BRB Nos. 04-0608 BLA
and 04-0608 BLA-A

DEWEY EVANS	)	
	)	
Claimant-Petitioner	)	
Cross- Respondent	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 06/13/2005
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Mark L. Ford, Harlan, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly, PLLC), Lexington, Kentucky, for employer/carrier.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross appeals, the Decision and Order – Denying Benefits (03-BLA-5522) of Administrative Law Judge Joseph E. Kane on a subsequent claim for benefits 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). Claimant's initial application for benefits was denied by Administrative Law Judge E. Earl Thomas in a Decision and Order Denying Benefits issued on January 7, 1988. Judge Thomas found the evidence insufficient to establish that claimant suffered from coal workers' pneumoconiosis or that he was totally disabled from a respiratory or pulmonary impairment. Accordingly, benefits were denied. Claimant took no further action on this claim.

On February 1, 2001, claimant filed the instant claim for benefits. After holding a hearing, Administrative Law Judge Joseph E. Kane (the administrative law judge), issued a Decision and Order – Denying Benefits on April 8, 2004. The administrative law judge credited claimant with twenty-five years of coal mine employment and noted the procedural history of this case. The administrative law judge discussed the limitations on the amount of evidence that is admissible and he noted that this case involves a subsequent claim pursuant to 20 C.F.R. §725.309. The administrative law judge considered the newly submitted medical evidence and found it insufficient to establish both the existence of pneumoconiosis and that claimant is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge found that claimant did not "meet his threshold burden for subsequent claims under §725.309," Decision and Order at 18, and, thus, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred by not admitting Director's Exhibits 27, 28 and 30. Claimant maintains that the administrative law judge erred in his analysis of the newly submitted x-ray evidence, and in finding that the disability shown by the pulmonary function study evidence is not due to pneumoconiosis. Claimant also alleges that the administrative law judge's preference for the employer's physicians on the causation issue resulted from his faulty analysis of the x-ray evidence. Employer responds, urging affirmance of the administrative law judge's denial of benefits. In its cross-appeal, employer asserts that the administrative law judge erred by not admitting Employer's Exhibits 6, 7, 8, and 9, and Director's Exhibit 21, into the record. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in response to both claimant's appeal and employer's cross-appeal. The Director asserts that any error by the administrative law judge in excluding the opinion of Drs. C.C. and C.A. Moore, Director's Exhibit 28, is harmless. The Director also urges the Board to reject employer's assertion that the administrative law judge erred by excluding its evidence. The Director takes no position on claimant's challenges to the administrative law judge's findings on the merits of entitlement.

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. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In addition, the regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. The regulations provide that a subsequent claim, such as the instant one, "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d)...) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d).[1] The regulations further provide that "For purposes of this section, the

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[1] In defining the conditions of entitlement in a miner's claim, 20 C.F.R. §725.202(d) states:

> An individual is eligible for benefits under this subchapter if the individual:
>
> (1) Is a miner as defined in this section; and
> (2) Has met the requirements for entitlement to benefits by establishing that he or she:
>
> (i) Has pneumoconiosis (see §718.202), and
> (ii) The pneumoconiosis arose out of coal mine employment (see §718.203), and
> (iii) Is totally disabled (see §718.204(c)), and
> (iv) The pneumoconiosis contributes to the total disability (see §718.204(c)), and
>
> (3) Has filed a claim for benefits in accordance with the provisions of this part.

20 C.F.R. §725.202(d). Although the regulations refer to establishing that the miner is "totally disabled (see §718.204(c))," 20 C.F.R. §725.202(d)(2)(iii), total disability is

applicable conditions of entitlement shall be limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

As an initial matter, we consider claimant's assertion that the administrative law judge erred in finding Director's Exhibits 27, 28 and 30 inadmissible. Director's Exhibit 30 includes the district director's Proposed Decision and Order – Award of Benefits dated November 21, 2002, and a cover letter, sending this decision to employer. Contrary to claimant's assertion, the administrative law judge did not find Director's Exhibit 30 to be inadmissible. *See* Decision and Order at 6.

Regarding the administrative law judge's exclusion of Director's Exhibits 27 and 28, claimant asserts that these exhibits:

> had already been admitted of record at the hearing, with both parties consenting to their admission, and the reason given by the ALJ ("the doctors relied on an x-ray" that was not submitted into the evidence) would not affect the consideration of the medical opinion of the physicians concerning total disability or legal pneumoconiosis.

Claimant's Brief at 1-2. Director's Exhibit 27 is an x-ray interpretation by Dr. Srisumrid of a film dated January 29, 2002. Director's Exhibit 28 is a medical report by Drs. C.C. and C.A. Moore. The administrative law judge found that the report of Drs. Moore was not a treatment record, and therefore, to be admissible, it must conform to the limitations of §725.414(a)(2)(i). The administrative law judge found the report of Drs. Moore to be "inadmissible because the doctors relied on an x-ray, notwithstanding the non-conformance with §718.102(d), in excess of the two x-rays already submitted from Dr. Alexander." Decision and Order at 6.

We reject claimant's assertion that the administrative law judge erred by finding Director's Exhibits 27 and 28 to be inadmissible. The regulations set limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). Section 725.456(b)(1) specifically states that medical evidence submitted in excess of the Section 725.414 limitations "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.414. The Board has held that it is error for the administrative law judge to accept the parties' waiver of these regulatory limitations without making a finding that there was good cause for admitting medical evidence in excess of the Section 725.414 limitations. *See Smith v.*

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established pursuant to 20 C.F.R. §718.204(b), while disability causation is established pursuant to 20 C.F.R. §718.204(c).

Martin Coal Corp., ____ BLR ____,BRB No. 04-0126 BLA (Oct. 27, 2004); *see also Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). We, therefore, affirm the administrative law judge's exclusion of this evidence because it exceeds the quantity of evidence allowed by the regulations, and no assertion of good cause for their admission has been made. 20 C.F.R. §§725.414; 725.456(b)(1).

Claimant also asserts that the administrative law judge erred in his analysis of whether there has been a "material change in conditions" demonstrated in this case. Claimant's Brief at 2. Judge Thomas denied benefits in claimant's initial claim because he found that the evidence did not establish the existence of pneumoconiosis or that claimant was totally disabled from a respiratory or pulmonary impairment. 1988 Decision and Order at 11. Consequently, in order to avoid denial of this subsequent claim, claimant must first demonstrate that one of the applicable conditions of entitlement, in this case either that he has pneumoconiosis or is totally disabled from a respiratory or pulmonary impairment, has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(d).

Claimant specifically challenges the administrative law judge's consideration of the x-ray evidence. The administrative law judge detailed the ten x-ray interpretations of record taken from 1998 through 2003. Decision and Order at 7. The administrative law judge determined that the four films taken in 1998, during claimant's hospitalizations, and the April 2, 2001 x-ray,[2] do not support a finding of pneumoconiosis. Decision and Order at 12; Employer's Exhibits 1, 5. The administrative law judge then considered the three interpretations of the July 9, 2001 film. Director's Exhibit 16; Claimant's Exhibit 1; Employer's Exhibit 2. The administrative law judge noted that Dr. Baker, who has no radiological qualifications, read this film as 0/1, which the administrative law judge stated "does not support a finding of pneumoconiosis." Decision and Order at 12. The administrative law judge reviewed Dr. Alexander's positive interpretation and Dr. Wiot's negative interpretation of this film, noting that both physicians are dually qualified as B-readers and board-certified radiologists. The administrative law judge stated "To resolve conflicting interpretations, I will consider Dr. Baker's interpretation, the equivalent of a negative interpretation under the regulations, to tip the balance of evidence and find that this x-ray does not support a finding of pneumoconiosis." Decision and Order at 13.

Regarding the 2003 x-ray evidence, Claimant's Exhibit 2; Employer's Exhibit 3, the administrative law judge stated:

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[2] In his analysis of the x-ray evidence, the administrative law judge refers to this film as the April 20, 2001 film, Decision and Order at 12, however, in his summary of the evidence, the administrative law judge correctly describes this as the film taken on "4/02/01." Decision and Order at 6.

> The last x-ray also received differing interpretations from the two interpreters; however, these physicians are not equally qualified. Dr. Alexander, with superior dual-qualifications, classified the x-rays as "1/0" while B-reader Dr. Jarboe read the x-ray as negative for pneumoconiosis. Where Dr. Alexander possesses superior qualification [sic], his opinion outweighs that of Dr. Jarboe and consequently, I find that this x-ray supports a finding of pneumoconiosis.

Decision and Order at 13.[3] However, the administrative law judge stated:

> Of the seven x-rays, only one offers positive evidence of pneumoconiosis. Because it is the most recent interpretation, however, I may permissibly accord it the most weight. Consequently, I find that the superior qualifications of Dr. Alexander and the recency of the x-ray entitle this x-ray to the most probative weight. However, Claimant's burden is to show by a preponderance of the x-ray evidence the presence of pneumoconiosis. The weight of the last x-ray does not serve to meet this burden in the face of the other negative x-rays. Additionally, to meet his threshold burden for a subsequent claim, [claimant] must show a substantial difference in the bodies of evidence when comparing the newly submitted evidence against the previously submitted evidence. It is legal error for an administrative law judge not to show a worsening of Claimant's condition on the element selected to show a material change.
>
> Turning to the evidence submitted in the prior claim, three x-rays appear in the record with seven interpretations. Two more-qualified readers contradicted the only positive x-ray interpretation by Dr. Baker. The remainder of the interpreters found the x-rays negative. After comparing the sum of the newly submitted evidence, two positive interpretations with one controverted, with the sum of the previous evidence, I cannot find that the evidence shows a substantial

[3] As noted by employer in its response brief, there is a problem with the administrative law judge's description of the x-ray evidence. In his summary of the x-ray evidence, the administrative law judge refers to two interpretations by Drs. Alexander and Jarboe of a "1/03/03" film. Decision and Order at 7. In fact, the record contains Dr. Alexander's interpretation of a January 29, 2003 film, Claimant's Exhibit 2, and Dr. Jarboe's interpretation of a January 30, 2003 film. Two interpretations of a January 29, 2002 film were submitted, but were not admitted into the record.

> difference. Consequently, I find that Claimant has not met his burden on this element of entitlement by the x-ray evidence.

Decision and Order at 13 (citations omitted).

Because the administrative law judge has considered the number of positive and negative newly admitted interpretations, as well as the credentials of the physicians providing the interpretations, we hold that the administrative law judge permissibly considered both the quality and the quantity of the newly admitted x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). We, therefore, affirm the administrative law judge's weighing of the newly admitted x-ray evidence as it is supported by substantial evidence.

Claimant has not challenged any other findings by the administrative law judge regarding the existence of pneumoconiosis. Accordingly, we affirm the administrative law judge's finding that the newly admitted evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because we affirm the administrative law judge's finding that the newly admitted evidence does not establish the existence of pneumoconiosis, we also affirm the administrative law judge's finding that claimant has not established a change in one of the applicable elements of entitlement pursuant to Section 718.202(a).

The administrative law judge next considered the issue of total disability due to pneumoconiosis. He stated that the pulmonary function studies:

> universally show that [claimant] is totally disabled, however, due to the persuasive opinions of Drs. Jarboe and Dahhan, disability due to pneumoconiosis is absent where these physicians blamed the ventilatory test results on [claimant's] 40-year smoking history and specifically ruled out coal dust exposure as a cause.

Decision and Order at 17. The administrative law judge noted that none of the blood gas studies yielded qualifying values, and he thus found that the preponderance of the blood gas study evidence weighs against a finding of total disability. Regarding the medical opinion evidence, the administrative law judge stated:

> The newly submitted evidence contains three physicians' opinions addressing Claimant's disabilities or impairments. All three concur that Claimant is totally disabled but there the agreement stops. Only

> Dr. Baker concluded that [claimant] is totally disabled due to coal dust exposure, as well as cigarette smoking. However, I have previously found Dr. Baker's opinion less probative than the opinions of Drs. Dahhan and Jarboe. To meet his burden of persuasion, Claimant must show each element of entitlement by a preponderance of the evidence and this is where his claim must fail. The evidence does not show by a preponderance that he has pneumoconiosis and is totally disabled; and that both are due to coal mine employment.

Decision and Order at 18.

In his consideration of the evidence, the administrative law judge erred by not considering separately the evidence relevant to total disability at Section 718.204(b)(2)(i)-(iv), and erred subsequently in not weighing together the newly admitted contrary probative evidence, like and unlike, to determine whether it is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*). Moreover, the administrative law judge erred by analyzing the evidence relevant to the issues of total disability and disability causation simultaneously. *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 609, n.7, 22 BLR 2-288, 2-301, n.7 (6th Cir. 2001). Consequently, we vacate the administrative law judge's finding that claimant has not established a change in an applicable condition of entitlement pursuant to Section 718.204. On remand, the administrative law judge must determine, based on the newly admitted evidence, whether claimant suffers from total disability pursuant to Section 718.204(b). If the administrative law judge finds that the newly admitted evidence establishes total disability pursuant to Section 718.204(b), claimant will have established a change in one of the applicable conditions of entitlement pursuant to Section 725.309, if the administrative law judge also determines that there is a "qualitative difference" in the records accompanying the initial claim and the subsequent claim. *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 480, 23 BLR 2-44, 2-66 (2003).

If, on remand, the administrative law judge finds that claimant has established a change in an applicable condition of entitlement pursuant to Section 725.309, the administrative law judge must then consider claimant's 2001 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

We now consider employer's assertions raised in its cross-appeal. Employer challenges the administrative law judge exclusion of Employer's Exhibits 6-9 and Director's Exhibit 21. Employer asserts that Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. §923(b), requires the fact finder to consider "all relevant evidence." Employer argues that the Department of Labor's revised regulations violate this portion

of the Act, as well as the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Moreover, employer asserts that this evidence should be admitted in view of *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Employer also asserts that this evidence should be admitted under the "good cause" exception pursuant to 20 C.F.R. §725.456(b)(1) because it is relevant. The Director responds, asserting that these arguments are similar to the assertions that the Board rejected in *Dempsey*, and urging the Board to reject employer's arguments in the instant case as well.

We reject employer's assertions raised in its cross-appeal. As the Director contends, each of the arguments raised by employer has been rejected previously by the Board. In *Dempsey*, the Board rejected the argument that Section 725.414 is invalid because it conflicts with the Act's requirement that "all relevant evidence shall be considered…" 30 U.S.C. §923(b), *Dempsey*, 23 BLR at 1-58, and also rejected the argument that Section 725.414 is invalid because it conflicts with the APA, *Dempsey*, 23 BLR at 1-58. In addition, the Board rejected the argument that Section 725.414 is invalid because it conflicts with the holding of the United States Court of Appeals for the Fourth Circuit in *Underwood*. *Dempsey*, 23 BLR at 1-59. Since the Board has previously rejected each of the arguments raised by employer, we reject employer's assertions that the administrative law judge erred by excluding Employer's Exhibits 6-9 and Director's Exhibit 21 from the record.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge