BRB Nos. 03-0443 BLA
and 03-0443 BLA-A

DAVID BAILEY	)	
	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED: 05/28/2004
	)	
SHAMROCK COAL COMPANY	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
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 – Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (Edmund Collett, P.S.C.), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order - Denying Benefits (02-BLA-5244) of Administrative Law Judge Joseph E. Kane on a duplicate 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 found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), and insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2).[2] Therefore, the administrative law judge concluded that the new evidence was insufficient to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

The relevant procedural history of this case is as follows: Claimant filed his first claim with the Department of Labor (DOL) on December 20, 1995. Director's Exhibit 1. Following a hearing, Administrative Law Judge Daniel J. Roketenetz issued a Decision and Order on February 17, 1998, denying benefits on the bases that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204. Claimant appealed to the Board. The Board affirmed only Judge Roketenetz's finding that the evidence failed to establish total respiratory disability due to pneumoconiosis pursuant to Section 718.204, without addressing his findings pursuant to Section 718.202(a). *Bailey v. Shamrock Coal Co.*, BRB No. 98-0720 BLA (Feb. 23, 1999)(unpub). The record reflects that claimant took no further action on this claim, and therefore the resulting denial of benefits became final. Claimant filed a subsequent claim on February 21, 2001. Director's Exhibit 3. Following a hearing, Administrative Law Judge Joseph E. Kane (the administrative law judge) issued a Decision and Order dated March 14, 2003, denying benefits on the basis that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(b), and therefore was insufficient to establish a change in an applicable condition of entitlement pursuant to Section

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[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.

[2] 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 total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

725.309(d). Claimant filed the instant appeal. Employer responded, urging affirmance of the administrative law judge's denial of benefits. Employer also filed a cross-appeal. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), responded to employer's cross-appeal, urging rejection of the arguments raised therein.

On appeal, claimant contends that the administrative law judge erred in his analysis of the new x-ray evidence of record when he found that it failed to establish the existence of pneumoconiosis at Section 718.202(a)(1). Claimant also contends that the administrative law judge erred in his weighing of the new medical opinions of record when he found that they were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant finally contends that the administrative law judge erred in his weighing of the new medical opinions of record when he found that they failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Employer, in response, urges affirmance of the administrative law judge's denial of benefits based upon his finding that the new evidence is insufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Employer has also filed a cross-appeal. Therein, employer challenges the administrative law judge's determination that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308, citing *Tennessee Consolidation Coal Co. v. Kirk,* 264 F. 3d 602, 22 BLR 2-288 (6th Cir. 2001) in support of its contention. Employer also contends that the administrative law judge improperly limited employer's right to submit additional medical evidence. Employer further asserts that the regulation at 20 C.F.R. §725.414 is invalid, as violative of 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), procedural due process, and the statutory requirement that all relevant evidence be considered by the trier-of-fact. Employer asserts that because claimant's counsel failed to raise an objection based upon 20 C.F.R.§725.414 at the hearing, claimant's counsel waived any exclusion of evidence in excess of the limits described in Section 725.414. Employer further asserts that this issue must be resolved by the Board regardless of how it decides claimant's appeal, as it is likely that claimant will seek modification if the denial of benefits is affirmed on appeal. Employer's Brief in Support of Cross-Petition for Review at 20. Employer also asserts, assuming *arguendo* that the regulations are valid, the administrative law judge erred in his application of Section 725.414 to exclude from the record the depositions and supplemental opinions of Drs. Broudy and Dahhan. *Id*. at 16-20.

The Director responds only to employer's cross-appeal, asserting that claimant's duplicate claim was timely filed, consistent with both Section 725.308 and the decision of the United States Court of Appeals for the Sixth Circuit in *Peabody Coal Co. v. Director, OWCP*, [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) (unpublished), which, the Director asserts, clarifies *Kirk*. The Director also contends that the regulation at

Section 725.414 is valid, and is not violative of procedural due process or the requirements of the APA. The Director further asserts that the administrative law judge properly excluded the depositions and supplemental reports of Drs. Broudy and Dahhan, despite the lack of an objection from claimant's counsel. The Director thus urges the Board to reject the arguments raised in employer's cross-appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim, such as the instant claim, shall be denied unless the claimant demonstrates 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). Claimant's prior claim was denied because Judge Roketenetz found that the evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total respiratory disability pursuant to Section 718.204(c). Director's Exhibit 1. In the instant claim, claimant must thus establish either the existence of pneumoconiosis pursuant to Section 718.202(a) or total respiratory disability pursuant to Section 718.204(b)(2) by new evidence in order to satisfy his burden to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Claimant initially challenges the administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and thereby failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d). Claimant asserts that the administrative law judge selectively analyzed the evidence. Claimant's Brief at 13. We disagree. The administrative law judge found that the record contains five newly submitted x-ray interpretations. Drs. Baker and Hussain each read an x-ray as positive for pneumoconiosis. Director's Exhibits 11, 12. Drs. Scott, Wheeler, and Broudy, all dually qualified as B readers and Board-certified radiologists, read x-rays as negative for pneumoconiosis. Director's

[3] No party challenges the administrative law judge's findings that the evidence established "19.24" years of qualifying coal mine employment, and that the new evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (a)(3) and total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i) – (iii). Therefore, we affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Exhibit 15; Employer's Exhibit 4. We affirm, as a permissible exercise of the administrative law judge's discretion, his decision to give greater weight to the negative x-ray interpretations of the dually qualified physicians based on their superior credentials, *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Martinez v. Director, OWCP*, 10 BLR 1-24 (1987), and on the numerical superiority of their negative readings, *Edmiston v. F & R Coal* Co., 14 BLR 1-65 (1990); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). We affirm, therefore, the administrative law judge's finding that the new evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1).

We next address the administrative law judge's finding that the new evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Claimant asserts that the opinions of Drs. Baker and Hussain are sufficient to establish the existence of pneumoconiosis. The administrative law judge initially considered Dr. Baker's opinion. He found that Dr. Baker based his opinion on nothing more that his own positive x-ray reading and a twenty year coal mine employment history. Director's Exhibit 12; Decision and Order at 16. Contrary to claimant's assertion, the administrative law judge recognized that Dr. Baker also submitted treatment notes and other records, but determined that these records contained no supporting rationale. The administrative law judge found that Dr. Baker did not indicate how his opinion was supported by the information in these records. Decision and Order at 13, 16. The administrative law judge thus permissibly discounted Dr. Baker's opinion as only a recitation of an x-ray reading, and rationally found that Dr. Baker never explained how claimant's work history supported the physician's ultimate diagnosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach*, 17 BLR at 1-110; A*nderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111(1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Director's Exhibit 12.

Further, the administrative law judge credited the opinion of Dr. Hussain, who found that claimant suffered from pneumoconiosis, and the contrary opinion of Dr. Broudy, who opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 4; Decision and Order at 16. While noting that Dr. Broudy's opinion was better explained, the administrative law judge ultimately concluded that both opinions were entitled to probative weight, and therefore, the evidence was in equipoise. Decision and Order at 16. The administrative law judge also stated that, even assuming he were to credit Dr. Baker's opinion as an opinion diagnosing legal pneumoconiosis, he would give the opinion little weight and, therefore, the evidence would still be in equipoise. Decision and Order at 16-17. We affirm the administrative law judge's finding that, because the new evidence was in equipoise, claimant failed to satisfy his burden of establishing the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Anderson*, 12 BLR at 1-113; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). We, therefore, further affirm the

administrative law judge's determination that the new evidence failed to establish a change in this applicable condition of entitlement, namely the existence of pneumoconiosis. 20 C.F.R. §725.309(d).

Claimant next asserts that the administrative law judge erred in weighing the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv). Claimant contends that the opinions of Drs. Baker and Hussain are sufficient to establish total respiratory disability and that the administrative law judge erred when he discredited them.

The administrative law judge considered the three new medical opinions of record. Dr. Baker opined that claimant had a totally disabling respiratory condition that was due to the effects of both smoking and pneumoconiosis. Director's Exhibit 12. The record reflects that Dr. Baker predicated his opinion regarding disability, at least in part, upon the non-qualifying pulmonary function studies he performed. *Id.* Dr. Hussain opined that claimant suffered from pneumoconiosis and that claimant did not retain the respiratory capacity to perform his usual coal mine employment or comparable work in a dust-free environment due to "impaired effort tolerance, dypsnea." Director's Exhibit 11. Finally, Dr. Broudy opined that claimant suffered from obesity, chronic bronchitis, chronic hernias and hypertension. Employer's Exhibit 4. Dr. Broudy stated that claimant did not have any chronic lung disease caused by the inhalation of coal mine dust. *Id.* He further opined that claimant did not have a respiratory impairment and believed that claimant retained the respiratory capacity to perform the work of an underground miner. *Id.*[4]

In weighing the new medical opinions at Section 718.204(b)(2)(iv), the administrative law judge accorded less weight to Dr. Baker's opinion. Decision and Order at 20. The administrative law judge found that Dr. Baker never explained how the results of his pulmonary function studies, which indicated that claimant's pulmonary capacity was near normal or at normal capacity, supported a diagnosis of total respiratory disability. *Id.* In addition, the administrative law judge rejected Dr. Baker's rationale that merely because claimant suffered from pneumoconiosis, he was disabled from coal mine employment because he must avoid dusty environments. Director's Exhibit 12; Decision and Order at 20. We affirm the administrative law judge's decision to accord Dr. Baker's opinion less weight as the administrative law judge permissibly found that it was poorly reasoned and poorly

[4]The administrative law judge listed, but did not weigh, the reports he excluded from the record pursuant to 20 C.F.R. §725.414, including Dr. Dahhan's October 29, 2001 report, submitted as one of employer's two medical opinions. Employer's Exhibit 4. The administrative law judge excluded Dr. Dahhan's report because Dr. Dahhan reviewed additional evidence not in the record which, if considered, would have exceeded the limits set forth in Section 725.414. Decision and Order at 7-8.

explained. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, claimant asserts, albeit with respect to the administrative law judge's findings at Section 718.202(a), that Dr. Baker's opinion is entitled to greater weight because of his status as claimant's treating physician. Claimant's Brief at 6. The applicable regulation at 20 C.F.R. §725.104(d) requires the administrative law judge to give consideration to the nature of the relationship between the treating physician(s) and the claimant. In the instant case, the administrative law judge noted claimant's testimony that he "treats with Drs. Varghese and Baker. (Tr. 20)." Decision and Order at 3. The administrative law judge, however, permissibly discredited Dr. Baker's opinion, despite his status as one of claimant's treating physicians, as he found it to be poorly explained and poorly reasoned. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). We reject, therefore, claimant's contentions with respect to the administrative law judge's weighing of Dr. Baker's opinion at Section 718.204(b)(2)(iv).

The administrative law judge further weighed the opinion of Dr. Hussain, who stated that claimant was totally disabled due to a respiratory impairment, against Dr. Broudy's contrary opinion that claimant was not totally disabled due to a respiratory impairment. The administrative law judge found that each opinion was well documented, but that each opinion was "lacking completeness." Decision and Order at 20. The administrative law judge thus stated that he would not grant either doctor's opinion "full probative weight." *Id.* The administrative law judge indicated, "… I am left with the opposing views of Drs. Broudy and Hussain. Both physicians proffer well documented and marginally reasoned reports. Neither report is particularly impressive or influential. At bottom, I find the reports cancel out each other leaving the Court with two moderately weighted reports espousing opposing views. The situation is the epitome of equipoise." Decision and Order at 21. We affirm the administrative law judge's finding that because the new evidence was in equipoise, claimant failed to satisfy his burden of establishing total respiratory disability at Section 718.204(b)(2)(iv), as the administrative law judge reasonably interpretated the evidence. *Anderson*, 12 BLR at 1-113; *Worley*, 12 BLR at 1-23; *Gee*, 9 BLR at 1-6; *Perry*, 9 BLR at 1-3.[5] Based on the foregoing, we affirm the administrative law judge's finding that the new evidence is insufficient to establish total respiratory disability at Section 718.204(b)(2) and is

[5] Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant asserts that the administrative law judge erred in failing to consider his age, education or work experience in conjunction with the administrative law judge's assessment that claimant was not totally disabled. Claimant's Brief at 9-11. We reject this contention. Claimant's age, education and work experience are not relevant to establishing total respiratory disability at 20 C.F.R. Part 718.

thereby insufficient to establish a change in this applicable condition of entitlement pursuant to Section 725.309(d).

Since we herein affirm the administrative law judge's finding that the new evidence failed to establish a change in any applicable condition of entitlement at Section 725.309(d), we also affirm the administrative law judge's denial of benefits in this subsequent claim. In light of our affirmance of the administrative law judge's denial of benefits, we need not reach the issues raised by employer in its appeal.[6]

[6] Employer asserts in its cross-appeal that because "it is likely that claimant will request modification…it will greatly complicate the modification proceedings if the evidentiary issues in the original claim are left unresolved." Employer's Brief in Support of Cross-Petition for Review at 20. We reject this contention. Because of our disposition of claimant's appeal, *see* discussion *supra*, it is not necessary for the adjudication of this appeal to address further the issues raised by employer in its cross-appeal.

Accordingly, the administrative law judge's Decision and Order - Denying 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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BETTY JEAN HALL
Administrative Appeals Judge