

BRB Nos. 09-0423 BLA
and 09-0423 BLA-A

ORVILLE BURNETTE)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 12/29/2009
)	
c/o JAMES RIVER SERVICES COMPANY)	
)	
Employer/Carrier- Respondents)	
Cross-Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order – Denying Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden Kentucky, for claimant.

Ronald E. Gilbertson (K&L Gates LLP), Washington, D.C., for employer.

Before: McGRANERY, HALL, and BOGGS Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denying Subsequent Claim (07-BLA-5601) of Administrative Law Judge Larry S. Merck (the administrative law judge), rendered 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).¹ The administrative law judge credited claimant with thirty-five years of coal mine employment² and found that the medical evidence developed since the denial of claimant's prior claim did not establish either the existence of pneumoconiosis or total disability, pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2). The administrative law judge therefore determined that claimant did not establish a change in an applicable condition of entitlement pursuant to 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 existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1),(4), and that total disability was not established at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, asserting that the administrative law judge erred in considering the element of pneumoconiosis to be an applicable condition of entitlement under 20 C.F.R. §725.309. The Director, Office of Workers' Compensation Programs, declined to file a substantive response 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 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).

¹ Claimant's first claim, filed on February 12, 2001, was denied by an administrative law judge on July 2, 2003, because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1 at 71. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on April 29, 2004. *Id.* at 21. Claimant appealed to the United States Court of Appeals for the Sixth Circuit, which affirmed the denial of benefits on April 28, 2005. *Id.* at 8. Claimant filed the instant claim on June 29, 2006. Director's Exhibit 3.

² The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

³ We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis and total disability based on the new evidence pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.204(b)(2)(i)-(iii), as those findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). The administrative law judge found that claimant’s prior claim was denied for failure to establish the existence of pneumoconiosis or total disability. Consequently, he found that to obtain review of the merits of the current claim, claimant had to submit new evidence establishing either the existence of pneumoconiosis or total disability. 20 C.F.R. §725.309(d)(2),(3).

Employer contends that the administrative law judge erred in considering the pneumoconiosis element to be an applicable condition of entitlement in which claimant could establish a change, because the Board affirmed the prior denial on the ground that claimant did not establish total disability, without addressing the prior administrative law judge’s finding that claimant did not establish the existence of pneumoconiosis. Thus, employer argues, total disability “was the only element ultimately decided adversely to claimant in the original claim.” Employer’s Brief at 5 n.1. We disagree. The record reflects that Administrative Law Judge Rudolf L. Jansen denied claimant’s prior claim based on alternative findings that claimant failed to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total disability pursuant to 20 C.F.R. §718.204(b). Director’s Exhibit 1 at 71. The fact that the Board chose to address only Judge Jansen’s disability finding in affirming his decision does not alter the fact that Judge Jansen decided both the pneumoconiosis and total disability elements against claimant. Judge Jansen’s adverse factual determinations became final. When the Board affirmed his determination that claimant had failed to establish total disability, the Board did not disturb his determination that claimant had also failed to establish the existence of pneumoconiosis. Consequently, the current administrative law judge did not err in finding that the pneumoconiosis element was adjudicated against claimant previously and thus, is an applicable condition of entitlement in the current claim for purposes of Section 725.309(d). We therefore reject employer’s allegation of error, and turn to the administrative law judge’s findings regarding the new evidence under Section 725.309(d).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered four readings of three new x-rays. As the administrative law judge correctly found, there

were no positive readings for the existence of pneumoconiosis.⁴ Based on the readers' qualifications and the absence of any conflicting interpretations of record, the administrative law judge found the July 18, 2005, November 20, 2006, and June 25, 2007 x-rays to be negative for pneumoconiosis, and rationally determined that the preponderance of the new x-ray evidence did not establish the existence of pneumoconiosis. See *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White*, 23 BLR at 1-4-5. Claimant's arguments that the administrative law judge improperly relied on the readers' credentials, that he deferred to the numerical superiority of the negative readings, and that he "may have 'selectively analyzed'" the x-ray evidence, lack merit. Claimant's Brief at 3. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the new medical reports of Drs. Simpao, Dahhan, and Rosenberg. Dr. Simpao diagnosed a mild pulmonary impairment due to coal dust exposure, based on claimant's symptoms, physical findings, and pulmonary function studies. Director's Exhibit 10 at 26. By contrast, Drs. Dahhan and Rosenberg opined that claimant has no evidence of any impairment and thus, no evidence of legal pneumoconiosis,⁵ citing claimant's normal pulmonary function and blood gas studies, and normal examination results. Director's Exhibit 13 at 4; Employer's Exhibit 2 at 4. Finding that each of the physicians explained his opinion and supported it with objective medical evidence, the administrative law judge found all of the new medical reports to be reasoned and documented. Decision and Order at 14. The administrative law judge further found the opinions of Drs. Dahhan and Rosenberg to be entitled to "at least as much weight as, if not more than, the opinion of Dr. Simpao," because they were consistent with the preponderance of normal objective studies. *Id.* The administrative law judge therefore found that claimant did not establish the existence of pneumoconiosis through a preponderance of the new medical opinion evidence. *Id.*

⁴ Dr. Westerfield, a B reader, and Dr. Scott, a Board-certified radiologist and B reader, interpreted the July 18, 2006 x-ray as negative for pneumoconiosis. Director's Exhibits 10, 12. Dr. Barrett, a Board-certified radiologist and B reader, reviewed the July 18, 2006 x-ray for its film quality only. Director's Exhibit 11. Dr. Dahhan, a B reader, interpreted the November 20, 2006, x-ray as negative for pneumoconiosis. Director's Exhibit 13. Dr. Halbert, a Board-certified radiologist and B reader, interpreted the June 25, 2007 x-ray as negative for pneumoconiosis. Employer's Exhibit 1.

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Claimant contends that the administrative law judge erred in rejecting Dr. Simpao's opinion on the ground that it was based, in part, on a positive x-ray that was not credited by the administrative law judge. Claimant further asserts that Dr. Simpao's opinion was well-reasoned, and that the administrative law judge "appears to have" interpreted medical data and substituted his own conclusion for that of Dr. Simpao. Claimant's Brief at 4-5. Claimant's arguments lack merit.

Contrary to claimant's assertion, Dr. Simpao did not consider any positive x-ray interpretations. As the administrative law judge observed, none of the new x-ray interpretations was positive for pneumoconiosis. Further, contrary to claimant's contention, the administrative law judge found Dr. Simpao's opinion to be reasoned. However, the administrative law judge did not find Dr. Simpao's opinion to be sufficient to carry claimant's burden of proof because he permissibly found the opinions of Drs. Dahhan and Rosenberg to be as well-reasoned and more consistent with the preponderance of the normal objective evidence. See *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Substantial evidence supports the administrative law judge's credibility determination with respect to Dr. Simpao's opinion. Therefore, we affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In his report dated July 18, 2006, Dr. Simpao stated that claimant "is not totally disabled from his mild pulmonary impairment." Director's Exhibit 10 at 26. Drs. Dahhan and Rosenberg opined that claimant has no evidence of any impairment, and is not totally disabled. Director's Exhibit 13, Employer's Exhibit 2. Finding that "there is no well-reasoned and well-documented opinion finding total disability," the administrative law judge determined that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 17.

Claimant asserts that, "[t]aking into consideration the claimant's condition against [further coal mine dust exposure], as well as the medical opinion of Dr. Simpao, it is rational to conclude that the claimant's condition prevents him from engaging in his usual employment in that such employment occurred in a dusty environment and involved exposure to dust on a daily basis." Claimant's Brief at 6. We disagree. Contrary to claimant's assertion, a physician's statement that a miner should limit further exposure to coal dust is not equivalent to a finding of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-88 (1988).

Claimant further asserts that the administrative law judge erred in failing to consider the physical requirements of claimant's previous coal mine work in conjunction

with the medical opinion evidence under Section 718.204(b)(2)(iv). We disagree. The administrative law judge rationally determined that the opinions of Drs. Simpao, Dahhan, and Rosenberg do not support a finding of total disability, as each physician explicitly stated that claimant is not totally disabled. Decision and Order at 16-17; Director's Exhibits 10, 13; Employer's Exhibits 1-3. Contrary to claimant's assertion, therefore, it was unnecessary for the administrative law judge to compare these physicians' opinions with the exertional requirements of claimant's usual coal mine work. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-123 (6th Cir. 2000); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

We also reject claimant's argument that, because pneumoconiosis is a progressive disease that must have worsened, it has thus affected his ability to perform his usual coal mine employment. Claimant's Brief at 6. The Act provides no such presumption, and an administrative law judge's findings must be based solely on the medical evidence of record. *White*, 23 BLR at 1-7 n.8. Therefore, we affirm the administrative law judge's finding that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv).

Because we have affirmed the administrative law judge's findings that the new medical evidence did not establish the existence of pneumoconiosis or total disability, we affirm the administrative law judge's determination that claimant did not establish a change in an applicable condition of entitlement, and we affirm the denial of benefits pursuant to Section 725.309(d).

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

SO ORDERED.

Regina C. McGranery
Administrative Appeals Judge

Betty Jean Hall
Administrative Appeals Judge

Judith S. Boggs
Administrative Appeals Judge