BRB Nos. 99-0478 BLA
and 99-0478 BLA-A

BILLY R. CORNETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Barry H. Joyner (Henry L. Solano, 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (97-BLA-1961) of Administrative Law Judge Daniel J. Roketenetz 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). Initially, the administrative law judge found employer to be the properly designated responsible operator in this case. Next, the administrative law judge determined that, inasmuch as the instant claim was a duplicate claim,[1] claimant must establish a material

[1] Claimant originally filed a claim on April 12, 1993, which was denied by the Department of Labor on September 14, 1993, inasmuch as claimant failed to establish the

change in conditions pursuant to 20 C.F.R. §725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), *i.e.*, whether the newly submitted evidence established the existence of pneumoconiosis or total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.204(c)(1)-(4), the elements of entitlement previously adjudicated against claimant. The administrative law judge considered the newly submitted evidence pursuant to 20 C.F.R. Part 718 and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4). Thus, the administrative law judge found that a material change in conditions was not established, *see* 20 C.F.R. §725.309. Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find a material change in conditions established by the newly submitted evidence pursuant to Section 725.309(d). Employer and the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, have responded to claimant's appeal, urging the Board to affirm the administrative law judge's findings pursuant to Sections 725.309(d) and Part 718 and, therefore, urging the Board to affirm the administrative law judge's denial of benefits. Alternatively, on cross-appeal, employer contends that the administrative law judge erred in naming employer as the properly designated responsible operator and contends that any potential liability in this claim should be assumed by the Black Lung Disability Trust Fund. The Director, as party-in-interest, responds, urging the Board to affirm the administrative law judge's finding that employer is the properly designated responsible operator in this case, if reached. Claimant has not responded to employer's cross-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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Sixth Circuit Court held that in order to determine whether a material change in conditions is established under 20 C.F.R. §725.309(d), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him, *see Ross*, *supra*. If claimant establishes the existence of that element, then he

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existence of pneumoconiosis, pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis, Director's Exhibit 26. No further action was taken by claimant on this claim. Claimant filed the instant, duplicate claim on September 5, 1996, Director's Exhibit 1.

has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits, *id*.

In the instant case, the administrative law judge considered all of the relevant, newly submitted evidence pursuant to Part 718 and found it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or total disability pursuant to Section 718.204(c)(1)-(4). In order to establish entitlement to benefits under Part 718 in a living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP,* 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Pursuant to Section 718.202(a)(1), the administrative law judge considered the x-ray evidence accrued and submitted since the denial of claimant's previous claim, which consisted of two negative readings of an x-ray dated September 23, 1996, one from Dr. Sargent, a board-certified radiologist and B-reader,[2] Director's Exhibit 12, and the other from Dr. Wicker, a B-reader, Director's Exhibit 15, as well as a positive reading of an x-ray dated April 14, 1997, from Dr. Bushey, whose qualifications are not in the record, Director's Exhibit 24. Decision and Order at 7-8. Contrary to claimant's contentions, the administrative law judge, within his discretion, permissibly found that the existence of pneumoconiosis was not established under subsection (a)(1) based on the weight and numerical superiority, *see Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), of the negative x-rays from readers who were both board-certified radiologists and/or B-readers due to their superior qualifications, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Trent*, *supra*. Inasmuch as the administrative law judge considered the qualifications of the physicians and weighed the results of all of the x-ray evidence, his finding is in

[2] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

accord with the holding of the Sixth Circuit court in *Woodward*, *supra*. Consequently, inasmuch as the administrative law judge's finding that the existence of pneumoconiosis was not established by the newly submitted x-ray evidence under Section 718.202(a)(1) is supported by substantial evidence, it is affirmed.

The administrative law judge also properly found that there is no relevant biopsy or autopsy evidence of record pursuant to 20 C.F.R. §718.202(a)(2) and that none of the presumptions under 20 C.F.R. §718.202(a)(3) are applicable, *see* 20 C.F.R. §718.202(a)(3). The administrative law judge properly found that inasmuch as there is no evidence of complicated pneumoconiosis, the irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable, *see* 20 C.F.R. §718.304, and that the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to this claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1, and, finally, that the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is also inapplicable in this living miner's claim. Inasmuch as the administrative law judge's findings that the existence of pneumoconiosis was not established under Section 718.202(a)(2)-(3) are not challenged by claimant on appeal, they are affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, pursuant to Section 718.202(a)(4), the administrative law judge considered the two medical opinions of record accrued and submitted since the denial of claimant's previous claim one from Dr. Wicker, who found no evidence of pneumoconiosis, Director's Exhibit 10, and the other from Dr. Bushey, who read an x-ray as positive and diagnosed chronic lung disease with pulmonary emphysema and fibrosis compatible with coal workers' pneumoconiosis, 2/1, Director's Exhibit 24. The administrative law judge found that Dr. Bushey based his diagnosis primarily, if not wholly, on his positive x-ray reading, which he found was contrary to the preponderance of the newly submitted x-ray evidence. Decision and Order at 8-9. Inasmuch as the administrative law judge found no additional support for Dr. Bushey's diagnosis, he assigned Dr. Bushey's opinion little probative weight. On the other hand, the administrative law judge found Dr. Wicker's opinion supported by the objective evidence of record, including normal physical examination, x-ray, pulmonary function study and blood gas study results, and found that Dr. Wicker's opinion outweighed Dr. Bushey's opinion. Thus, the administrative law judge found that the preponderance of the medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Claimant contends that Dr. Bushey's opinion was adequately documented and contends that the administrative law judge erred in discrediting Dr. Bushey's opinion merely because it was contrary to the administrative law judge's weighing of the x-ray evidence. Contrary to claimant's contentions, the administrative law judge, within his discretion, found Dr. Wicker's opinion entitled to greater weight because it was better supported by the objective evidence of record, *see Wetzel*

v. Director, OWCP, 8 BLR 1-139 (1985). Thus, as the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), we affirm the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4) as supported by substantial evidence.

Next, the administrative law judge found that the relevant evidence accrued and submitted since the denial of claimant's previous claim failed to establish total disability pursuant to Section 718.204(c). Claimant contends that the administrative law judge erred in failing to find the medical opinion evidence sufficient to establish that claimant was totally disabled pursuant to Section 718.204(c)(4). Claimant contends that the administrative law judge erred in failing to consider the physical requirements of claimant's coal mine work in weighing whether the medical opinion evidence was sufficient to establish total disability. Claimant also contends that the relevant evidence establishes that claimant is also unable to perform comparable and gainful employment. Finally, claimant contends that, because pneumoconiosis is a progressive disease, it may be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual coal mine work.

As the administrative law judge found pursuant to Section 718.204(c), however, all of the newly accrued and submitted pulmonary function study and blood gas study evidence, Director's Exhibits 8, 10, 24, was non-qualifying, *see* 20 C.F.R. §718.204(c)(1)-(2),[3] and there was no evidence of cor pulmonale with right sided congestive heart failure, *see* 20 C.F.R. §718.204(c)(3), Decision and Order at 10-11. Inasmuch as the administrative law judge's findings pursuant to Section 718.204(c)(1)-(3) are not challenged by claimant on appeal, they may be affirmed, *see Skrack*, *supra*.

Finally, pursuant to Section 718.204(c)(4), the administrative law judge considered all of the relevant newly accrued and submitted medical opinion evidence of record, which includes the opinion of Dr. Wicker, who found that claimant's respiratory capacity appears to be adequate to perform his previous coal mining work, Director's Exhibit 10, and Dr. Bushey, who did not provide an opinion regarding disability, Director's Exhibit 24. Contrary to claimant's contention, opinions finding no significant or compensable impairment, such as Dr. Wicker's, need not be discussed by the administrative law judge in terms of claimant's former job duties, *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Thus, we affirm the administrative law judge's finding that total disability was

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

not established pursuant to Section 718.204(c)(1)-(4) as supported by substantial evidence, *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.

Consequently, we affirm the administrative law judge's finding that the newly accrued and submitted evidence failed to establish a material change in conditions pursuant to Section 725.309(d), *see Ross*, *supra*.[4]

[4]Inasmuch as we affirm the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability pursuant to Section 718.204(c), and therefore failed to establish a material change in conditions pursuant to Section 725.309(d), we need not address employer's contentions in its cross-appeal regarding the administrative law judge's finding that employer was the properly designated responsible operator, *see Trent*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge