

BRB No. 05-0564 BLA

ALFRED BAZIL THACKER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SCOTTS BRANCH COAL COMPANY)	
)	
and)	DATE ISSUED: 01/31/2006
)	
MAPCO, INCORPORATED)	
)	
Employer/Carrier-)	
Respondents)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Alfred Bazil Thacker, Shelbiana, Kentucky, *pro se*.¹

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

¹ Susie Davis, with the Kentucky Black Lung Association of Pikeville, Kentucky, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Davis is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

Claimant appeals the Decision and Order (03-BLA-6188) of Administrative Law Judge Joseph E. Kane (the administrative law judge) denying benefits 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).² This case involves a subsequent claim filed on March 22, 2001.³ After crediting claimant with thirteen years of coal mine employment, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's

²The 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.

³The relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on December 21, 1989. Director's Exhibit 1. In a Decision and Order dated September 22, 1993, Administrative Law Judge David W. Di Nardi found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* Judge Di Nardi also found that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). *Id.* Accordingly, Judge Di Nardi denied benefits. *Id.* By Decision and Order dated May 22, 1995, the Board affirmed Judge Di Nardi's findings pursuant to 20 C.F.R. §§718.202(a) and 718.204(c) (2000). *Thacker v. Scotts Branch Coal Co.*, BRB No. 94-0258 BLA (May 22, 1995) (unpublished). The Board, therefore, affirmed Judge Di Nardi's denial of benefits. *Id.*

Claimant filed a Notice of Appeal with the Board on July 3, 1995. Director's Exhibit 1. The Board construed claimant's Notice of Appeal to be a request for reconsideration of the Board's May 22, 1995 Decision and Order. *Thacker v. Red Dog Coal Corp.*, BRB Nos. 94-0258 BLA and 95-1777 BLA (Sept. 28, 1995) (Order) (unpublished). However, because claimant's request for reconsideration was untimely, the Board held that it lacked jurisdiction to consider it. *Id.* There is no indication that claimant took any further action in regard to his 1989 claim.

Claimant filed a second claim on March 22, 2001. Director's Exhibit 3.

denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Claimant's 2002 claim is considered a "subsequent" claim under the amended regulations because it was filed more than one year after the date that claimant's prior 1989 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement⁴ has changed since the date upon which the order denying the prior claim became final. *Id.* Administrative Law Judge David W. Di Nardi denied benefits on claimant's 1989 claim because he found that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1. Judge Di Nardi also found that the evidence was insufficient to establish that claimant was totally disabled. *Id.* The Board affirmed each of these findings. *Thacker v. Scotts Branch Coal Co.*, BRB No. 94-0258 BLA (May 22, 1995) (unpublished).

The administrative law judge initially addressed whether the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge noted that the newly submitted x-ray evidence consists of two x-ray interpretations; Dr. Baker's negative interpretation of claimant's August 9, 2001 x-ray and Dr. Broudy's negative interpretation of claimant's February 15, 2002 x-ray.⁵ Decision and Order at 5, 9; Director's Exhibits 14, 16.

⁴The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d).

⁵Claimant submitted Dr. Sundaram's positive interpretation of a February 20, 2001 x-ray. *See* Director's Exhibit 12. Claimant also submitted a positive interpretation of a June 3, 2002 x-ray rendered by a physician whose signature is illegible. *See* Director's Exhibit 33. In a Proposed Decision and Order dated April 1, 2003, the district director noted that these x-ray interpretations had been excluded from consideration "because the original x-ray film [had] not been submitted into evidence as required by 20 C.F.R. §718.102(d)." Director's Exhibit 34.

Because the record does not contain any newly submitted x-ray evidence supportive of a finding of pneumoconiosis, we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order at 9.

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 8 n.1. Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions arising under 20 C.F.R. §718.202(a)(3).⁶ *Id.*

Employer subsequently submitted Dr. Wheeler's negative interpretation of claimant's February 20, 2001 as rebuttal evidence. *See* Employer's Exhibit 1.

In his Decision and Order, the administrative law judge stated:

The District Director correctly excluded several x-ray interpretations, including Dr. Sundaram's, from consideration because these films were not submitted. Where Dr. Sundaram's interpretation is inadmissible, then Employer's rebuttal interpretation cannot be admitted.

Decision and Order at 5.

We affirm the administrative law judge's exclusion of Dr. Sundaram's positive interpretation of claimant's February 20, 2001 x-ray and the unidentified physician's positive interpretation of claimant's June 3, 2002 x-ray because the original films had not been submitted pursuant to 20 C.F.R. §718.102(d). Because the administrative law judge excluded Dr. Sundaram's positive interpretation of claimant's February 20, 2001 x-ray, the administrative law judge also properly excluded employer's rebuttal evidence (Dr. Wheeler's negative interpretation of claimant's February 20, 2001 x-ray).

⁶Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. The Section 718.305 presumption is inapplicable because claimant filed the instant claim after January 1, 1982. *See* 20 C.F.R. §718.305(e). Finally, inasmuch as the instant claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),⁷ is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

In considering whether the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the reports of Drs. Sundaram, Baker and Broudy. The administrative law judge discredited Dr. Sundaram's diagnosis of pneumoconiosis because it was based upon an inadmissible positive x-ray interpretation. Decision and Order at 9; Director's Exhibit 12. The regulations do not specify what is to be done with a medical report that references an inadmissible x-ray interpretation. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). However, in a recent case, the Board considered the treatment that an administrative law judge should afford admissible evidence which contains references to evidence that has been excluded as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414. *See Harris v. Old Ben Coal Co.*, BLR , BRB No. 04-0812 BLA (Jan. 27, 2006) (*en banc*) (McGranery and Hall, JJ., concurring and dissenting). Because the regulations do not contain a provision regarding the appropriate treatment of such evidence, the Board held that the weight to be accorded such evidence is committed to an administrative law judge's discretion. *Harris*, slip op. at 6. Although Dr. Sundaram did not rely upon evidence that was excluded for having exceeded the evidentiary limitations of Section 725.414, the doctor relied upon x-ray evidence that had nevertheless been excluded from the record. Review of Dr. Sundaram's report reflects that his opinion regarding the presence of coal workers' pneumoconiosis was closely linked to his interpretation of claimant's February 20, 2001 x-ray.⁸ Director's Exhibit 12. Consequently, we hold that the administrative law judge did not abuse his discretion in discrediting Dr. Sundaram's diagnosis of pneumoconiosis because it was based upon an inadmissible x-ray interpretation. *Harris, supra; see generally Dempsey, supra; see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

The administrative law judge also discredited Dr. Baker's opinion because he provided contradictory opinions. In a report dated August 9, 2001, Dr. Baker diagnosed chronic bronchitis and attributed the disease to "cigarette smoking/coal dust exposure." Director's Exhibit 14. However, in an accompanying questionnaire dated August 9, 2001, Dr. Baker indicated that claimant did not suffer from an occupational lung disease

⁷"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).

⁸As noted *supra*, the administrative law judge excluded Dr. Sundaram's positive interpretation of claimant's February 20, 2001 x-ray because the original film had not been submitted pursuant to 20 C.F.R. §718.102(d).

caused by his coal mine employment. Director's Exhibit 14. During a March 21, 2002 deposition, Dr. Baker opined that claimant does not suffer from an occupational lung disease which was caused by his coal mine employment. Director's Exhibit 32 at 7. Dr. Baker also opined that claimant does not suffer from coal workers' pneumoconiosis. *Id.* at 8. Thus, although Dr. Baker initially diagnosed chronic bronchitis which he attributed in part to claimant's coal dust exposure, the doctor subsequently indicated that claimant did not suffer from coal workers' pneumoconiosis or any occupational lung disease caused by his coal mine employment. Given Dr. Baker's contradictory conclusions, the administrative law judge permissibly found that Dr. Baker's opinion was not entitled to any weight. *See Clark, supra; Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Because there is no other newly submitted medical opinion evidence supportive of a finding of pneumoconiosis,⁹ we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Thus, we affirm the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).

Having found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis, the administrative law judge next addressed whether the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

The record contains three newly submitted pulmonary function studies conducted on February 20, 2001, August 9, 2001 and February 15, 2002, Director's Exhibits 12, 14, 16, and two newly submitted arterial blood gas studies conducted on August 9, 2001 and February 15, 2002. Director's Exhibits 14, 16. Because the administrative law judge properly found that these studies are non-qualifying,¹⁰ we affirm the administrative law

⁹The administrative law judge found that Dr. Broudy's opinion that claimant does not suffer from coal workers' pneumoconiosis or any other occupational lung disease was well reasoned. Decision and Order at 10; Director's Exhibit 16; Director's Exhibit 30.

The record also contains Dr. Mettu's Office Notes from January 6, 2000 through November 28, 2001. Director's Exhibit 33. Although Dr. Mettu's diagnoses include bronchial asthma, acute bronchitis and chronic obstructive pulmonary disease, he did not address whether these conditions were related to claimant's coal dust exposure. *Id.*

¹⁰A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values, *i.e.* Appendices B and C of Part 718. A "non-qualifying" study yields values that exceed the requisite table values.

judge's finding that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) and (ii). Decision and Order at 10.

Because there is no newly submitted evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

The record contains three newly submitted medical opinions relevant to the issue of total disability. While Dr. Sundaram opined that claimant is totally disabled from a pulmonary standpoint,¹¹ Director's Exhibit 12, Drs. Baker and Broudy opined that claimant does not suffer from a totally disabling respiratory or pulmonary impairment.¹² Director's Exhibits 14, 16, 30, 32. The administrative law judge properly credited the opinions of Drs. Baker and Broudy that claimant is not totally disabled, over Dr. Sundaram's contrary opinion, because he found that the opinions of Drs. Baker and Broudy are more consistent with the objective evidence. Decision and Order at 11. An administrative law judge may properly credit the opinions of physicians that he determines are better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the newly submitted medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus, we affirm the administrative law judge's

¹¹In a report dated February 20, 2001, Dr. Sundaram opined that claimant is not able, from a pulmonary standpoint, to perform his usual coal mine employment. Director's Exhibit 12.

¹²In a questionnaire dated August 9, 2001, Dr. Baker opined that claimant does not suffer from any pulmonary impairment. Director's Exhibit 14. Dr. Baker opined that claimant retains the respiratory capacity to perform the work of a coal miner. *Id.* During a deposition on March 21, 2002, Dr. Baker reiterated that claimant does not suffer from any respiratory or pulmonary impairment. Director's Exhibit 32 at 9. Dr. Baker also opined that from a respiratory or pulmonary standpoint, claimant could perform a job requiring "arduous manual labor." *Id.* at 9-10.

In a report dated February 15, 2002, Dr. Broudy opined that there was no evidence of any disabling respiratory impairment. Director's Exhibit 16. During a deposition on April 12, 2002, Dr. Broudy opined that claimant does not suffer from any significant respiratory or pulmonary impairment. Director's Exhibit 30 at 11. Dr. Broudy further opined that from a respiratory or pulmonary standpoint, claimant is capable of performing "hard arduous manual labor." *Id.*

findings that the newly submitted evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv).

In light of our affirmance of the administrative law judge's findings that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) and total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm the administrative law judge's finding that claimant failed to establish that any of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. 20 C.F.R. §725.309. Consequently, claimant's entitlement to benefits is precluded.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge