BRB Nos. 07-0211 BLA
and 07-0211 BLA-A

B.W.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
PHILLIPPI DEVELOPMENT, INCORPORATED	)	DATE ISSUED: 10/31/2007
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMONCONIOSIS FUND	)	
	)	
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 Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Jack R. Heneks, Jr., Uniontown, Pennsylvania, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; 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 (05-BLA-514) of Administrative Law Judge Adele Higgins Odegard 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] The administrative law judge, based on a stipulation by the parties and evidence in the record, credited claimant with thirty years of qualifying coal mine employment and adjudicated this claim, filed on June 28, 2002, pursuant to the regulatory provisions contained in 20 C.F.R. Part 718.[2] The administrative law judge found that employer was properly designated the responsible operator, but that the evidence developed since the most recent denial of benefits was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1)-(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), (c). Consequently, the administrative law judge determined that claimant failed to demonstrate a change in an applicable condition of entitlement as required by 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 x-ray and medical opinion evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[3] Claimant also argues that the

[1] Claimant filed a claim for benefits on December 11, 1996, which the district director denied on April 29, 1997, based on claimant's failure to establish any of the elements of entitlement. Director's Exhibit 1; *see* Decision and Order at 3. Claimant took no further action until filing his subsequent claim on June 28, 2002. Director's Exhibit 3.

[2] The record indicates that claimant's last coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked thirty years in coal mine employment, and her findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(3) or a totally disabling respiratory or pulmonary

administrative law judge erred in finding that the evidence did not establish total disability or disability causation pursuant to 20 C.F.R. §718.204(b)(2), (c). Employer responds in support of the administrative law judge's denial of benefits. On cross-appeal, employer challenges its designation as the responsible operator. The Director, Office of Workers' Compensation Programs, has not filed a response brief on the merits of claimant's appeal, but responds to employer's cross-appeal, urging affirmance of the administrative law judge's designation of employer as the responsible operator.

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).

In order to establish his entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis arising out of coal mine employment, and that he is totally disabled due to pneumoconiosis. 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 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26 (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., Inc.*, 23 BLR 1-1 (2004); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995) (applying prior regulations, claimant must establish at least one element of entitlement previously adjudicated against him). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1.

Claimant contends that, pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge disregarded the newly submitted x-ray interpretations by Drs. Binns and Devabhaktuni. Claimant's Brief at 1. Claimant's argument is without merit. Contrary to claimant's contentions, a review of the administrative law judge's decision reveals that in

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impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

evaluating the x-ray evidence, the administrative law judge did not ignore the interpretations of Drs. Binns and Devabhaktuni. With respect to the November 7, 2002 x-ray, the administrative law judge, noting that Dr. Devabhaktuni had no radiological qualifications, reasonably gave his interpretation little weight. Decision and Order at 12; Director's Exhibit 13. In addition, because Dr. Binns read the November 7, 2002 x-ray for quality purposes only, the administrative law judge rationally concluded that it was unclear from the record how Dr. Binns interpreted the x-ray with respect to the presence of pneumoconiosis. Decision and Order at 11 n.18, 12; Director's Exhibit 14. The administrative law judge thus permissibly deferred to the readings of those physicians who were dually-qualified as Board-certified radiologists and B readers to find that a preponderance of the newly submitted x-ray evidence did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999) (*en banc on recon*.); Decision and Order at 11-12; Director's Exhibits 13, 30; Employer's Exhibit 1. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1), as it is supported by substantial evidence.

Claimant's next asserts that pursuant to Section 718.202(a)(4), the administrative law judge improperly discredited the newly submitted reports and/or testimony of Drs. Gress and Sachs, that claimant suffered from pneumoconiosis. We reject claimant's assertion. The administrative law judge indicated that while Drs. Gress and Sachs diagnosed pneumoconiosis, both physicians relied primarily on x-rays in reaching their conclusions. However, as the administrative law judge noted, Dr. Sachs relied on an x-ray that he himself interpreted, but that was not part of the record evidence. Decision and Order at 16 n.25; Claimant's Exhibit 2. In addition, the administrative law judge determined that Dr. Gress's medical report was not well reasoned and, therefore, was entitled to little weight because Dr. Gress relied on two x-ray readings, one of which was reported to him by Dr. Sachs, and the other of which was his own interpretation of an x-ray that had been refuted by a physician with superior qualifications, Dr. Abrahams. Decision and Order at 13-16; Director's Exhibit 30; Claimant's Exhibit 1. Whether a medical opinion is sufficiently documented and reasoned is for the administrative law judge to decide. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149; *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988)(*en banc*). Based upon the evidence set forth above, the administrative law judge permissibly accorded diminished weight to the opinions of Drs. Sachs and Gress in light of their reliance upon discredited x-ray evidence. Decision and Order at 16; *see Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

Substantial evidence also supports the administrative law judge's finding that all of the newly submitted evidence relating to the existence of pneumoconiosis, when weighed together, is insufficient to establish the existence of pneumoconiosis pursuant to

20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). This finding is therefore affirmed.

Claimant next contends that the administrative law judge erred in finding the newly submitted pulmonary function study evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). Claimant argues that the qualifying pulmonary function study values reported by Drs. Sachs and Gress were improperly rejected by the administrative law judge and "[s]uch tests met [c]laimant's burden and should have been accepted by the [administrative law judge]," as establishing that claimant is totally disabled.[4] Claimant's Brief at 2. Claimant therefore alleges that the administrative law judge erred in finding the evidence insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i). We disagree.

Pursuant to Section 718.204(b)(2)(i), the administrative law judge rationally found that the newly submitted pulmonary function studies of record did not establish that claimant was totally disabled, in spite of the qualifying values obtained in the studies administered by Drs. Sachs and Gress.[5] The administrative law judge acted properly in basing his finding upon the fact that the March 22, 2000 study obtained by Dr. Sachs was nonconforming "as the record contains only one flow-volume loop tracing, not the multiple tracings that are required under the regulation," and Dr. Gress's October 23, 2002 study was nonconforming in that it "did not contain flow volume loops." 20 C.F.R. 718.103(b); *Estes v. Director, OWCP*7 BLR 1-414 (1984); Decision and Order at 19; Director's Exhibit 30; Claimant's Exhibit 2. Since "there is no record of a valid test in which [claimant] has obtained a qualifying FEV_1 value," the administrative law judge properly found that claimant could not establish total disability pursuant to Section 718.204(b)(2)(i) by means of the pulmonary function study evidence. Decision and Order at 19.

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[4] Contrary to claimant's assertion, although an administrative law judge may find that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i) based upon his weighing of the pulmonary function study evidence, he must also weigh together all of the contrary probative evidence of record, like and unlike, in determining whether the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b) overall. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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*).

[5] A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i)-(ii).

Claimant next argues that the administrative law judge erred in finding that the newly submitted medical opinions did not contain reasoned diagnoses of total respiratory disability pursuant to Section 718.204(b)(2)(iv). This contention is without merit. The administrative law judge indicated correctly that Dr. Devabhaktuni diagnosed a moderate pulmonary impairment based on claimant's pulmonary function test results, but "[a]t his deposition, Dr. Devabhaktuni stated that he was unable to determine whether [claimant] was totally disabled, from a pulmonary perspective." Decision and Order at 20; Director's Exhibit 6 at 20-21. Regarding Dr. Gress's opinion, the administrative law judge also correctly noted that although the doctor concluded, in his written report, that claimant was disabled from coal mine employment, Dr. Gress stated in his deposition that "[claimant] was partially disabled from employment based on his pulmonary impairments alone." Decision and Order at 20-21; Claimant's Exhibit 1 at 39-42. With respect to Dr. Sachs's report, the administrative law judge stated accurately that "Dr. Sachs did not specifically determine whether [claimant] was disabled," but advised against returning to coal mine employment. Decision and Order at 21; Claimant's Exhibit 2. Regarding Dr. Fino's opinion, the administrative law judge stated that while "[i]n his written report, Dr. Fino concluded that [claimant's] inability to take a deep breath would cause him to be disabled…Dr. Fino did not specify the degree of [claimant's] disability, or relate this disability to any of [claimant's] coal mine employment positions." Decision and Order at 21; Employer's Exhibit 3. With respect to Dr. Renn's opinion, the administrative law judge indicated correctly that "[o]f the physicians who ventured opinions on this matter, only Dr. Renn concluded that the Claimant's respiratory condition should be considered disabling, when considering the Claimant's coal mine employment. Dr. Renn, however, did not explain what objective test results led him to his conclusion." Decision and Order at 21.

Because the administrative law judge's finding that the newly submitted opinions of Drs. Devabhaktuni, Gress, Sachs, Fino, and Renn do not contain reasoned, documented, and unequivocal diagnoses of a totally disabling respiratory or pulmonary impairment is supported by substantial evidence, the administrative law judge rationally concluded that these opinions were insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Decision and Order at 21; *see Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 and 13 BLR 1-46 (1986) *aff'd on recon.*, 9 BLR 1-104 (1986)(en banc). Thus, we affirm the administrative law judge's determination that claimant failed to establish, by a preponderance of the evidence, that he is totally disabled under Section 718.204(b)(2)(iv). *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark*, 12 BLR 1-149; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). We also affirm, as supported by substantial evidence, the administrative law

judge's finding that the newly submitted evidence, when considered as a whole, is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Collins*, 21 BLR at 1-191; *Beatty v. Danri Corp.*, 16 BLR 1-11 (1991).

Based upon the administrative law judge's rational determination that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis or total disability, we hold that she also rationally found that claimant could not demonstrate that he is totally disabled due to pneumoconiosis pursuant to Section 718.204(c).[6] Decision and Order at 22. We must affirm, therefore, her determination

[6] We decline to address claimant's arguments concerning the administrative law judge's failure to resolve the conflict in the evidence regarding the effect of claimant's weight gain on his breathing problems and the administrative law judge's decision to reject the opinions of Drs. Gress and Sachs. Based upon the administrative law judge's permissible determination that claimant could not establish that he is totally disabled due to pneumoconiosis because he did not prove that he has pneumoconiosis or that he is totally disabled, error, if any, in the administrative law judge's consideration of the newly submitted evidence under 20 C.F.R. §718.204(c) is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

that claimant failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309.[7] 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3; *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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

[7] In light of our disposition of this case based upon the administrative law judge's appropriate finding under 20 C.F.R. §725.309(d), we decline to address employer's contentions, on cross-appeal, that the administrative law judge erred in her designation of the responsible operator. *Larioni*, 6 BLR at 1-1277.