BRB Nos. 07-0232 BLA
and 07-0232 BLA-A

K.G.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/14/2007
	)	
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 LLP), Washington, D.C., for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denial of Benefits (04-BLA-6773) of Administrative Law Judge Thomas F. Phalen, Jr., 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] Claimant filed this claim for benefits on October 16, 2003. Director's Exhibit 3. The administrative law judge credited claimant with twelve and one-quarter years of coal mine employment.[2] Decision and Order at 4. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. In considering the subsequent claim, the administrative law judge concluded that the newly submitted evidence did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation to substantiate his claim. Employer responds, urging affirmance of the denial of benefits. The Director responds that he met his obligation to provide claimant with a complete and credible pulmonary evaluation. On cross-appeal, employer contends that the administrative law judge erred in finding the claim to be timely pursuant to 20 C.F.R. §725.308, in failing to consider the negative x-ray interpretation by Dr. Scott, and in addressing the total disability issue in this subsequent claim. The Director responds to employer's cross-appeal, contending that claimant's 2003 claim was timely filed at 20

[1] Claimant filed his initial claim on January 3, 1991, which was denied on April 5, 1996, based on claimant's failure to establish the existence of pneumoconiosis. Director's Exhibit 1.

[2] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 1. 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, 1-202 (1989) (*en banc*).

C.F.R. §725.308. Employer has filed a reply brief, reiterating its contentions on cross-appeal regarding timeliness.[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. 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).

We initially address employer's contention, raised on cross-appeal, that the administrative law judge erred in finding claimant's current claim to be timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge found that the claim was timely pursuant to the standard enunciated in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis. . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner. . . ," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). With respect to the time limitation of 20 C.F.R. §725.308, the Sixth Circuit held in *Kirk* that "[t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. . . ." *Kirk*, 264 F.3d at 608, 22 BLR at 2-298.

Employer relied on Dr. Baker's October 9, 1990 report. Dr. Baker opined that claimant had an occupational lung disease caused by coal mine employment based upon x-ray evidence, stated that his impairment was due to coal workers' pneumoconiosis and possibly his smoking history, and advised that claimant should have no further exposure to coal dust. Director's Exhibit 1.

Employer contends that the administrative law judge erred in finding that Dr. Baker's report was insufficient to trigger the statute of limitations. The administrative law judge, however, rationally found Dr. Baker's opinion, that claimant should have no further exposure to coal dust and would have difficulty doing sustained manual labor, constituted an admonishment and therefore is not equivalent to a finding of total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 576, 12 BLR 2-254, 2-258

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(4). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

(6th Cir. 1989). Consequently, we affirm the administrative law judge's finding that the claim was timely filed.

We now address the administrative law judge's determination that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, did not establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 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).

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.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The prior denial was based on claimant's failure to establish the existence of pneumoconiosis, and the issue of total disability was not addressed. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis to obtain review of the merits of his claim.[4] 20 C.F.R. §725.309(d)(2),(3).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of three new x-rays.[5] Dr. Simpao, a physician with no special radiological

[4] As employer contends, the administrative law judge erred in addressing the issue of total disability under 20 C.F.R. §725.309(d). Because the total disability element was not addressed in the prior claim, it was not a condition "upon which the prior denial was based," and thus was not an applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2); *see also Caudill v. Arch of Ky., Inc.,* 22 BLR 1-97, 1-102 (2000)(*en banc*). In light of the denial of benefits, the administrative law judge's consideration of total disability is harmless error. *See Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

[5]Employer contends that the administrative law judge did not consider Dr. Scott's reading of the November 21, 2003 x-ray. However, review of the record reflects that employer did not designate that x-ray reading in its proposed evidence summary form

qualifications, read the November 21, 2003[6] x-ray as positive for pneumoconiosis. Director's Exhibit 14. Dr. Dahhan, a B reader, read the March 10, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Dr. Rosenberg, a B reader, read the November 4, 2004 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. The administrative law judge found that the negative readings by Drs. Dahhan and Rosenberg outweighed the positive reading by Dr. Simpao, based on their superior qualifications, and concluded that "the x-ray evidence does not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)." Decision and Order at 13.

The administrative law judge based his finding on a proper qualitative analysis of the x-ray evidence. *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); *White*, 23 BLR at 1-4-5. Consequently, claimant's arguments that the administrative law judge improperly relied on the readers' credentials, and "may have 'selectively analyzed'" the readings, lack merit. Claimant's Brief at 3. We therefore affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Claimant further contends that because the administrative law judge discounted Dr. Simpao's opinion diagnosing pneumoconiosis, as "based merely upon an erroneous x-ray interpretation," the Director failed to provide claimant with a "credible pulmonary evaluation." Claimant's Brief at 4. The Director responds that the administrative law judge's finding that Dr. Simpao's opinion was outweighed by contrary evidence does not mean that the Director failed to satisfy his obligation.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406. The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the

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submitted to the administrative law judge. Employer's Exhibit 5. The administrative law judge followed the evidence designations submitted by the parties. Decision and Order at 5-6. The administrative law judge did not err by failing to consider the x-ray reading, as it was not included under any category of evidence to be considered by the administrative law judge pursuant to 20 C.F.R. §725.414. *See Clark v. Karst-Robbins Coal Co*, 12 BLR 1-149, 1-153 (1989)(*en banc*)(holding that the administrative law judge exercises broad discretion regarding procedural matters).

[6]Dr. Barrett read the November 21, 2003 x-ray for quality purposes only. Director's Exhibit 15.

Department of Labor examination form. 20 C.F.R. §§718.101(a), 718.104, 725.406(a). Director's Exhibit 14. The administrative law judge found that Dr. Simpao's diagnosis of pneumoconiosis was entitled to less weight because it was based on Dr. Simpao's own positive x-ray reading, which the administrative law judge found outweighed by the negative x-ray readings by physicians with superior radiological credentials. Decision and Order at 13. The administrative law judge also found that Dr. Simpao failed to otherwise explain how the documentation underlying his report supported his diagnosis. *Id.* at 14.*; see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Additionally, the administrative law judge chose to give "greater weight" to the better reasoned and documented opinions of Drs. Dahhan and Rosenberg, that claimant does not suffer from pneumoconiosis. *Id.; see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999)(explaining that "[administrative law judges] may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). We agree with the Director that the administrative law judge found Dr. Simpao's opinion outweighed, and that this finding does not indicate a failure by the Director to fulfill his statutory obligation to provide claimant with a complete pulmonary evaluation. *Cf. Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

Because the administrative law judge properly found that the new evidence fails to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), claimant has failed to establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). We therefore affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge