



PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (03-BLA-0179) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) on a request for modification<sup>1</sup> in a miner’s claim filed pursuant to the provisions of Title IV of

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<sup>1</sup> The procedural history of this case is as follows: Claimant filed the instant claim on August 25, 1992. Director’s Exhibit 1. Administrative Law Judge Bernard J. Gilday, Jr. denied benefits by Decision and Order dated January 24, 1994. Director’s Exhibit 39. Claimant appealed. The Board, in *Sizemore v. Leeco, Inc.*, BRB No. 94-0785 BLA (Nov. 4, 1994)(unpublished), affirmed Judge Gilday’s denial of benefits. Director’s Exhibit 50. Claimant then requested modification, which the district director denied on August 4, 1995. Director’s Exhibit 59. Following a hearing, Administrative Law Judge Gerald M. Tierney denied claimant’s request for modification by Decision and Order dated December 16, 1996. Director’s Exhibit 63.

Claimant appealed. The Board, in *Sizemore v. Leeco, Inc.*, BRB No. 97-0548 BLA (Jan. 28, 1998)(unpublished), affirmed Judge Tierney’s findings on modification at 20 C.F.R. §718.204(c) (2000) and vacated his findings at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Director’s Exhibit 67. The Board thus remanded the case for further findings in connection with claimant’s request for modification at 20 C.F.R. §725.310 (2000). The Board subsequently denied employer’s motion for reconsideration. Director’s Exhibit 69. In his Decision and Order on Remand – Denial dated July 27, 1999, Judge Tierney found that the newly submitted x-ray evidence “did not change the fact that when considered together all x-ray evidence failed to prove pneumoconiosis” at 20 C.F.R. §718.202(a)(1) (2000). Director’s Exhibit 10. Judge Tierney thus “reinstated” his denial of benefits. *Id.*

Claimant appealed. The Board, in *Sizemore v. Leeco, Inc.*, BRB No. 99-1180 BLA (Aug. 16, 2000)(unpublished), affirmed Judge Tierney’s finding at 20 C.F.R. §718.202(a)(1) (2000). Director’s Exhibit 74. The Board further remanded the case for Judge Tierney to determine, pursuant to the Board’s previous instructions, whether the newly submitted medical opinion evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000) and whether claimant established a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) in the prior denial of benefits. *Id.* By Decision and Order on Remand – Denying Benefits dated January 26, 2001, Judge Tierney found that the newly submitted evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) (2000) or total disability at 20 C.F.R. §718.204(c) (2000). Director’s Exhibit 75. Judge Tierney also found that claimant failed to establish either a change in conditions or a mistake in a determination of fact at 20 C.F.R. §725.310 (2000) and thus failed to establish a ground for modification. *Id.*

the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).<sup>2</sup> In his Decision and Order - Denial of Benefits dated May 24, 2004, the administrative law judge credited claimant with twenty-five years of coal mine employment pursuant to the parties' stipulation. The administrative law judge found that the evidence submitted since Administrative Law Judge Gerald M. Tierney's January 26, 2001 denial of benefits, *see* Director's Exhibit 75, was insufficient to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iv).<sup>3</sup> The administrative law judge

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Claimant appealed. The Board, in *Sizemore v. Leeco, Inc.*, BRB No. 01-0450 BLA (Dec. 12, 2001)(unpublished), affirmed Judge Tierney's denial of benefits. Director's Exhibit 81. The Board rejected claimant's assertion that Judge Tierney erred in finding that Dr. Bushey's opinion failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) (2000) and, therefore, a basis for modification at 20 C.F.R. §725.310 (2000) under *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994). *Id.* On April 10, 2002, claimant filed a motion to withdraw the instant claim filed on August 25, 1992, and the district director granted claimant's motion on April 19, 2002. Director's Exhibits 1, 82, 83. The district director subsequently rejected employer's challenge to his granting of claimant's Motion. Director's Exhibits 84, 85.

Claimant filed a second claim on June 7, 2002, and submitted new evidence, including Dr. Simpao's August 16, 2002 report. Director's Exhibits 86, 89. By Proposed Decision and Order Denying Request for Modification dated January 13, 2003, the district director indicated that his prior granting of claimant's motion to withdraw the 1992 claim had been "deemed to have been inappropriate." Director's Exhibit 96. The district director accepted claimant's April 10, 2002 motion to withdraw as a timely request for modification of the Board's Decision and Order in *Sizemore v. Leeco, Inc.*, BRB No. 01-0450 BLA (Dec. 12, 2001)(unpublished). *Id.* The district director further denied claimant's request for modification. *Id.* Pursuant to claimant's request, a hearing was held before Administrative Law Judge Thomas F. Phalen, Jr., whose ensuing May 24, 2004 Decision and Order – Denial of Benefits is the subject of the instant appeal.

<sup>2</sup> 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.

<sup>3</sup> The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

thus determined that claimant failed to establish a change in conditions at 20 C.F.R. §725.310 (2000). The administrative law judge further found that the prior denial of benefits did not contain a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

On appeal, claimant alleges error in the administrative law judge's findings that the new evidence failed to establish both the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (a)(4), and total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv).<sup>4</sup> Employer responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief. The Director urges the Board to reject claimant's assertion that the administrative law judge erred in failing to exclude from the record certain x-ray evidence, pursuant to the evidentiary limitations provided at 20 C.F.R. §725.414. Citing 20 C.F.R. §725.2(c), the Director argues that the evidentiary limitations at 20 C.F.R. §725.414 do not apply to claims, such as the instant claim, that were pending on January 19, 2001.

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 applicable law, they are binding upon this Board and may not be disturbed. 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 administrative law judge "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority" of the negative x-ray readings, and "may have 'selectively analyzed' the x-ray evidence." Claimant's Brief at 3, 4.

Claimant's contentions lack merit. The newly submitted x-ray evidence consists of five interpretations of two x-rays. The August 16, 2002 x-ray was read as positive by Dr. Simpao, who had no special radiological qualifications, Director's Exhibit 89, and was reread as negative by Drs. Barrett and Wiot, both dually qualified as B readers and Board-certified radiologists, Director's Exhibit 90; Employer's Exhibit 6. The December 2, 2002 x-ray was read as negative by Dr. Poulos, a B reader, and by Dr. Dahhan, a B reader and Board-certified radiologist. Employer's Exhibits 1, 3. The administrative law

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<sup>4</sup> Claimant does not challenge the administrative law judge's findings that the new evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and (a)(3) or total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), and that the prior denial contained no mistake in a determination of fact at 20 C.F.R. §725.310 (2000). We thus affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge analyzed the quantitative and qualitative nature of the newly submitted x-ray evidence, and specifically found that Dr. Simpao did not “hold any advanced credentials for the interpretation of chest x-rays.” Decision and Order at 10. The administrative law judge properly relied on the negative readings rendered by better qualified physicians to find that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Further, claimant provides no support for his assertion that the administrative law judge may have selectively analyzed the x-ray evidence. See Claimant’s Brief at 4. Moreover, a review of the administrative law judge’s Decision and Order reveals that he considered the newly submitted x-ray evidence without engaging in a selective analysis. Decision and Order at 5-6, 10. We thus reject claimant’s assertion.

Claimant next contends that the administrative law judge committed reversible error by not excluding from the record one of the two rereadings of Dr. Simpao’s August 16, 2002 x-ray, which were submitted by employer in excess of the evidentiary limitations provided at 20 C.F.R. §725.414(a)(3)(ii). Claimant’s Brief at 3. Claimant requests a remand of the case for a proper evaluation of the evidence.

Claimant’s contention lacks merit. The evidentiary limitations provided at 20 C.F.R. §725.414 do not apply to claims, such as the instant claim, that were pending on January 19, 2001. 20 C.F.R. §725.2(c). We thus reject claimant’s assertion that the administrative law judge erred by considering all of the newly submitted x-ray evidence at 20 C.F.R. §718.202(a)(1), and deny claimant’s request for a remand of the case on this basis. Because the administrative law judge’s finding, that the newly submitted x-ray evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), is supported by substantial evidence and is in accordance with law, we affirm it.

Claimant next asserts that Dr. Simpao’s August 16, 2002 opinion, the only newly submitted medical opinion that contains a diagnosis of pneumoconiosis, see Director’s Exhibit 89, is reasoned and documented and should not have been rejected by the administrative law judge “for the reasons he provided,” at 20 C.F.R. §718.202(a)(4). Claimant’s Brief at 4-5.

Claimant’s contention lacks merit. By report dated August 16, 2002, Dr. Simpao diagnosed coal workers’ pneumoconiosis 1/1. Director’s Exhibit 89. Addressing the etiology of this diagnosis, Dr. Simpao indicated, “[A history of] [m]ultiple years of coal dust exposure is medically significant in his pulmonary impairment.” *Id.* At 20 C.F.R. §718.202(a)(4), the administrative law judge found that both the new opinion of Dr. Simpao and the new, contrary opinion of Dr. Dahhan, who found no evidence of pulmonary disease due to coal dust exposure by report dated December 5, 2002, Employer’s Exhibits 3, 5, were reasoned and documented “because they were based on Claimant’s history, coal mine employment history, physical findings, and test results.”

Decision and Order at 11. The administrative law judge, however, accorded greater weight to Dr. Dahhan's opinion in light of Dr. Dahhan's credentials as a Board-certified pulmonologist. *Id.*; *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge thereby provided a valid reason for according greater weight to Dr. Dahhan's opinion over Dr. Simpao's contrary opinion regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Based on the foregoing, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

Claimant contends that the administrative law judge erred in finding that the newly submitted medical evidence was insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b). Claimant asserts that Dr. Simpao's opinion should not have been rejected by the administrative law judge "for the reasons he provided." Claimant's Brief at 7. Claimant also asserts that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Simpao's opinion of disability."<sup>5</sup> *Id.* at 9.

Claimant's contentions lack merit. A review of the record shows that the administrative law judge addressed the exertional requirements of claimant's usual coal mine work in determining, at 20 C.F.R. §718.204(b)(2)(iv), the weight and credibility of the newly submitted medical opinions, including that of Dr. Simpao. Decision and Order at 13, 14. The administrative law judge specifically found that Dr. Simpao "considered an accurate account of Claimant's coal mine employment..." *Id.* at 13. The administrative law judge, however, ultimately relied on the opinion of Dr. Vuskovich, that claimant "had the pulmonary capacity to continue working in the coal industry, or [to] engage in any occupation that requires pulmonary capacity comparable to that required for successful coal industry employment." Employer's Exhibit 8. The administrative law judge found that while Dr. Vuskovich's opinion was not based on the physician's actual knowledge of the specific exertional requirements of claimant's usual coal mine employment, the scientific medical literature he relied upon to form his opinion was "an adequate basis" because it demonstrated that "claimant's mild pulmonary

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<sup>5</sup> Claimant's contention that Dr. Simpao's opinion is sufficient to invoke the "presumption of disability," Claimant's Brief at 6, is unavailing. The presumption of total disability due to pneumoconiosis provided in 20 C.F.R. Part 727, is inapplicable to the instant claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the instant claim, filed on August 25, 1992. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 1.

impairment would not prevent him from returning to arduous normal labor.” Decision and Order at 14. The administrative law judge also found, within his discretion, that Dr. Vuskovich set forth sufficient clinical observations and findings. *Id.* at 13, 14; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). The administrative law judge further permissibly found that Dr. Vuskovich’s opinion on total disability was enhanced by his Board-certification in occupational medicine. Decision and Order at 14; *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987). Based on the foregoing, we hold that the administrative law judge provided a rational basis for relying on Dr. Vuskovich’s opinion over Dr. Simpao’s opinion, upon which claimant relies. *See Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

Claimant further contends that the administrative law judge “made no mention of the claimant’s age, education or work experience in conjunction with his assessment that the claimant was not totally disabled.” Claimant’s Brief at 8. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Based on the foregoing, we affirm the administrative law judge’s finding that the newly submitted medical opinions, including Dr. Simpao’s opinion, are insufficient to establish total respiratory or pulmonary disability at 20 C.F.R. §718.204(b)(2)(iv), as it is supported by substantial evidence and is in accordance with law.

We thus further affirm the administrative law judge’s findings that the newly submitted evidence is insufficient to establish a ground for modification under either 20 C.F.R. §718.202(a) or 20 C.F.R. §718.204(b)(2). 20 C.F.R. §725.310 (2000). We, therefore, affirm the administrative law judge’s denial of claimant’s request for modification and the claim.

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

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge