BRB Nos. 01-0174 BLA
and 03-0237 BLA

CARL SAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY	)	
	)	DATE ISSUED: 12/08/2003
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, and the Decision and Order Denying Request to Withdraw Claim of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer and carrier.

Timothy S. Williams (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Request to Withdraw Claim (2002-BLA-0376) of Administrative Law Judge Richard E. Huddleston and the Decision and Order (1999-BLA-0519) of Administrative Law Judge Robert L. Hillyard 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).[1] The pertinent procedural history of this case is as follows. Claimant filed his original claim for benefits on August 18, 1992. Director's Exhibit 32-178. On November 1, 1993, the district director issued a Proposed Decision and Order Memorandum of Conference, finding that claimant failed to establish any element of entitlement and denying benefits. Director's Exhibit 32-1. Claimant took no further action until he filed the present duplicate claim for benefits on March 18, 1998. Director's Exhibit 1. In a Decision and Order issued on September 29, 2000, Judge Hillyard credited claimant with thirteen years of qualifying coal mine employment, as stipulated to by the parties and supported by the record, but found that the newly submitted evidence was insufficient to establish either the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) (2000) or a totally disabling respiratory impairment at 20 C.F.R. §718.204(c)(1)-(4) (2000), and thus was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Accordingly, benefits were denied.

While the case was pending on appeal to the Board, claimant filed a request to withdraw the claim. By Order dated April 18, 2001, the Board dismissed claimant's appeal without prejudice, and remanded the case to the district director for further proceedings. Subsequently, in a Decision and Order issued on November 13, 2002, Judge Huddleston denied claimant's request to withdraw his duplicate claim pursuant to 20 C.F.R. §725.306, and granted employer's motion for summary decision.

In the present appeal, which was assigned the Board's docket number BRB No. 03-0237 BLA, claimant contends that Judge Huddleston erred in denying withdrawal of the claim pursuant to Section 725.306. Claimant additionally requested reinstatement of his prior appeal, which was assigned the Board's docket number BRB No. 01-0174 BLA, and challenges Judge Hillyard's findings at Sections 718.202(a)(1), (4) and 718.204(c)(4)

[1]The Department of Labor (DOL) has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

(2000). By Order issued January 28, 2003, the Board granted claimant's request for reinstatement and consolidated claimant's appeals. Employer responds, urging affirmance of both the denial of withdrawal and the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to the merits but urges affirmance of Judge Huddleston's denial of withdrawal.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially challenges Judge Huddleston's denial of claimant's request to withdraw his claim, arguing that all of the requirements of Section 725.306 were met, as claimant filed a written request for withdrawal on the ground that it was in his best interest to file a new claim under the 2001 amendments to the regulations. Claimant asserts that the Act and its implementing regulations contain no language which would prohibit claimant from withdrawing his claim at any time, regardless of the prior denial of benefits issued against him. Claimant acknowledges that Judge Huddleston's denial of withdrawal was consistent with the Board's holdings in *Lester v. Peabody Coal Co.*, 22 BLR 1-183 (2002)(*en banc*), and *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), but claimant asserts that these cases were wrongly decided. We disagree.

While the text of Section 725.306 does not address the precise point at which an adjudication officer[2] loses authority to approve withdrawal, in *Lester* and *Clevenger*, the Board adopted the Director's interpretation of the regulation, and held that the withdrawal provisions of Section 725.306 are applicable only up until such time as a decision on the merits, issued by an adjudication officer, becomes effective. *Lester*, 22 BLR at 1-191; *Clevenger*, 22 BLR at 1-200. The Board reasoned that the Director's interpretation preserves the integrity of the black lung adjudicatory system by providing a mechanism for removing premature claims from the system without disturbing valid claim decisions made at the conclusion of the adversarial process, and balances a claimant's interest in forgoing further pointless litigation on a premature claim with an employer's interest in maintaining the advantages gained by successfully defending the claim. *Id.* The Board further determined that the Director's interpretation was consistent with both the regulatory scheme under the Act, and case law which interprets Rule 41(a)(2), an analogous rule under the Federal Rules of Civil Procedure, as barring the dismissal of a claim without prejudice after it has been fully litigated. *Id.*

[2]An adjudication officer is defined as a district director or administrative law judge who is authorized by the Secretary of Labor to accept evidence and decide claims. *See* 20 C.F.R. §725.350.

The regulations provide that a district director's proposed decision and order is effective thirty days after the date of issuance unless a party requests a revision or a hearing, and an administrative law judge's decision and order on the merits of a claim is effective on the date it is filed in the office of the district director. *See* 20 C.F.R. §§725.419, 725.479, 725.502(a)(2); *Lester*, 22 BLR at 1-190; *Clevenger*, 22 BLR at 1-199. In the present case, since Judge Huddleston accurately determined that claimant sought withdrawal of his claim after Judge Hillyard's adjudication on the merits became effective, the provisions at Section 725.306 were inapplicable and Judge Huddleston correctly found that he was not authorized to approve withdrawal of the claim, consistent with *Lester* and *Clevenger*. We decline to revisit our holdings in those cases, and therefore affirm Judge Huddleston's Decision and Order denying claimant's request to withdraw his duplicate claim pursuant to Section 725.306.

Turning to the merits, 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). Where a claimant files a claim 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) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held that in order to assess whether a material change in conditions is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against the miner. If the miner establishes the existence of that element, he has demonstrated, as a matter of law, a material change. Then the administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1985). In the present case, Judge Hillyard determined that claimant's previous claim was denied on the ground that claimant did not establish the presence of pneumoconiosis or any other element of entitlement. Decision and Order at 13. Judge Hillyard then properly reviewed all of the evidence submitted subsequent to the date of the prior denial to determine whether claimant had proven at least one of the elements of entitlement previously adjudicated against him. Decision and Order at 6-12, 13-16.

Claimant first maintains that the evidence is sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), as two newly submitted x-rays were interpreted as positive for pneumoconiosis. Citing Board case law holding that an administrative law judge need not defer to a physician with superior qualifications or accept as conclusive the numerical preponderance of x-ray interpretations, claimant contends that Judge

Hillyard erred in weighing the newly submitted x-ray evidence. We disagree. Judge Hillyard reviewed all of the x-ray evidence of record and the qualifications of the readers, and determined that no interpretation considered in the prior denial was positive for pneumoconiosis. Decision and Order at 6-7, 13. Judge Hillyard further determined that the newly submitted evidence consisted of thirteen interpretations of four films, of which only two were read as positive for pneumoconiosis by Dr. Baker, a B reader, whereas eleven negative interpretations were provided by one B reader and ten dually qualified Board-certified radiologists and B readers. Decision and Order at 13. Judge Hillyard then rationally assigned greater weight to the readings by physicians with dual qualifications, and found that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) by a preponderance of the evidence. *Id.*; *see 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); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). We find no evidence to support claimant's suggestion that Judge Hillyard selectively analyzed the x-ray evidence of record. As substantial evidence supports Judge Hillyard's findings at Section 718.202(a)(1), they are affirmed.

Claimant next contends that Judge Hillyard erred in evaluating the medical opinions at Section 718.202(a)(4), as claimant asserts that Dr. Baker's diagnosis of pneumoconiosis is well-reasoned and entitled to substantial weight. Claimant's arguments amount to a request to reweigh the evidence, which is beyond the scope of the Board's review. *See Anderson*, 12 BLR 1-111. The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). In the present case, Judge Hillyard accurately reviewed the medical opinions of record, including the earlier opinions of Drs. Vuskovich and Dahhan, that claimant had no occupational disease secondary to coal dust exposure, which were considered in the prior denial. Decision and Order at 9-12. In finding that the newly submitted medical opinions of Drs. Baker and Dahhan were also insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), Judge Hillyard acknowledged that Dr. Baker examined claimant and conducted objective testing, but specifically based his diagnosis of pneumoconiosis upon the duration of claimant's coal dust exposure and his abnormal x-ray. Decision and Order at 14-15; Director's Exhibits 9, 10. Judge Hillyard, however, found that the x-ray evidence was negative for pneumoconiosis, and further determined that Dr. Baker diagnosed a restrictive ventilatory defect on February 18, 1998, yet less than two months later diagnosed an obstructive impairment. Decision and Order at 15. Moreover, Dr. Baker relied on a twenty-year history of coal mine employment, contrary to Judge Hillyard's finding of thirteen years of coal mine employment. Judge Hillyard thus concluded that Dr. Baker's opinion was unreasoned and unsupported by the evidence, and acted within his discretion in according the opinion little weight. *Id.*; *see Worhach*, 17 BLR 1-105; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). Judge Hillyard permissibly gave greater weight to the contrary opinion of Dr. Dahhan,

that claimant did not have pneumoconiosis, which he found to be well-reasoned and supported by the objective medical evidence. Decision and Order at 14; *see Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic*, 8 BLR 1-46. We therefore affirm Judge Hillyard's findings pursuant to Section 718.202(a)(4), as supported by substantial evidence.

Because both the old and new evidence of record were found to be insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1)-(4), claimant is precluded from establishing entitlement to benefits. *Anderson*, 12 BLR 1-111. Consequently, we affirm Judge Hillyard's denial of benefits, and need not reach claimant's arguments regarding the issue of total disability due to pneumoconiosis.

Accordingly, Judge Huddleston's Decision and Order Denying Request to Withdraw Claim and Judge Hillyard's Decision and Order denying benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge