BRB Nos. 06-0272 BLA
and 06-0272 BLA/A

LEONARD ADAMS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
and	)	
	)	
SUN COAL COMPANY	)	DATE ISSUED: 08/22/2006
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, 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, PLLC), Washington, D.C., for employer.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order (04-BLA-6131) of Administrative Law Judge Joseph E. Kane 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). The administrative law judge found that the claim was timely filed and that claimant established sixteen years of coal mine employment. Decision and Order at 3-4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 9. After determining that the instant claim was a subsequent claim,[1] the administrative law judge noted the proper standard and found that the newly submitted evidence did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 since the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b). Decision and Order at 2, 4, 10-16; Director's Exhibit 1. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1) and in failing to find total disability established pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also asserts, with respect to the medical opinion evidence, that he was not provided a complete pulmonary evaluation as required by the Act and regulations. Employer responds, urging affirmance of the denial of benefits as supported by substantial evidence, and cross-appeals, asserting that the administrative law judge erred in failing to find this claim untimely pursuant to 20 C.F.R. §725.308 and in failing to consider the blood gas study results obtained by Drs. Dahhan and Rosenberg. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter

[1] Claimant filed his initial claim for benefits on February 9, 1998, which was finally denied by Administrative Law Judge Daniel J. Roketenetz on November 24, 1999 as claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 1. Claimant appealed to the Board which affirmed the denial of benefits on December 18, 2000. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on January 16, 2003, in which the district director denied benefits on December 15, 2003. Director's Exhibits 3, 29. Claimant subsequently requested a hearing before the Office of Administrative Law Judges. Director's Exhibit 31.

stating that he takes no position with respect to the merits of the case but asserting that claimant has been provided with a complete pulmonary examination and that the administrative law judge properly found that the claim was timely filed and that any error in the administrative law judge's consideration of the blood gas study evidence is harmless.[2]

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, and in accordance with applicable 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Where a miner 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 "one of the applicable conditions of entitlement ... has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Administrative Law Judge Daniel J. Roketenetz denied claimant's prior claim because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment and the Board subsequently affirmed the denial. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he suffers from pneumoconiosis or is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42

[2] The administrative law judge's length of coal mine employment determination as well as his findings pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i), (iii) are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish at least one element of entitlement previously adjudicated against him).[3]

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 contains no reversible error. Considering all the newly submitted evidence of record, the administrative law judge acted within his discretion, as fact-finder, in concluding that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) or total disability pursuant to Section 718.204(b)(2). *See White*, 23 BLR at 1-3; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the four[4] newly submitted readings of the three x-rays of record in light of the readers' radiological qualifications. Decision and Order at 10. Only one reading was positive for pneumoconiosis, a "1/0" reading of the May 2, 2003 x-ray by Dr. Simpao, who has no specialized qualifications for the interpretation of x-rays. Director's Exhibit 11. Taking into account that the May 2, 2003 x-ray was read as negative for the existence of pneumoconiosis by Dr. Hayes, a B-reader and Board-certified radiologist, the administrative law judge found that the May 2, 2003 x-ray was negative for pneumoconiosis. Decision and Order at 10; Director's Exhibit 16. Because all of the other readings were negative, the administrative law judge found that claimant did not establish the existence of pneumoconiosis by a preponderance of the x-ray evidence. Decision and Order at 10. The administrative law judge conducted a proper qualitative analysis of the conflicting x-ray readings. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *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); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1988)(*en banc*); Director's Exhibits 11, 15, 16; Employer's Exhibits 1, 4; Decision and Order at 10. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, merely counted the negative readings and that the administrative law judge "may have 'selectively analyzed' the readings, lack

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[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 4.

[4] Dr. Barrett interpreted the May 2, 2003 x-ray for quality purposes only. Director's Exhibit 12.

merit. Claimant's Brief at 3-4. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to Section 718.202(a)(4), the administrative law judge, in considering the medical opinion evidence, found that the weight of the better documented and reasoned opinions did not establish the existence of pneumoconiosis. Decision and Order 11-12. Claimant does not challenge this finding. It is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Regarding the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), claimant initially asserts that in addressing the issue of total disability, the administrative law judge is required 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 5-6, 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). The only specific argument claimant sets forth, however, is that:

> The claimant's usual coal mine work included being a rock truck driver and a mechanic. It can be reasonably concluded that such 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 5-6. Claimant's argument is without merit. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that a 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, 12 BLR 2-254 (6th Cir. 1989); *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83 (1988).

Further, we also reject claimant's argument that pneumoconiosis is a progressive disease that must have worsened, thus affecting his ability to perform his usual coal mine employment, because an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Consequently, as claimant makes no other specific challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm the administrative law judge's finding that claimant did not establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See White*,

23 BLR at 1-6-7; *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Finally, claimant contends that because the administrative law judge did not fully credit Dr. Simpao's May 2, 2003 opinion provided by the Department of Labor, "the Director has failed to provide claimant with a complete, credible pulmonary examination sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. The Director responds that Section 413(b) requires the Director to provide each miner who files a claim for benefits with the opportunity to undergo a complete pulmonary evaluation and states that the Director's obligation does not require him to secure the most persuasive medical opinion in the record and thus Dr. Simpao's opinion satisfies the Director's Section 413(b) obligation. Director's Brief at 2-3.

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 11. The administrative law judge did not find nor does claimant allege that Dr. Simpao's report was incomplete. Nor did the administrative law judge find that Dr. Simpao's report lacked credibility on any issue. The administrative law judge chose to give less weight to Dr. Simpao's opinion, with respect to his diagnosis of pneumoconiosis and total disability, because he did not find it as well reasoned and documented as the contrary opinions by Drs. Dahhan and Rosenberg. Decision and Order at 11-12, 15-16; *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "ALJ's may evaluate the relative merits of conflicting physicians' opinions and choose to credit one ... over the other"). Because the administrative law judge did not find that Dr. Simpao's report lacked all credibility, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51 (1990).

Because the administrative law judge's findings that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis or total disability pursuant to Sections 718.202(a) and 718.204(b) are supported by substantial evidence and are in accordance with law, claimant has failed to establish any element of entitlement previously adjudicated against him and we affirm the denial of benefits in this subsequent claim. *See* 20 C.F.R. §725.309; *Ross*, 42 F.3d 993, 19 BLR 2-10; *White*, 23 BLR at 1-7. Moreover, we need not address the arguments made by employer on cross-appeal since we affirm the denial of benefits and, thus, this case no longer presents any real case or controversy for adjudication. *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 110 S.Ct. 1249, 108 L.Ed.2d 400 (1990).

Accordingly, the administrative law judge's Decision and Order denying benefits 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