BRB Nos. 05-0337 BLA
and 05-0337 BLA-A

ROBERT C. GILLENWATER	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
RANGER FUEL CORPORATION	)	
	)	DATE ISSUED: 12/12/2005
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 – Denying Benefits of Stephen L. Purcell, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Williams S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (03-BLA-5773) of Administrative Law Judge Stephen L. Purcell with respect to 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). Employer has filed a cross-appeal of the administrative law judge's Decision and Order. The administrative law judge determined that the claim before him, filed on March 28, 2002, was a subsequent claim pursuant to 20 C.F.R. §725.309 and that claimant's prior claim was denied because claimant did not establish any of the elements of entitlement. The administrative law judge found that the newly submitted evidence did not establish a change in an applicable condition of entitlement. Accordingly, the administrative law judge denied benefits.

Claimant contends that the administrative law judge erred in admitting and considering Dr. Brooks's medical report under 20 C.F.R. §§718.202(a)(4) and 718.204 because Dr. Brooks referred to an x-ray reading that was not admitted into the record. Claimant also argues that the administrative law judge did not properly weigh the newly submitted evidence supportive of his burden of proof under 20 C.F.R. §§718.202(a)(1), (a)(4), 718.204(b)(2)(iv) and (c).

Employer has responded and urges affirmance of the denial of benefits. In its cross-appeal, which employer has made contingent upon the Board finding merit in claimant's appeal, employer argues that claimant's most recent claim was not timely filed pursuant to 20 C.F.R. §725.308 and that the evidentiary limitations set forth in 20 C.F.R. §725.414 are not valid. The Director, Office of Workers' Compensation Programs (the Director), responds only to employer's cross-appeal and urges the Board to reject employer's arguments.[1]

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

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[1] We affirm the administrative law judge's findings under 20 C.F.R. §§718.202(a)(2), (a)(3), and 718.204(b)(2)(i)-(iii), as they have not been challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

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). In this case, claimant's prior claim was denied because he did not establish any of the elements of entitlement. Director's Exhibit 3. Consequently, claimant had to submit new evidence establishing at least one of these elements to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[2]

Pursuant to Section 718.202(a)(1), the administrative law judge noted that the record contained readings of four newly submitted films. With respect to the film dated June 6, 2002, the administrative law judge found that the positive reading by Dr. Patel, a Board-certified radiologist and B reader, was outweighed by the negative readings of Dr. Wiot, an equally qualified physician, and of Dr. Rao, who has no special radiological qualifications, but who is Board certified in internal medicine and pulmonary disease.[3] Decision and Order at 8; Director's Exhibits 17, 19; Claimant's Exhibit 4. The administrative law judge found that the x-rays dated November 6, 2002 and November 18, 2002 were in equipoise because they were read as positive and negative by an equal number of physicians who are both Board-certified radiologists and B readers. *Id*; Claimant's Exhibits 3, 7; Employer's Exhibits 5, 11. Regarding the April 2, 2003 film, the administrative law judge determined that it was positive because two of the three dually qualified readers interpreted it as positive for pneumoconiosis. *Id*; Claimant's Exhibits 1,2; Employer's Exhibit 7. The administrative law judge concluded that because

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibits 1-3; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3] The administrative law judge indicated that Dr. B. Patel, rather than Dr. M. Patel, read the June 6, 2002 film as positive for pneumoconiosis. Decision and Order at 8; Claimant's Exhibit 4. Both Drs. M. and B. Patel are Board-certified radiologists and B readers.

one film was positive and one film was negative and the remaining two were in equipoise, the newly submitted x-ray evidence as a whole was in equipoise and, therefore, insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1). Decision and Order at 9.

Claimant argues that remand of the present case is necessary, as the administrative law judge erred in disregarding Dr. Baker's positive reading of the November 6, 2002 x-ray and in crediting Dr. Rao's negative reading of the June 6, 2002 film along with Dr. Wiot's negative reading, when Dr. Rao does not have radiological qualifications equal to those of Dr. Wiot and Dr. Patel. These contentions are without merit. Dr. Baker's x-ray reading was not made part of the record, as none of the parties requested its admission as affirmative, rebuttal, or rehabilitative evidence pursuant to Section 725.414(a)(2) or (a)(3). At employer's request, the administrative law judge admitted Dr. Baker's opinion as rebuttal evidence on the issue of total disability. Hearing Transcript at 32.

Regarding the administrative law judge's treatment of Dr. Rao's x-ray reading, we hold that any error committed by the administrative law judge in crediting Dr. Rao's negative interpretation of the June 6, 2002 film is harmless. *Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge's ultimate determination regarding the newly submitted x-ray evidence was that:

> [S]ince all four of the chest x-rays have been interpreted as both positive and negative by dually-qualified physicians, I find that the x-ray evidence, when viewed chronologically, numerically, and based on physician qualifications, is in equipoise in this case.

Decision and Order at 9. If, as claimant suggests, Dr. Rao's negative reading were omitted from consideration, under the administrative law judge's analysis, the June 6, 2002 x-ray would be in equipoise, which would not alter the administrative law judge's conclusion regarding the x-ray evidence as a whole. Moreover, the administrative law judge gave a valid rationale for declining to accord greater weight to the most recent film, which he found was positive for pneumoconiosis. The administrative law judge rationally determined that the five month period between the November 18, 2002 and April 2, 2003 x-rays was too brief to justify giving additional weight to the latter film on the basis of recency. *Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). We affirm, therefore, the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1).

Under Section 718.202(a)(4), the administrative law judge concluded that the opinions in which Drs. Brooks and Castle stated that claimant is not suffering from

pneumoconiosis or any other dust related disease of the lungs were entitled to greater weight than the opinions in which Drs. Baker and O'Brien diagnosed pneumoconiosis. Decision and Order at 9-10; Director's Exhibits 16, 18, 22; Employer's Exhibits 6-8. Claimant argues that the administrative law judge erred in crediting Dr. Brooks's opinion under Section 718.202(a)(4) because Dr. Brooks relied upon an x-ray reading that was not admitted into the record. *See* 20 C.F.R. §725.414(a)(3)(i). Claimant also argues that the administrative law judge erred in discrediting the opinions in which pneumoconiosis was diagnosed, particularly the opinion of Dr. O'Brien, claimant's treating physician.

We affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), as it is rational and supported by substantial evidence. Contrary to claimant's allegation, the administrative law judge properly addressed the issue of Dr. Brooks's reference to an x-ray reading that was not made part of the record. After the formal hearing was conducted in this case, claimant asked the administrative law judge to exclude Dr. Brooks's report because he relied, in part, upon a negative x-ray interpretation by Dr. Silbiger which was not admitted into the record. Employer submitted Dr. Wiot's negative reading of the same film as part of its affirmative case. Hearing Transcript at 43, 45. The administrative law judge denied claimant's motion in an Order issued on March 18, 2004, finding that:

> Since the interpretations of Drs. Silbiger and Wiot are both consistent with the ultimate conclusion reached by Dr. Brooks, there is no reason to believe that Dr. Brooks's opinion would change if employer is allowed to substitute Dr. Wiot's interpretation for Dr. Silbiger's interpretation.

Order Denying Claimant's Motion to Exclude at 3. We affirm the administrative law judge's determination as it was within his discretion as fact-finder. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997).

Furthermore, in his Decision and Order, the administrative law judge rationally found that the opinions of Drs. Brooks and Castle are entitled to greater weight than the contrary opinions of record because they are based upon a greater amount of data, are more thoroughly explained, and are more consistent with the objective evidence of record. Decision and Order at 10; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997). The administrative also acted within his discretion as fact-finder in declining to accord greater weight to Dr. O'Brien's diagnosis of pneumoconiosis based upon his status as claimant's treating physician, as Dr. O'Brien did not identify the x-ray upon which he relied and did not explain how the pulmonary function study to which he referred supported the diagnosis of a coal dust related lung disease. *Id*; 20 C.F.R. §718.104(d)(5).

Regarding the administrative law judge's determination that claimant has not established total disability or total disability due to pneumoconiosis, claimant argues that because the administrative law judge relied upon Dr. Brooks's opinion and did not give proper deference to Dr. O'Brien's opinion, his findings under §718.204(b)(2) and (c) must be vacated. These contentions are without merit. As indicated, the administrative did not err in admitting and considering Dr. Brooks's opinion. In addition, the administrative law judge rationally found that the medical reports in which Drs. Brooks and Castle opined that claimant is not disabled are entitled to greater weight than the contrary opinions of record because they are based upon a greater amount of data, are more thoroughly explained, and are more consistent with the objective evidence of record. Decision and Order at 13; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-276. The administrative law judge also acted within his discretion in finding that Dr. O'Brien's diagnosis of a totally disabling impairment caused by coal dust exposure is entitled to little weight, as Dr. O'Brien relied upon a pulmonary function study that was invalidated and did not explain how he arrived at his conclusion. *Id.*

Thus, we affirm the administrative law judge's determination that the newly submitted evidence is insufficient to establish either total disability or total disability due to pneumoconiosis. We must also affirm, therefore, the administrative law judge's finding that claimant has not demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309(d). *White,* 23 BLR at 1-3. Accordingly, we need not address the arguments raised in employer's cross-appeal.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge