BRB No. 98-1314 BLA

DENNIS J. COMPTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Ira D. Newman (Appalachian Research and Defense Fund of Kentucky, Incorporated), Richmond, Kentucky, for claimant.

Dorothy L. Page (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, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order - Denying Benefits (97-BLA-1777) of Administrative Law Judge Donald W. Mosser 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,

[1] Claimant is Dennis J. Compton, the miner, who filed two claims with the Department of Labor (DOL). The first, filed on May 17, 1979, was denied by DOL on November 2, 1979. Director's Exhibit 21. Thereafter, claimant then filed a second claim, the instant duplicate claim, on October 16, 1996. Director's Exhibit 1.

30 U.S.C. §901 *et seq*. (the Act). The administrative law judge, citing *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), concluded that the evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(c) because it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c), elements previously adjudicated against claimant. Accordingly, benefits were denied on the duplicate claim.

On appeal, claimant challenges the administrative law judge's findings pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge erred by failing to consider claimant's testimony regarding his condition pursuant to Section 718.202(a)(1). Claimant contends that his testimony is indicative of severe respiratory distress, and would allow the administrative law judge to find that the evidence established the existence of pneumoconiosis at Section 718.202(a)(1). The Director, Office of Workers' Compensation Programs, in response, asserts that the administrative law judge's finding that the evidence fails to establish entitlement is supported by substantial evidence, and accordingly, he urges affirmance of the administrative law judge's denial of benefits.[2]

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).

To be entitled to benefits under 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that he is total disabled due to pneumoconiosis arising out of

[2] Inasmuch as no party challenges the administrative law judge's findings that claimant established 7 years of qualifying coal mine employment, that the evidence fails to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(2)- (4), and that the evidence fails to establish total respiratory disability at Section 718.204(c)(1)-(4), these findings are affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

coal mine employment. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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).

Where a claimant files for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *See Rutter*, *supra*. If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter*, *supra*.

Claimant was previously denied benefits, in part, because he failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Director's Exhibit 21. Therefore, the threshold issue in claimant's duplicate claim is whether the new evidence establishes a material change in conditions by proving the existence of pneumoconiosis pursuant to Section 718.202(a). *See Rutter*, *supra*. Claimant challenges only the administrative law judge's finding pursuant to Section 718.202(a)(1). Claimant asserts that the administrative law judge erred by failing to consider claimant's testimony regarding his condition pursuant to Section 718.202(a)(1). Claimant contends that his testimony is indicative of severe respiratory distress, and would allow the administrative law judge to find that the evidence established the existence of pneumoconiosis at Section 718.202(a)(1). We disagree. The administrative law judge initially found that the newly submitted evidence fails to establish a material change in conditions pursuant to Section 725.309(d), as it fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). He correctly found that the newly submitted x ray interpretation evidence of record consisted of seven interpretations of three different films, five of which were negative interpretations and two of which were positive. Decision and Order at 7-8. The administrative law judge found that the most recent x-ray of record, a film taken on February 21, 1997,[3] was interpreted by four different readers. Decision and Order at 8. The administrative law judge correctly found that Drs. Acoyth and Ahmed found this x-ray to be positive for pneumoconiosis, Claimant's Exhibits 1, 2, while Drs. Sargent and Barrett found it to be negative for pneumoconiosis. Director's Exhibits 23, 24; Decision and Order at 8. The administrative law judge correctly found that as all four doctors were B-readers and Board-certified radiologists, and thus

[3] The administrative law judge incorrectly stated that this x-ray was taken on February 23, 1997, however, he correctly listed the date where he described all of the evidence of record. Decision and Order at 5-6.

possessed the same credentials, this evidence was equally probative, and thus, insufficient to establish a material change in conditions and the existence of pneumoconiosis. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 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). The precise language of Section 718.202(a)(1) makes it clear that only properly classified x-rays can be considered under this subsection. 20 C.F.R. §718.202(a)(1); *see also Trent, supra*; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Thus, at Section 718.202(a)(1) lay testimony is not relevant. Further, inasmuch as the administrative law judge also found that the other newly submitted x-rays were interpreted negative, we affirm the administrative law judge's finding that the x-ray interpretation evidence fails to establish a material change in conditions pursuant to Section 725.309(d) insofar as it fails to establish the existence of pneumoconiosis at Section 718.202(a)(1). As this finding precludes entitlement pursuant to the Part 718 regulations, *see Anderson, supra*; *Trent, supra*; we affirm the administrative law judge's denial of benefits in the instant duplicate claim.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge