BRB Nos. 05-0360 BLA
and 05-0360 BLA-A

EUGENE FELTNER	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/22/2005
	)	
	)	
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 – 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.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

DOLDER, J., Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-5750) of

Administrative Law Judge Thomas F. Phalen, Jr. 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). Employer has filed a cross-appeal in the instant case. Initially, the administrative law judge found that, even though the district director's allowance of claimant's request to withdraw the October 14, 1988 claim pursuant to 20 C.F.R. §725.306 was contrary to the holding in *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), the district director's February 13, 2001 decision was rendered prior to the issuance of *Clevenger*, employer had failed to appeal or request modification of the district director's approval of the withdrawal, and the holding in *Clevenger* did not contain

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[1] Claimant, Eugene Feltner, filed an application for benefits on March 22, 2001, which is pending herein. Director's Exhibit 3. Previously, claimant filed an application for benefits on June 21, 1973, which was finally denied by the Social Security Administration on March 14, 1979 and by the Department of Labor on December 14, 1979. Director's Exhibit 1. Subsequently, claimant filed a duplicate application for benefits on October 14, 1988, which was denied by Administrative Law Judge Donald Mosser in a Decision and Order issued on January 27, 1992. Director's Exhibit 1. Claimant appealed and the Board affirmed Judge Mosser's findings under 20 C.F.R. §§718.202(a), 718.203(b), and 725.309 (2000), but vacated his findings under 20 C.F.R. §§718.204(c)(1) and (c)(4) (2000) and remanded the case for further consideration. *Feltner v. Whitaker Coal Corp.*, BRB No. 92-0994 BLA (May 24, 1993) (unpub.); Director's Exhibit 1. On remand, Judge Mosser again denied benefits in a Decision and Order dated September 29, 1993, which was affirmed by the Board. *Feltner v. Whitaker Coal Corp.*, BRB No. 94-0274 BLA (Feb. 17, 1995) (unpub.). Thereafter, claimant filed a petition for modification with supporting evidence on May 15, 1995. Because claimant failed to establish either a mistake in a determination of fact or a change in conditions, Judge Mosser denied modification. Claimant appealed and the Board affirmed the denial of modification pursuant to 20 C.F.R. §725.310 (2000). *Feltner v. Whitaker Coal Corp.*, BRB No. 97-0565 BLA (Dec. 23, 1997) (unpub.). On February 10, 1998, claimant again sought modification of the 1988 claim and filed additional evidence. By Decision and Order dated September 22, 1999, Administrative Law Judge Daniel J. Roketenetz denied modification because claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(c) (2000). Claimant again appealed and the Board affirmed the denial of modification pursuant to 20 C.F.R. §725.310 (2000). *Feltner v. Whitaker Coal Corp.*, BRB No. 00-0110 BLA (Sep. 25, 2000) (unpub.). Similarly, claimant filed a third petition for modification on December 19, 2000 with additional evidence, which the district director denied on February 2, 2001. Thereafter, on February 9, 2001, claimant requested that the 1988 claim be withdrawn; the district director granted claimant's withdrawal request in a Proposed Decision and Order dated February 13, 2001. Employer requested reconsideration, but the district director's denied employer's request on March 6, 2001.

any language indicating that it was be applied retroactively. Accordingly, the administrative law judge approved the district director's withdrawal of the claim, concluding that claimant's October 14, 1988 claim was considered not to have been filed pursuant to 20 C.F.R. §725.306(b).[2] Next, the administrative law judge treated the March 22, 2001 claim, which is pending herein, as a subsequent claim pursuant to 20 C.F.R. §725.309 because it was filed more than one year after the final denial of claimant's June 21, 1973 claim and he credited the parties' stipulation that claimant worked in qualifying coal mine employment for at least seventeen years. Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that, because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204, claimant failed to demonstrate that one of the applicable conditions of entitlement had changed since the date upon which the order denying the prior claim became final under 20 C.F.R. §725.309(d).[3] Accordingly, benefits were denied.[4]

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[2] In *Clevenger v. Mary Helen Coal Co.*, 22 BLR 1-193 (2002) (*en banc*), the Board held that the provisions of 20 C.F.R. §725.306 are applicable only up until such time as a decision on the merits issued by an adjudication officer (*e.g.*, district directors, administrative law judges) becomes effective, *see* 20 C.F.R. §§725.419, 725.479, 725.502, at which time, there no longer exists an appropriate adjudication officer authorized to approve a withdrawal request under 20 C.F.R. §725.306. *Clevenger*, 22 BLR at 1-199-200; *accord Lester v. Peabody Coal Co.*, 22 BLR 1-183, 1-190-191 (2002) (*en banc*). The Board agreed with the Director's argument that "the date a decision on the merits becomes effective is a practical point for terminating authority to allow withdrawal because it is readily identifiable and marks the point beyond which allowing withdrawal would be unfair to opposing parties," and consequently, "there is no compelling reason to allow [claimant] to avoid the consequences of that defeat; claimant may instead appeal the denial, seek modification within a year pursuant to Section 725.310, or thereafter file a subsequent claim under Section 725.309." *Clevenger*, 22 BLR at 1-200; *Lester*, 22 BLR 1-191.

[3] 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.

[4] Prior to rendering his Decision and Order, the administrative law judge issued an Order on November 5, 2003 wherein he denied employer's motion to remand. The administrative law judge found that, notwithstanding that the district director's approval of claimant's request to withdraw the October 17, 1988 claim was erroneous under *Clevenger* and *Lester*, the matter was not before him because employer neither requested a formal hearing nor filed a request for modification of the district director's approval, dated March 6,

On appeal, claimant argues that the administrative law judge erred in failing to find the existence of pneumoconiosis established by x-ray and medical opinion evidence under Section 718.202(a)(1) and (a)(4) and total respiratory disability under Section 718.204(b)(2)(iv). Claimant additionally contends that because the administrative law judge concluded that the medical opinion of Dr. Hussain was unreasoned, the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary examination as required by Section 413(b) of the Act, 30 U.S.C. §923(b), to substantiate his claim. Employer responds to claimant's appeal, urging affirmance of the denial of benefits. The Director, as party-in-interest, has filed a response letter addressing arguments contained in claimant's brief, arguing that he satisfied his obligation to provide claimant with a complete, credible pulmonary evaluation as required by the Act.

Employer has filed a cross-appeal in this case, arguing that, while the ultimate decision denying benefits in this case is rational and supported by substantial evidence, the administrative law judge's decision contains several errors with respect to certain procedural issues. Specifically, employer argues that the administrative law judge erred: in finding that the district director permissibly granted claimant's request to withdraw his October 1988 claim under Section 725.306; in finding the March 22, 2001 claim to be timely filed under Section 725.308; in failing to consider the x-ray reports contained in the hospital treatment records; in refusing to allow the post-hearing depositions of employer's experts; in rejecting Dr. Dahhan's total disability causation opinion as based on inadmissible evidence; and in calculating claimant's cigarette smoking history. Claimant has not filed a response brief to employer's cross-appeal. The Director has filed a response letter limited to two of employer's allegations of error contained in the cross-appeal. Initially, the Director argues that because the administrative law judge's ultimate decision is a denial of benefits, any error resulting from the administrative law judge's approval of the withdrawal of the prior claim is harmless and the Board need not address this issue. Similarly, the Director asserts that the administrative law judge's refusal to consider the x-ray evidence contained in the hospital treatment records is harmless error since the administrative law judge permissibly found that the classified chest x-ray films were negative for the existence of pneumoconiosis.[5]

2001, therefore, it became a final and effective order. Hence, the administrative law judge concluded that the only matter before him was the adjudication of the March 22, 2001 claim. Furthermore, the administrative law judge denied employer's motion to take and submit the post-hearing depositions of Drs. Broudy, Dahhan, and Rosenberg.

[5] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a)(2)-(3) and 718.204(b)(2)(i)-(iii) because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and

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 the 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant argues that in rendering his finding that claimant was not totally disabled pursuant to Section 718.204(b)(2)(iv), the administrative law judge erred by rejecting the well reasoned and documented opinion of Dr. Baker and by finding that claimant failed, therefore, to carry his burden of establishing total respiratory disability by a preponderance of the evidence. Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant argues that a single medical opinion may be sufficient to invoke the presumption of total disability.

Claimant's reliance on *Meadows* is misplaced, however, because that case dealt with the application of the interim presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. Part 727. The instant case arises under 20 C.F.R. Part 718 which requires that claimant affirmatively establish each element of entitlement. 20 C.F.R. §§718.2, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*); *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). The administrative law judge permissibly found that Dr. Baker's total disability assessment was entitled to little weight inasmuch as the only rationale underlying his opinion consisted of a recommendation that claimant not return to a dusty environment to preclude further exacerbation of his pneumoconiosis. Decision and Order at 20; Director's Exhibit 12. Inasmuch as a medical opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis is insufficient to demonstrate total respiratory disability, we affirm the administrative law judge's rejection of Dr. Baker's opinion on this basis. *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 1296-1297, 13 BLR 2-418, 2-425 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990); *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988); *Bentley v. Director, OWCP*, 7 BLR 1-612, 614 (1984); *New v. Director, OWCP*, 6 BLR 1-597 (1983); Decision and Order at 20.

Claimant argues further that the administrative law judge erred by failing to consider the exertional requirements of claimant's usual coal mine work as a general laborer in

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Order at 4, 17, 19.

conjunction with the medical opinion of Dr. Baker, who diagnosed a Class I impairment. Claimant further asserts that the administrative law judge erred by failing to consider his disability, age, limited education, and work experience, factors that would preclude him from obtaining gainful employment outside of the coal mine industry, when the administrative law judge determined that claimant was not totally disabled.

In assessing the probative value of the medical opinion evidence, the administrative law judge found that Dr. Baker's opinion possessed little probative value because Dr. Baker, who diagnosed claimant with a Class I impairment as classified in the *Guides to the Evaluation of Permanent Impairment*, 5th Ed., relied upon the guide's recommendation against further exposure to the offending agent to conclude that claimant was "100% occupationally disabled." *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988) (qualified or equivocal physician's opinion may be properly discredited by administrative law judge); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order at 12; Director's Exhibit 12. The administrative law judge found Dr. Baker's opinion further undermined because he did not provide an accounting of claimant's physical limitations in order to ascertain whether claimant retained the residual exertional capacity necessary to perform his usual coal mine employment duties. Decision and Order at 20; Director's Exhibit 12. Consequently, the administrative law judge found that, while Dr. Baker is an internist and pulmonologist, his opinion was outweighed by the contrary opinions of Drs. Dahhan, Hussain, and Broudy, physicians who also possess demonstrated pulmonary expertise and who opined that, from a respiratory standpoint, claimant retains the physiological capacity to perform his previous coal mine work or a job of comparable physical demand, because the latter physicians' opinions were well reasoned and documented by normal physical examination findings and normal pulmonary function studies and arterial blood gas studies. Decision and Order at 21; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983) (determination as to whether physician's report is sufficiently reasoned and documented is credibility matter for administrative law judge); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 21; Director's Exhibits 14, 16; Employer's Exhibit 1.

Contrary to claimant's assertion therefore, consideration of the exertional requirements of his usual coal mine work and other factors affecting his ability to obtain gainful employment was "unnecessary" because the administrative law judge properly found that the credible medical opinion evidence of record demonstrated that claimant did not suffer from a totally disabling respiratory or pulmonary impairment. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-45-46 (4th Cir. 1997); Decision and Order at 20-21. Accordingly, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to

Section 718.204(b)(2)(iv). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

In addition, the administrative law judge properly found that the newly submitted pulmonary function studies and arterial blood gas studies of record were non-qualifying, that there was no evidence of cor pulmonale with right-sided congestive heart failure, and that the medical opinions of Drs. Dahhan, Hussain, and Broudy concluded that claimant retained the physiological capacity to continue his previous coal mine employment and was not totally disabled due to a respiratory or pulmonary impairment. Decision and Order at 19-21. Accordingly, after weighing the evidence relevant to Section 718.204(b)(2)(i)-(iv), the administrative law judge rationally found that the evidence of record failed to affirmatively establish total respiratory disability. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). Because the administrative law judge found that claimant previously failed to establish total disability, Decision and Order at 15, and claimant has not otherwise challenged the administrative law judge's credibility determinations regarding total disability, we affirm the administrative law judge's determination that claimant failed to satisfy his burden of demonstrating total respiratory disability pursuant to Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Taylor*, 12 BLR at 1-87; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*); Decision and Order at 21.

Consequently, because the administrative law judge's determination that claimant failed to affirmatively establish total respiratory disability at Section 718.204(b), a requisite element of entitlement under Part 718, is rational, contains no reversible error, and is supported by substantial evidence, we affirm the administrative law judge's determination that claimant's entitlement to benefits is precluded. *See Fields*, 10 BLR at 1-19; *Shedlock*, 9 BLR at 1-236.[6]

[6] Our affirmance of the administrative law judge's determination that claimant failed to establish total respiratory disability at Section 718.204(b) precludes the need to address claimant's arguments with respect to the administrative law judge's finding concerning the existence of pneumoconiosis under Section 718.202(a). Similarly, our affirmance of the administrative law judge's denial of benefits in this case obviates the necessity to address the merits of employer's cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the Decision and Order – Denial of Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

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REGINA C. McGRANERY
Administrative Appeals Judge