BRB Nos. 05-0242 BLA
and 05-0242 BLA-A

GILLIS PENNINGTON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	DATE ISSUED: 09/23/2005
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leroy Lewis and Phillip Lewis (Law Office of Phillip Lewis), Hyden, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals and employer cross-appeals the Decision and Order (03-BLA-6089) of Administrative Law Judge Daniel J. Roketenetz 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). The administrative law judge credited claimant with at least nineteen years of coal mine employment based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence insufficient to establish any element of entitlement: the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4); total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv); and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance of the administrative law judge's denial of benefits. On cross-appeal, employer contends that claimant's claim for benefits was untimely filed. Employer further argues on cross-appeal that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid. Alternatively, employer argues that the administrative law judge erred by misapplying the evidentiary limitations set forth at 20 C.F.R. §725.414. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's assertion that the administrative law judge misapplied the evidentiary limitations set forth at 20 C.F.R. §725.414.[1]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding the x-ray evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant's contention has no merit. The x-ray evidence consists of eight

[1]Since the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2)-(4) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

interpretations of four x-rays taken on July 6, 1993, July 28, 1993, August 15, 2001 and August 19, 2002.[2] Although Dr. Myers, a reader with no special radiological qualifications, interpreted claimant's July 6, 1993 x-ray as positive for pneumoconiosis and Dr. Baker, a B reader, interpreted claimant's July 28, 1993 x-ray as positive for pneumoconiosis, Director's Exhibit 18, Dr. Poulos, a B reader and a Board-certified radiologist, interpreted each of these x-rays as negative for the disease. Employer's Exhibits 12, 13. The administrative law judge acted within his discretion in crediting Dr. Poulos's negative interpretations of these x-rays over the contrary interpretations of Drs. Myers and Baker, based upon Dr. Poulos's superior qualifications. *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7-8. All of the other x-ray interpretations of record are negative for pneumoconiosis. Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

In light of our affirmance of the administrative law judge's findings that the evidence is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*). Given this disposition of the case, we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

On cross-appeal, employer raises two arguments. The first is that the evidentiary limitations set forth at 20 C.F.R. §725.414 are invalid. In light of our decision in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004), we reject that contention. In any event, in view of our decision to affirm the denial of benefits, any error by the administrative law judge in misapplying the evidentiary limitations to employer's medical opinion evidence would be harmless. *Larioni*, 6 BLR at 1-1278. Employer's second argument is that the claim is untimely filed under the regulations. *See* 20 C.F.R. §725.308. We decline to address this argument because its resolution would require further findings by the administrative law judge, an unnecessary use of judicial resources as long as the claim is in denial status. We recognize that employer has preserved the issue for appeal, and benefits cannot be awarded until the question of timeliness is resolved.

[2]Of these eight x-ray interpretations, two are positive for pneumoconiosis, Director's Exhibit 18, and six are negative for the disease. Director's Exhibits 11, 16, 26; Employer's Exhibits 8, 9, 12, 13.

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

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to decline to address employer's contention on cross-appeal that the claim is untimely filed. Employer asserts that "[t]he fact that Dr. Baker's 1993 diagnosis of total disability due to pneumoconiosis was not a documented and reasoned diagnosis does not stop it from triggering the three year statute of limitations." Employer's Brief in Support of Cross-Petition for Review at 7 n.2. Contrary to employer's assertion, in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, explicitly held that, under 30 U.S.C. §932(f), the three year statutory period for filing a claim is triggered by a "reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298; 30 U.S.C. §932(f); 20 C.F.R. §725.308. In the instant case, employer conceded that Dr. Baker's August 5, 1993 opinion is not reasoned. Therefore, because the Sixth Circuit has held that an unreasoned opinion cannot trigger the time limitations set forth at 20 C.F.R. §725.308 and 30 U.S.C. §932(f), I would affirm the administrative law judge's finding that this claim was timely filed.

I concur in all other respects in the majority's opinion.

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BETTY JEAN HALL
Administrative Appeals Judge