BRB Nos. 05-0548 BLA
and 05-0548 BLA-A

JOHN ST. CLAIR	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 03/28/2006
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-Denying Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

John St. Clair, Fairmont, West Virginia, *pro se*.

Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; 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:

Claimant appeals, without the assistance of counsel, and employer cross-appeals, the Decision and Order–Denying Benefits (03-BLA-6416) of Administrative Law Judge Gerald M. Tierney, 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 extensive procedural history of this case was set out in the Board's most recent Decision and Order. *St. Clair v. Consolidation Coal Co.*, BRB No. 99-0664 BLA (Mar. 31, 2000)(unpub.). In that decision, the Board affirmed the findings of Administrative Law Judge Richard A. Morgan that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2000) and total respiratory disability pursuant to 20 C.F.R. §718.204(c) (2000).[1] Therefore, the Board also affirmed Judge Morgan's finding that claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). 20 C.F.R. §725.309(d) (2000). *St. Clair v. Consolidation Coal Co.*, BRB No. 99-0664 BLA (Mar. 31, 2000)(unpub.).

Claimant filed the instant claim on September 28, 2001. Director's Exhibit 3. The administrative law judge noted that this case involved claimant's fifth claim for benefits, and that claimant needed to prove that one of the applicable conditions of entitlement has changed since the denial of his prior claim, pursuant to 20 C.F.R. §725.309. As a preliminary matter, the administrative law judge rejected employer's assertion that claimant's current claim is barred by the statute of limitations set forth in 20 C.F.R. §725.308. The administrative law judge found the newly submitted evidence insufficient to establish the existence of pneumoconiosis, total disability, or total disability due to pneumoconiosis. Consequently, he denied benefits.

Claimant has filed his appeal *pro se*. 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 in finding that the instant claim was timely filed. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's cross-appeal, urging the Board to reject employer's argument.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), 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), is now found at 20 C.F.R. §718.204(c).

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).

As an initial matter, we consider employer's cross-appeal, wherein it asserts that the administrative law judge erred in finding that the instant claim was timely filed. While the case was before the administrative law judge, employer argued that the claim is barred by the three year statute of limitations contained in Section 725.308. The administrative law judge discussed employer's assertion, and noted that employer based its challenge on the holding of 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), while the instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The administrative law judge declined to apply *Kirk* to this case, and he rejected employer's timeliness argument, stating "the prior adjudicator's finding that Claimant is not totally disabled due to pneumoconiosis renders the earlier medical opinions of total disability due to pneumoconiosis ineffective to trigger the running of the statute of limitations." Decision and Order at 3.

On appeal, employer argues that the administrative law judge erred in rejecting its assertion that *Kirk* should be applied to bar the instant claim for benefits. Further, employer argues that the record is clear that two physicians informed claimant that he had a totally disabling pulmonary impairment due to coal dust exposure at least three years prior to September 28, 2001, the date he filed this claim. Employer argues that, consequently, the claim should be barred by the statute of limitations under Section 725.308. The Director responds, urging the Board to reject employer's argument. The Director notes that the Board has declined to apply the language of *Kirk* regarding the statute of limitations outside the Sixth Circuit, and the Director asserts that *Westmoreland Coal Co. v. Amick*, Case No. 04-1147 (4th Cir. Dec. 6, 2004)(unpub.) enunciates the correct legal standard to be applied. Therefore, the Director maintains that the instant claim is not barred by the statute of limitations.

The Board has held that it will not apply *Kirk* to cases arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). Therefore, we reject employer's assertion that the administrative law judge erred by not applying *Kirk*, and we affirm the administrative law judge's finding that the instant claim was timely filed.

We now turn to the administrative law judge's finding that the newly submitted evidence does not establish any of the elements of entitlement.

Existence of pneumoconiosis

The administrative law judge detailed the newly submitted x-ray evidence and found it insufficient to establish the existence of pneumoconiosis.[2] The administrative law judge stated:

> Dr. Gaziano's latest reading, identifying pneumoconiosis on the November 2003 chest x-ray, is challenged by Drs. Renn and Fino, equally qualified readers. Drs. Renn, Fino and fellow B-reader Dr. Abrahams also reported that there were no abnormalities consistent with pneumoconiosis on Claimant's interim April 2002 chest x-ray.
>
> Claimant does not meet his burden of proof. Claimant does not prove, by the preponderance of the new chest x-ray evidence, the existence of pneumoconiosis at §718.202(a)(1).

Decision and Order at 3-4.

The administrative law judge permissibly considered both the quality and the quantity of the newly submitted x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §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). Therefore, we affirm the administrative law judge's finding that the newly submitted x-ray evidence does not establish the existence of pneumoconiosis at Section 718.202(a)(1), as this finding is supported by substantial evidence.[3]

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[2] Dr. Gaziano, a B reader, interpreted the August 29, 1997 film as positive for pneumoconiosis. Claimant's Exhibit 2; Director's Exhibit 1. The April 10, 2002 film was read as negative by Drs. Fino, Abrahams, and Renn, all B readers, and by Dr. Binns, who is dually qualified as a B reader and a Board-certified radiologist. Director's Exhibits 18, 19; Employer's Exhibits 1, 3. The November 5, 2003 film was interpreted as negative by Drs. Renn and Fino, and as positive by Dr. Gaziano. Claimant's Exhibit 1; Employer's Exhibits 3, 6.

[3] It was improper for the administrative law judge to discuss Dr. Gaziano's interpretation of a 1997 film. This interpretation was previously considered by Judge Moran in his 1999 Decision and Order and would not provide a basis for establishing a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309; *see generally Lisa Lee Mines v. Director, OWCP* [*Rutter*], 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *rev'd in part*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *cert. denied* 117 S.Ct. 763 (1997). However, since the administrative law judge's analysis was based

The administrative law judge did not consider whether the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3). Because the newly submitted evidence does not contain biopsy evidence, nor is there any evidence of complicated pneumoconiosis in this living miner's claim filed in 2001, claimant is unable to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) or (a)(3). 20 C.F.R. §§718.202(a)(2)-(3), 718.304, 718.305, 718.306.

As the administrative law judge noted, the newly submitted medical opinion evidence consists of the reports of Drs. Renn, Fino and Abrahams.[4] The administrative law judge stated:

> I find the opinions of Drs. Renn and Fino more persuasive than the opinion of Dr. Abrahams. Dr. Abrahams examined Claimant on one occasion. The District Director represented that Dr. Abrahams' subspecialty is pulmonary medicine. However, Dr. Abrahams simply noted a partial causal connection to coal dust exposure without any accompanying rationale. The record contains the curriculum vitaes of Drs. Renn and Fino documenting their board certifications in pulmonary medicine. Drs. Renn's and Fino's reports and testimony demonstrate their tracking of Claimant's respiratory condition through the years and provided detailed rationale to support their conclusion that Claimant does not suffer from pneumoconiosis as defined in §718.201.

Decision and Order at 5 (citations omitted).

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primarily on the newly developed evidence, his notation of this earlier evidence does not affect his consideration of the new x-ray evidence, and therefore, this error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[4] Dr. Abrahams examined claimant and diagnosed chronic bronchitis with mild obstructive airway disease which, he opined, was due to cigarette smoke and coal dust exposure. Director's Exhibit 15. Dr. Renn, who is Board-certified in Internal Medicine and Pulmonary Diseases, examined claimant and opined that claimant does not have coal workers' pneumoconiosis. He stated that claimant's exposure to coal mine dust did not cause or contribute to any of claimant's diagnoses. Employer's Exhibits 3, 5. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Diseases, reviewed claimant's medical records and opined that claimant does not have any impairment or disability related to coal mine dust, nor any impairing or disabling respiratory condition from any cause. Employer's Exhibit 1. In his deposition, Dr. Fino indicated that the pattern of change, the x-ray findings and the lack of progression are not consistent with a coal mine dust related disease. Employer's Exhibit 6 at 11.

We affirm the administrative law judge's reliance on the opinions of Drs. Renn and Fino, whose superior qualifications are contained in the record. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985). Moreover, we affirm the administrative law judge's reliance on the opinions of Drs. Renn and Fino, based on the detailed rationale they provided to support their opinions that claimant does not suffer from pneumoconiosis. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987). We therefore hold that the administrative law judge rationally determined that the newly submitted medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Total disability

As the administrative law judge noted, the newly submitted evidence contains the results of two pulmonary function studies, and two blood gas studies, all of which yielded non-qualifying results. Director's Exhibits 16, 17; Employer's Exhibit 3. We therefore affirm the administrative law judge's finding that the newly submitted pulmonary function study and blood gas study evidence does not demonstrate the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) or (ii). In addition, as the administrative law judge noted, the newly submitted medical evidence does not indicate that claimant suffers from cor pulmonale with right-sided congestive heart failure. Consequently, we affirm the administrative law judge's finding that the newly submitted evidence does not demonstrate total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Regarding the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated:

> None of the new physician reports finds that Claimant's respiratory condition prevents him from performing his usual coal mine job as a supply motorman to meet the disability criteria of §718.204(b)(2)(iv). Dr. Abraham[s] reported that the minimal impairment Claimant suffers should not preclude him from performing his last coal mining job. Dr. Abraham[s] was aware that Claimant last worked as a supply motorman lifting and unloading various supplies of various weights. Drs. Renn and Fino indicated that they were both familiar with the heavy exertional requirements of Claimant's supply motorman job and found that Claimant is capable of performing that job from a respiratory or pulmonary standpoint.

Decision and Order at 5 (citations omitted).

We affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv), as none of the newly submitted medical opinions indicates that claimant is not able to perform his usual coal mine employment.[5] Director''s Exhibit 15; Employer's Exhibits 1, 3, 5, 6. Because the administrative law judge's finding at Section 718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed.

In light of the foregoing, we further affirm the administrative law judge's finding that the newly submitted evidence does not establish total disability at Section 718.204(b)(2).

Disability causation:

The administrative law judge also stated that claimant cannot establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Because we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and total disability pursuant to Section 718.204(b)(2), we also affirm the administrative law judge's finding that claimant has not established that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).

Accordingly, we affirm the administrative law judge's denial of benefits, as claimant has not proven a change in one of the applicable conditions of entitlement pursuant to Section 725.309.

[5] Dr. Abrahams opined that claimant suffered a minimal impairment "which should not preclude [his] ability to perform [his] last coal mining job." Director's Exhibit 15. Dr. Abrahams noted that claimant's last job was working as a supply motorman where he lifted and unloaded supplies ranging between twenty and ninety pounds, as well as "rock dust (bags, 50-60 bundles per shift)." Director's Exhibit 15. Dr. Fino noted that claimant's last coal mine job involved heavy labor, and he opined that claimant's mild abnormalities would not be disabling. Employer's Exhibits 1, 6 at 14-15. Dr. Renn noted that claimant's last coal mine employment was working as a supply motorman. Dr. Renn noted claimant's description of this job where claimant, with another miner would unload "belts weighing 1,500 pounds" and "trolley wire weighing 1,000 to 1,200 pounds." In addition, Dr. Renn noted claimant's statements that claimant unloaded supplies weighing one hundred pounds or more. Employer's Exhibit 3. Dr. Renn stated that from a respiratory standpoint, claimant is not impaired from performing his last coal mine employment. Employer's Exhibit 3, 5 at 10.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge