

BRB Nos. 09-0775 BLA
and 09-0775 BLA-A

PAUL W. JAMESON)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	
)	DATE ISSUED: 07/22/2010
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 on Remand of Janice K. Bullard, 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.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits on Remand (05-BLA-5667) of Administrative Law Judge Janice K. Bullard rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act).¹ This case involves a subsequent claim filed on April 28, 2004. The present claim is before the Board for the second time.² In her initial decision, the administrative law judge found that claimant's 2004 claim was timely filed. The administrative law judge credited claimant with fourteen years of coal mine employment,³ and found that the new evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant did not establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).⁴ Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board rejected claimant's sole contention that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete pulmonary evaluation. The Board further affirmed, as unchallenged, the administrative law judge's finding that the new evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of these holdings, the Board affirmed the administrative law judge's finding that claimant did not

¹ The Director, Office of Workers' Compensation Programs, and employer correctly state that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

² The Board previously set forth the procedural history of claimant's prior denied claims. *P.J. [Jameson] v. Whitaker Coal Corp.*, BRB Nos. 08-0345 BLA and 08-0345 BLA-A (Dec. 23, 2008) (unpub.), slip op. at 2 n.2.

³ The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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 (1989)(*en banc*).

⁴ As discussed in the Board's previous decision, the administrative law judge mistakenly characterized this claim as a "duplicate" claim rather than a "subsequent" claim, but the mischaracterization was harmless since the administrative law judge correctly inquired whether the new evidence established that claimant's total disability was due to pneumoconiosis. *Jameson*, slip op. at 7 n.6.

establish that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). Therefore, the Board affirmed the administrative law judge's denial of benefits.⁵ However, pursuant to employer's cross-appeal, the Board vacated the administrative law judge's finding that claimant's 2004 subsequent claim was timely filed pursuant to 20 C.F.R. §725.308.⁶ *P.J. [Jameson] v. Whitaker Coal Corp.*, BRB Nos. 08-0345 BLA and 08-0345 BLA-A (Dec. 23, 2008) (unpub.). The Board remanded the case for the administrative law judge to address whether the October 20, 1986 report of Dr. Hieronymous contained "a medical determination of total disability due to pneumoconiosis that has been communicated to the miner," sufficient to trigger the statute of limitations pursuant to 20 C.F.R. §725.308, under the standard of *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

On remand, the administrative law judge correctly found that the only issue for adjudication was whether claimant's 2004 subsequent claim was timely filed. Decision and Order on Remand at 4. The administrative law judge noted that, following the Board's decision remanding this case for further consideration of the timeliness issue, the United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year time limit for filing a claim if it was discredited, or found to be outweighed by contrary evidence, in a prior adjudication. Decision and Order on Remand at 4, *citing Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009). The administrative law judge further found, and employer conceded, that under the *Hatfield* standard, claimant's 2004 subsequent claim was timely filed. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). The administrative law judge concluded, however, that claimant was not entitled to benefits, based on the prior finding, as affirmed by the Board, that claimant failed to establish a change in the applicable condition of entitlement. Decision and Order on Remand at 3 n.8, 4. Accordingly, the administrative law judge again denied benefits.

⁵ In light of the Board's affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d), the Board declined to address employer's contentions that the administrative law judge erred in finding that the existence of pneumoconiosis and a totally disabling pulmonary impairment were established by Administrative Law Judge Joseph E. Kane's decision denying claimant's previous claim. *Jameson*, slip op. at 7 n.7.

⁶ The Board held that, although the administrative law judge's denial of benefits was affirmed, it was necessary to remand the case for the administrative law judge to reconsider whether the 2004 claim was timely filed, because a determination that the claim was untimely would preclude claimant from filing any future claims unless he resumes work as a coal miner. *Jameson*, slip op. at 6.

On appeal, claimant's only contention of error is that the administrative law judge erred in her evaluation of the medical opinion evidence relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, contending that if the Board does not affirm the denial of benefits, the Board should vacate the administrative law judge's prior findings that the existence of pneumoconiosis and a totally disabling pulmonary impairment were established in the decision denying claimant's previous claim. The Director declined to file a response brief in this appeal.⁷

The Board 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge "erred in resolving that claimant was not totally disabled" pursuant to 20 C.F.R. §718.204(b)(2)(iv), specifically arguing that the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine work. Claimant's Brief at 2, 4-5. As employer correctly asserts, however, the only issue the Board instructed the administrative law judge to reconsider on remand was whether claimant's 2004 claim was timely, and she resolved that issue in claimant's favor. The Board previously affirmed Judge Bullard's unchallenged determination that the new evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and, therefore, affirmed her finding that claimant did not establish a change in the applicable condition of entitlement in this subsequent claim. *See* 20 C.F.R. §725.309(d). As claimant raises no further arguments on appeal, we affirm the administrative law judge's denial of benefits.⁸

⁷ Because no party challenges the administrative law judge's finding that claimant's 2004 claim was timely, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁸ In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d), we need not address employer's contentions, raised on cross-appeal, that the administrative law judge erred in finding that the existence of pneumoconiosis and a totally disabling pulmonary impairment were established by Judge Kane's decision that finally denied claimant's prior claim. *Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge