and in accordance with 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v.*

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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Director, OWCP, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a district director has denied modification of a duplicate claim, the administrative law judge should consider whether the newly submitted evidence is sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), rather than determining whether claimant has established a basis for modification of the district director's denial of his duplicate claim. The administrative law judge may properly review, *de novo*, the issue of whether the evidence establishes a material change in conditions. *Hess v. Director, OWCP*, 21 BLR 1-141 (1998). A material change in conditions is established if one of the elements previously adjudicated against claimant is established. See *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Claimant contends that the administrative law judge erred in not considering the positive x-ray readings of Drs. Anderson, Baker, and Lane, B-readers, which were submitted in support of claimant's first claim, when he found that the existence of pneumoconiosis was not established by x-ray evidence.²

In considering the x-ray evidence submitted since the denial of claimant's first claim on August 1, 1996, the administrative law judge correctly found it insufficient to establish the existence of pneumoconiosis based on the numerical superiority of negative readings by physicians with superior qualifications. Director's Exhibits 13, 14, 16, 23, 24, 27-13; Employer's Exhibits 1-3; Decision and Order at 11; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence submitted subsequent to the denial of claimant's first claim failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).³

Contrary to claimant's argument, the administrative law judge properly

² These x-rays were submitted in support of claimant's first claim, which was denied by the district director for failure to establish the existence of pneumoconiosis and total disability. As summarized by the administrative law judge, in addition to the positive interpretations by Dr. Anderson, Baker and Lane, the x-ray evidence submitted in support of the first claim also included negative interpretations by Drs. Whaley and Rogers and by Drs. Sargent, Wiot, and West, Board-certified, B-readers. Decision and Order at 8.

³ The administrative law judge's finding that the existence of pneumoconiosis was not established at 20 C.F.R. 718.202(a)(2) and (3) is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

considered the x-ray evidence submitted subsequent to the denial of claimant's first claim when he determined that claimant failed to establish a reason to modify the denial of his duplicate claim. *See Hess, supra; Ross, supra*. Accordingly, claimant's argument that the existence of pneumoconiosis was established based on three positive x-ray interpretations submitted in support of his first claim for benefits is rejected. *See Hess, supra; see also Ross, supra*.

Claimant next contends that the administrative law judge should have found the existence of pneumoconiosis established based on the opinions of Drs. Rogers and Ammisetty. We disagree. Contrary to claimant's argument, the administrative law judge properly accorded little weight to the opinions of Drs. Rogers and Ammisetty because Dr. Rogers did not support his opinion with adequate documentation and because Dr. Ammisetty did not diagnose the existence of the disease although he noted that claimant had been diagnosed with pneumoconiosis. Director's Exhibit 23; Claimant's Exhibits 1, 2. The administrative law judge accorded greater weight to the opinions of Drs. Dahhan and Younes, finding no pneumoconiosis, because they were better reasoned and documented, and because Drs. Dahhan and Younes had better qualifications than Drs. Rogers and Ammisetty. This was rational. *See Jericol Mining, Inc. v. Napier*, ___ F.3d ___, 2002 WL 198821 (6th Cir. Aug. 30, 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, ___ BLR ___ (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence, submitted subsequent to the denial of the first claim, failed to establish the existence of pneumoconiosis. *See Hess, supra; see also Ross, supra*. Regarding the administrative law judge's finding that claimant failed to establish total disability, we need not address claimant's general contention that the evidence of record is sufficient to establish total disability as it is not sufficiently briefed, *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The administrative law judge's finding regarding total disability is, therefore, affirmed. *Cox, supra; Sarf, supra*.

Accordingly, the administrative law judge's Decision and Order- Denial of Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge