BRB Nos. 09-0322 BLA
and 09-0322 BLA-A

HALEY C. MANNING	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
ANDY FROST COAL COMPANY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 01/13/2010
	)	
KENTUCKY CENTRAL INSURANCE COMPANY	)	
	)	
	)	
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 – 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.

Johanna F. Ellison (Ferreri & Fogle), Lexington, Kentucky, for employer.

Helen H. Cox (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order - Denial of Benefits (2005-BLA-6304) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent claim[1] 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 parties' stipulation to at least twelve years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). The administrative law judge found, therefore, that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and total disability pursuant to Section 718.204(b)(2)(iv).[2] In addition,

[1] Claimant filed a claim for benefits on August 14, 1989. Director's Exhibit 1. On October 1, 1991, Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order – Denying Benefits, finding that while the evidence established the existence of pneumoconiosis arising out of coal mine employment, claimant failed to establish a totally disabling respiratory or pulmonary impairment. *Id.* Claimant appealed and the Board affirmed the denial of benefits. *Manning v. Andy Frost Coal Co.*, BRB No. 92-0165 BLA (Dec. 21, 1992) (unpub.). Claimant filed a second claim for benefits on August 16, 1994, which was denied by the district director on January 17, 1995, on the grounds that the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 2. Claimant took no action with regard to the denial of his second claim until he filed his current subsequent claim on August 12, 2004. Director's Exhibit 4. The district director denied benefits and, pursuant to claimant's request, a hearing was held on April 10, 2007. Director's Exhibits 43, 48. Thereafter, the administrative law judge issued his Decision and Order – Denial of Benefits on December 9, 2008, which is the subject of this appeal.

[2] Claimant's counsel cites to 20 C.F.R. §718.204(c) as the applicable regulation for addressing whether he has established total disability. We note, however, that after revision of the regulations, the provision pertaining to total disability, previously set out

claimant contends that the Director, Office of Workers' Compensation Programs (the Director), failed to fulfill his statutory obligation to provide claimant with a complete, credible, pulmonary evaluation on the issue of respiratory disability pursuant to Section 413(b) of the Act, 30 U.S.C. §923(b). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. Employer, in its cross-appeal, contends that the administrative law judge erred in determining that employer is the responsible operator. The Director has filed a letter brief in response to claimant's appeal, asserting that he has satisfied his obligation to provide claimant with a complete pulmonary evaluation. The Director has also filed a letter brief in response to employer's cross-appeal, asserting that the administrative law judge permissibly found that employer failed to prove that it was incorrectly identified as the responsible operator.[3]

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 pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling.[4] *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[3] We affirm, as unchallenged by the parties on appeal, the administrative law judge's length of coal mine employment determination and his findings that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

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., Inc*., 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 the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and total disability at 20 C.F.R. §718.204(b). Director's Exhibit 2. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement. *See* 20 C.F.R. §725.309(d)(2), (3); *White*, 23 BLR at 1-3.

In challenging the administrative law judge's finding that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), claimant argues that the administrative law judge erred by placing substantial weight on the numerical superiority of the negative x-ray interpretations and by relying exclusively on the qualifications of the physicians providing those x-ray interpretations. Claimant contends that the administrative law judge is not required either to defer to a physician with superior qualifications or to accept as conclusive the numerical weight of the x-ray interpretations. Claimant further contends that the administrative law judge "may have selectively analyzed" the x-ray evidence. Claimant's Brief at 3.

Contrary to claimant's arguments, however, where x-ray evidence is in conflict, consideration shall be given to the readers' radiological qualifications. 20 C.F.R. §718.202(a)(1). Moreover, the administrative law judge did not selectively analyze the x-ray evidence as he correctly determined that there are no positive x-ray readings.[5] Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See 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. 1994).

Claimant also makes a general assertion that the administrative law judge erred in finding that he failed to establish total disability under Section 718.204(b)(2)(iv). Claimant contends that the administrative law judge must consider the exertional

[5] The administrative law judge properly found that the record contains two chest x-rays. Dr. Westerfield read the September 17, 2004 x-ray as negative for pneumoconiosis and Dr. Broudy read the May 4, 2005 x-ray as negative for pneumoconiosis. Decision and Order at 14; Director's Exhibits 18, 19. Dr. Barrett read the September 17, 2004 x-ray for quality only. Director's Exhibit 20.

requirements of his usual coal mine employment as a coal truck driver and compare said requirements to the medical reports assessing a disability. 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's specifically argues that:

> 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.

Contrary to claimant's contention, a miner's inability to withstand further exposure to coal dust does not establish the presence of a totally disabling respiratory or pulmonary impairment. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans and Gambrel Co.*, 12 BLR 1-83, 1-88 (1988). Moreover, there is no merit to claimant's assertion that the administrative law judge failed to consider his usual coal mine work in finding that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge specifically identified claimant's last job as a coal truck driver and found that his responsibilities included "sitting for five hours, standing for five hours, and occasionally lifting 20-25 pounds." Decision and Order at 17. The administrative law judge concluded that claimant's coal mine employment involved moderately strenuous manual labor and further found that while Dr. Simpao "considered the type of work claimant performed," his opinion that claimant's mild respiratory impairment "may affect [claimant's] ability to perform regular coal mine employment," was equivocal and entitled to little weight. *Id*. Thus, the administrative law judge concluded that claimant did not satisfy his burden to establish total disability based on Dr. Simpao's opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv).[6] Because claimant does not assign an specific error to the administrative law judge's credibility findings with regard to the weight accorded to the

[6] The administrative law judge also gave little weight to Dr. Broudy's opinion, that claimant did not have a totally disabling respiratory impairment, because the administrative law judge found that Dr. Broudy did not adequately explain his opinion, in light of the doctor's observation that claimant quit work because "he was too short of breath to tarp the trucks" and that "the diffusing capacity was markedly reduced." Decision and Order at 18, *citing* Director's Exhibit 20.

conflicting medical opinions at Section 718.204(b)(2)(iv),[7] there is no basis for further review of the administrative law judge's findings thereunder. *See* 20 C.F.R. §802.211(b); *Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-49 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

We also reject claimant's argument that he must now be totally disabled since pneumoconiosis is a progressive and irreversible disease and a "considerable amount of time … has passed since the initial diagnosis…." Claimant's Brief at 5. A finding of total respiratory disability must be supported by the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Thus, we affirm the administrative law judge's finding that the medical opinion evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). We also affirm his finding that the evidence, overall, does not establish total disability. Decision and Order at 18; *see Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

Claimant's further argues that because the administrative law judge found Dr. Simpao's opinion to be "insufficiently reasoned" on the issues of the existence of pneumoconiosis and total disability, the Director "failed to provide [him] with a complete, credible pulmonary evaluation sufficient to substantiate the claim, as required by the Act." Claimant's Brief at 4. We disagree.

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 United States Court of Appeals for the Sixth Circuit has recently set forth the standard for determining whether a pulmonary evaluation is complete:

[7] The administrative law judge concluded that, at best, the conflicting medical opinions of Drs. Simpao and Broudy were equally probative and that claimant had not satisfied his burden of proving total disability by a preponderance of the evidence. Decision and Order at 18.

> In the end, the [Department of Labor's] duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The [Department of Labor] meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. § 923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) specifically links each conclusion in his or her medical opinion to those medical tests. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, i.e., based on objective medical evidence, and reasoned.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, --- BLR ---, (6th Cir. 2009). The court held in *Greene*, that while the physician who performed the [Department of Labor] sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement "even if lacking in persuasive detail." *Id*.

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. Director's Exhibit 16; 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Contrary to claimant's contention, the fact that the administrative law judge found Dr. Simpao's opinion to be unpersuasive as to the existence of pneumoconiosis or "equivocal" with regard to whether claimant is totally disabled by a respiratory or pulmonary impairment, does not show that claimant did not receive a complete pulmonary evaluation. Because Dr. Simpao performed all of the necessary tests and his report addressed the requisite elements of entitlement, we agree with the Director that claimant received a complete pulmonary evaluation.[8] *Greene*, 575 F.3d at 641-42,--- BLR ---. We therefore reject claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-93.

[8] The administrative law judge considered whether claimant had received a complete pulmonary evaluation and specifically noted that Dr. Simpao "conducted the examination and testing as required by the regulations." Decision and Order at 19. The administrative law judge clarified that he "did not find Dr. Simpao's report to be devoid of probative value," but simply "accorded it *less weight*." *Id*. (emphasis in original). Thus, the administrative law judge found that the requirements of 20 C.F.R. §725.406(a) were satisfied. Decision and Order at 19-20.

Because we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish either the existence of pneumoconiosis or total disability, we affirm the administrative law judge's finding that claimant has failed to demonstrate a change in an applicable condition of entitlement since the denial of his prior claim pursuant to 20 C.F.R. §725.309(d). Entitlement to benefits in this subsequent claim is precluded, therefore. 20 C.F.R. §725.309(d). In light of the disposition of claimant's appeal, we need not reach employer's argument on cross-appeal.

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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REGINA C. McGRANERY
Administrative Appeals Judge