

BRB No. 98-1010 BLA

FOX M. REYNOLDS)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
DOUBLE L COAL COMPANY,)	DATE ISSUED:
INCORPORATED)	
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise III (Vinyard and Moise), Abingdon, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (90-BLA-00609) of Administrative Law Judge Robert D. Kaplan denying benefits 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 Act). This case is before the Board for the fourth time. In the original Decision and Order dated December 18, 1991, Administrative Law Judge Robert S. Amery found that claimant's prior claim was finally denied on June 5, 1981, and that the present claim, which claimant filed on June 16, 1987, was a duplicate claim subject to the provisions of 20 C.F.R.

§725.309.¹ The administrative law judge credited claimant with at least thirty-eight years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge, without weighing all of the evidence, found that claimant established a material change in conditions pursuant to Section 725.309 based on positive x-ray readings and medical opinions submitted by claimant. The administrative law judge further found that the evidence established total disability due to pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b) and 718.204(c)(4). Accordingly, benefits were awarded. In a supplemental Decision and Order, the administrative law judge awarded claimant's counsel an attorney fee of \$3,957.95 for services rendered in this case. Employer appealed and in *Reynolds v. Double L Coal Company, Inc.*, BRB No. 92-0830 BLA (Dec. 30, 1993)(unpub.), the Board affirmed the administrative law judge's findings of a material change in conditions pursuant to 20 C.F.R. §725.309 and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.203(b), but vacated the administrative law judge's findings with respect to 20 C.F.R. §718.204(c)(4) and remanded the case to the administrative law judge for further consideration thereunder. The Board also instructed the administrative law judge, on remand, to address employer's objections to the award of attorney's fees.

On remand, the administrative law judge again found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) and that the total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). The administrative law judge also considered and rejected employer's objections to the award of attorney's fees. Accordingly, benefits and an attorney's fee were awarded. Employer appealed and in *Reynolds v. Double L. Coal Company, Inc.*, BRB No. 94-2348 BLA (Apr. 14, 1995)(unpub.), the Board noted that the United States Supreme Court had recently issued *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries*

¹ Claimant filed his initial claim for black lung benefits with the Department of Labor on January 26, 1981, which the district director denied on June 5, 1981. Decision and Order on Remand at 1; Director's Exhibit 53. Claimant took no further action until he filed the present claim. Decision and Order on Remand at 1; Director's Exhibit 1.

v. Director, OWCP, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), which held that the “true doubt rule” violated Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Inasmuch as the administrative law judge had applied the true doubt rule in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4) in his prior decision and in his most recent decision, the Board vacated those findings and remanded the case to the administrative law judge with instructions to reconsider his findings with respect to this element of entitlement. In addition, the Board affirmed the administrative law judge’s finding of total disability pursuant to 20 C.F.R. §718.204(c)(4), but vacated his finding of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b).

On remand, the administrative law judge again found the x-ray evidence and medical opinion evidence to be equally probative, but contradictory, and thus that claimant failed to meet his burden of proof pursuant to 20 C.F.R. §718.202(1), (4). Accordingly, benefits were denied. Claimant appealed and in *Reynolds v. Double L Coal Company, Inc.*, BRB No. 95-2237 BLA (Oct. 30, 1996)(unpub.), the Board initially vacated the administrative law judge’s finding that a material change in conditions was established pursuant to 20 C.F.R. §725.309 as the standard used by the administrative law judge did not comport with the standard articulated by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev’g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). The Board also affirmed the administrative law judge’s finding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but vacated the administrative law judge’s findings under 20 C.F.R. §718.202(a)(4) and remanded the case for further consideration of the medical opinion evidence in light of the decisions of the United States Court of Appeals for the Fourth Circuit in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996) and *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), which were issued subsequent to the issuance of the administrative law judge’s Decision and Order on Remand.

On remand, the case was reassigned to Administrative Law Judge Kaplan, who reopened the record at the request of the parties and allowed the submission of additional medical evidence. The administrative law judge initially found a material change in conditions established pursuant to 20 C.F.R. §725.309, but further found that the evidence of record at the time the case was before Administrative Law Judge Amery as well as the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Accordingly, benefits were denied. In the instant appeal, claimant contends that the

administrative law judge erred in finding that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief 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 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 establish 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 of claimant to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. In weighing the medical opinions of record, the administrative law judge rationally concluded that this evidence failed to establish the existence of pneumoconiosis by a preponderance of the evidence pursuant to Section 718.202(a)(4).² *Perry, supra*. In so finding, the administrative law judge acted within his discretion as fact-finder in determining that the opinions of Drs. Dahhan and Fino, that were considered by Judge Amery, could not be discredited since he found nothing in their statements indicated they were of the opinion that pneumoconiosis never causes an obstructive impairment. Decision and Order on Remand at 4-6. The administrative law judge thus rationally refused to alter Judge Amery's determination that the medical opinion evidence was in equipoise and failed to establish the existence of pneumoconiosis

² The administrative law judge found that a preponderance of the newly submitted x-ray readings were negative and that they failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order on Remand 3-4. This finding is unchallenged on appeal and is therefore affirmed. *Skrack v. Island Coal Creek Co.*, 6 BLR 1-710 (1983).

by a preponderance of the evidence. In addition, the administrative law judge permissibly concluded that with respect to the newly submitted physicians' opinions, the opinions of Drs. Sutherland and Robinette, who stated that claimant suffered from pneumoconiosis, were outweighed by the contrary medical opinions of Drs. Dahhan and Castle, who found that claimant's condition was unrelated to coal mine employment, after finding that their opinions were well-documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-146 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); Decision and Order on Remand at 6-8; Claimant's Exhibits 5-8; Employer's Exhibits 11, 13. Contrary to claimant's assertion, the administrative law judge's evidentiary analysis of the medical opinion evidence is consistent with the holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995), inasmuch as the administrative law judge found that the physicians' opinions reflected an understanding of the clinical definition of pneumoconiosis as well as the legal definition of pneumoconiosis as defined in the Act. Decision and Order on Remand 4-8. As the medical opinions of Drs. Dahhan, Fino and Castle were based on a thorough review of all of the medical evidence, see *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996)(Williams, J., dissenting), claimant's contentions are without merit. Inasmuch as the administrative law judge reconsidered the medical opinions as instructed, weighed all of the newly submitted medical opinions and rationally concluded that the preponderance of the evidence did not establish the existence of pneumoconiosis, we affirm his findings that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). See *Clark, supra*; *Wetzel, supra*; *Lucostic, supra*. As claimant has failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), an essential element of entitlement, an award of benefits is precluded under 20 C.F.R. Part 718. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent, supra*.

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge