BRB Nos. 06-0153 BLA
and 06-0153 BLA-A

JAY BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 10/31/2006
	)	
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 on Remand of Alice M. Craft, 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.

Barry H. Joyner (Howard M. Radzely, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (2003-BLA-5346) of Administrative Law Judge Alice M. Craft denying benefits 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). In a Decision and Order issued on April 16, 2004, the administrative law judge accepted employer's stipulation that claimant had thirty-three years of qualifying coal mine employment, and determined that this claim, filed on March 13, 2001, was subject to the provisions at 20 C.F.R. §725.309(d) and was timely filed pursuant to 20 C.F.R. §725.308.[1] The administrative law judge then determined that claimant had established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202 in his prior claim, and found that new evidence submitted in support of this subsequent claim was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge thus found that claimant had failed to demonstrate a change in an applicable condition of entitlement since the denial of his prior claim as required by 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

On appeal, the Board did not reach claimant's arguments on the merits of the claim, but vacated the administrative law judge's findings pursuant to Section 725.308 and remanded the case for the administrative law judge to consider whether this subsequent claim was timely filed under the standard set forth by the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[2] *Bowling v. Whitaker Coal Corp.*, BRB Nos. 04-0651 BLA and 04-0651 BLA-A (Apr. 14, 2005)(unpub.).

On remand, the administrative law judge again found that this claim was timely filed pursuant to Section 725.308, and reinstated her findings on the merits. Claimant appeals, challenging the administrative law judge's finding that the newly-submitted medical opinions of record failed to establish total respiratory disability at Section 718.204(b)(2)(iv).[3] Employer responds, urging affirmance of the denial of benefits, and cross-appeals, challenging the administrative law judge's finding of timeliness pursuant to Section 725.308. The Director, Office of Workers' Compensation Programs (the

[1] The full procedural history of this case is set forth in *Bowling v. Whitaker Coal Corp.*, BRB Nos. 04-0651 BLA and 04-0651 BLA-A (Apr. 14, 2005)(unpub.).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mine industry in the Commonwealth of Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] Claimant's reference to "Section 718.204(c)" is misplaced. *See* Claimant's Brief at 2. The regulatory provisions for establishing total respiratory or pulmonary disability are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv).

Director), has filed a limited response, urging the Board to reject employer's arguments on cross-appeal.[4]

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).

Claimant contends that the newly-submitted medical opinion of Dr. Baker is reasoned, documented, and sufficient to establish total respiratory disability at Section 718.204(b)(2)(iv), and that the administrative law judge should not have rejected the opinion for the reasons provided but instead should have compared the exertional requirements of claimant's usual coal mine employment, as a repairman, supply loader and coal dumper, with Dr. Baker's assessment of disability.[5] Claimant's arguments are without merit, and essentially amount to a request to reweigh the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

The administrative law judge accurately reviewed the newly-submitted medical opinions of record, and determined that Dr. Baker was the only physician who opined that claimant was "100% occupationally disabled," Director's Exhibit 12, based on his diagnosis of a Class I impairment and a second impairment pursuant to the *Guides to the Evaluation of Permanent Impairment*, which states that persons who develop pneumoconiosis should limit further exposure to dust.[6] 2004 Decision and Order at 7-9.

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that the newly-submitted evidence of record did not establish complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] Claimant additionally asserts that Dr. Baker's opinion is buttressed by the opinion of Dr. Hussain, who diagnosed a mild pulmonary impairment. Claimant's Brief at 4-5. The administrative law judge accurately determined, however, that Dr. Hussain concluded that claimant retained the respiratory capacity to perform his usual coal mine employment. 2004 Decision and Order at 8; Director's Exhibit 10.

[6] Dr. Baker diagnosed a Class I impairment based on FEV_1 and vital capacity values that were greater than 80% of the predicted value, which is equivalent to a 0% impairment as listed in Table 5-12 of the *Guides to the Evaluation of Permanent Impairment, Fifth Edition*. Director's Exhibit 12.

The administrative law judge properly found that Dr. Baker's opinion was not the equivalent of a finding of total respiratory disability, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83 (1988), and permissibly credited the contrary opinions of Drs. Hussain, Rosenberg and Broudy, that claimant retained the respiratory capacity to perform his usual coal mine work, which were consistent with the objective medical evidence of record.[7] 2004 Decision and Order at 9; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). The administrative law judge's finding, that the newly-submitted medical opinions of record are insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv), is supported by substantial evidence and thus is affirmed. We, therefore, affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309(d) because claimant has not established that one of the applicable elements of entitlement has changed since the date of the denial of his prior claim. 2004 Decision and Order at 9-10; *see White v. New White Coal Co.*, 23 BLR 1-1 (2004). Consequently, we affirm the administrative law judge's denial of benefits and need not reach employer's arguments on cross-appeal.

[7] Claimant further asserts that because "pneumoconiosis is proven to be a progressive and irreversible disease," it can be concluded that his condition has worsened, and, therefore, that his ability to perform his usual coal mine work or comparable and gainful work is adversely affected. Claimant's Brief at 5. We reject claimant's argument, as an administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b).

Accordingly, the administrative law judge's Decision and Order on Remand 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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REGINA C. McGRANERY
Administrative Appeals Judge