BRB Nos. 99-1126 BLA
and 99-1126 BLA-A

PAUL VRABEL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, 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 (98-BLA-0955) of Administrative Law

Judge Michael P. Lesniak 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). The administrative law judge credited claimant with at least twenty-three years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and determined that this claim, filed on June 27, 1997, was subject to the duplicate claim provisions at 20 C.F.R. §725.309 because claimant took no action within one year of the final denial of claimant's original claim, filed on June 1, 1984.[1] The administrative law judge found that new evidence submitted in support of this duplicate claim was sufficient to establish an element of entitlement previously adjudicated against claimant, *i.e.*, total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1), (4), thus claimant established a material change in conditions pursuant to Section 725.309. The administrative law judge further found, however, that the weight of the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or disability causation pursuant to Section 718.204(b). Accordingly, benefits were denied.

In the present appeal, claimant contends that the administrative law judge erred in readjudicating the issue of the existence of pneumoconiosis, an element of entitlement which claimant established in his original claim. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, challenging the standard for establishing a material change in conditions as enunciated in *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20

[1]In a Decision and Order issued on November 16, 1987, Administrative Law Judge Michael F. Colligan credited claimant with at least twenty-three years of qualifying coal mine employment, and found the evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), but insufficient to establish total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Director's Exhibit 52. In a Decision and Order issued on May 31, 1989, the Board affirmed Judge Colligan's denial of benefits, *see Vrabel v. Bethlehem Mines Corp.*, BRB No. 87-3701 BLA (May 31, 1989)(unpub.), and claimant took no further action until the filing of the instant duplicate claim. Director's Exhibits 1, 52.

BLR 2-76 (3d Cir. 1995), by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge was not precluded from readjudicating the issue of the existence of pneumoconiosis, and declining to take a position on the merits of the claim

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 be entitled to benefits pursuant to 20 C.F.R. Part 718, claimant must establish, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis arising out of coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Turning first to employer's cross-appeal, employer maintains that the *Swarrow* standard for establishing a material change in conditions is inconsistent with the Act and the United States Supreme Court's holdings in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). Employer's Brief at 4. The Board addressed and rejected this argument in *Troup v. Reading Anthracite Coal Co.*, 21 BLR 1-211 (1999), and for the reasons set forth therein, we reject employer's challenge to the *Swarrow* standard in the present appeal.

Turning to claimant's arguments on appeal, claimant notes that in adjudicating the merits of claimant's original claim, Administrative Law Judge Michael F. Colligan found the evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and the Board subsequently affirmed his findings thereunder as unchallenged on appeal. Director's Exhibit 52. Claimant thus maintains that principles of *res judicata* are applicable to preclude the administrative law judge from readjudicating the issue of the existence of pneumoconiosis in the instant duplicate claim. Claimant's arguments are without merit. The doctrine of *res judicata*, or claim preclusion, generally has no application in the context of a duplicate claim. *See Swarrow*, *supra*; *Sellards v. Director, OWCP*, 17 BLR 1-77 (1993). Collateral estoppel, or issue preclusion, will only apply to foreclose relitigation of an issue of law or fact in a subsequent action if all of the following elements are present:

> (1) the issue sought to be precluded must be the same as the one involved in the prior action;

(2) the issue must have been actually litigated;
(3) the issue must have been determined by a valid and final judgment; and
(4) the determination must have been essential to the prior judgment.

In re Docteroff, 133 F.3d 210 (3d Cir. 1997); *see Witkowski v. Welch*, 173 F.3d 192 (3d Cir. 1999); *Haize v. Hanover Ins. Co.*, 536 F.2d 576 (3d Cir. 1976). In the present case, inasmuch as benefits were denied in claimant's original claim for failure to establish total respiratory disability pursuant to Section 718.204(c)(1)-(4), Judge Colligan's finding of the existence of pneumoconiosis was not necessary to support his adverse judgment, thus Judge Lesniak was not precluded from readjudicating that issue. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*); *Haize, supra*. After finding a material change in conditions established pursuant to Section 725.309, Judge Lesniak properly evaluated all of the relevant evidence of record to determine whether it was sufficient to establish all contested elements of entitlement, including the issue of the existence of pneumoconiosis. Decision and Order at 14-19; Director's Exhibit 53; *see Swarrow, supra*. As claimant has not otherwise challenged the administrative law judge's finding that the weight of the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), a requisite element of entitlement, *see Trent, supra*, and as claimant has failed to identify any substantive error of law or fact which would provide the Board with a basis upon which to review the administrative law judge's findings, *see* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Slinker v. Peabody Coal Co.*, 6 BLR 1-465 (1983); *Fish v. Director, OWCP*, 6 BLR 1-107 1983), we affirm the administrative law judge's finding that claimant is not entitled to benefits under the Act.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge