BRB Nos. 07-0302 BLA
and 07-0302 BLA-A

H. K.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 12/13/2007
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 Denying Benefits of Alice M. Craft, 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.

Helen H. Cox (Jonathan L. Snare, Acting 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 Denying Benefits (04-BLA-6517) of Administrative Law Judge Alice M. Craft 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).[1] The administrative law judge found that the current claim was timely filed. She further found that the new evidence did not establish the existence of pneumoconiosis or total disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final, pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required by the Act. Employer responds, urging affirmance of the denial of benefits. In its cross-appeal, employer asserts that the administrative law judge erred in finding that this subsequent claim was timely filed. In response to claimant's appeal, the Director asserts that he met his obligation to provide a complete pulmonary evaluation, and states that a remand to the district director to supplement Dr. Simpao's opinion is unwarranted. Regarding employer's cross-appeal, the Director urges the Board to reject employer's assertion that this claim was not timely filed. Employer has filed a reply brief, reiterating its position.[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).

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[1] The record reflects that claimant filed two previous claims for benefits, both of which were finally denied. Director's Exhibit 1. His most recent claim, filed on July 18, 1996, was denied on June 8, 1999, because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Claimant filed this claim for benefits on July 23, 2003. Director's Exhibit 4.

[2] The administrative law judge's findings that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii) are not challenged on appeal. These findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. If 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). Claimant's prior claim was denied because he failed to establish total respiratory or pulmonary disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled to obtain consideration of the merits of the subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

We will first address employer's cross-appeal. In discussing employer's allegation that the claim was not timely filed pursuant to 20 C.F.R. §725.308, the administrative law judge found that the only physician in claimant's prior claim to have diagnosed claimant as totally disabled, Dr. Myers, "did not attribute the disability specifically to coal dust exposure." Decision and Order at 5. The administrative law judge therefore determined that employer did not demonstrate that there had been a reasoned medical determination of total disability due to pneumoconiosis, more than three years before the filing of the current claim. The administrative law judge therefore found that the current claim was timely filed.

On appeal, employer contends that the administrative law judge erred in finding that Dr. Myers's opinion did not trigger the statute of limitations. Upon review, we conclude that substantial evidence supports the administrative law judge's finding that Dr. Myers opined that claimant was totally disabled, but did not specifically opine that claimant's total disability was due to pneumoconiosis. Director's Exhibit 1. Therefore, we affirm the administrative law judge's determination that Dr. Myers's opinion did not satisfy the standard set out by the United States Court of Appeals for the Sixth Circuit to trigger the three-year statute of limitations. *See* 20 C.F.R. §725.308; *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *see also Brigance v. Peabody Coal Co*. 23 BLR 1-170, 1-175 (2006)(*en banc*); *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159 (2006)(*en banc*). Accordingly, we affirm the administrative law judge's determination that this claim was timely filed pursuant to 20 C.F.R. §725.308.[3]

[3] Consequently, we need not address employer's contention that Dr. Myers's medical opinion was communicated to claimant.

Turning to claimant's appeal, pursuant to 20 C.F.R. §718.202(a)(1), claimant asserts that the administrative law judge erred in her evaluation of the x-ray evidence. Because claimant previously established the existence of pneumoconiosis, that issue is not one of the applicable conditions of entitlement that can provide the basis for a change in this subsequent claim. *See* 20 C.F.R. §725.309(d)(2); *White*, 23 BLR at 1-3. Consequently, error, if any, by the administrative law judge in her weighing of the new x-ray readings pursuant to 20 C.F.R. §718.202(a)(1) was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Therefore, we need not address claimant's arguments regarding the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant contends that the administrative law judge erred in finding that total disability was not established by the new medical opinions. We disagree. The administrative law judge accorded substantial weight to the opinions of Drs. Repsher and Rosenberg, that claimant is not disabled, because they were supported by objective evidence, and determined that Dr. Simpao did not address disability. Director's Exhibits 10, 12; Employer's Exhibits 1-3. Decision and Order at 14. We reject claimant's allegation that because pneumoconiosis is a progressive disease, it has worsened and thus, adversely affected his ability to perform his usual coal mine work. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *White*, 23 BLR at 1-7, n.8. This is the only specific argument raised by claimant regarding the administrative law judge's disability findings. Otherwise, claimant's comments concerning the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv) are general and lack specificity, such that claimant has not raised any specific allegation of error by the administrative law judge, and thus has not provided the Board with a basis for reviewing the administrative law judge's finding.[4] *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In light of our affirmance of the administrative law judge's finding that the new evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of his prior claim. 20 C.F.R. §725.309.

[4] Claimant suggests that his coal dust exposure establishes total disability. Claimant's Brief at 5. This suggestion lacks merit. 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).

Finally, we reject claimant's assertion that, because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in the medical report of Dr. Simpao that was provided to claimant by the Department of Labor, the Director failed to provide claimant with a complete pulmonary evaluation. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). 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.[5] Director's Exhibit 10; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Claimant alleges no defect in Dr. Simpao's opinion regarding disability, the applicable condition of entitlement being considered in this subsequent claim. Consequently, we agree with the Director that he met his obligation to provide a complete pulmonary evaluation.

[5] The record reflects that Dr. Simpao diagnosed a moderate impairment. Director's Exhibit 10. Thus, the administrative law judge incorrectly stated that Dr. Simpao did not provide an opinion on total disability. *See Gallaher v. Bellaire Corp.*, 71 Fed.Appx. 528 (6th Cir. 2003)(unpub.).

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