BRB Nos. 08-0332 BLA
and 08-0332 BLA-A

J.W., on Behalf of the Estate of L.W.	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
SHAMROCK COAL COMPANY	)	DATE ISSUED: 01/27/2009
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 Thomas F. Phalen, Jr., 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), Washington, D.C., for employer.

Emily Goldberg-Kraft (Carol A. DeDeo, Deputy Solicitor; 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, and employer cross-appeals, the Decision and Order - Denial of Benefits (2007-BLA-5363) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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 credited the miner with at least thirty-three years of qualifying coal mine employment, and determined that this case involved a request for modification of the denial of a subsequent claim, and was subject to the regulatory provisions at 20 C.F.R. §§725.309, 725.310.[2] The administrative law judge determined that the miner's previous claim had been denied by reason of abandonment,[3] and found that the newly submitted evidence established both total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Addressing the merits of entitlement, however, the administrative law judge found that the weight of the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's denial of benefits, arguing that the administrative law judge erred in finding that the x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4).[4] In response, employer urges affirmance of the administrative law

[1] Claimant, J.W., the son of the deceased miner, L.W., is pursuing this claim on behalf of the miner's estate. Decision and Order at 3; Hearing Transcript at 10-11.

[2] The denial of the miner's first claim for benefits, filed August 18, 1989, was affirmed by the Board. [*L.W.*] *v. Shamrock Coal Co.*, BRB No. 92-1407 BLA (Aug. 30, 1993) (unpub.). The miner's second claim for benefits, filed on June 16, 1995, was abandoned, and thereafter administratively closed on August 29, 1995. The instant claim was filed on March 12, 2001, and denied by the district director on April 17, 2002. Two requests for modification were filed and denied by the district director, respectively, on July 16, 2003, and August 6, 2003, following which the miner timely requested a hearing. After the death of the miner on November 9, 2004, and the substitution of the miner's son as the proper claimant in this matter, the case was referred to the Office of Administrative Law Judges for hearing and adjudication.

[3] The regulations provide that "denial by reason of abandonment shall be deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c). Consequently, the administrative law judge correctly noted that claimant could meet his burden under 20 C.F.R. §725.309(d) by establishing any of the requisite elements of entitlement. Decision and Order at 3, 12.

judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not file a response brief in claimant's appeal.

By cross-appeal, employer contests the administrative law judge's determination that the claim was timely filed. Employer also assigns error to the administrative law judge's exclusion of medical evidence pursuant to the regulatory limitations at 20 C.F.R. §725.414 in the event that the Board does not affirm the denial of benefits. Claimant does not respond to employer's cross-appeal. The Director has filed a limited response, urging the Board to reject employer's contention that the claim was untimely filed.[5]

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.[6] 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).

Initially, we address employer's contention on cross-appeal that the administrative law judge erred in finding that this claim was timely filed. Employer's Brief at 3, 4-8. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §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. 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.

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[4] Claimant's assertion that the instant case involves both a miner's and a survivor's claim, Claimant's Brief at 1-2, 8, is inaccurate; only a miner's claim is at issue.

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly submitted evidence of record was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), thus establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d); and his finding on the merits that the weight of the evidence of record was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), but insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the miner's last coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 4-5.

§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, within whose jurisdiction this cases arises, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination [of total disability due to pneumoconiosis] 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.

In the present case, employer challenges the administrative law judge's finding that, because the record did not reflect that a well-reasoned medical opinion of total disability due to pneumoconiosis was in fact communicated to the miner, employer had failed to rebut the presumption of timeliness. Decision and Order at 4. Employer maintains that, in reports of examinations conducted on March 29, 1990 and July 24, 1991, Dr. Baker diagnosed pneumoconiosis arising out of coal mine employment and stated that the miner was not physically able from a pulmonary standpoint to perform his usual coal mine employment duties. Employer's Brief at 6; Director's Exhibit 1 at 93, 159. Employer asserts that Dr. Baker's opinion was offered as evidence in the miner's original claim, and that the miner's counsel specifically argued on appeal to the Board that the opinion established total disability due to pneumoconiosis. Employer's Brief at 6. Accordingly, employer submits: "the [miner], through his attorney, was well aware of Dr. Baker's opinion and specifically relied upon it as a basis for attempting to establish entitlement." Employer's Brief at 7. Employer further argues that "the evidence in Director's Exhibit 1 shows that the contents of the old opinions were 'communicated' to [the miner] by mail by the district director and by the administrative law judge." Employer's Brief at 8. Finally, employer asserts that the miner wrote to the Department of Labor on July 28, 2003, enclosing copies of various x-rays, objective tests and medical reports,[7] and stating: "[a]s I explained these reports show black lung detected as early as 1990." *Id.*; Director's Exhibit 54. Employer thus contends that the administrative law judge erred in failing to consider this evidence of communication to the miner.

