BRB Nos. 08-0384 BLA
and 08-0384 BLA-A

S.W.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
	)	
DON WOOTEN MINING COMPANY, INCORPORATED	)	DATE ISSUED: 02/26/2009
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 on Remand - Denying Benefits of Administrative Law Judge Donald W. Mosser, United States Department of Labor.

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

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor of Labor; Rae Ellen Frank James, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand - Denying Benefits (2003-BLA-06677) of Administrative Law Judge Donald W. Mosser, rendered on a subsequent claim,[1] filed on February 1, 2002, 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). Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on June 9, 2003. Director's Exhibit 36. Claimant requested a hearing, which was held before Administrative Law Judge Rudolph L. Jansen on March 2, 2005. On November 9, 2005, Judge Jansen issued a Decision and Order - Denying Benefits, in which he found that claimant's subsequent claim was untimely filed pursuant to 20 C.F.R. §725.308. Claimant appealed, and the Board reversed Judge Jansen's timeliness finding and remanded the case for consideration on the merits of entitlement. [*S.C.W.*] *v. Wooton Mining Co.*, BRB No. 06-0233 BLA (Nov. 30, 2006) (unpub.). On remand, because Judge Jansen had retired, the case was reassigned to Administrative Law Judge Donald W. Mosser (the administrative law judge). In his Decision and Order on Remand issued on January 25, 2008, the administrative law judge accepted the parties' stipulation, as supported by the record evidence, that claimant worked at least sixteen years in coal mine employment. The administrative law judge found that the newly submitted evidence was insufficient to establish a totally disabling

[1] Claimant filed his initial claim on May 7, 1975, which the district director denied on August 29, 1980, for failure to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no further action with regard to the denial of his May 1975 claim, until he filed a duplicate claim for benefits on July 2, 1985. Director's Exhibit 2. In a Decision and Order dated July 18, 1990, Administrative Law Judge Daniel Lee Stewart denied benefits, finding that while claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1) and a material change in conditions, *see* 20 C.F.R. §725.309(d) (2000), the evidence was insufficient to establish that he was totally disabled pursuant to 20 C.F.R. §718.204. *Id.* Claimant appealed, and the Board affirmed the denial of benefits. [*S. W.*] *v. Wooton Mining Co.*, BRB No. 90-1903 BLA (June 16, 1992) (unpub.). Claimant then filed a request for modification, which was denied by Administrative Law Judge Donald W. Mosser on April 17, 1995. Claimant's Exhibit 3. The Board also affirmed Judge Mosser's denial of claimant's modification request. [*S. W.*] *v. Wooton Mining Co.*, BRB No. 95-1480 BLA (Feb. 27, 1996) (unpub.). Thereafter, claimant filed his subsequent claim on February 1, 2002, which is the subject of this appeal. Director's Exhibit 3.

respiratory impairment pursuant to 20 C.F.R. §718.204(b) and thus, he found that claimant failed to demonstrate a change in one of the applicable conditions of entitlement, since the denial of his prior claim, pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in finding that he is not totally disabled from his usual coal mine work.[2] Claimant further asserts that because the administrative law judge concluded that Dr. Simpao's report was not well-reasoned on the issue of total disability, the Department of Labor (DOL) has failed to provide him with a complete and credible pulmonary evaluation as required under the Act. Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, asking the Board to reconsider its prior holding with regard to whether claimant timely filed his subsequent claim. Employer also states that it is reserving its objection to the Board's timeliness holding under 20 C.F.R. §725.308 for the purposes of a future appeal. The Director, Office of Workers' Compensation Programs (the Director), responds to claimant's appeal, urging the Board to reject claimant's assertion that he did not receive a complete pulmonary evaluation and affirm the denial of benefits. In response to employer's cross-appeal, the Director urges the Board to reject employer's arguments.

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.[3] 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).

When 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);

[2] Claimant asserts that the administrative law judge erred in finding that he is not totally disabled, citing to 20 C.F.R. §718.204(c). Claimant's Brief at 3. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2), while the provision pertaining to disability causation is now found at 20 C.F.R. §718.204(c).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

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). Because claimant's prior claim for benefits, filed on July 2, 1985, was denied for failure to establish the existence of a totally disabling respiratory impairment, claimant was required to prove, based on the newly submitted evidence, that he is totally disabled by a respiratory or pulmonary impairment in order for the administrative law judge to consider the merits of his claim.[4]

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), claimant challenges the administrative law judge's finding that he is not totally disabled. Claimant notes that the administrative law judge is required to consider the exertional requirements of his usual coal mine work in conjunction with the medical reports assessing disability.[5] Claimant's Brief at 3, citing *Cornett v. Benham Coal*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Hvizdzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); *Parsons v. Black Coal Co.*, 7 BLR 1-469 (1984). Claimant argues that because his usual coal mine employment included work as a supervisor, dozer operator, jeep operator, coal loader and timber setter, "[i]t can be reasonably concluded that such duties involved the claimant being exposed to heavy concentrations of dust on a daily basis" and that "[t]aking into consideration the claimant's condition against such duties, 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 3.

Contrary to claimant's contention, a miner's inability to withstand 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.*

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[4] In order to establish entitlement to benefits, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by 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 a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

[5] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant has at least sixteen years of coal mine employment, and his determinations that claimant failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 4.

Evans and Gambrel Co., 12 BLR 1-83, 1-88 (1988). Furthermore, there is no merit to claimant's assertion that the administrative law judge did not consider the exertional requirements of his usual coal mine work. *See Cornett*, 227 F.3d at 578, 22 BLR 2-124.

The administrative law judge considered claimant's testimony that he worked as a foreman, loader operator, dozer operator and mechanic and that his last job involved heavy lifting of up to forty pounds. Decision and Order at 3; Hearing Transcript at 11-13, 15. As noted by the administrative law judge, Dr. Simpao examined claimant at the request of the DOL on April 15, 2002 and opined that claimant suffered from a mild respiratory impairment and checked a box on the form indicating that claimant does not have the respiratory capacity to perform his last coal mine employment. Decision and Order at 6; Director's Exhibit 12. Although Dr. Simpao opined that claimant is totally disabled from his usual coal mine work, the administrative law judge found that Dr. Simpao's opinion was entitled to less weight at 20 C.F.R. §718.204(b)(2)(iv) because the doctor "failed to explain his determination in any manner." Decision and Order at 9. The administrative law judge noted that while Dr. Baker examined claimant on July 9, 2003 and diagnosed a minimal respiratory impairment, Dr. Baker did not specifically address whether or not claimant would be able to perform his last coal mine employment. Decision and Order at 9. Thus, the administrative law judge found that Dr. Baker's opinion was insufficient to support claimant's burden of proof.

In contrast, the administrative law judge found the opinions of Drs. Broudy and Rosenberg, that claimant has no respiratory or pulmonary impairment, that would disable claimant from his usual coal mine work, to be better reasoned and documented, and better supported by the objective evidence. Decision and Order at 6; Employer's Exhibits 1, 3. Thus, the administrative law judge found that the weight of the medical opinion evidence established that claimant is not totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 9. Because claimant does not raise a specific challenge with respect to the administrative law judge's credibility determinations, we affirm the administrative law judge's finding that claimant failed to establish total disability pursuant 20 C.F.R. §718.204(b)(2)(iv).[6] *Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir.1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*); Decision and Order at 9. Because claimant failed to establish that he is totally disabled based on the newly submitted evidence, we affirm the administrative law judge's finding that claimant failed to demonstrate a change in an applicable condition of entitlement pursuant to 20

[6] The administrative law judge noted that Dr. Simpao "merely checked a box to indicate disability without [offering] any rationale for his conclusion." Decision and Order on Remand at 8.

C.F.R. §725.309(d).[7] *White*, 23 BLR at 1-3; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); Decision and Order at 9.

Claimant contends that because the administrative law judge concluded that Dr. Simpao's opinion was not well-reasoned on the issue of whether claimant is totally disabled from his usual coal mine work, the Director has failed to provide claimant with a complete, credible pulmonary evaluation sufficient to substantiate his claim. According to the Director, claimant "misperceives the Director's obligation under Section 413(b)," because the Director is "only required to provide each miner-claimant with a credible and complete pulmonary evaluation, not a dispositive one." Director's Brief at 2. The Director maintains that claimant received a credible and complete pulmonary evaluation because Dr. Simpao addressed all of the requisite elements of entitlement in his report, and since the administrative law judge did not wholly discredit Dr. Simpao's opinion, but rather "found it outweighed by contrary evidence." *Id*.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

The record reflects that Dr. Simpao conducted an examination and the full range of testing required by the regulations, and addressed each element of entitlement on the Department of Labor examination form. *See* 20 C.F.R. §§718.101(a), 718.104, 725.406(a); Director's Exhibit 12. On the issue of whether claimant is totally disabled, the administrative law judge concluded that Dr. Simpao's opinion was not well-reasoned and was entitled to "little weight," in comparison to the opinions of Drs. Rosenberg and

[7] Claimant asserts that, because pneumoconiosis is a progressive disease, "[i]t can therefore be concluded that during the considerable amount of time that has passed since the initial diagnosis of pneumoconiosis [his] condition has worsened, thus adversely affecting his ability to perform his usual coal mine work or comparable and gainful work." Claimant's Brief at 4. Contrary to claimant's assertion, however, there is no such presumption of total disability. The administrative law judge findings as to total disability must be based solely on the medical evidence of record. *White v. New White Coal Co., Inc.* 23 BLR 1-1, 1-7 n.8 (2004).

Broudy, who the administrative law judge found had provided reasoned opinions that claimant is not totally disabled from his usual coal mine employment. Decision and Order at 8; *see Gray v. SLC Coal Co*., 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999) (explaining that administrative law judges "may evaluate the relative merits of conflicting physicians' opinions and choose to credit one . . . over the other"). Because Dr. Simpao addressed all of the requisite elements of claimant's entitlement in his report, and the administrative law judge merely found Dr. Simpao's opinion to be outweighed on the issue of total disability, there is no merit to claimant's argument that the Director failed to fulfill his statutory obligation to provide claimant with a complete and credible pulmonary evaluation. *See Gallaher v. Bellaire Corp.*, No. 03-3066, 71 Fed. Appx. 528, 531, 2003 WL 21801463 (6th Cir. Aug. 4, 2003); *cf. Hodges*, 18 BLR at 1-93. Thus, we reject claimant's request that the Board remand this case to the district director for further proceedings.

In light of our affirmance of the denial of benefits, it is not necessary that we address employer's arguments on cross-appeal, although we note that the Board's prior holding that the subsequent claim was timely filed constitutes the law of the case.[8] *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

[8] The doctrine of "the law of the case" is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter, and therefore, it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000) (*en banc*) (Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Accordingly, the administrative law judge's Decision and Order Remand - 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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JUDITH S. BOGGS
Administrative Appeals Judge