BRB Nos. 97-0988 BLA
and 97-0988 BLA-A

ELBERT PERRY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HAMBLIN COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Edward J. Murty, Jr., Administrative Law Judge, United States Department of Labor.

Dorothy B. Stulberg (Mostoller and Stulberg), Oak Ridge, Tennessee, for claimant.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

Edward Waldman (Marvin Krislov, Deputy Solicitor of Labor for National Operations; 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensation

Programs (the Director), cross-appeals the Decision and Order (96-BLA-1807) of Administrative Law Judge Edward J. Murty, Jr. 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). In his Decision and Order, the administrative law judge determined that claimant's last coal mine employment for more than one year was with Monarch Mines, Inc. He then found that neither Monarch Mines, Inc. nor its corporate officers had been identified as responsible operators; and consequently, concluded that the Director should be responsible for the payment of benefits. Hamblin Coal Company was, therefore, dismissed as a party to this claim. The administrative law judge concluded that claimant's prior claim was finally denied on April 11, 1991 and that the present claim was a duplicate claim under 20 C.F.R. §725.309.[1] The administrative law judge found the newly submitted evidence insufficient to demonstrate a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied. On appeal, claimant challenges the determination of the administrative law judge that his new application for benefits was a duplicate claim and the determination that the newly submitted evidence was insufficient to demonstrate a material change in conditions. Employer and the Director respond, urging affirmance of the administrative law judge's finding at Section 725.309 as supported by substantial evidence. On cross-appeal, the Director challenges its designation as responsible operator, and employer responds, urging affirmance of the Decision and Order of the administrative law judge dismissing it as responsible operator as supported by substantial evidence.[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

[1] Claimant filed his initial claim in March 1983 which the district director finally denied in July 1987. Director's Exhibit 30. Following a hearing on the merits, Administrative Law Judge Earl Thomas issued a Decision and Order on April 11, 1991 wherein he credited claimant with fifteen years of coal mine employment, determined that claimant was a qualified miner under the Act, and applied the regulations at 20 C.F.R. Part 718. *Id.* Judge Thomas found the evidence of record insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. *Id.* Claimant took no further action until he filed the present claim on June 7, 1991. Director's Exhibit 1.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

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 consideration of the administrative law judge's Decision and Order, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Initially, claimant contends that his request for modification filed on April 26, 1991 was filed within one year of the final denial of his prior claim as the Decision and Order of Administrative Law Judge Earl E. Thomas did not become final until the time to appeal the decision had expired on May 11, 1991. We disagree. Both the statute and regulations provide that a party may file a request for modification at any time before one year from the denial of a claim. *See* 33 U.S.C. §922, as incorporated into the Act by Section 422(a), 30 U.S.C. §932(a); 20 C.F.R. §725.310(a); *Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-21 (1996). The denial of a claim becomes effective when the Decision and Order of the administrative law judge is filed in the office of the district director.[3] *See* 33 U.S.C. §921(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.479(a); *Wooten, supra*. The time to request modification of this denial begins to run from this date. *Id.* In the instant case, the administrative law judge properly concluded that the request for modification filed by claimant on April 26, 1991 was not timely as Judge Thomas' Decision and Order dated April 11, 1990 was filed in the office of the district director on April 17, 1990. *Id.*; s*ee* Director's Exhibit 30. We, therefore, affirm the administrative law judge's denial of claimant's request for modification as it is supported by substantial evidence and is in accordance with law.

[3] The deputy commissioner is now referred to as the District Director. 20 C.F.R. §725.101(a)(11); 55 Fed. Reg. 28604 (July 12, 1990).

Claimant asserts that the newly submitted evidence demonstrates a material change in condition at Section 725.309. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge properly applied the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Ross*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the administrative law judge properly concluded that claimant's prior claim was denied because the evidence of record failed to show the presence of pneumoconiosis.[4] *See* Decision and Order at 2. The administrative law judge correctly considered claimant's newly submitted medical evidence which included numerous x-ray interpretations, numerous pulmonary function studies and blood gas studies, the qualifications of Dr. Bruton, claimant's treating physician, and numerous medical reports from Dr. Bruton, including a statement that the physician was aware of claimant's smoking history, as well as the medical reports of Drs. Castle, Stafford, Fino, Dahhan, and W. K. C. Morgan. Director's Exhibits 5, 7-14, 23-25, 27, 28, 30, 32, 34, 59; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 5, 7-9. Based on his review of the newly submitted evidence, the administrative law judge properly determined that at Section 718.202(a), this evidence was insufficient to establish the existence of pneumoconiosis. The administrative law judge permissibly found the medical opinion of Dr. Bruton less credible because the additional medical information provided by Dr. Bruton concerning claimant's medical condition was not any different from the medical information provided to Judge Thomas in the prior claim, and because Dr. Bruton continued to rely primarily on his x-ray reading and pathology interpretation for his diagnosis of coal workers' pneumoconiosis. *Ross, supra*. The administrative law judge correctly noted that more qualified physicians failed to find x-ray or pathology evidence of pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Since the medical opinion of Dr. Bruton is the only newly submitted evidence which supports claimant's burden of proof, the administrative law judge properly concluded that claimant failed to demonstrate a material change in conditions. We, therefore, affirm the finding of the administrative law judge that the

[4] Since he found the evidence of record insufficient to establish the existence of pneumoconiosis, Judge Thomas did not decide the issue of total disability as claimant had failed to establish a necessary element of entitlement. See *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

newly submitted evidence was insufficient at 20 C.F.R. §725.309; *Ross,supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983).

Contrary to claimant's contention, the Decision and Order of the administrative law judge not does violate the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge addressed the validity and credibility of the medical opinion evidence supportive of claimant's burden of proof and articulated reasons and bases for his finding the medical opinion of Dr. Bruton less credible. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, the administrative law judge has provided the necessary findings of fact and law required by the APA.[5] *Id.*

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[5] Because we affirm the findings of the administrative law judge at 20 C.F.R. §718.204(c), we need not address the responsible operator issue raised in the Director's cross-appeal.