BRB Nos. 07-0649 BLA
and 07-0649 BLA-A

W.C.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 04/30/2008
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denial of Benefits (2005-BLA-06308) of Administrative Law Judge Donald W. Mosser on a subsequent 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 procedural history of this case is as follows: Claimant filed an initial claim on September 21, 1994.[1] Director's Exhibit 1-782. In a Decision and Order dated March 24, 1997, Administrative Law Judge Robert L. Hillyard denied benefits on the grounds that claimant failed to establish the existence of pneumoconiosis or total disability. Pursuant to claimant's appeal, the Board affirmed the denial of benefits. *[W.C.] v. Whitaker Coal Corp.*, BRB No. 97-0916 BLA (Feb. 4, 1998) (unpub.); Director's Exhibits 1-549, 1-594. Claimant filed a request for modification on March 14, 1998, and the case was assigned to Administrative Law Judge Donald W. Mosser. Director's Exhibits 1-327, 1-545. Judge Mosser determined that claimant failed to establish either a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and denied benefits. Claimant appealed, and the Board affirmed Judge Mosser's decision. *[W.C.] v. Whitaker Coal Corp.*, BRB No. 99-1076 BLA (Oct. 18, 2000) (unpub.); Director's Exhibit 1-237.

On May 31, 2001, claimant filed a motion to withdraw his 1994 claim. Director's Exhibit 1-216. On June 7, 2001, the district director issued an Order of Withdrawal, granting claimant's motion, to which employer objected. Director's Exhibit 1-208. In the interim, claimant filed a new application for benefits on August 8, 2001 and evidentiary development ensued. Director's Exhibit 1-205. On December 30, 2002, the district director rescinded his prior order granting claimant's request to withdraw his 1994 claim. Director's Exhibit 1-30. Claimant was informed that the district director would treat his August 2001 application for benefits as a request for modification of the denial of his 1994 claim, unless claimant notified the district director, in writing, that he did not wish to seek modification. Director's Exhibit 1-4. Claimant was further advised of his right to file a subsequent claim pursuant to 20 C.F.R. §725.309, on or after October 18, 2001 (one year from the Board's October 18, 2000 decision). *Id*. Claimant, by counsel, responded that he did not want his August 8, 2001 application for benefits treated as a modification request and, therefore, the case was administratively closed.[2] Director's Exhibits 1-1, 1-2.

[1] The Department of Labor 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.

[2] In light of claimant's specific statement that he did not wish his August 8, 2001 filing to be treated as a modification request, we refer to that filing, herein, as an "application" for benefits.

Claimant next filed a subsequent claim on April 17, 2003, which is the subject of the instant appeal. Director's Exhibit 2. Judge Mosser (the administrative law judge) accepted the parties' stipulation that claimant had at least thirty years of coal mine employment, and determined that the subsequent claim was timely filed. Based on the newly submitted evidence, as designated by the parties in accordance with the evidentiary limitations at 20 C.F.R. §725.414,[3] the administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203 and, therefore, he found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits of the claim, the administrative law judge further determined that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

Claimant appeals, alleging that the administrative law judge erred by failing to consider the exertional requirements of his usual coal mine work, in conjunction with the opinion of Dr. Baker, prior to finding that claimant was not totally disabled under Section 718.204(b)(2)(iv). Claimant's Brief at 2-4. Claimant also asserts that, insofar as Dr. Simpao did not specifically address whether he was "totally disabled as a result of his pulmonary impairment," the Department of Labor has failed to provide claimant with a complete pulmonary evaluation as required under the Act.[4] Claimant's Brief at 5. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a response, asserting that, even if Dr. Simpao's opinion is considered to be incomplete on the issue of total disability, a remand for further development of the evidence is not required, as the administrative law judge permissibly determined that Dr. Simpao's diagnosis of a severe respiratory impairment was outweighed by the contrary opinions of Drs. Repsher and Dahhan, that claimant has no respiratory impairment. Director's Letter Brief at 2.

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[3] The administrative law judge determined that the August 2001 application for benefits was "never officially withdrawn by the miner nor was there a denial by reason of abandonment." Decision and Order at 9. Noting that both parties developed evidence with respect to that 2001 application in good faith, the administrative law judge stated that "the evidence developed [in conjunction with the 2001 application] may be used as newly submitted evidence in the current [subsequent] claim" if the evidence is submitted by the parties in accordance with the evidentiary limitations pursuant to 20 C.F.R. §725.414. *Id*.

[4] Dr. Simpao performed an examination of claimant at the request of the Department of Labor on May 16, 2003. Director's Exhibit 11.

Employer has filed a cross-appeal, asserting that the administrative law judge erred in finding that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. Employer also contends that the administrative law judge erred by failing to consider all of the relevant evidence developed in conjunction with the August 2001 claim,[5] including the February 15 and July 29, 2002 medical reports of Dr. Broudy, the February 16, 2003 medical report of Dr. Dahhan, an x-ray reading by Dr. Wheeler of a film dated January 24, 2001, and two x-ray readings by Dr. Barrett of films dated January 24, 2001 and October 24, 2001. Employer's Brief in Support of Cross-Appeal at 12; Director's Exhibits 1-12, 1-13, 1-36, 1-44, 1-92 and 13. Employer further asserts that the administrative law judge erred by failing to consider x-ray readings by Dr. Wheeler, which were allegedly submitted as Employer's Exhibits 2 and 3. Although employer concedes that all of these evidentiary errors are harmless, as they do not alter the administrative law judge's finding that claimant is not totally disabled, employer asks the Board to resolve the evidentiary matters in this case, as they "could be critical in any future litigation."[6] Employer's Brief in Support of Cross-Appeal at 13. The Director responds to employer's cross appeal, asserting that the administrative law judge erred in finding the August 8, 2001 application to be operative, as that application was effectively withdrawn.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence,

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[5] Employer asserts that the August 8, 2001 application was effectively a request for modification of the denied 1994 claim, which was abandoned by claimant. Employer asserts that all of the evidence developed by the parties with respect to the August 2001 application constitutes either "record evidence" in the prior claim or medical treatment evidence, neither of which is subject to the evidentiary limitations at 20 C.F.R. §725.414. Employer's Brief in Support of Cross-Appeal at 14. Employer also contends that because the August 2001 application constitutes a request for modification, the Department of Labor erred in sponsoring a second, complete pulmonary evaluation of claimant with Dr. Hussain. Employer's Brief in Support of Cross-Appeal at 14 n.3; Director's Exhibit 1-163. Employer therefore requests that Dr. Hussain's report be stricken from the record. *Id.*

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), and 718.203, that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and his determination that the evidence failed to establish the existence of complicated pneumoconiosis or that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[7] 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Timeliness of Claim

Initially, we address employer's contention that the administrative law judge erred in finding that claimant's April 17, 2003 subsequent claim was timely filed. Employer's Brief at 6-12. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. *See* 20 C.F.R. §725.308(a). The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the miner]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Employer contends that the administrative law judge erred by failing to find that claimant's subsequent claim was not timely filed within three years of the medical report dated February 23, 1994, in which Dr. Baker diagnosed pneumoconiosis and indicated that claimant was totally disabled, from a pulmonary standpoint, from returning to his usual coal mine work. Employer's Brief at 8-9; Director's Exhibit 1. We disagree. The administrative law judge specifically considered employer's argument stating:

> The employer argues that the claim is not timely filed because Dr. Baker provided a report on behalf of the claimant, dated February 23, 1994, in which he diagnosed the miner with pneumoconiosis arising out of coal mine employment and stated that the claimant was not physically able from

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 5.

> a pulmonary standpoint to do his usual coal mine employment duties. However, in order for a physician's diagnosis to trigger the three year statute of limitations, the opinion must be well-reasoned. In a decision dated March 24, 1997, an administrative law judge considered Dr. Baker's February 23, 1994 report and found it unreasoned due to internal inconsistencies and lack of rationale. (DX 1, p. 603). After considering Dr. Baker's 1994 report, I agree with the previous administrative law judge's conclusion that the report is unreasoned and did not trigger the three year statute of limitation[s].

Decision and Order at 4. Thus, the administrative law judge ruled that employer failed to rebut the presumption of timeliness.

In defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit court, in *Kirk*, specifically stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *see also Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (*en banc*). Thus, contrary to employer's assertion, in accordance with the dictates of *Kirk*, the administrative law judge properly considered whether Dr. Baker's opinion, that claimant was totally disabled due to pneumoconiosis, was reasoned. Decision and Order at 4. In so doing, the administrative law judge acted within his discretion, as the trier-of-fact, in concluding that Dr. Baker's 1994 opinion was "unreasoned and did not trigger the three-year statute of limitation[s]" because Dr. Baker's disability findings were inconsistent and he did not explain the basis for his medical conclusion. *Id*. We, therefore, affirm the administrative law judge's credibility determination as it is proper and supported by substantial evidence. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Accordingly, we also affirm the administrative law judge's finding that employer failed to rebut the presumption at Section 725.308, and further affirm his determination that the April 17, 2003 claim was timely filed.[8]

Withdrawal of Modification Request

[8] The administrative law judge also found that Dr. Baker's opinion was not communicated to claimant. We need not address this aspect of the administrative law judge's findings under 20 C.F.R. §725.308, in light of our affirmance of his determination that Dr. Baker's opinion was not reasoned. 20 C.F.R. §725.308(a); *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer and the Director are in agreement that the administrative law judge erred in stating that the August 2001 application was "never officially withdrawn by [clamant] nor was there a denial by reason of abandonment." Decision and Order at 9. Employer asserts on cross-appeal that the August 2001 application constituted a modification request that was ultimately denied by reason of abandonment. Although the Director agrees that the August 2001 application constituted a modification request, the Director also asserts that the modification request was properly withdrawn by claimant. The Director contends that a withdrawn modification request is treated in a manner similar to a withdrawn claim, insofar as it must be considered never to have been filed. *See* 20 C.F.R. §725.306(b). We agree with the Director's position.

The record establishes that claimant specifically advised the district director that he did not wish to pursue modification. Director's Exhibit 1-2. Although the regulations do not directly provide for the withdrawal of a modification request, given the regulatory void, the district director reasonably treated the circumstances of this case as analogous to those of a request for withdrawal of a claim. 20 C.F.R. §725.306(b). A claim may be withdrawn at any time before a denial becomes effective. *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*). In this case, no decision had been issued addressing the August 2001 application prior to claimant's intent letter. Because claimant expressly stated that he did not want to pursue modification, there was no reason not to allow withdrawal of the 2001 modification request. The district director also reasonably concluded that the consequences of modification withdrawal were the same as those of claim withdrawal. When a claim is withdrawn, it is treated as if it were never filed. 20 C.F.R. §725.306(b); *see* Director's Letter Brief at 2.

Since the Director is charged with the administration of the Act, special deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). We agree with the Director's reasonable interpretation of the regulations to allow for the withdrawal of a modification request, in the same manner that a claimant is allowed to withdraw a claim under Section 725.306. Consistent with our holding in *Clevenger*,[9] we

[9] In *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), the Board held that the provisions of 20 C.F.R. §725.306 are applicable only "up until such time as a decision on the merits issued by an adjudication officer [*e.g.*, district directors, administrative law judges] becomes effective[,]" *see* 20 C.F.R. §§725.419, 725.479, 725.502, at which time, there no longer exists an appropriate adjudication officer authorized to approve a withdrawal request under 20 C.F.R. §725.306. *Clevenger*, 22 BLR at 1-199-200; *accord Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-191 (2002) (*en banc*). The Board agreed with the Director's argument that "the date a decision on the merits becomes effective is a practical point for terminating authority to allow

agree that claimant may withdraw a modification request "up until such time as a decision on the merits issued by an adjudication officer becomes effective." *Clevenger*, 22 BLR at 2-200. Thus, contrary to the administrative law judge's determination, the district director acted appropriately in allowing claimant to withdraw his August 2001 application (modification request), as there had not been a decision on the merits issued by an adjudication officer prior to the date of claimant's letter advising that he did not want his August 2001 application to be treated as a request for modification. *Id*. Because claimant's current claim, filed on April 17, 2003, was filed more than one year after the Board's October 18, 2000 decision, it is a subsequent claim pursuant to Section 725.309. Based on the April 17, 2003 filing date, the subsequent claim is also governed by the revised regulations and the evidentiary limitations pursuant to Section 725.414.

Evidentiary Limitations

We now turn to employer's evidentiary challenges. Employer asserts that all of the evidence developed in conjunction with the August 2001 application (modification request) is automatically part of the record of the prior denied claim, and is not subject to the evidentiary limitations at Section 725.414. Accordingly, employer argues that the administrative law judge erred in requiring it to designate evidence developed in conjunction with the August 2001 application for consideration in the instant claim. Although we have held that the administrative law judge erred in concluding that claimant's August 2001 application had not been properly withdrawn, we consider that error to be harmless, as his ruling did not affect the proper application of the evidentiary limitations to this claim. S*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge correctly decided to "rely on the evidence submitted by both parties in their evidence summary form, provided that the evidence is within the limits prescribed by the Act." Decision and Order at 9. Contrary to employer's assertion, the administrative law judge acted properly in requiring the parties to specifically designate evidence developed in conjunction with the withdrawn August 2001 application. 20 C.F.R. §725.414. Under Section 725.306, the effect of the withdrawal of a claim is to treat the claim, and its corresponding evidence, as if it had never been filed. 20 C.F.R. §725.306. The same must hold true with respect to the withdrawal of a modification request. Therefore, in this case, the evidence developed in conjunction with the August 2001 application must be treated as if it had never been filed, and is not a part of the

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withdrawal because it is readily identifiable and marks the point beyond which allowing withdrawal would be unfair to opposing parties," and consequently, "there is no compelling reason to allow [claimant] to avoid the consequences of that defeat; claimant may instead appeal the denial, seek modification within a year pursuant to Section 725.310, or thereafter file a subsequent claim under Section 725.309." *Clevenger*, 22 BLR at 1-200; *Lester*, 22 BLR at 1-191.

record unless the parties choose to specifically designate that evidence under Section 725.414. Therefore, we reject employer's assertion that the administrative law judge erred by failing to consider all of the evidence developed in conjunction with the August 2001 application.[10]

Merits of Entitlement

Claimant challenges the administrative law judge's finding that he is not totally disabled pursuant to Section 718.204(b)(2)(iv). Claimant asserts that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work, in conjunction with a physician's findings regarding the extent of any respiratory impairment. Claimant's Brief at 5, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984). Claimant specifically states:

> It can be reasonably concluded that claimant's coal mining duties involved the claimant being exposed to heavy concentrations of dust on a daily basis. Taking into consideration the claimant's condition against such duties, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis.

Claimant's Brief at 5. We reject claimant's assertion of error as it is without merit.

The administrative law judge properly noted that there were five medical reports submitted with the current claim from Drs. Baker, Hussain, Simpao, Repsher and Dahhan. Decision and Order at 12. Dr. Baker, claimant's treating physician, stated:

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[10] The administrative law judge noted that, although employer designated two x-rays by Dr. Wheeler as rebuttal evidence on its evidence summary form, he was unable to locate those readings under Employer's Exhibits 2 or 3, or "anywhere else in the record." Decision and Order at 5 n.3. Employer alleges that the readings were properly submitted, but that they were misplaced by the Office of Administrative Law Judges. Employer contends that "the administrative law judge abused his discretion by failing to obtain a copy of the exhibits." Employer's Brief in Support of Cross-Appeal at 18. It is not necessary that we address employer's evidentiary argument as to the missing exhibits, since employer specifically concedes that claimant has simple pneumoconiosis, Employer's Brief in Support of Cross-Appeal at 5, and therefore, error, if any, committed by the administrative law judge is harmless. *Larioni*, 6 BLR 1-1278.

> [Claimant] has a Class 2 impairment with the FEV1 between 60% and 79% of predicted. . . . based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition. . . . [and] has a second impairment, based on Section 5.8, Page 106, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition, which states that persons who develop pneumoconiosis should limit further exposure to the offending agent. . . .[t]his would imply the patient is 100% occupationally disabled for work in the coal mining industry or similar dusty occupations.

Claimant's Exhibit 5. Dr. Baker further indicated that claimant had mild resting hypoxemia based on the arterial blood gas testing. *Id*. Dr. Hussain stated that claimant was "moderately impaired" but he did not address whether claimant could continue his usual coal mine employment. Director's Exhibit 1-167. Dr. Simpao diagnosed a severe respiratory impairment, but he did not address whether claimant could perform his usual coal mine work. Drs. Repsher and Dahhan opined that claimant had no respiratory impairment and further stated that claimant was not totally disabled for his usual coal mine work. Director's Exhibits 11, 42; Employer's Exhibit 2.

In weighing the conflicting medical opinion evidence, the administrative law judge gave no weight to the opinions of Drs. Hussain and Simpao because he found that those doctors failed to explain the basis for their respective diagnoses of moderate and severe respiratory impairment. Decision and Order at 12. In comparison to Dr. Baker, the administrative law judge determined that the opinions of Drs. Repsher and Dahhan were entitled to controlling weight because their finding, that claimant had no respiratory impairment, was well-reasoned and better supported by the objective evidence of record. *See Clark*, 12 BLR at 1-151; Decision and Order at 12. The administrative law judge further noted that a preponderance of all of the medical opinions of record supported a finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12-13.

We reject claimant's argument that the administrative law judge erred by failing to find that he established total disability based on Dr. Baker's opinion. Dr. Baker's statement that claimant should avoid further dust exposure is not supportive of claimant's burden of proof at Section 718.204(b)(2)(iv). The Sixth Circuit Court has held that a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *accord Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Moreover, we reject claimant's contention that the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine work in considering whether he established total disability based on the medical opinion evidence at Section 718.204(b)(2)(iv). The administrative law judge specifically credited the opinions of Drs.

Repsher and Dahhan, who were aware of claimant's last coal mine job and specifically opined that claimant had no respiratory impairment, and that he was capable of performing his usual coal mine work. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-113 (6th Cir. 1995); *Clark*, 12 BLR at 1-151. Because the administrative law judge determined that that claimant had no respiratory impairment, he properly found that claimant was unable to establish total disability. S*ee McMath v. Director, OWCP*, 12 BLR 1-6, 1-9-10 (1988). As claimant does not specifically challenge the weight accorded the opinions of Drs. Repsher, Dahhan, Hussain or Simpao at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant failed to establish a totally disabling respiratory or pulmonary impairment. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish total disability pursuant to Section 718.204(b).[11]

Complete Pulmonary Evaluation

Lastly, claimant argues that because Dr. Simpao, the physician who performed the Department of Labor examination, did not specifically state whether or not claimant is totally disabled, the Board must conclude that the Department of Labor failed to provide claimant with a complete and credible pulmonary evaluation sufficient to substantiate his claim, as required under the Act. The Director acknowledges that Dr. Simpao's opinion is not complete on the issue of total disability; however, the Director maintains that a remand for further development of the medical evidence is not warranted. We agree.

Pursuant to Section 413(b) of the Act, "[e]ach miner who files a claim for benefits under this subchapter shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-89-90 (1994). The regulation at 20 C.F.R. §725.406(a) provides that "[a] complete pulmonary evaluation includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

[11] Claimant argues that since pneumoconiosis has been proven to be a progressive and irreversible disease, and a considerable amount of time has passed since claimant's initial diagnosis of pneumoconiosis, it can be assumed that claimant's condition has worsened and adversely affected his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 5. Contrary to claimant's assertion, an administrative law judge's findings of total disability must be based on the medical evidence of record. 20 C.F.R. §725.477(b); *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004); Claimant's Brief at 5.

In this case, claimant does not challenge the weight accorded Dr. Simpao's opinion at Section 718.204(b)(2)(iv) on the issue of total disability. Although Dr. Simpao diagnosed a severe respiratory impairment, the administrative law judge assigned Dr. Simpao's opinion less weight because he determined that the opinions of Drs. Dahhan and Repsher, that claimant has no respiratory impairment, were better explained and more consistent with the objective evidence. Because the administrative law judge found Dr. Simpao's diagnosis of a severe respiratory impairment less persuasive, it is not necessary that the Department of Labor undertake to obtain any further opinion from Dr. Simpao as to whether claimant is totally disabled from performing his usual coal mine work. Even if Dr. Simpao were to provide an additional statement that claimant is totally disabled from returning to work, the underlying basis for his disability opinion remains the diagnosis of a severe respiratory impairment, which has been rejected by the administrative law judge. Thus, we agree with the Director that a remand for further medical development is not required under the circumstances of this case. In light of the foregoing, we affirm the administrative law judge's denial of benefits. [12]

[12] As we affirm the denial of benefits, it is not necessary that we address employer's argument that because claimant did not raise the issue of a complete pulmonary evaluation before the administrative law judge, he has waived his right to challenge the denial of his claim pursuant to 20 C.F.R. §725.406. Employer's Response Brief at 13.

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge