BRB No. 08-0719 BLA

T.R. Claimant-Respondent v. CARBON RIVER COAL CORPORATION and KENTUCKY EMPLOYERS MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/31/2009 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Paul E. Jones and Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Sarah M. Hurley (Carol A. DeDeo, 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2007-BLA-05581) 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 twenty-one years of qualifying coal mine employment, based on a stipulation by the parties and the evidence of record, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. Initially, the administrative law judge found that claimant's current claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge then determined that the new evidence, developed since the denial of claimant's prior 2000 claim, was sufficient to establish that he was totally disabled due to a respiratory or pulmonary impairment and, therefore, that claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

In considering the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment in light of employer's stipulation in the prior claim, as well as the x-evidence of record, pursuant to 20 C.F.R. §§718.202(a)(1), 718.203. The administrative law judge further found that the evidence of record established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that this claim was timely filed pursuant to 20 C.F.R. §725.308. Further, employer contends that claimant has not demonstrated a "material change" in conditions under 20 C.F.R. §725.309. Employer's Brief at 7. Employer also generally challenges the administrative law judge's award of benefits. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response supportive of the administrative law judge's finding that this claim was timely filed and asserting that the administrative law judge correctly found a change in an applicable condition of entitlement established pursuant to 20 C.F.R §725.309(d).

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[1] Claimant initially filed a claim for black lung benefits on May 12, 2000. Director's Exhibit 1. In a Decision and Order dated December 13, 2002, Administrative Law Judge Daniel J. Roketenetz, denied benefits because, although the parties stipulated that claimant had pneumoconiosis, the evidence did not establish total disability. Director's Exhibit 1. Pursuant to claimant's appeal, the Board affirmed Judge Roketenetz's denial of benefits in [*T.R.*] *v. Carbon River Coal Corp.*, BRB No. 03-0293 BLA (Sept. 26, 2003)(unpub.). *Id*. There is no indication that claimant took any further action in regard to his 2000 claim. Claimant filed the instant subsequent claim on May 1, 2006. Director's Exhibit 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.[2] 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 suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is 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 a finding of 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).

Employer initially contends that, contrary to the administrative law judge's finding, this claim was untimely filed pursuant to 20 C.F.R. §725.308. We disagree. Miners' claims for black lung benefits are presumed to be timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). In defining what constitutes a medical determination that is sufficient to start the running of the limitations clock, the United States Court of Appeals for the Sixth Circuit, in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Employer relies solely on the testimony provided by claimant at the September 12, 2007 hearing before the administrative law judge to rebut the presumption of timeliness. Employer's Brief at 5-7. On cross-examination, employer's counsel asked claimant if he was ever told that he was totally disabled by black lung. Hearing Transcript at 22. Claimant responded that, in 2000, Dr. Alam told him he was disabled and had to get out of the mines. *Id*. at 22-23. Employer contends that the administrative law judge erred in failing to find that claimant's uncontradicted testimony, standing alone, was sufficient to rebut the timeliness presumption. Employer's Brief at 7. Citing *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006), employer argues

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

that the administrative law judge erred in his analysis at 20 C.F.R. §725.308 because he required Dr. Alam's communication to be in writing in order to trigger the statute of limitations. *Id*. at 6-7. The Director urges the Board to reject employer's argument that the administrative law judge erred in finding the claim timely filed. The Director asserts that claimant's hearing testimony in this case, regarding Dr. Alam's opinion, is legally insufficient to prove that claimant received a credible diagnosis that he was totally disabled due to pneumoconiosis.

In his Decision and Order, the administrative law judge discussed Dr. Alam's May 30, 2000 treatment note advising claimant to switch jobs and stop working in the mines because continued dust exposure could cause additional lung deterioration. Decision and Order at 8; Director's Exhibit 1 at 181. The administrative law judge also noted that the record contains a 2003 letter by Dr. Alam stating that claimant has coal workers' pneumoconiosis. Decision and Order at 8; Claimant's Exhibit 5. The administrative law judge concluded that there was no evidence that claimant received written notice that he was totally disabled due to pneumoconiosis and, notwithstanding whether notice needed to be in writing, Dr. Alam did not state that claimant was totally disabled or that any disability was due to pneumoconiosis. Decision and Order at 8. Instead, the administrative law judge found that the 2000 treatment note only advised against further dust exposure and that the 2003 letter from Dr. Alam stated only that claimant had pneumoconiosis, but was silent regarding disability. *Id*. Consequently, he determined that claimant's testimony, that Dr. Alam told him that he was totally disabled due to pneumoconiosis, was insufficient and inconsistent with Dr. Alam's treatment notes. *Id*. The administrative law judge thus found that employer failed to rebut the presumption of timeliness at 20 C.F.R. §725.308. *Id*.

Contrary to employer's contention, the administrative law judge acted within his discretion in finding that no credible medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years before the instant claim was filed. *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2- (6th Cir. 2009) (a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year time limit for filing a claim if it was discredited, or found to be outweighed by contrary evidence in a prior adjudication). Moreover, the Board recently held that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a misdiagnosis and thus cannot trigger the statute of limitations for filing a subsequent claim. *J.O v. Helen Mining Co.*, 24 BLR 1- (2009); BRB No. 08-0671 BLA (June 24, 2009), slip op. at 4. In the adjudication of claimant's prior claim, Administrative Law Judge Daniel J. Roketenetz found that the evidence was insufficient to establish total disability due to pneumoconiosis. Consequently, Dr. Alam's treatment notes, which predated the prior, final denial, could not trigger the running of the three-year time limit for filing this subsequent claim. *Hatfield*, 556 F.3d at 483, 24 BLR at 2- ; *J.O.*, 24 BLR

at 1- ; slip op. at 4. We, therefore, reject employer's contention that claimant's 2006 claim was untimely filed. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Consequently, we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness provided at 20 C.F.R. §725.308(c) and, therefore, affirm his finding that the instant claim was timely filed.

Employer next contends that the administrative law judge failed to properly apply the requirements of 20 C.F.R. §725.309. Employer challenges the administrative law judge's analysis of the evidence since it did not include consideration of the qualitative difference between the earlier evidence and the new evidence, consistent with *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003). Employer's Brief at 8. Employer asserts that the administrative law judge erred because claimant "failed to demonstrate by a preponderance of the evidence that there has been a material alteration in his condition." Employer's Brief at 8. The Director responds that the administrative law judge was not required to qualitatively compare the old and new evidence under the revised version of 20 C.F.R. §725.309(d), but that "the miner need only prove that a preponderance of the newly-submitted evidence establishes a previously denied element of entitlement." Director's Brief at 5. The Director maintains that the administrative law judge engaged in the proper evidentiary analysis in this case to find that the newly submitted evidence established total disability. *Id.*

We reject employer's contention that the administrative law judge erred in his weighing of the evidence pursuant to 20 C.F.R. §725.309. The Sixth Circuit precedent relied on by employer construed the prior version of 20 C.F.R. §725.309, while the current claim was filed after January 19, 2001, the effective date of the amendments to this regulation. Under the revised version of 20 C.F.R. §725.309, 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., Inc.*, 23 BLR 1-1, 1-3 (2004); *compare* 20 C.F.R. §725.309 (2000); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because he failed to establish total disability. Decision and Order at 9; 2002 Decision and Order at 5-8. The administrative law judge found that claimant established a change in an applicable condition of entitlement by proving, with new evidence, i.e., qualifying pulmonary function studies and medical opinion evidence, that he is now totally disabled.[3] Decision

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[3] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C, for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). The

and Order at 10-12. Because the administrative law judge reasonably determined that the newly submitted evidence was sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge properly found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *Id*. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §725.309, as supported by substantial evidence. *White*, 23 BLR at 1-3.

Employer next contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer acknowledges that the numerical preponderance of the x-ray interpretations supports a finding of the presence of pneumoconiosis and that both Drs. Dahhan and Rasmussen diagnosed pneumoconiosis. Employer's Brief at 9. Employer argues, however, that Dr. Wheeler is the most qualified radiologist and that his negative x-ray interpretation "would support a finding of no pneumoconiosis." *Id*. Employer's arguments have no merit.

The administrative law judge stated that employer made a "binding" stipulation to the existence of pneumoconiosis arising out of coal mine employment in the prior claim. Decision and Order at 12; Director's Exhibit 1; *see* 20 C.F.R. §725.463; 2002 Decision and Order at 4; 2002 Hearing Transcript at 10-12. The administrative law judge also found that, notwithstanding the binding stipulation, the "overwhelming majority of the x-ray evidence [was] positive for pneumoconiosis" and that the evidence of record supported a finding that claimant suffers from pneumoconiosis arising out of coal mine employment. Decision and Order at 12.

The x-ray evidence consists of twelve interpretations of five x-rays taken on May 26, 2000, November 2, 2000, February 19, 2005, July 20, 2006, and October 24, 2006. Drs. Barrett and Sargent, both B readers and Board-certified radiologists, and Drs. Baker and Rosenberg, both B readers, interpreted the May 26, 2000 x-ray as positive for pneumoconiosis. Director's Exhibit 1. Dr. Broudy, a B reader, interpreted the November 2, 2000 x-ray as positive for pneumoconiosis. *Id*. Dr. Deponte, a B reader and Board-certified radiologist, interpreted the February 19, 2005 x-ray as positive for pneumoconiosis. Claimant's Exhibit 1. Dr. Deponte and Dr. Rasmussen, a B reader, interpreted the July 20, 2006 x-ray as positive for pneumoconiosis, while Dr. Wheeler, a

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administrative law judge found that three of the four newly-submitted pulmonary function studies yielded qualifying values, whereas none of the pulmonary function studies submitted in the prior claim yielded qualifying values. Decision and Order at 10, 12; Director's Exhibits 1, 10, 16; Claimant's Exhibit 4.

B reader and Board-certified radiologist, interpreted this x-ray as negative for pneumoconiosis.[4] Director's Exhibits 10, 14; Claimant's Exhibit 3. Dr. Deponte and Dr. Dahhan, a B reader, interpreted the October 24, 2006 x-ray as positive for pneumoconiosis.

Because a clear preponderance of the x-ray readings, by dually qualified radiologists, as well as physicians qualified as B readers, was positive for the presence of pneumoconiosis, the administrative law judge permissibly found that the x-ray evidence established the existence of pneumoconiosis.[5] *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We, therefore, affirm the administrative law judge's finding that the preponderance of the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

We also reject employer's assertion that claimant did not establish total disability and disability causation. Employer's assertion that the pulmonary function studies do not demonstrate total disability is without merit, since three of the four recent pulmonary function studies were qualifying, and the administrative law judge permissibly determined that these studies demonstrated total disability under the regulations. 20 C.F.R. §718.204(b)(2)(i); Decision and Order at 10; Director's Exhibits 10, 16; Claimant's Exhibit 4. Similarly, employer's assertion that Dr. Dahhan was familiar with the exertional requirements of claimant's usual coal mine employment as a drill operator because Dr. Dahhan has been treating patients and coal miners in eastern Kentucky is meritless.[6] Having general experience in treating coal miners does not establish the

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[4] Dr. Barrett interpreted the July 20, 2006 x-ray for quality purposes only. Director's Exhibit 11.

[5] Employer notes that Dr. Wheeler "trained at Harvard Medical School and is Professor of Radiology at Johns Hopkins University." Employer's Brief at 9; *see* Director's Exhibit 14-3. The administrative law judge, however, is not required to accord greater weight to a physician's x-ray readings based upon his academic qualifications. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *citing Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993).

[6] Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinion of Dr. Rasmussen, that claimant lacks the respiratory capacity to perform his last coal mine employment, and the opinion of Dr. Dahhan, that claimant retains the respiratory capacity to perform his last coal mine employment.

requisite familiarity with the requirements of claimant's specific job. Employer's other contentions constitute a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson*, 12 BLR at 1-113.

In light of the foregoing, we affirm the administrative law judge's findings that the preponderance of the medical evidence of record was sufficient to establish total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c), as supported by substantial evidence. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Decision and Order at 10-11; Director's Exhibits 10, 16; Employer's Exhibit 1. The administrative law judge found that the opinion of Dr. Rasmussen was "supported by his objective testing" and was well-reasoned and documented. Decision and Order at 11. He found that, by contrast, the opinion of Dr. Dahhan was not well-reasoned because the doctor did not explain his conclusion in light of the qualifying pulmonary function study he administered or demonstrate familiarity with the exertional requirements of claimant's usual coal mine employment as a drill operator. *Id.* Based on the preponderance of the pulmonary function study evidence and the medical opinion of Dr. Rasmussen, the administrative law judge found that claimant was totally disabled. *Id.* In addition, pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that pneumoconiosis was a substantially contributing cause of claimant's total disability since Drs. Dahhan and Rasmussen opined that claimant's pneumoconiosis contributed to his pulmonary impairment. Decision and Order at 13-14; Director's Exhibits 10, 16; Claimant's Exhibit 1.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge