BRB Nos. 99-1218 BLA
and 99-1218 BLA-A

DARRELL BROWNING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAG AMERICAN COAL COMPANY	)	
	)	
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 of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (98-BLA-0497) of Administrative Law Judge Donald W. Mosser 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 initially accepted the stipulation of the parties that claimant had thirty-two years of coal mine employment, based on a review of the record, and found that the claim was timely filed pursuant to 20 C.F.R. §725.308(a), (c). Next, the administrative law judge found that the instant claim, Director's Exhibit 1, was a duplicate claim pursuant to 20 C.F.R. §725.309(d), filed more than one year after the denial of claimant's prior claim, Director's Exhibit 70. Thus, the administrative law judge considered whether the new evidence submitted since, and dated subsequent to, the denial of claimant's prior claim established a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 556 (7th Cir. 1991). The administrative law judge considered all of the new evidence dated subsequent to the prior denial pursuant to 20 C.F.R. Part 718 and found that it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Thus, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to Section 725.309(d). Nevertheless, the administrative law judge further found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(c), but failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding that the new medical opinion evidence, dated subsequent to the prior denial, was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer responds, urging that the administrative law judge's findings pursuant to Section 718.202(a) be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to claimant's appeal. On cross-appeal, employer contends that the administrative law judge erred in finding that the instant claim was timely filed pursuant to Section 725.308(a), (c). Claimant has not responded to employer's cross-appeal. The Director, as a party-in-interest, responds to employer's cross-appeal, urging the Board to affirm the administrative law judge's finding that the instant claim was timely filed pursuant to Section 725.308(a), (c).

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).

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[1] Claimant originally filed a claim on February 22, 1991, which was denied by reason of abandonment on August 28, 1991, without claimant having submitted any evidence in support of his claim, Director's Exhibit 70. Claimant took no further action on that claim. Subsequently, claimant filed the instant claim on October 21, 1996, Director's Exhibit 1.

Initially, employer contends that claimant's original claim was untimely filed. Specifically, employer notes that, while the record contains a medical report finding claimant totally disabled due to pneumoconiosis from Dr. Khan dated July 20, 1987, which was submitted in conjunction with claimant's current claim, Director's Exhibit 57, claimant did not file a claim until February, 1991, Director's Exhibit 70. The statute of limitations at Section 422(f) of the Act, 30 U.S.C. §932(f), provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later -
>
> (1) a medical determination of total disability due to pneumoconiosis; or
>
> (2) March 1, 1978.

The implementing regulation at Section 725.308 provides in pertinent part:

> (a) A claim for benefits...shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner...
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, ... the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308. The Board has held that "communication to the miner" is to be construed as to require that a medical opinion is actually physically received by the miner and that mere knowledge of the contents of a medical report, *i.e.*, by oral statements to the miner and/or hearsay communications, is insufficient, *see Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *see also Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-945 (1994).

The administrative law judge found that Dr. Khan's report was only addressed to claimant's counsel and that claimant testified that he didn't know whether his counsel had showed him the report or not, didn't remember reading the report, "couldn't say definitely" whether Dr. Khan had orally informed claimant that he was totally disabled due to pneumoconiosis, but was "almost sure" he did, *see* Hearing Transcript at 35-36. Decision and Order at 4. Thus, the administrative law judge found that the evidence of record did not establish that claimant was in actual physical receipt of Dr. Khan's report. Consequently, the administrative law judge found that employer did not rebut the presumption that the claim was timely filed pursuant to Section 725.308(c).

Employer contends that knowledge of the contents of Dr. Khan's report by claimant's counsel is imputed to claimant and that Section 725.308 does not require that claimant receive a written report, but contends that a verbal communication of a report's contents to the miner is sufficient to satisfy the Administrative Procedure Act and employer's burden of proof. Contrary to employer's contentions, inasmuch as the administrative law judge's finding that the evidence of record does not establish that claimant actually physically received Dr. Khan's report is supported by substantial evidence, we affirm the administrative law judge's finding that employer did not rebut the presumption that the claim was timely filed pursuant to Section 725.308(c) in accordance with standard enunciated in *Adkins, supra*; *see also Daugherty*, *supra*.

Next, the administrative law judge found that the instant claim was a duplicate claim and, therefore, considered whether claimant established a material change in conditions pursuant to Section 725.309(d) in accordance with the standard enunciated by the Seventh Circuit in *McNew*. However, the Seventh Circuit has recently held that a claimant may advance a second claim for benefits on the merits and is not required to demonstrate a "material change in conditions" in accordance with the standard enunciated in *McNew* where a claimant's initial claim was denied solely on procedural grounds, *see Crowe v. Director, OWCP*, 226 F.3d 609, BLR (7th Cir. 2000). Thus, inasmuch as claimant's initial claim in this case was denied solely on procedural grounds as abandoned, without the submission or consideration of any evidence on the merits of entitlement, *see* Director's Exhibit 70, the administrative law judge should have considered claimant's second claim, at issue herein, on the merits, *see Crowe*, *supra*.

The administrative law judge considered only the new evidence of record dating from the denial of claimant's first claim and found that it was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4) or, therefore, total disability due to pneumoconiosis pursuant to Section 718.204(b), but found that it was sufficient to establish total disability pursuant to Section 718.204(c). Although the administrative law judge found total disability established pursuant to Section 718.204(c) after considering only the new evidence of record dating from the denial of claimant's first claim, the Seventh Circuit has held that the date of hearing, *i.e.*, September 22, 1998 in this case, is the date upon which disability is assessed by the administrative law judge in a living miner's case, *see Freeman United Coal Co v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *Zettler v. Director, OWCP*, 886 F.2d 831 (7th Cir. 1989). Thus, any error by the administrative law judge in not considering the evidence of record submitted in conjunction with claimant's current claim which pre-dates the denial of claimant's first claim on the merits pursuant to Section 718.204(c), *see* Director's Exhibits 52, 56-61, is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, inasmuch as the administrative law judge's finding that total disability was established pursuant to Section 718.204(c) is unchallenged by any party on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

However, the evidence of record pre-dating the prior denial of claimant's first claim, which was submitted in conjunction with claimant's current claim, but not considered by the administrative law judge, does include x-ray and medical opinion evidence diagnosing pneumoconiosis and total disability due to pneumoconiosis, *see* Director's Exhibits 56-58, 60. Consequently, inasmuch as the administrative law judge did not consider all of the relevant evidence on the merits in finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1), (4) or that total disability due to pneumoconiosis was not established pursuant to Section 718.204(b), *see Crowe*, *supra*; *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), the administrative law judge's findings under Section 718.202(a)(1) and (4) and 718.204(b) are vacated and the case is remanded for consideration of all the relevant evidence of record on the merits.

Nevertheless, in order to avoid any possible repetition of error on remand by the administrative law judge, we address claimant's contentions regarding the administrative law judge's findings pursuant to Section 718.202(a)(4). The administrative law judge noted that Dr. Simpao, Director's Exhibit 12 and , Dr. Baker, a board-certified physician in internal medicine and pulmonary disease, Director's Exhibit 41, examined claimant and diagnosed pneumoconiosis, as well as Dr. Younes, who reviewed the evidence of record, Director's Exhibit 50. Decision and Order at 14. The administrative law judge further noted that Dr. Selby, a board-certified physician in internal medicine and pulmonary disease, found no evidence of pneumoconiosis, Employer's Exhibits 1, 28, and that his opinion was supported by the opinions of Drs. Tuteur, Employer's Exhibits 16, 26, Fino, Employer's Exhibits 18, 29, Repsher, Employer's Exhibits 17, 27, and Renn, Employer's Exhibit 23, who all reviewed the evidence of record and all have qualifications similar to Dr. Selby. The administrative law judge gave more weight to Dr. Selby's opinion in light of his qualifications and because the administrative law judge found his opinion well documented and reasoned and supported by several opinions of other highly qualified physicians. Although the administrative law judge noted that Dr. Baker had similar qualifications, the administrative law judge found the opinions of Drs. Baker, Simpao and Younes were not supported by any evidence other than positive x-ray readings.

[2] The administrative law judge properly noted that there is no relevant biopsy evidence of record under Section 718.202(a)(2) and that none of the available presumptions under Section 718.202(a)(3) are applicable, Decision and Order at 13. The irrebuttable presumption at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, is inapplicable inasmuch as there is no evidence of complicated pneumoconiosis in the record. Moreover, the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim, filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1, and the presumption at Section 411(c)(5) of the Act, 30 U.S.C. §921(c)(5), as implemented by 20 C.F.R. §718.306, is inapplicable to this living miner's claim. Consequently, the administrative law judge's findings that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(2)-(3) are affirmed.

Claimant contends that those physicians who only reviewed the evidence of record and did not find evidence of pneumoconiosis are "hired guns" whose opinions are known in advance of any evidence being submitted to them for review. However, opinions provided on behalf of employer, prepared in the course of litigation, are probative evidence and are not presumptively biased, *see Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992), *citing Richardson v. Perales*, 401 U.S. 389 (1971); *Chancey v. Consolidation Coal Co.*, 7 BLR 1-240 (1984), and an administrative law judge is permitted to assign a physician's report prepared at the request of employer determinative weight, *Stanford v. Valley Camp Coal Co.*, 7 BLR 1-906, 1-908 (1985); *see also Urgolites v. BethEnergy Mines, Inc.*, 17 BLR 1-20 (1992)(the identity of party who hires a medical expert does not, by itself, demonstrate partiality on the part of the physician); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35 (1991)(*en banc*). Finally, claimant also contends that the administrative law judge should have given greater weight to the opinions of Drs. Simpao and Baker, who examined claimant, over the contrary opinions of those physicians who only reviewed the evidence of record. However, the administrative law judge also credited the opinion of Dr. Selby, who examined claimant as well, and, in any event, the Seventh Circuit has held that it is error to give less weight to a physician simply because he was a reviewing physician, and more weight to another physician simply because he was an examining physician, where the reviewing physician was a qualified expert and his opinion was consistent with the opinion of the examining physician, *see Amax Coal Company v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *see also Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *Johnson v. Old Ben Coal Co.*, 17 BLR 1-5 (1992); *see also Cadwallader v. Director, OWCP*, 7 BLR 1-879 (1985).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge