

BRB No. 96-1677 BLA

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

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Emory E. Keen, Richlands, Virginia, *pro se*.

Helen H. Cox (J. Davitt McAteer, Acting 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, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,<sup>1</sup> appeals the Decision and Order (96-BLA-0026) of Administrative Law Judge Frederick D. Neusner denying benefits 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). Claimant's initial application for benefits filed on March 30, 1981 was finally denied on October 9, 1981. Director's Exhibit 22. On September 8, 1994, claimant filed the present application, which is a duplicate claim because it was filed more than one year after the prior denial. Director's Exhibit 1;

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<sup>1</sup> Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

see 20 C.F.R. §725.309(d). The administrative law judge denied benefits on the duplicate claim because he found that the evidence failed to establish the existence of pneumoconiosis and thus failed to establish a material change in conditions, a threshold requirement under Section 725.309(d). In so doing, the administrative law judge apparently relied upon medical evidence not contained in this record and failed to consider the medical evidence pertaining to claimant.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion requesting that the Board remand the case for the administrative law judge to consider whether claimant's evidence establishes entitlement to benefits pursuant to 20 C.F.R. Part 718.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989). 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 into the Act by 30 U.S.C. § 932(a); *O'Keefe 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 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 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).

As the Director contends, the administrative law judge did not consider the evidence relevant to claimant's application for benefits and addressed evidence which is not in the record before us.<sup>2</sup> Director's Motion at 1-2; Decision and Order at 4-6. Therefore, we grant the Director's motion, vacate the administrative law judge's findings, and remand the case for the administrative law judge to consider the evidence of record to determine whether claimant's evidence establishes entitlement to benefits pursuant to 20 C.F.R. Part 718. Because this claim is a duplicate claim, before proceeding to the merits of entitlement the administrative law judge must first determine whether a material change in conditions is established under Section 725.309(d). Specifically, 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. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'd en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). If so, the administrative law judge must then consider whether all of the evidence establishes entitlement to benefits. *Rutter, supra*.

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<sup>2</sup> The Director indicates that the administrative law judge may have inadvertently considered the medical reports pertaining to the claim of another miner. Director's Motion at 2.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL  
Chief Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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REGINA C. MCGRANERY  
Administrative Appeals Judge