BRB Nos. 04-0637 BLA
and 04-0637 BLA-A

DENNIS RAY KING	)	
	)	
Claimant-Petitioner/	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
JERICOL MINING INCORPORATED	)	DATE ISSUED: 03/18/2005
	)	
Employer-Respondent/	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order-Denying Benefits of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

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

Jeffrey S. Goldberg (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order-Denying Benefits (2003-BLA-05452) of Administrative Law Judge Mollie W. Neal with respect to 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 noted that the claim before her was the third application for benefits filed by claimant and that she must determine whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[1] The administrative law judge credited claimant with nine years of coal mine employment and considered the newly submitted evidence under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge determined that this evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or total respiratory disability pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge found that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to Section 725.309 and benefits were denied.

Claimant argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(1), (a)(4) and 718.204(b)(2)(iv). Employer has responded and urges affirmance of the denial of benefits. In its cross-appeal, employer argues that the administrative law judge should have determined that claimant's most recent claim was barred by the terms of 20 C.F.R. §725.308. Employer further asserts that the administrative law judge erred in applying 20 C.F.R. §725.414 to exclude two x-ray rereadings it sought to admit into the record. The Director, Office of Workers' Compensation, has responded to employer's cross-appeal and urges the Board to reject employer's allegations of error.[2]

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

[1] Claimant filed an application for benefits on December 4, 1990. This claim was denied in a Decision and Order issued by Administrative Law Judge Charles P. Rippey on May 9, 1995. The Board affirmed the denial of benefits in a Decision and Order dated June 19, 1996. Claimant filed a second claim on August 14, 1997. Administrative Law Judge Joseph E. Kane denied this claim on May 26, 1999. Employer's Exhibit 1. Claimant took no further action until filing a third application for benefits on April 4, 2001. Director's Exhibit 1.

[2] We affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1)-(3) and 718.204(b)(2)(i)-(iii), as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 argues initially that the administrative law judge erred in finding that the newly submitted x-ray evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as the administrative law judge relied exclusively on the qualifications of the x-ray readers, counted heads, and selectively analyzed the evidence. These contentions are without merit. The administrative law judge rationally determined that the existence of pneumoconiosis was not demonstrated at Section 718.202(a)(1) based upon the fact that a preponderance of the x-ray interpretations by the better qualified physicians was negative for the disease. Decision and Order at 11; 20 C.F.R. §718.202(a)(1); *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995).

With respect to the medical opinion evidence, claimant argues that the administrative law judge erred in finding that the opinions of Drs. Baker and Simpao were insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Director's Exhibits 9, 12. Claimant's contention is without merit. The administrative law judge discussed the four newly submitted medical opinions relevant to Section 718.202(a)(4) and acted within her discretion in finding that the opinions in which Drs. Dahhan and Rosenberg stated that claimant does not have pneumoconiosis were entitled to greater weight than the opinions of Drs. Baker and Simpao. Decision and Order at 12; Director's Exhibit 11; Employer's Exhibit 4. The administrative law judge rationally determined that Dr. Dahhan's and Dr. Rosenberg's conclusions were better supported by the evidence of record and that these physicians had the opportunity to review the entire record and, therefore, had a more complete view of claimant's health. Decision and Order at 12; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002).[3] In light of these permissible findings, contrary to claimant's assertion, the administrative law judge was not required to give greater weight to Dr. Baker's opinion based upon his status as claimant's treating physician. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003). Accordingly, we affirm the administrative law judge's determination that the newly submitted medical opinions of record did not support a finding of pneumoconiosis pursuant to Section 718.202(a)(4).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last full year of coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Regarding the issue of total disability pursuant to Section 718.204(b)(iv), claimant argues that the newly submitted opinions of Drs. Baker and Simpao are sufficient to establish that he is totally disabled. Claimant also contends that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Drs. Baker's and Simpao's diagnoses of total disability. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant notes that the administrative law judge did not mention claimant's age or work experience in conjunction with her assessment that claimant was not totally disabled. Claimant also suggests that the administrative law judge erred in according less weight to the opinions of Drs. Baker and Simpao because they relied upon nonconforming and/or nonqualifying objective studies.

Claimant's contentions are without merit. The administrative law judge rationally found that the opinions in which Drs. Dahhan and Rosenberg determined that claimant is not suffering from a totally disabling respiratory and pulmonary impairment were entitled to greater weight than the opinions of Drs. Baker and Simpao. Decision and Order at 14; Director's Exhibit 11; Employer's Exhibit 4. The administrative law judge acted within her discretion in treating their opinions as better reasoned and documented because their conclusions were better supported by the objective evidence of record and were based upon a thorough review of the entire record. *Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 2-551; *Stephens*, 298 F.3d 511, 516, 22 BLR 2-495, 2-512.

We also find no merit in claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the assessments of claimant's physical limitations by Drs. Baker and Simpao. Herein, the administrative law judge did not credit the opinions of Drs. Baker and Simpao but rationally found that the most persuasive medical opinions of record did not contain a reasoned and documented diagnosis of total respiratory impairment. Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.[4] *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal* Co., 19 BLR 1-18 (1994). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory or pulmonary disability under Section 718.204(b).

[4] Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding, at 20 C.F.R. §410.426(a), that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment. *See also* 20 C.F.R. §718.204(b)(1), (b)(2).

Because we have affirmed the administrative law judge's determination that the newly submitted evidence did not support a finding of pneumoconiosis or total disability under Sections 718.202(a) and 718.204(b), we must affirm her determination that claimant has failed to establish a change in an applicable condition of entitlement pursuant to Section 725.309. *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The denial of benefits is also, therefore, affirmed. In light of our affirmance of the denial of benefits, we decline to address the arguments raised in employer's cross-appeal, as errors, if any, in the administrative law judge's determinations regarding the application of Sections 725.308 and 725.414 would be harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order-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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BETTY JEAN HALL
Administrative Appeals Judge