BRB No. 98-1196 BLA

JULIS H. WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
READING BATES & CORPORATION	)	
	)	
Employer/Carrier-Respondent	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Phillip Lewis, Hyden, Kentucky, for claimant.

A. Stuart Bennett (Jackson & Kelly), Lexington, Kentucky for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denial of Benefits (97-BLA-0612) of

[1] Claimant is Julis H. Williams, the miner, who filed four application for benefits with the Department of Labor (DOL). The first claim, filed on June 28, 1973, was administratively denied on May 21, 1980. Director's Exhibit 27. Claimant took no

Administrative Law Judge Daniel A. Roketenetz on a 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 administrative law judge concluded that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) because it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(c), elements previously adjudicated against claimant. Benefits were accordingly, denied.

On appeal, claimant challenges the administrative law judge's determination at Section 725.309(d) and Section 718.202(a)(1), asserting that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis and, thereby, a material change in conditions. Employer, in response, asserts that the administrative law judge's finding that the evidence fails to establish entitlement is supported by substantial evidence, and accordingly, urges affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in the instant appeal.[2]

---

further action and this denial became final. *Id*. The second claim was filed with DOL on July 21, 1987, and was administratively denied on December 19, 1989. Director's Exhibit 28. Again, claimant took no further action and this denial became final. *Id*. Claimant then filed a third claim, on November 26, 1991 which was administratively denied on October 8, 1992. Director's Exhibit 29. Claimant then filed the instant duplicate claim on May 17, 1996. Director's Exhibit 1.

[2] Inasmuch as no party challenges the administrative law judge's findings that claimant established 21 years of qualifying coal mine employment, that employer is the putative responsible operator, that the evidence fails to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(2)-(a)(4), and that the evidence fails to establish total respiratory disability at Section 718.204(c)(1)-(4), they are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is total disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Where a claimant files for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. However, in making this determination the administrative law judge must find that the claimant's physical condition has worsened since the prior denial. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) ; *Flynn v. Grundy Mining Co.*, 19 BLR 1-40 (1997). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Id*.

Claimant initially challenges the administrative law judge's finding that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309(d). Specifically, claimant contends that the administrative law judge erred in finding that the x-ray interpretation evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1). The administrative law judge correctly found that the record contained ten newly submitted interpretations of three different x-rays. Decision and order at 5-6. He correctly noted that Dr. Marshall, a B-reader, read a July 7, 1993 x-ray as positive, Director's Exhibit 13, but that Drs. Sargent , Director's Exhibit 11 and Barrett, Director's Exhibit 25, B-readers and Board-certified radiologists, reread this x-ray as negative. Decision and Order at 5. The administrative law judge then found that Dr. Baker, also a B-reader, read a May 20, 1996 x-ray as positive, Director's Exhibit 12, but that Drs. Sargent and Barrett, B-readers and Board-certified radiologists, again reread this x-ray as negative. Decision and Order at 5. Finally, the administrative law judge correctly found that Dr. Spitz, who is both a B-reader and a Board-certified radiologist, read a December 10, 1996 film as being positive, Employer's Exhibit 2, but that Drs Jarboe, Wiot and Shipley, all B-readers and Board-

certified radiologists, reread the x-ray as negative. Employer's Exhibits 1, 2; Decision and Order at 5-6. In weighing the newly submitted x-ray interpretations, the administrative law judge permissibly concluded that as the majority of interpretations from readers with superior qualifications were negative for the existence of pneumoconiosis, the preponderance of the x-ray evidence failed to establish the existence of pneumoconiosis. Decision and Order at 6; *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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grounds* 14 BLR 1-37 (1990)(*en banc*); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). As the administrative law judge's finding at Section 718.202(a) is supported by substantial evidence and is in accordance with applicable law, it is affirmed. Furthermore, as this finding precludes entitlement pursuant to the Part 718 regulations, *see Trent, supra*; *Perry, supra*, we affirm the administrative law judge's denial of benefits in the instant duplicate claim. *Ross, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge