BRB Nos. 03-0203 BLA
and 03-0203 BLA-A

ARTHUR J. MOORE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 10/31/2003
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 – Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Dorothea J. Clark and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denying Benefits of Administrative Law Judge Gerald M. Tierney.[1] The procedural history of this case is as follows. Claimant filed an application for benefits on October 26, 1977. In a Decision and Order issued on May 31, 1988, Administrative Law Judge Glenn Robert Lawrence credited claimant with sixteen years of coal mine employment. Judge Lawrence found the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). Similarly, he found the evidence insufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D, and 20 C.F.R. §410.490. The Board, in a Decision and Order issued on February 28, 1990, affirmed Judge Lawrence's denial of benefits. *Moore v. Consolidation Coal Co.*, BRB No. 88-2182 BLA (Feb. 28, 1990)(unpub.). No further action was taken on this claim. Director's Exhibit 35.

On March 25, 1993, claimant filed a new application for benefits. On May 21, 1993, the district director denied benefits, finding that the evidence did not show that claimant was totally disabled by the disease, and finding that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). No further action was taken on this claim. Director's Exhibit 36.

Claimant filed another application for benefits on April 21, 1999. Director's Exhibit 1. Administrative Law Judge Gerald M. Tierney (the administrative law judge) credited claimant with sixteen years of coal mine employment and noted that the instant case involves a duplicate claim. The administrative law judge found the newly submitted evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). Thus, the administrative law judge determined that claimant established a material change in conditions and he reviewed the entire record to determine whether it established entitlement to benefits. The administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, therefore, denied benefits.

On appeal, claimant alleges that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis, and claimant contends

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[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.

that Dr. Jaworski's examination does not satisfy the duty of the Department of Labor to provide claimant with a complete pulmonary evaluation. In response, the Director, Office of Workers' Compensation Programs (the Director), asserts that Dr. Jaworski's evaluation does satisfy its obligation to provide claimant with a complete pulmonary evaluation. Employer also responds, urging the Board to affirm the administrative law judge's denial of benefits. In its cross-appeal, employer challenges the administrative law judge's finding that a material change in conditions is established. In response, the Director maintains that the administrative law judge's material change in conditions finding may be affirmed. Claimant responds to employer's cross-appeal and states that there is no need for the Board to consider it because the case must be remanded for a new pulmonary evaluation of claimant.

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).

As an initial matter, we consider claimant's challenge to the adequacy of Dr. Jaworski's evaluation of claimant. It is well established that the Department of Labor has a statutory duty to arrange and pay for a miner=s complete pulmonary evaluation sufficient to constitute an opportunity to substantiate the claim, pursuant to 30 U.S.C. §923(b). *See Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984); *Hodges v. Bethenergy Mines, Inc.*, 18 BLR 1-84 (1994); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990)(*en banc*).

After consideration of Dr. Jaworski's opinion, the administrative law judge's findings regarding Dr. Jaworski's opinion, and the arguments made on appeal concerning the adequacy of Dr. Jaworski's opinion, we hold that Dr. Jaworski's evaluation satisfies the obligation of the Department of Labor to provide claimant with a complete pulmonary evaluation. *See* Decision and Order at 9-10; Director's Exhibits 10, 29; Claimant's Exhibit 1-3. The administrative law judge did not find that Dr. Jaworski's opinion is not credible, nor, contrary to claimant's assertion, that it is equivocal. Rather, the administrative law judge found that Dr. Jaworski's opinion is insufficient to establish the existence of pneumoconiosis, in view of the contrary opinions of Drs. Renn, Bellotte and Morgan, whom the administrative law judge found had a more complete picture of claimant's health over time. Decision and Order at 10. We, therefore, deny claimant's request that the case be remanded to the district director to provide claimant with a new pulmonary evaluation.

We now turn to claimant's assertions regarding the administrative law judge's finding that claimant has not established the existence of pneumoconiosis pursuant to Section 718.202(a). Claimant asserts that because coal workers' pneumoconiosis is an irreversible disease, the 1993 finding that he has pneumoconiosis should be given credence. Claimant appears to be referring to a 1993 denial by the claims examiner.[2] Director's Exhibit 36-19.

Once the administrative law judge has found a material change in conditions established pursuant to Section 725.309 (2000), claimant is entitled to have the newly filed claim decided on its merits. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-234 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Moreover, unless the doctrine of collateral estoppel applies, all elements of entitlement must be considered. *Hughes v. Clinchfield Coal Co.,* 21 BLR 1-134 (1999)(*en banc*). Inasmuch as collateral estoppel is not applicable in the instant case, *see Hughes*, 21 BLR at 1-137, the administrative law judge acted correctly in considering all of the elements of entitlement. Consequently, we reject claimant's assertion that the 1993 decision by the claims examiner constitutes a finding of the existence of pneumoconiosis which is binding in this adjudication.

We next consider the administrative law judge's findings at 20 C.F.R. §718.202(a)(1). The administrative law judge summarized the x-ray evidence and noted that claimant "presented evidence of pneumoconiosis with the opinions of board-certified radiologists and B-readers identifying the disease." Decision and Order at 7. However, in view of the number of interpretations by equally qualified physicians, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 7. As the administrative law judge found, the record contains forty-nine interpretations of ten

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[2] The form used by the claims examiner to inform claimant that he was being denied benefits provides four possible bases for the denial, *i.e.,* the evidence does not show that claimant has pneumoconiosis, the evidence does not show that the disease was caused in part by coal mine work; the evidence does not show that claimant is totally disabled by the disease; and the district director finds no material change in conditions has occurred. Director's Exhibit 36-19. In the instant case, the claims examiner provided two bases for denying benefits: The evidence does not show total disability due to the disease and the district director did not find that a material change in conditions had occurred. Director's Exhibit 36-19.

chest films,[3] seven of which had at least one positive interpretation. *See* Director's Exhibits 12, 25, 27, 28, 30-32, 35-36; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4, 6, 8, 10, 11, 13, 15, 17, 18, 20.

Claimant asserts that the administrative law judge erred by ignoring the three positive interpretations of the March 24, 1993 x-ray. We disagree. Contrary to claimant's assertion, the administrative law judge identified these interpretations in his summary of the x-ray evidence, Decision and Order at 6, and in his analysis of the evidence, the administrative law judge noted that the record contained x-ray interpretations that are positive for pneumoconiosis. Decision and Order at 7. We hold that the administrative law judge permissibly considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), *see* Decision and Order at 8; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and we affirm his weighing of the x-ray evidence as it is supported by substantial evidence.[4]

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[3] The record also contains interpretations of chest x-rays taken between 1982 and 1985, and between 1997 and 1999, all of which were read as normal, or noted slight hyperinflation or copd change, Director's Exhibits 24, 26, 35-33, by readers whose qualifications are not contained in the record. Because these interpretations do not assist claimant in establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but only further support the administrative law judge's finding that the evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1), the administrative law judge's failure to consider these interpretations constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] Claimant does not specifically challenge the administrative law judge's consideration of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). We, therefore, affirm his finding that the existence of pneumoconiosis is not established thereunder. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In addition, although the administrative law judge did not specifically address 20 C.F.R. §718.202(a)(2) or (a)(3), since the record does not contain any biopsy evidence and this is a living miner's claim filed in 1999, claimant would be unable to establish the existence of pneumoconiosis at either Section 718.202(a)(2) or (a)(3).

Claimant also argues that the administrative law judge erred by failing to satisfy the standard set out in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), which requires the administrative law judge to weigh together all of the relevant evidence regarding the existence of pneumoconiosis. We disagree. After evaluating the x-ray evidence pursuant to Section 718.202(a)(1), and the medical opinion evidence pursuant to Section 718.202(a)(4), the administrative law judge stated "Claimant does not establish the existence of pneumoconiosis by either of the means available to him at §718.202. *Island Creek Coal Co. v. Compton,* 211 F.3d 203 (4th Cir. 2000)." Decision and Order at 10. We, therefore, affirm the administrative law judge's determination that the evidence relevant to the existence of pneumoconiosis is, as a whole, insufficient to establish the existence of pneumoconiosis, as this finding is supported by substantial evidence. We further hold that the administrative law judge's analysis satisfies the mandate of *Compton*.

Consequently, as we affirm the administrative law judge's finding that the evidence, as a whole, is insufficient to establish the existence of pneumoconiosis under Section 718.202(a), one of the essential elements of entitlement at Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987), we further affirm the administrative law judge's denial of benefits. In view of this holding, we need not address employer's cross-appeal concerning the administrative law judge's material change in conditions finding.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, JR.
Administrative Appeals Judge