Employer's arguments are without merit. Employer fails to explain, and our review does not reveal, how the miner's quoted statement constitutes an acknowledgement that he had been told that he was totally disabled due to pneumoconiosis. Further, the prior issuance of an administrative law judge's opinion describing a reasoned medical opinion of total disability due to pneumoconiosis, without more, is insufficient to trigger the running of the three-year statute of limitations. *See W.C. v. Benham Coal Co.*, 24 BLR 1-50 (2008). In *Adkins v. Donaldson Mine Co.*, 19

[7] The enclosed materials did not include Dr. Baker's March 29, 1990 and July 24, 1991 reports previously referenced by employer, nor any medical opinion stating that the miner suffered from a totally disabling respiratory impairment.

BLR 1-34 (1993), the Board held that "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins*, 19 BLR at 1-43. The Board reiterated this principle in *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993), in which it held that receipt of a medical determination of total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner. *Daugherty*, 18 BLR at 1-101. Based on the foregoing, the administrative law judge rationally determined that the presence of Dr. Baker's reports in the miner's original claim fails to "demonstrate [that] the physician's opinion was *in fact* communicated to the miner." Decision and Order at 4. As this determination is validly within the exercise of the administrative law judge's discretion to evaluate the evidence, s*ee generally Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003), we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness pursuant to Section 725.308(c), as supported by substantial evidence. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-298.

Turning to the merits, in order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis arising out of coal mine employment, and total disability due to pneumoconiosis. 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).

Claimant initially contends that the administrative law judge erred in finding that the weight of the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Specifically, claimant asserts that the "x-ray evidence of record consists of numerous interpretations of several films, three (3) of which were read as being positive for the existence of pneumoconiosis," and argues that the administrative law judge "relied almost solely on the qualifications" of the interpreting physicians, "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3. Claimant's arguments are without merit.

An administrative law judge must consider the quantity of the x-ray evidence in light of the qualifications of the interpreting physicians. *Staton v Norfolk & Western Railroad Co.*, 65 F.3d 55, 58, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Moreover, Section 718.202(a)(1) requires that when two or more x-ray interpretations are in conflict, consideration shall be given to the relative radiological qualifications of the interpreting physicians. 20 C.F.R. §718.202(a)(1). Readings by physicians who are qualified as B readers and Board-certified radiologists are validly accorded greater weight than interpreting physicians without such qualifications. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-213 (1985). In the present case, the administrative law judge

considered the quality and quantity of the x-ray evidence, and permissibly relied on a numerical preponderance of negative interpretations by qualified readers. Decision and Order at 15; *see White v. New White Coal Co., Inc*., 23 BLR 1-1 (2004). We reject claimant's assertion that the administrative law judge "may have" selectively analyzed the x-ray evidence, as claimant has provided no support for that assertion. *See White*, 23 BLR at 1-5. As claimant has not identified with specificity any substantive error of law or fact in the administrative law judge's weighing of the x-ray evidence at Section 718.202(a)(1), the Board has no basis upon which to review his findings thereunder. *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's finding that the weight of the x-ray evidence of record was insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1).

Next, claimant challenges the administrative law judge's determination that the medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), generally asserting that the administrative law judge improperly interpreted medical tests and substituted his own opinion for that of a physician. Claimant's Brief at 4-5. Claimant specifically maintains that the opinion of Dr. Baker is well reasoned and that the administrative law judge "should not have rejected it for the reasons he provided." Claimant's Brief at 5.

Claimant's arguments with respect to the administrative law judge's evaluation of the medical opinion of Dr. Baker are without merit. The administrative law judge accurately determined that Dr. Baker's diagnosis of clinical pneumoconiosis was based "solely upon his own readings of a chest x-ray and Miner's history of dust exposure." *See* Decision and Order at 16; Director's Exhibit 37. Thus, the administrative law judge properly accorded little weight to Dr. Baker's diagnosis of clinical pneumoconiosis. Decision and Order at 17; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993). The administrative law judge also permissibly found that Dr. Baker's diagnosis of coal dust induced chronic obstructive pulmonary disease was unreasoned and insufficient to establish legal pneumoconiosis, as the physician failed to explain how he reached his conclusion and how the underlying documentation supported his diagnosis. Decision and Order at 17; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1993); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We conclude that the administrative law judge provided valid reasons for according little weight to Dr. Baker's opinion, and find no support for claimant's assertion that the administrative law judge erroneously "interpret[ed] medical tests and thereby substitute[d] his own conclusion for those of a physician." Claimant's

Brief at 5. As claimant has not identified any specific legal or factual errors in the administrative law judge's weighing of the remaining medical opinions at Section 718.202(a)(4), we affirm the administrative law judge's finding that the weight of the medical opinions of record was insufficient to establish the existence of pneumoconiosis thereunder. *See Cox*, 791 F.2d 445, 9 BLR 2-46; *Etzweiler*, 16 BLR 1-38.

Because we affirm the administrative law judge's finding that claimant failed to establish pneumoconiosis, an essential element of entitlement, we affirm the administrative law judge's denial of benefits. *See Anderson*, 12 BLR at 1-114. Consequently, we need not reach employer's evidentiary challenges on cross-appeal, as employer concedes that any error therein would be harmless. Employer's Brief at 8; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge