BRB Nos. 99-0799 BLA
and 99-0799 BLA-A

GEORGE B. COX, III	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
POND CREEK 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 Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

George B. Cox, III, Phelps, Kentucky, *pro se*.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Edward Waldman (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 Judges.

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals, and employer cross-

appeals, the Decision and Order (1998-BLA-0526) of Administrative Law Judge Robert L. Hillyard 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). The administrative law judge determined that this claim was subject to the duplicate claim provision at 20 C.F.R. §725.309, that claimant established six and one-half years of qualifying coal mine employment, and that Pond Creek is the properly named responsible operator. The administrative law judge then found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a material change in conditions pursuant to 20 C.F.R. §725.309. Accordingly, benefits were denied. In the instant appeal, claimant generally contends that the administrative law judge erred in failing to find that claimant established entitlement to benefits. Employer responds urging affirmance of the denial of benefits. On cross-appeal, employer contends that the administrative law judge erred in finding that it is the properly designated responsible operator. The Director, Office of Workers' Compensation Programs, responds, urging affirmance of the administrative law judge's responsible operator determination.

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 findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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 United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish a material change in conditions pursuant to Section 725.309, claimant must prove "under all of the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g*, 57 F.3d 402, 19 2-223 (4th Cir. 1995). In the present case, the administrative law judge determined that claimant's prior claim was denied on the ground that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Decision and Order at 6; Director's Exhibit 37.

The administrative law judge accurately reviewed the newly submitted evidence of record, consisting of thirty-one interpretations of six x-rays, only one of which is positive for the existence of pneumoconiosis. Director's Exhibits 14, 15, 17, 18, 21, 31-34, 36, 39; Claimant's Exhibit 1; Employer's Exhibits 2, 3, 5-8, 11. The

one positive interpretation was submitted by a B-reader while twenty-three of the thirty negative interpretations were submitted by physicians who are both B-readers and board-certified radiologists. *Id.* The administrative law judge rationally found that the preponderance of the interpretations by the physicians with dual qualifications is negative for the existence of pneumoconiosis. Decision and Order at 14; *Parulis v. Director, OWCP*, 15 BLR 1-28 (1991); *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)*; Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Therefore, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

We also affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) inasmuch as the record contains no autopsy or biopsy evidence and the presumptions set forth at Section 718.202(a)(3) are inapplicable in this living miner's claim filed after January 1, 1982, in which there is no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.202(a)(2), (3); 718.304, 718.305(e), 718.306; Decision and Order at 9; Director's Exhibit 1.

The medical opinion evidence submitted since the denial of claimant's initial claim consists of opinions by Drs. Fino, Hussain, Jarboe, Castle and Dahhan, none of whom diagnosed the existence of pneumoconiosis, and the opinion of Dr. Younes, who opined that claimant has pneumoconiosis. Director's Exhibits 10-12; Claimant's Exhibit 1; Employer's Exhibits 5, 6, 8-10, 12. The administrative law judge rationally found the opinions of Drs. Fino, Jarboe, Castle and Dahhan entitled to greater weight than the opinion of Dr. Younes on the basis of their superior credentials.[2] Decision and Order at 15-16; *Parulis, supra; Lafferty, supra; Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *McMath, supra; Dillon, supra; Martinez, supra; Wetzel, supra*; *Perry, supra*. Consequently, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and, thus, that claimant failed to establish a material change in conditions pursuant to Section 725.309.[3]

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

MALCOLM D. NELSON, Acting
Administrative Appeals Judge