

BRB No. 08-0104 BLA

G.W.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 10/30/2008
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

G. W., Marion, Ohio, *pro se*.

Emily Goldberg-Kraft (Gregory F. Jacob, 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: McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order – Denial of Benefits (2006-BLA-05460) of Administrative Law Judge Donald W. Mosser 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). The administrative law judge found the instant case to be a subsequent claim filed on

November 15, 2004.<sup>1</sup> The administrative law judge credited claimant with two years of coal mine employment and considered whether the evidence submitted since the prior denial was sufficient to establish one of the conditions of entitlement previously adjudicated against claimant pursuant to 20 C.F.R. §725.309. The administrative law judge found that the medical evidence did not support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Consequently, the administrative law judge found that claimant did not establish a change in an applicable condition of entitlement at Section 725.309. Accordingly, the administrative law judge denied benefits. On appeal, claimant generally challenges the denial of benefits and asserts that he worked as a miner for more than two years. In response to claimant's appeal, the Director, Office of Workers' Compensation Programs (the Director), urges affirmance of the administrative law judge's findings and the denial of benefits.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.<sup>2</sup> 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).

If a miner files an application 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.

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<sup>1</sup> Claimant filed his initial claim on June 30, 1982, which was denied by the district director, based on his finding that claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718. Director's Exhibit 1. Claimant filed a second application for benefits on October 1, 1990, which was denied by the district director on the same grounds as the prior denial. Director's Exhibit 2. Claimant's third application for benefits, filed on February 9, 2001, was denied by reason of abandonment. Director's Exhibit 3. Claimant filed a fourth claim on October 30, 2002, which was denied by the district director on June 20, 2003 because claimant did not establish any of the elements of entitlement. Director's Exhibit 4. Claimant filed a subsequent claim on November 15, 2004, which is the subject of this appeal. Director's Exhibit 7.

<sup>2</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment was in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 8.

§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). Claimant’s prior claim was denied because he failed to establish either the existence of pneumoconiosis or that he was totally disabled by a respiratory or pulmonary impairment. Director’s Exhibit 4. Consequently, claimant had to submit new evidence establishing either of these conditions of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994).

Initially, we address the administrative law judge’s determination that claimant established two years of coal mine employment. In a letter to the Board, claimant asserts that he had additional years of coal mine employment that were not credited by the administrative law judge, noting that the Social Security records do not show his coal mine employment because he was paid in company scrip and no taxes were deducted. Claimant’s December 14, 2007 Letter at 1. Claimant also contends that he was able to provide an affidavit from only one co-worker because he was “the only survivor with whom I worked...in the mines.” *Id.*

In noting the varying lengths of coal mine employment that claimant reported in his five claims, the administrative law judge considered claimant’s Social Security Administration (SSA) earnings records, Director’s Exhibit 12; claimant’s statements in his applications for benefits and in letters to the Department of Labor, Director’s Exhibits 1-4, 8, 11, 21; and an affidavit from a former co-worker, Director’s Exhibit 10. The administrative law judge found that the SSA earnings records do not reflect any coal mine employment between 1954 and 2002. Decision and Order at 3; Director’s Exhibit 12. In addition, he found that “claimant’s statements, standing alone, are not reliable enough to credit over the [S]ocial [S]ecurity earning records.” Decision and Order at 3. However, the administrative law judge found that claimant’s statements, as corroborated by the affidavit of his former co-worker, were sufficient to establish two years of coal mine employment with Ham Bone Coal Company from 1962 to 1964. *Id.* Consequently, the administrative law judge credited claimant with at least two years of coal mine employment. *Id.*

Claimant bears the burden of proof with respect to the number of years he worked in coal mine employment. *Croucher v. Director, OWCP*, 20 BLR 1-68, 1-72 (1996)(*en banc*); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985); *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-711 (1985). The Board has held that in considering the evidence submitted by claimant, the administrative law judge may use any reasonable method of calculation. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988). Because the administrative law judge discussed all of the relevant evidence of record and set forth rational bases for his conclusions, we affirm his determination that claimant had at least two years of coal mine employment. 20 C.F.R. §725.101(a)(32); *see Croucher*, 20 BLR

at 1-72; *Dawson*, 11 BLR at 1-60; *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986); *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-11.

We will now address the administrative law judge's findings that the newly submitted evidence was insufficient to establish a change in one of the applicable conditions of entitlement pursuant to Section 725.309(d). Pursuant to Section 718.202(a)(1), the administrative law judge considered two readings of an x-ray dated March 21, 2005. Decision and Order at 4, 5. Dr. Kaufman, who possesses no specific radiological qualifications, read the film as completely negative, and Dr. Ruiz, who also possesses no specific radiological qualifications, submitted a letter stating that the x-ray showed "old scarring."<sup>3</sup> Director's Exhibit 20. The administrative law judge correctly found that neither film was positive for pneumoconiosis and rationally determined, therefore, that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). 20 C.F.R. §718.202(a)(1); see *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 5; Director's Exhibit 20.

In addition, the administrative law judge correctly found that the claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3), as the record contains no biopsy evidence of pneumoconiosis and the presumptions set forth at 20 C.F.R. §§718.304, 718.305, and 718.306 are not available to claimant.<sup>4</sup> See 20 C.F.R. §718.202(a)(2)-(3); *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986); Decision and Order at 5. These findings, therefore, are affirmed.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the only newly submitted medical opinion, that of Dr. Kaufman. Decision and Order at 4, 5-6; Director's Exhibit 17. Based on a physical examination and objective testing, Dr. Kaufman diagnosed hypertension and stated, "there is no evidence of coal workers' pneumoconiosis." Director's Exhibit 17. The administrative law judge rationally found the opinion of Dr. Kaufman insufficient to establish the existence of pneumoconiosis

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<sup>3</sup> Dr. Gaziano, a B reader, read the film for quality purposes, noting Quality 1, and also stating that the film showed "fibrosis & calcifications Left Upper Zone possible old TB." Director's Exhibit 20.

<sup>4</sup> The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. Claimant is not entitled to the presumption at 20 C.F.R. §718.305 because this claim was filed after January 1, 1982. See 20 C.F.R. §718.305(e); Director's Exhibit 7. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

pursuant to Section 718.202(a)(4).<sup>5</sup> 20 C.F.R. §718.202(a)(4); *see Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); Decision and Order at 5-6. Accordingly, we affirm the administrative law judge's determination that claimant did not prove, pursuant to Section 718.202(a)(4), that he is suffering from pneumoconiosis.

In considering the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b), the administrative law judge properly determined that the newly submitted pulmonary function study and blood gas study, both dated January 4, 2005, yielded non-qualifying values, and, therefore are insufficient to demonstrate total disability pursuant to Section 718.204(b)(2)(i) and (ii).<sup>6</sup> *See* 20 C.F.R. §718.204(b)(2)(i), (ii); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); Decision and Order at 6; Director's Exhibits 18, 19. The administrative law judge further correctly determined that claimant could not establish total disability under Section 718.204(b)(2)(iii), as there is no evidence of cor pulmonale with right-sided congestive heart failure in the record. *See* 20 C.F.R. §718.204(b)(2)(iii); *Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989); Decision and Order at 6.

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the newly submitted medical opinion of Dr. Kaufman, and found that it was "silent as to whether the miner is totally disabled from engaging in his [usual] coal mine employment."<sup>7</sup> Decision and Order at 7; Director's Exhibit 17. Consequently, the administrative law judge found that Dr. Kaufman's opinion was not probative on the issue of total disability and, therefore, that claimant "failed to establish[,] through medical opinion evidence[,] total disability." Decision and Order at 7. Because the

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<sup>5</sup> The record also contains a letter from Dr. Ruiz, dated February 13, 2002, in which he stated that claimant was under his care for hypertension, emphysema and back pain. Director's Exhibit 16. However, this letter was also submitted in conjunction with claimant's prior claim and, therefore, is not relevant to establishing a change in one of the applicable conditions of entitlement. 20 C.F.R. §725.309(d)(3).

<sup>6</sup> A "qualifying" objective study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

<sup>7</sup> Dr. Kaufman stated that "the [pulmonary function] study is almost normal. The spirometry would not suggest obstructive disease and his lung volumes are normal." Director's Exhibit 17. Dr. Kaufman stated that the blood gas study "revealed a mild degree of hypoxemia." *Id.* Dr. Kaufman did not otherwise address the issue of total disability.

administrative law judge rationally found the newly submitted medical opinion was insufficient to establish total respiratory disability, we affirm his finding that claimant failed to prove that he is suffering from a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(b)(2)(iv). 20 C.F.R. §718.204(b)(2)(iv); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*).

Because we have affirmed the administrative law judge's determination that the new evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or total respiratory disability pursuant to Section 718.204(b), we also affirm the administrative law judge's determination that claimant failed to demonstrate a change in one of the applicable conditions of entitlement pursuant to Section 725.309. Entitlement to benefits is, therefore, precluded.<sup>8</sup> See 20 C.F.R. §725.309(d); *Ross*, 42 F.3d at 997, 19 BLR at 2-18; *White*, 23 BLR at 1-7.

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<sup>8</sup> We also affirm the administrative law judge's determination that remand to the district director for a complete pulmonary evaluation is not required in this case. The administrative law judge noted that because Dr. Kaufman, who examined claimant on behalf of the Department of Labor, was silent as to whether claimant is totally disabled, his report was "somewhat lacking" in the extent to which it satisfied the Director's obligation to provide claimant with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. Decision and Order at 7 n.4. The administrative law judge concluded, however, that "a remand to the district director to further develop Dr. Kaufman's opinion would be useless in that the evidence clearly establishes that the miner does not suffer from pneumoconiosis." *Id.* The administrative law judge's finding is supported by substantial evidence as the only evidence in the record suggestive of the existence of pneumoconiosis is a positive reading by Dr. Hall, a B reader, of a 1982 x-ray that was reread as negative by a physician with superior radiological qualifications, Dr. Cole, who is dually qualified as a B reader and Board-certified radiologist. Director's Exhibit 1.



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

SO ORDERED.

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge