

BRB No. 97-0995 BLA

LONNIE C. KIRK, JR.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
K C & D MINING COMPANY)	DATE ISSUED:
)	
and)	
)	
WEST VIRGINIA COAL WORKERS')	
PNEUMOCONIOSIS FUND)	
)	
Employer/Carrier-)	
Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

K. Keian Weld, Senior Assistant Attorney General, West Virginia Coal Workers' Pneumoconiosis Fund, Charleston, West Virginia, for employer.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (95-BLA-2224) of Administrative Law Judge Michael P. Lesniak awarding 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). In his Decision and Order, the administrative law judge determined that claimant's prior claim was finally denied on

December 30, 1988 and that the present claim was a duplicate claim pursuant to the provisions of 20 C.F.R. §725.309.¹ The administrative law judge found the newly submitted x-ray evidence sufficient to demonstrate a material change in conditions at Section 725.309. On the merits, the administrative law judge credited claimant with twenty-two years of coal mine employment and named employer as the responsible operator. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment and the presence of a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(c), (b). Accordingly, benefits were awarded. On appeal, employer challenges the award of benefits and the finding of a material change in conditions at Section 725.309. Claimant does not participate in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not respond in this appeal.²

¹ Claimant filed his initial claim for benefits with the Social Security Administration (SSA) in 1973 which SSA denied in November 1973. Director's Exhibit 19. Claimant elected review under the 1977 Amendments to the Act by the Department of Labor (DOL). *Id.* DOL denied this claim on the basis of no pneumoconiosis arising out of coal mine employment in March 1981. *Id.* Claimant took no further action until he filed his second claim in August 1984. *Id.* In the Decision and Order in the second claim, Administrative Law Judge Alfred Lindeman determined that claimant's prior claim was finally denied on March 26, 1981 and that the claim before him was a duplicate claim under the provisions of 20 C.F.R. §725.309. *Id.* Judge Lindeman concluded that the newly submitted evidence filed prior to the referral of the claim to the Office of Administrative Law Judges was insufficient to demonstrate a material change in conditions pursuant to Section 725.309. *Id.* Judge Lindeman then determined that the newly submitted x-ray evidence and the medical opinion of Dr. Gaal established the existence of pneumoconiosis and that claimant had, thus, showed a material change in conditions pursuant to 20 C.F.R. §725.309. *Id.* On the merits, Judge Lindeman found the evidence sufficient to establish the existence of pneumoconiosis, but insufficient to demonstrate the presence of a totally disabling respiratory impairment. *Id.* Accordingly, benefits were denied. On appeal, the Board affirmed the finding of Judge Lindeman that the evidence of record was insufficient demonstrate the presence of a totally disabling respiratory impairment and the denial of benefits. *Kirk v. K C & D Mining Company*, BRB No. 87-2147 BLA (Dec. 30, 1988)(unpub.). *Id.* Claimant took no further action until he filed the present claim on June 11, 1994. Director's Exhibit 1.

² We affirm the findings of the administrative law judge on the length of coal mine employment and on the designation of employer as the responsible operator as unchallenged on appeal. See *Skrack v. Island Creek 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. See 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer asserts that since claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) in his prior claim, the administrative law judge erred in finding that the newly submitted positive x-ray evidence was sufficient to demonstrate a material change in conditions at Section 725.309. We agree. As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly applied the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 117 S.Ct. 763 (1997) for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Rutter*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. *Id.* In the instant case, the administrative law judge incorrectly concluded that claimant's prior claim was denied because Administrative Law Judge Alfred Lindeman determined that claimant failed to demonstrate a material change in conditions pursuant to Section 725.309. See Director's Exhibit 19. In his Decision and Order, Judge Lindeman found that the positive March 5, 1987 x-ray interpretation and the report of Dr. Gaal established the existence of pneumoconiosis, one of the elements of entitlement. See Director's Exhibit 19. Judge Lindeman, however, determined that the evidence of record was insufficient to demonstrate the presence of a totally disabling respiratory impairment, a finding affirmed on appeal by the Board. See Director's Exhibit 19. Since claimant

established the existence of pneumoconiosis in the prior claim, we vacate Judge Lesniak's finding of a material change in conditions based on the existence of pneumoconiosis as claimant previously established this element of entitlement. See *Rutter, supra*. Consequently, we vacate the award of benefits and remand this case to the administrative law judge to reconsider the newly submitted evidence to determine if it demonstrates the presence of a totally disabling respiratory impairment, an element of entitlement previously decided against claimant.³ *Id.*; see 20 C.F.R. §725.309. If the administrative law judge finds the new evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment, he must consider all the evidence of record to determine if claimant has meet his burden of proof at 20 C.F.R. §718.204(c). *Rutter, supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³ The new evidence consists of a pulmonary function study and blood gas study performed on July 28, 1994 and the medical opinions of Drs. Ranavaya and Fino. See Director's Exhibits 8-10; Employer's Exhibit 1.