

BRB Nos. 06-0539 BLA
and 06-0539 BLA-A

BOBBY J. OSBORNE)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
WHITAKER COAL CORPORATION)
) DATE ISSUED: 01/26/2007
and)
)
SUN COAL COMPANY, INCORPORATED)
)
Employer/Carrier-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 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/carrier.

Helen H. Cox (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, HALL and
BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denying Benefits (2004-BLA-5581) of Administrative Law Judge Joseph E. Kane rendered 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 credited claimant with seventeen years of coal mine employment and determined that claimant's most recent application for benefits was timely filed. The administrative law judge found that the medical evidence developed since the prior denial of benefits was sufficient to establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). With respect to the merits of the claim, however, the administrative law judge determined that claimant did not establish the existence of pneumoconiosis as required under 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge did not properly weigh the x-ray evidence under Section 718.202(a)(1). Claimant argues further that the administrative law judge erred in his consideration of the medical opinion evidence when he found that claimant did not establish that he is totally disabled. Additionally, claimant argues that the Department of Labor failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded to claimant's appeal and asserts that the Department of Labor has provided claimant with a complete and credible pulmonary evaluation.

In its cross-appeal, employer argues that the administrative law judge erred in determining that claimant's subsequent claim was timely filed under 20 C.F.R. §725.308 and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Employer further contends that the administrative law judge erred in admitting Dr. Simpao's supplemental medical report, in rejecting the blood gas study obtained by Dr. Repsher, and in neglecting the blood gas study obtained by Dr. Rosenberg. The Director responds that the administrative law judge properly denied benefits and urges the Board to reject employer's allegations of error regarding the

¹ Claimant's initial application for benefits, filed on May 8, 1998, was finally denied on September 18, 1998 because claimant did not establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on January 15, 2001, which was finally denied by the district director on April 12, 2001 because claimant did not prove any of the requisite elements of entitlement. Director's Exhibit 2. Claimant filed a third application for benefits on October 3, 2002. Director's Exhibit 3.

administrative law judge's evidentiary ruling regarding Dr. Simpao's supplemental report and his findings under Sections 725.308 and 725.309(d).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).

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).

We will first address employer's allegations of error regarding the administrative law judge's finding that claimant's subsequent claim, dated October 3, 2002, was timely filed pursuant to Section 725.308. Section 725.308 provides that a claim must be filed within three years "after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner[.]" 20 C.F.R. §725.308(a). The regulation also provides that there is a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to Section 725.308(a) involves factual findings which are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In this case, the administrative law judge determined that Dr. Baker's report of his physical examination of claimant on April 6, 1995, was the only previously submitted medical report in which the physician indicated that claimant was totally disabled due to pneumoconiosis. Decision and Order at 5; Director's Exhibit 1. The administrative law judge found that Dr. Baker's report did not trigger the running of the three year statute of limitations set forth in Section 725.308, as Dr. Baker's opinion was not reasoned and there was no evidence establishing that it was communicated to claimant. *Id.* Employer argues that the administrative law judge erred in finding that Dr. Baker's report had to be

² We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant has seventeen years of coal mine employment and his findings pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

reasoned in order to satisfy the terms of Section 725.308. Employer also maintains that the administrative law judge erred in determining that Dr. Baker's report had to be given directly to claimant.

Employer's contentions are without merit. As the Director indicates, in *Tennessee Consolidated 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, within whose jurisdiction this case arises, held that the three year limitations period is triggered by "the reasoned opinion of a medical professional." 264 F.3d at 607, 22 BLR at 2-298. The administrative law judge acted within his discretion in determining that Dr. Baker's report is not reasoned, as the doctor did not set forth the basis for his opinion and explain the inconsistency between his report and his objective testing. See *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999). Dr. Baker's report merely advises that claimant not be further exposed as to coal dust, which is not the same as a finding of total disability. *Zimmerman v. Director* 871 F.2d 564, 566 (6th Cir. 1989); Decision and Order at 5. We affirm, therefore, the administrative law judge's finding that the subsequent claim filed by claimant on October 3, 2002 was timely.

We will now address the issues raised in claimant's appeal. Claimant contends that because the administrative law judge did not credit a diagnosis of pneumoconiosis contained in Dr. Simpao's January 6, 2003 opinion provided by the Department of Labor, this case must be remanded to the district director, as "the Director has failed to provide the claimant with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required under the Act." Claimant's Brief at 4. 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), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); accord *Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The administrative law judge did not find, nor does claimant allege, that Dr. Simpao's report was incomplete with respect to the issue of the existence of pneumoconiosis. Furthermore, the administrative law judge did not ultimately rely upon his determination that Dr. Simpao's opinion was unreasoned or undocumented with respect to this issue. Rather, the administrative law judge rationally concluded that even if he fully credited Dr. Simpao's diagnosis of pneumoconiosis, which was set forth in the doctor's initial report, he would find it outweighed by the contrary opinions of Drs. Rosenberg and Repsher because these opinions are based upon a more complete review of the medical data and are better supported by the objective evidence of record. Decision

and Order at 19; Employer's Exhibits 1-5; *see Gray*, 176 F.3d at 388, 21 BLR at 2-626. We hold, therefore, that 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. *Cf. Hodges*, 18 BLR at 1-93.

We will now turn to the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). In this case, the administrative law judge found that claimant established a change in an applicable condition of entitlement, as the newly submitted evidence demonstrated that claimant is totally disabled pursuant to Section 718.204(b)(2). Decision and Order at 23. The administrative law judge then considered the merits of entitlement and determined that the evidence of record, as a whole, was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1)-(4). *Id.* at 23-24.

Claimant argues that when weighing the x-ray evidence pursuant to Section 718.202(a)(1), the administrative law judge improperly relied on the readers' radiological credentials, merely counted the negative readings, and selectively analyzed the readings. These contentions are without merit. Under Section 718.202(a)(1), the administrative law judge noted accurately that the preponderance of readings of the newly submitted x-rays by physicians who are B readers or B readers and Board-certified radiologists was negative for the existence of pneumoconiosis. Decision and Order at 17; Director's Exhibits 11, 14; Employer's Exhibits 1, 3; *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). We therefore affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

In addition, because claimant has not raised any allegations of error with respect to the administrative law judge's findings that the evidence of record, when considered as a whole, is insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(2)-(4), this finding is also affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). In light of our affirmance of the administrative law judge's determination that claimant has failed to prove the existence of pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits under 20 C.F.R. Part 718. *Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27. Because we have affirmed the denial of benefits on the merits, we decline to address the arguments raised in employer's cross-appeal, as errors, if any, in the administrative law judge's evidentiary rulings or his findings pursuant to Sections 718.204(b)(2)(ii) and 725.309(d) are harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge