

BRB No. 05-0680 BLA

EVERETT H. BURKE)	
)	
Claimant-Petitioner)	
v.)	
)	
ADDINGTON, INCORPORATED)	DATE ISSUED: 02/03/2006
)	
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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

Mark E. Solomons (Greenberg Traurig LLP), Washington D.C., for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor, Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (03-BLA-6217) of Administrative Law Judge Alice M. Craft (the administrative law judge) rendered on a subsequent 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 the evidence submitted in support of the subsequent claim failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment and

failed, therefore, to establish a change in an applicable condition of entitlement. 20 C.F.R. §§718.202(a), 718.204(b), 725.309(d). Accordingly, the administrative law judge denied benefits on this subsequent claim.¹

On appeal, claimant contends that the administrative law judge erred in finding that the new x-ray and medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Claimant also contends that the administrative law judge erred in finding that the new medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Additionally, claimant contends that the administrative law judge erred in considering only the new evidence, rather than all of the evidence of record and erred in failing to render a determination as to whether the prior denial contained a mistake in a determination of fact. In response, the Director, Office of Workers' Compensation Programs, (the Director) urges that the administrative law judge's Decision and Order denying benefits be affirmed. Employer has filed a "limited Appearance by Counsel", asserting that the Director wrongly stated in a footnote in his brief that employer failed to contest claimant's eligibility to benefits. The Director replies, agreeing with employer, and withdrawing the statement set forth in footnote 2 of his response brief.

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'Keefe 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*).

After careful consideration of the arguments made on appeal, the administrative law judge's Decision and Order, and the evidence we conclude that the administrative law judge

¹ This instant, subsequent claim was filed February 6, 2002. Claimant's prior two claims filed on January 16, 1992, and on September 22, 1994 were denied on June 23, 1992 and on February 16, 1995 because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

properly found that the new evidence failed to establish the existence of pneumoconiosis or total disability and failed therefore to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). 20 C.F.R. §§718.202, 718.203, 718.204(b), (c). Contrary to claimant's contentions, the administrative law judge properly found that the new x-ray evidence could not establish the existence of pneumoconiosis as both new x-rays were read negative for the existence of pneumoconiosis by B-readers. 20 C.F.R. §718.202(a)(1); *see 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). Likewise, contrary to claimant's contention the administrative law judge properly found that the new opinions of Drs. Dahhan and Wicker failed to establish the existence of pneumoconiosis as they did not find the existence of coal workers' pneumoconiosis or a pulmonary or respiratory impairment arising out of coal mine employment. 20 C.F.R. §§718.101, 718.202(a)(4); *Ondecko*.

Turning to total disability, the administrative law judge also properly found that total disability was not established as the new evidence, *i.e.*, the opinions of Drs. Wicker and Dahhan, did not find that claimant had a totally disabling respiratory impairment and stated that claimant had the respiratory capacity to return to his usual coal mine employment. The administrative law judge further noted that these opinions were consistent with the new pulmonary function studies and blood gas studies which were non-qualifying. 20 C.F.R. §718.204(b)(2)(iv);² *Ondecko*.

Finally, claimant contends that the administrative law judge erred in failing to consider all the evidence of record in order to ensure that no mistake in a determination of fact had been made in the prior denials. The instant claim, which was filed more than one year after the prior denial of benefits, constituted a subsequent claim for benefits, not a request for modification. 20 C.F.R. §§725.309(c), 725.310. The administrative law judge was not, therefore, required to consider all the evidence of record in order to determine whether there was a mistake in a determination of fact had been made in the previous denial. *Id.*; 20 C.F.R. §725.309(d). Accordingly, as the instant claim was a subsequent claim for benefits, the administrative law judge was only required to determine whether new evidence, *i.e.*, evidence submitted after the prior denial of benefits established an element of

² The administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) and (3) and that the new evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement previously adjudicated against him. 20 C.F.R. §725.309(d). In this case, the administrative law judge found that that new evidence failed to establish any element of entitlement previously adjudicated against claimant, *i.e.*, a change in an applicable condition. The administrative law judge's denial of benefits on claimant's subsequent claim for benefits must, therefore, be denied. 20 C.F.R. §725.309(d).

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

BETTY JEAN HALL
Administrative Appeals Judge