BRB Nos. 98-0590 BLA
and 98-0590 BLA-A

CAROL WILLIAM DUKES

Claimant-Respondent

Cross-Petitioner

v.

PEABODY COAL COMPANY

and

OLD REPUBLIC INSURANCE COMPANY

Employer/Carrier-Petitioners
Cross-Respondents

COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-In-Interest

DIRECTOR, OFFICE OF WORKERS'

)	)
)	)
)	)
)	)
)	)
)	)
)	)
)	)
)	)
)	)
)	)
) DATE ISSUED: 9/9/99	) DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley, Madisonville, Kentucky, for claimant.

Lawrence C. Renbaum (Arter & Hadden, LLP), Washington, D.C., for employer/carrier.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (97-BLA-0563) of Administrative Law Judge Donald W. Mosser on a 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). Noting the existence of a previously denied claim,[1] the administrative law judge determined that the instant claim is a duplicate claim pursuant to 20 C.F.R. §725.309 and adjudicated it pursuant to 20 C.F.R. Part 718, based on claimant's August 7, 1995 filing date. Initially, the administrative law judge determined that this claim was timely filed and that Peabody Coal Company was the properly named responsible operator. In addition, the administrative law judge credited claimant with nineteen years of coal mine employment and found that claimant's usual coal mine employment, as a pit welder, required strenuous labor. Considering the newly submitted evidence of record, the administrative law judge found the new x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and, therefore, sufficient to establish a material change in

[1] Claimant filed his initial claim on February 17, 1988. Director's Exhibit 31. This claim was denied by the district director on July, 25, 1988. *Id*. By Order dated August 29, 1989, the case was administratively closed and deemed abandoned. *Id*.

conditions pursuant to Section 725.309(d). The administrative law judge next considered all of the evidence of record, old and new, and found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence of record was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits beginning August 1995, the month in which claimant filed his application for benefits.

On appeal, employer contends that the administrative law judge erred in finding the evidence of record sufficient to establish entitlement to benefits. Initially, employer contends that the administrative law judge erred in finding the instant claim was timely filed, arguing that the claim is barred by the statute of limitations set forth at 20 C.F.R. §725.308 and, thus, should have been dismissed as a matter of law. In addition, employer contends that the administrative law judge erred in applying an incorrect material change in conditions standard under 20 C.F.R. §725.309 and that the administrative law judge erred in finding the newly submitted x-ray evidence sufficient to establish a material change in conditions. Employer further contends that the administrative law judge erred in finding the medical evidence sufficient to establish that claimant was totally disabled and that the total disability was due to pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits.[2]

[2] Claimant, within his response brief, requests that the Board dismiss his cross-

The Director, Office of Workers' Compensation Programs (the Director), in response, requests that the Board reject employer's contention that the claim was not timely filed, contending that a duplicate claim need not be filed within the three year statute of limitations set forth at Section 725.308. In addition, the Director requests that the Board reject employer's contention that the administrative law judge erred in applying the "later evidence rule" in his weighing of the x-ray evidence of record. The Director, however, declines to address the remainder of employer's contentions regarding the administrative law judge's weighing of the medical evidence of record. In its reply brief, employer reiterates the arguments set forth in its Petition for Review and brief.[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 supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

---

appeal docketed as BRB No. 98-0590 BLA-A. There have been no objections to claimant's request. We, therefore, grant claimant's request thereby dismissing the cross-appeal docketed as BRB No. 98-0590 BLA-A. 20 C.F.R. §802.401.

[3] The parties do not challenge the administrative law judge's decision to credit claimant with nineteen years of coal mine employment or his findings pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3). These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Initially, employer contends that the administrative law judge erred in finding that the instant claim was not barred by the statute of limitations set forth at Section 725.308.[4] Specifically, employer contends that inasmuch as claimant received his first diagnosis of total disability in 1987, any claim filed more than three years after that date is untimely filed. As a result, employer alleges that claimant's August 1995 claim was barred by the terms of Section 725.308. In its reply brief, employer further argues that the decision of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), while not specifically rejecting the Board's holding in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990)(the statute of limitations set forth in Section 725.308 applies only to the initial application for benefits and the filing of any subsequent claim will be considered timely), nonetheless, requires that a miner perform additional coal mine employment subsequent to a denied claim, in order to file a duplicate claim. We disagree.

---

[4] Section 725.308(a) states, in pertinent part:

> A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later.

20 C.F.R. §725.308(a), implementing Section 422(f)(1), (2) of the Act, 30 U.S.C. §932(f)(1), (2).

Contrary to employer's contention, the Sixth Circuit's holding in *Ross* does not necessitate that claimant must be employed after the initial denial of benefits. Rather, the court held that based on the facts of the case before it, establishing that claimant returned to coal mining following the initial denial of benefits, it need not reach the issue of the necessity of returning to coal mine employment in a duplicate claim situation. *Ross*, *supra*. However, the court further noted that the Act provides for the filing of sequential applications and, that given the progressive nature of pneumoconiosis, claimant must be allowed to reapply for benefits if the first application was premature. *Id*. Consequently, we reject employer's contention that claimant's duplicate claim is time barred under Section 725.308, absent a showing that he returned to coal mine employment after the denial of his initial claim, and, thus, affirm the administrative law judge's finding that the instant claim was timely filed. *See Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); *Faulk, supra*.

Moreover, we reject employer's contention that the recent decision of the United States Supreme Court in *Metropolitan Stevedore Co. v. Rambo [Rambo III]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997), bars the filing of duplicate claims. Employer argues that neither the Longshore Act nor the Black Lung Benefits Act provides statutory authority for the adjudication of duplicate claims when the original claim has been denied for more than one year and the miner has not had subsequent exposure to coal dust. We disagree. Contrary to employer's contention, *Rambo II* does not bar the filing of the instant duplicate claim. *Rambo II*, in which modification was at issue, is inapposite to a consideration of the instant case involving a duplicate claim. The issue in *Rambo II* was whether

a longshoreman who was experiencing no present, post-work injury reduction in wage-earning capacity, could nonetheless be entitled to nominal benefits so as to toll the one year time limitation for filing for modification. The Supreme Court did not indicate in *Rambo II* that its holding had any bearing whatsoever on duplicate black lung claims. Therefore, we reject employer's contention.

Employer further argues that the administrative law judge erred in his evaluation of the newly submitted evidence and, thus, contends that the evidence does not support a determination that the newly submitted evidence was sufficient to establish a material change in conditions. In addition, employer challenges the administrative law judge's weighing of the new x-ray evidence of record, contending that the administrative law judge erred in relying on the "later evidence rule" in finding that the new x-ray evidence was sufficient to establish the existence of pneumoconiosis and thus, a material change in conditions. We disagree.

Contrary to employer's contention, the administrative law judge reasonably accorded more weight to the most recent x-ray of evidence of record, particularly the film dated April 17, 1997, inasmuch as it showed claimant's current condition and was consistent with the progressive nature of pneumoconiosis. *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997). Likewise, the administrative law judge reasonably accorded greater weight to Dr. Bassali's positive reading of that film, based on his superior qualifications as a B reader and Board-certified radiologist, over the contrary readings of Drs. Branscomb and Selby, who are B readers. Decision and Order at 5; Claimant's Exhibit 2;

Employer's Exhibits 3, 5; *Woodward, supra; Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Since the administrative law judge considered the relevant evidence of record,[5] we affirm his finding that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Additionally, we reject employer's contention that the administrative law judge erred in failing to apply properly the standard enunciated in *Ross*, regarding the evaluation of the newly submitted evidence. In applying the *Ross* standard, the administrative law judge stated that he must review the evidence submitted subsequent to the July 25, 1988 denial of benefits to determine whether claimant has established any of the elements of entitlement that were previously adjudicated against him. Decision and Order at 5; *see also* Director's Exhibit 31. With regard to the new x-ray evidence, the administrative law judge reasonably found the new x-ray evidence was sufficient to establish the existence of pneumoconiosis, based on his decision to accord greatest weight to Dr. Bassali's interpretation of the April 17, 1997, which the physician opined exhibited 1/2 pneumoconiosis, over the contrary interpretations of this film as well as interpretations of earlier films, *see* discussion, *supra*. Decision and Order at 5-6. Therefore, the administrative law judge found that the existence of pneumoconiosis, one of the elements previously adjudicated against claimant,

---

[5] In addition, the administrative law judge found that the April 1997 x-ray film was over one year more recent than the next preceding film, which produced conflicting results by equally qualified readers. Decision and Order at 5; Director's Exhibits 27-29; Employer's Exhibits 1, 2.

was established pursuant to Section 718.202(a)(1) and, thus, found the evidence sufficient to establish that the claimant's condition has materially changed since the denial of his previous claim. Decision and Order at 6. Consequently, since the administrative law judge rationally found that the evidence submitted since the previous denial established that claimant's condition has materially changed since the previous denial, thus meeting even the most stringent interpretation of the requirements set forth in *Ross*, we affirm his finding that claimant established a material change in conditions pursuant to Section 725.309. *See* 20 C.F.R. §725.309; *Ross, supra*.

In challenging the administrative law judge's findings on the merits, employer contends that the administrative law judge erred in finding that the medical evidence of record, old and new, was sufficient to establish total disability pursuant to §718.204(c).[6] Specifically, employer contends that the administrative law judge erred in finding the opinions of Drs. Simpao and Selby sufficient to establish total respiratory disability inasmuch as neither physician specifically stated that claimant was totally disabled.

In its argument that the administrative law judge erred in finding the medical evidence sufficient to establish total respiratory disability pursuant to

---

[6] Employer, in challenging the administrative law judge's findings on the merits of entitlement, does not challenge the administrative law judge's finding that the x-ray evidence of record, old and new, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Section 718.204(c), employer is merely seeking a reweighing of the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Specifically, we reject employer's contention that Dr. Simpao's opinion is not reliable because it was based on a pulmonary function study which was invalidated by reviewing physicians. The administrative law judge, in weighing this opinion, noted the invalidation reports, but, nonetheless, reasonably exercised his discretion in finding that Dr. Simpao's opinion was supported by its underlying documentation. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *see also Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Moreover, contrary to employer's contention, Dr. Simpao not only stated that claimant's impairment was moderate to total, he further opined in his 1997 letter that claimant's pulmonary impairment would make him unable to perform his previous coal mine employment. Claimant's Exhibit 1; *see also* Director's Exhibits 8, 9; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

We also reject employer's contention that the administrative law judge erred in finding the opinion of Dr. Selby supported a finding of total disability. While employer is correct in stating that Dr. Selby did not diagnose a totally disabling respiratory impairment, it was not inherently unreasonable for the administrative law judge to infer a total respiratory disability from Dr. Selby's statement that had "claimant not smoked, he would have the respiratory and pulmonary capacity to perform even yet today any and all previous coal mine employment." Employer's Exhibit 3; *see Lafferty, supra; Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d

622, 11 BLR 2-147 (6th Cir. 1988). Inasmuch as the administrative law judge considered all the relevant evidence and employer does not otherwise challenge the administrative law judge's findings, we affirm his determination that the medical evidence of record was sufficient to establish total respiratory disability pursuant to Section 718.204(c).

Employer also challenges the administrative law judge's finding that the medical evidence of record was sufficient to establish that claimant's total disability was due, at least in part, to his pneumoconiosis. Employer argues that the administrative law judge erred in relying on the opinion of Dr. Simpao, that claimant's total disability was due to pneumoconiosis, inasmuch as Dr. Simpao did not consider claimant's fifty year history of cigarette smoking. In addition, employer contends that the administrative law judge erred in rejecting the opinions of Drs. Selby, Branscomb and Fino for improper reasons inasmuch as these opinions are based on the presence of a smoking induced respiratory impairment rather than the absence of pneumoconiosis. Also, employer contends that the administrative law judge erred in providing no explanation for "ignoring" the superior qualifications of Drs. Branscomb, Fino and Selby. Employer's Brief at 27 (unpaged).

Initially, contrary to employer's contention, the relevant inquiry in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, is whether claimant's total respiratory disability was due, at least in part, to pneumoconiosis. 20 C.F.R. §718.204(b); *see Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Moreover, contrary to employer's contention, the administrative law judge reasonably exercised his discretion as

trier-of-fact in according no weight to the opinions of Drs. Branscomb, Fino and Selby on this issue because these physicians did not diagnose pneumoconiosis, which is contrary to the administrative law judge's finding on this issue. Decision and Order at 16; Employer's Exhibits 3-5; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036,17 BLR 2-16 (6th Cir. 1993); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-474 (1986). In addition, the administrative law judge was not required to give greater weight to the opinions of Drs. Branscomb, Fino and Selby, based on their superior professional credentials. Rather, that is one factor that the administrative law judge may take into consideration in weighing the medical evidence of record. *See Clark, supra*; *Worley, supra*. Consequently, we affirm the administrative law judge's decision to accord little weight to the opinions of Drs. Branscomb, Fino and Selby, as within a reasonable exercise of his discretion. *See Clark, supra*; *Lafferty, supra*.

We also reject employer's contention that the administrative law judge erred in crediting Dr. Simpao's opinion, based on employer's assertion that Dr. Simpao did not consider claimant's smoking history in rendering his opinion. Employer's Brief at 25-26 (unpaged). Contrary to employer's contention, Dr. Simpao, in connection with his 1995 examination of claimant, recorded claimant's smoking history as a fifty (50) year history of cigarette smoking, with claimant quitting six months prior to the September 1995 examination. Director's Exhibits 8, 9; *see also* Decision and Order at 11; Claimant's Exhibit 1. Inasmuch as Dr. Simpao related an accurate smoking history in his 1995 medical opinion, which the administrative law judge noted in his discussion of this report, Decision and Order at 11, we hold that the administrative law judge acted within his discretion in crediting Dr. Simpao's opinion as reasoned and documented. *See*

Lafferty, supra; Kuchwara, supra. The remainder of employer's argument is merely a request for the Board to reweigh the medical opinion evidence, which the Board may not do. *Anderson, supra*; *Worley, supra*. Consequently, we affirm the administrative law judge's determination that the evidence is sufficient to establish that claimant's total disability was due, at least in part, to his pneumoconiosis. Decision and Order at 17; 20 C.F.R. §718.204(b); *Adams, supra*.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

_____

ROY P. SMITH
Administrative Appeals Judge

_____

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge