BRB No. 99-0179 BLA

WILLIAM C. CLOUD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COAL FUELS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WARNER COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employers/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
Party-in-Interest	)	

Appeal of the Decision and Order-Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John C. Carter, Evarts, Kentucky, for claimant.

Richard Davis (Arter & Hadden, LLP), for employer.

Michelle S. Gerdano (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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (97-BLA-1511) of Administrative Law Judge Robert L. Hillyard 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 found that claimant established a coal mine employment history of nine and one-half years, and that Warner Coal Company was properly designated as the responsible operator in this case. Decision and Order at 4-6. The administrative law judge further found that the instant claim was a duplicate claim[1] and arose within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Thus, the administrative law judge concluded that the claim was governed by the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Decision and Order at 10-11. The administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Decision and Order at 11-14. Accordingly, the administrative law judge found that claimant failed to establish a material change in conditions pursuant

[1]Claimant initially filed a claim for benefits with the Social Security Administration on January 28, 1970, which was finally denied on October 9, 1970. Director's Exhibit 33. Claimant filed a second claim with the Social Security Administration on December 22, 1972, and during the pendency of this claim, filed a third claim with the Department of Labor on March 14, 1979. Director's Exhibit 32. Both claims were eventually denied. Director's Exhibit 32. Claimant took no further action until the filing of the instant claim on January 14, 1994. Director's Exhibit 1. On October 6, 1998, the administrative law judge issued the Decision and Order-Denial of Benefits from which claimant now appeals.

to 20 C.F.R. §725.309 and denied benefits. On appeal, claimant contends that employer was able to produce eighteen experts and claimant only one and that this disparity, based on relative financial resources, results in a denial of due process and denial of equal protection of the laws.

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).

Claimant's previous claims were denied on the basis of claimant having failed to establish any element of entitlement. *See* Director's Exhibit 32, 33. In considering the instant duplicate claim, the administrative law judge found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) and further found that the newly submitted evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Accordingly, the administrative law judge concluded that, as claimant failed to establish at least one of the previously denied elements, a material change in conditions was not established. A review of the record indicates that, while claimant has produced a newly submitted positive x-ray interpretation and a medical opinion by Dr. Bushey diagnosing the presence of pneumoconiosis, Director's Exhibit 35, claimant has failed to produce any new evidence supportive of a finding of total disability pursuant to Section 718.204(c).[2] Inasmuch as claimant has failed to establish the presence of a totally disabling respiratory impairment, a requisite element of entitlement pursuant to Part 718, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*), we must affirm the administrative law judge's determination that claimant has failed to establish a material change in conditions and has failed to establish entitlement to benefits.[3] Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

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[2]Claimant submitted the medical opinion of Dr. Broudy, which omits discussion of claimant's disability or exertional limitations sufficient for the administrative law judge to determine that claimant is totally disabled, *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*); *see also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986). The newly submitted evidence relevant to total disability consists of four non-qualifying pulmonary function studies, Director's Exhibits 8, 35; Employer's Exhibit 7, three non-qualifying blood gas studies, Director's Exhibits 10, 35; Employer's Exhibit 8, and the medical opinions of Drs. Broudy and Branscomb, Fino and Dahan all of whom concluded that claimant retained the pulmonary and respiratory capacity to return to his previous coal mine employment. Director's Exhibits 9, 35; Employer's Exhibits 3, 6, 7, 8. Further, a review of the previously submitted evidence reveals no evidence supporting a finding of total disability pursuant to Section 718.204(c). Director's Exhibit 32.

[3]Inasmuch as claimant has failed to produce any evidence supporting a finding of total disability we need not address claimant's due process and equal protection assertions. *See Trent, supra; Perry, supra. See generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge