BRB Nos. 99-1280 BLA
and 99-1280 BLA/A

JERRY M. DeMOSS	)	
Claimant-Petitioner	)	
	)	DATE ISSUED:
v.	)	
ISLAND CREEK COAL COMPANY	)	
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier- Respondents and Cross-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (99-BLA-0116) of Administrative Law Judge Donald W. Mosser rendered 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 credited claimant with seven years of

coal mine employment and found that claimant's current application for benefits is a duplicate claim pursuant to 20 C.F.R. §725.309(d). The administrative law judge found that the medical evidence developed since the denial of claimant's previous claim established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c), thereby demonstrating a material change in conditions as required by 20 C.F.R. §725.309(d). *See Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Considering the merits of entitlement, the administrative law judge found that the record did not establish the existence of pneumoconiosis or that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in his analysis of the medical opinion evidence when he found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4). Employer responds, urging affirmance, and has filed a cross-appeal challenging the administrative law judge's finding that the new evidence established that claimant is totally disabled. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment.

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[1] Claimant's first application for benefits filed on August 14, 1979 was finally denied on May 2, 1980, and his second application filed on September 9, 1982 was finally denied on February 1, 1983. Director's Exhibits 48, 49. Claimant filed his third and current claim on March 17, 1997, more than one year after the previous denial. Director's Exhibit 1; 20 C.F.R. §725.309(d).

[2] We affirm as unchallenged on appeal the administrative law judge's finding regarding length of coal mine employment, his finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3), and his finding that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(3). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Pursuant to Section 718.202(a)(4), the administrative law judge found that the medical opinions of record did not support a finding of the existence of pneumoconiosis. The administrative law judge considered Dr. Simpao's 1979 diagnosis of pneumoconiosis but found that the basis of Dr. Simpao's opinion was "questionable" because the x-ray that Dr. Simpao relied upon was read as "0/1" by a Board-certified radiologist and as completely negative by another Board-certified radiologist and B-reader. Decision and Order at 15; Director's Exhibit 48. The administrative law judge also noted that Dr. Calhoun, claimant's treating physician, stated in a 1979 letter that he did not know whether claimant had pneumoconiosis. Director's Exhibit 48. The administrative law judge found further that Dr. Amundson's 1998 notation of "probably some degree of pneumoconiosis," was too equivocal to establish the existence of pneumoconiosis and appeared to be based merely upon claimant's statement of his medical history. Claimant's Exhibit 2. Additionally, the administrative law judge considered Dr. O'Bryan's 1999 letter stating that claimant has a severe obstructive ventilatory impairment, of which, "at least 90%" is "due to his many years of cigarette smoking." Claimant's Exhibit 1. The administrative law judge noted that Dr. O'Bryan was aware of claimant's coal mine employment history, yet did not attribute any portion of the respiratory impairment he diagnosed to claimant's coal dust exposure.

Having found the foregoing opinions insufficient, the administrative law judge accepted the opinions of Drs. Selby, Branscomb, and Fino stating that claimant does not have pneumoconiosis but rather suffers from conditions unrelated to coal dust exposure, including obstructive sleep apnea, hypertension, morbid obesity, and chronic obstructive pulmonary disease due to smoking. Director's Exhibits 36, 43; Employer's Exhibits 1, 4, 7, 8.

Claimant does not challenge the administrative law judge's analysis of the opinions of Drs. Simpao, Calhoun, Amundson, and O'Bryan, but instead argues that the reports of Drs. Selby, Branscomb, and Fino merit no weight because they are flawed in various ways and because they express opinions that are hostile to the Act. Claimant's Brief at 3-7.

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[3] A chest x-ray classified as "0/1" under the ILO classification system is not considered a positive reading for the existence of pneumoconiosis. *See* 20 C.F.R. §718.102(b).

We need not address claimant's contention. Claimant bears the burden of establishing the existence of pneumoconiosis, and here, substantial evidence supports the administrative law judge's unchallenged finding that the opinions of Drs. Simpao, Calhoun, Amundson, and O'Bryan do not support claimant's burden at Section 718.202(a)(4). Specifically, the administrative law judge permissibly questioned the underlying basis of Dr. Simpao's diagnosis, *see Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993), and rationally determined that Dr. Amundson's opinion was too equivocal to constitute evidence of pneumoconiosis. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). Furthermore, as noted correctly by the administrative law judge, Dr. Calhoun did not diagnose pneumoconiosis in his 1979 letter, and Dr. O'Bryan did not indicate that the obstructive disease he diagnosed was related to or aggravated by coal mine dust exposure. *See* 20 C.F.R. §718.201; *Cornett v. Benham Coal, Inc.*, 2000 WL 1262464, *5 (6th Cir., Sept. 7, 2000)(citing definition of "legal" pneumoconiosis). As the administrative law judge's unchallenged findings are supported by substantial evidence, we affirm his finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(4).

Because claimant has failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), a necessary element of entitlement under Part 718, we affirm the denial of benefits. *See Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*). Consequently, we need not address employer's cross-appeal.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge