

BRB No. 00-0213 BLA

CECIL SPURLOCK)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SANDY FORK MINING COMPANY,)	DATE ISSUED:
INCORPORATED)	
)	
and)	
)	
KY COAL PRODUCERS S-I FUND)	
)	
Employer/Carrier-)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

David H. Neeley (Neeley & Reynolds, P.S.C.), Prestonsburg, Kentucky, for employer.

Edmond Collett, Hyden, Kentucky, for claimant.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-BLA-0080) of Administrative Law Judge Donald W. Mosser 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). The administrative law judge found twenty and one-half years of coal

mine employment and based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 4. In considering this duplicate claim, the administrative law judge concluded that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a) and 718.204(c), elements previously adjudicated against claimant, and thus, found that a material change in conditions was not established pursuant to 20 C.F.R. §725.309. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).¹ Accordingly, benefits were denied. On appeal, claimant contends that the newly submitted evidence of record is sufficient to establish the existence of pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(1), (4) and 718.204(c), and thus, sufficient to establish a material change in conditions pursuant to 20 C.F.R. 725.309. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate 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 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).

First, claimant contends that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). We disagree. Contrary to claimant's arguments, the administrative law judge rationally found that the existence of pneumoconiosis was not established based on the preponderance of negative x-ray readings by physicians with superior qualifications. Director's Exhibits 11, 12, 23, 29-33, 35; Decision and Order at 10; *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*,

¹ Claimant filed earlier claims on August 25, 1983 and April 18, 1989, which were denied. The claim at issue herein was filed May 12, 1997.

12 BLR 1-149 (1988). Accordingly, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

Next, claimant contends that the administrative law judge erred in his weighing of the newly submitted medical opinions of record and contends that the opinions of Drs. Clarke, Bushey and Baker are sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). We disagree. Contrary to claimant's arguments, the administrative law judge permissibly accorded less weight to the opinions of Drs. Clarke and Bushey because they were not as well-qualified as Dr. Westerfield, who found no evidence of pneumoconiosis and diagnosed chronic obstructive pulmonary disease due to cigarette smoking alone. The administrative law judge also accorded less weight to the opinions of Drs. Clarke and Bushey because they were based primarily "on positive x-rays rather than other objective evidence from their examinations of claimant," and were not as well-reasoned as Dr. Westerfield's opinion, which he credited. See Director's Exhibits 11, 12, 13, 31; Decision and Order at 11; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1083); see also *Cornett v. Benham Coal Inc.*, 227 F.3d 569, No. 99-3469 (6th Cir. 2000). Additionally, the administrative law judge permissibly accorded less weight to Dr. Baker's opinion because "he fails to address how he determined that coal dust exposure played a role in the miner's chronic obstructive pulmonary disease." Decision and Order at 11; see *Clark, supra*; *King, supra*; *Wetzel, supra*. Accordingly, as the administrative law judge's consideration of the opinions of Drs. Clarke, Bushey and Baker was rational and claimant has not otherwise challenged the administrative law judge's findings at Section 718.202(a)(4), his finding thereunder is affirmed.²

Finally, claimant contends that the opinions of Drs. Baker and Clarke are sufficient to establish total disability pursuant to Section 718.204(c)(4). We disagree. The administrative law judge accorded less weight to the opinion of Dr. Baker that claimant could not perform the work of a miner because it was "inconsistent with his own pulmonary function test, his opinion that the miner does not suffer from an occupationally acquired pulmonary condition, and the objective evidence of record," less weight to the opinion of Dr. Clarke that claimant was totally disabled because it was "inconsistent with his own pulmonary function results

² The administrative law judge's findings pursuant to Section 718.202(a)(2), (a)(3), 718.204(c)(1)-(c)(3) are affirmed as unchallenged on appeal. *Skrack v. Island Coal Co.*, 6 BLR 1-616 (1983).

and the objective evidence of record,” and greater weight to the opinion of Dr. Westerfield based on his superior qualifications and because “his opinion [was] supported by the objective evidence of record, and he supported his examination opinion with subsequent consultative reports on additional medical evidence.” Decision and Order at 12. This was permissible. *See Clark, supra; Dillon, supra; Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff’d on recon.*, 9 BLR 1-236 (1987); *King, supra; Wetzel, supra; Kozele, supra*. Accordingly, inasmuch as the administrative law judge’s reasons for according less weight to the opinions of Drs. Baker and Clarke are rational and claimant has not challenged the administrative law judge’s evaluation of the other evidence relevant to Section 718.204(c)(4), we affirm his finding thereunder. Likewise, because claimant has failed to establish the existence of pneumoconiosis or total disability by the newly submitted evidence, we affirm the administrative law judge’s finding that claimant failed to establish a material change in condition at Section 725.309(d). *Ross, supra*.

Accordingly, the administrative law judge’s Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge