BRB No. 01-0827 BLA

RAYMOND ABSHIRE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D & L COAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER *En Banc*

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Jeffrey S. Goldberg (Eugene Scalia, 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.

Stephen A. Sanders, Prestonsburg, Kentucky, for Appalachian Citizens Law Center, Inc., as *amicus curiae*, in support of claimant.

William H. Howe and Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for Association of Bituminous Contractors, Inc., as *amicus curiae*, in support of employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2000-BLA-643) of Administrative Law Judge Daniel J. Roketenetz awarding benefits on a duplicate 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).[1] The procedural history of this case is as follows: Claimant filed his initial claim for benefits on January 21, 1992, which was denied by the Department of Labor on July 6, 1992 as claimant failed to establish any element of entitlement. Director's Exhibit 52. Claimant took no further action until he filed a second application for benefits on November 12, 1993, which was finally denied on April 28, 1998 as claimant failed to establish the existence of pneumoconiosis or total disability. Director's Exhibit 44.

Claimant filed his most recent application for benefits, the subject of the instant appeal, on April 29, 1999. This claim was denied by the district director on December 28, 1999 as the newly submitted evidence failed to establish a material change in conditions. Director's Exhibits 1, 10, 19. Claimant requested a formal hearing, the case was referred to the Office of Administrative Law Judges, and a hearing was held on October 18, 2000. Decision and Order at 3, 5; Director's Exhibit 45. After determining that the instant claim was a duplicate claim, the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis and thus

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

concluded that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[2] Decision and Order at 4-5, 7-9.

With respect to the merits, the administrative law judge found sixteen years of qualifying coal mine employment and, based on the date of filing, he adjudicated this claim pursuant to 20 C.F.R. Part 718. Decision and Order at 5-7; Director's Exhibit 1. The administrative law judge determined that employer was the responsible operator and, following a *de novo* review of the record, concluded that the evidence was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b), (c). Accordingly, benefits were awarded.

[2]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

On appeal, employer contends that the administrative law judge erred in failing to perform the proper material change in conditions analysis, in failing to dismiss the claim as untimely filed, and in failing to properly explain his basis for finding the existence of pneumoconiosis, total disability and disability causation established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.204(b)(2)(iv), (c). Claimant responds, contending that the administrative law judge's decision is supported by substantial evidence and asserting that employer has waived the issue of timeliness. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the regulations at 20 C.F.R. §725.308 do not bar claimant's duplicate claim as there has been no reasoned opinion of a medical professional as required by the Act to begin the statutory period. The Director declines to take a position with respect to the administrative law judge's material change in conditions finding or his weighing of the medical opinion evidence.[3] The Board, by Order dated May 16, 2002, scheduled oral argument in this case with respect to the timeliness issue. Oral argument was held in Cincinnati, Ohio on June 27, 2002.[4]

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes

[3]We affirm the findings of the administrative law judge with respect to the length of coal mine employment, the designation of employer as the responsible operator, and pursuant to 20 C.F.R. §§718.202(a)(2)-(3), 718.203(b) and 718.204(b)(2)(i)-(iii), as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Administrative Appeals Judge Roy P. Smith was not present at the oral argument, but has reviewed the transcript and will participate in this decision.

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Initially, we address employer's contention that, based on the recent decision by the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), this claim was untimely filed.[5] Employer contends that the instant claim is barred by Section 725.308,[6] since it was not filed within three years after Dr. Sutherland's medical determination that claimant was totally disabled due to pneumoconiosis. Employer's Brief at 13-17; Employer's Reply Brief at 3. Claimant responds to this contention, asserting that employer has waived any argument with respect to the timeliness of the claim. Claimant's Response Brief at 6-7. The Director responds, asserting that the Court's observations in *Kirk* with respect to the statute of limitations must be considered dicta. Director's Response Brief at 2.

We reject the contentions of both claimant and the Director that employer has waived its right to raise the issue of timeliness in this instance. Claimant and the Director specifically contend that because employer withdrew its controversion to this issue when this claim was referred to the Office of Administrative Law Judges for a hearing, employer has waived reliance on the issue as an affirmative defense under Section 725.308.[7] *See* Decision

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

[6]The amended regulations did not alter 20 C.F.R. §725.308 (2000).

[7]The record specifically indicates that employer raised the issue of timeliness before the district director but withdrew this controversion before the administrative law judge. 20 C.F.R. §725.462; Director's Exhibit 45; Hearing Transcript at 10-11; Decision and Order at 4.

and Order at 4; Hearing Transcript at 10-11; *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993). While an appellate court generally will not address an issue which was not presented below, an exception is made when raising the issue would have been futile. *See Youakim v. Miller*, 425 U.S. 231 (1976); *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995); *The Youghiogheny and Ohio Coal Co. v. Warren*, 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1987); *Kyle v. Director, OWCP*, 819 F.2d 139, 10 BLR 2-112 (6th Cir. 1987), *cert. denied*, 488 U.S. 997 (1988). This holding governs the instant case.

The Board has held that the time limitation set forth in Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308, does not bar the filing of a duplicate claim. *See Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). The Board consequently has held that the statute of limitations contained in Section 725.308 applies only to the filing of a claimant's initial Part C claim and that the filing of any subsequent claims need not comply with the statute of limitations. *Faulk, supra*; *Andryka, supra*. At the time that the instant claim was filed, the Board adhered to this position and thus it would have been futile for employer to raise this issue before the district director or the administrative law judge. *See Youakim, supra*; *Greer, supra*; *Warren, supra*; *Kyle, supra*. Consequently, we hold that the issue of timeliness was not waived by employer and we will now consider employer's arguments on this issue.

Employer asserts that because claimant received his first diagnosis of total disability due to pneumoconiosis in 1995, the present claim, which was filed more than three years after that date, is untimely filed in accordance with the recent decision by the Sixth Circuit in *Kirk*. Employer therefore alleges that claimant's April 1999 claim is barred by the terms of Section 725.308. Employer's Brief at 15-17; Employer's Reply Brief at 3. 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.

Section 422(f) of the Act, 30 U.S.C. §932(f). The implementing regulation 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. Subsequent to the administrative law judge's Decision and Order in the instant case, the Sixth Circuit issued *Kirk.* With respect to the time limitation of Section 725.308, the court held:

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination . . . and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Kirk, 264 F.3d at 608, 22 BLR at 2-298.

The Director asserts that this discussion by the Sixth Circuit is dicta and thus argues that employer's argument must fail. We reject this assertion. In *Kirk*, the Sixth Circuit found that the employer had failed to rebut the presumption of timeliness, and thus affirmed the finding that the claim was timely filed. The court then addressed the employer's complaint that accepting the claim in *Kirk* as timely implied that an employer would "never know when its liability for a particular miner would cease". *Id*. In over one full page of text, the Court explained why the employer was incorrect when it asserted that a miner would be able to "infinitely file 'claim after claim until they find a pliant ALJ' and a 'compliant physician.'" *Id*., quoting *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1366, 20 BLR 2-227,

2-242 (4th Cir. 1996)(*en banc*)(Luttig, J., dissenting). It was while addressing this complaint that the court provided the language that the Director now contends is dicta.

In the process of determining that the claim in *Kirk* was timely filed, the court carefully analyzed its holding and provided specific guidance on its application of this holding. Moreover, in support of its holding, the Sixth Circuit reconciled its reasoning with its prior decision in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We therefore reject the Director's suggestion that this language is merely dicta. Rather, the court has provided a detailed interpretation of Section 725.308, together with guidance on this provision's applicability to duplicate claims.

Based upon our holdings that the interpretation of Section 725.308 set forth in *Kirk* is not dicta and that employer did not waive its right to assert that claimant's 1999 claim was untimely filed, the timeliness issue is only now squarely presented for decision in this case. Although every claim for benefits is presumed to be filed within the prescribed time limits pursuant to Section 725.308(c), the party opposing entitlement is given an opportunity to rebut this presumption. 20 C.F.R. §725.308(c). Whether the evidence in a particular case is sufficient to establish rebuttal involves substantial *factual* findings which must be rendered by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The Sixth Circuit has held that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case[.]" *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Greer, supra; Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). Thus, the Board cannot resolve the conflict regarding the application of Section 725.308 to the facts of the present case. Accordingly, we must vacate the administrative law judge's award of benefits and remand this case to the administrative law judge to permit him to address the timeliness issue.[8] *See Kirk, supra*; *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994); *Clark, supra.* On remand, the administrative law judge must determine whether, as employer asserts, Dr. Sutherland's 1995 report constitutes "a medical determination of total disability due to pneumoconiosis that has been communicated to the miner" in accordance with Section 725.308 and the court's holding in *Kirk*. 20 C.F.R. §725.308(a).[9] The administrative law judge should also address

[8]The administrative law judge may exercise his discretionary authority to reopen the record on remand to allow the parties to submit additional evidence. *Cochran v. Consolidation Coal Co.*,16 BLR 1-101 (1992); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-147 (1989); *Toler v. Eastern Associated Coal Corp.*, 12 BLR 1-49 (1988).

[9]Dr. Sutherland, who had been treating the miner for several years, diagnosed pneumoconiosis due to coal dust exposure during the miner's coal mine employment. The physician opined that the miner, as a result of his pneumoconiosis, is unable to work in the

the Director's argument, to the contrary, that a duplicate claim is not time-barred by a medical opinion which meets the requirements of Section 725.308 but, like Dr. Sutherland's, is rejected as unpersuasive in a prior claim proceeding.[10] Finally, if the administrative law judge finds that the evidence of record is sufficient to establish rebuttal of the presumption that this claim was timely filed, then he must give claimant the opportunity to prove that extraordinary circumstances exist that may preclude the dismissal of the claim. 20 C.F.R. §725.308(c).

We are mindful, however, that employer has also raised specific allegations of error regarding the administrative law judge's analysis of the evidence with respect to the material change in conditions determination and pursuant to 20 C.F.R. Part 718. Accordingly, in the interest of judicial economy, we now address those allegations.

Employer asserts that the administrative law judge failed to make the proper inquiry in determining if a material change in conditions was established, as the administrative law judge failed to compare the newly submitted evidence with the prior evidence. Employer also contends that the administrative law judge's analysis was flawed, as a mistake in a prior denial cannot form the basis for an award. Rather, the evidence must show that the miner's condition has worsened, which is the proper inquiry pursuant to Section 725.309 (2000). Employer's Brief at 18-24; *Ross, supra*. We agree.

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coal mine industry. The physician also noted that claimant suffered from COPD (chronic obstructive pulmonary disease) with bronchospasms, pulmonary fibrosis, mitral regurgitation and spinal problems. Director's Exhibit 44.

[10]The Director relies upon the decision in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), in which the United States Court of Appeals for the Tenth Circuit held that a final finding by an adjudicator that the miner is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical opinions to the contrary ineffective to trigger the running of the statute of limitations.

The administrative law judge, in this case, found that the instant claim was subject to the provisions of Section 725.309 (2000) as claimant filed his claim more than one year after the final denial of the prior claim. Decision and Order at 4-5, 7-8. He noted that the previous claim was denied as claimant did not establish the existence of pneumoconiosis or any other element necessary for establishing entitlement. Decision and Order at 8; Director's Exhibit 44. Further, the administrative law judge correctly found that when assessing whether the evidence is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000), he must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *See Ross, supra*; Decision and Order at 8. Ultimately, the administrative law judge concluded that a preponderance of the newly submitted x-ray interpretations of record established the existence of pneumoconiosis, which established a material change in conditions.[11]

On appeal, employer contends that the administrative law judge failed to make a specific finding that claimant's condition has worsened. This contention has merit. Specifically, employer asserts that the new evidence reflects only an ongoing debate as to whether the x-ray evidence establishes the existence of pneumoconiosis, and thus does not indicate any actual change in the miner's condition pursuant to the standard set forth in *Ross*. In determining whether a material change in conditions is established pursuant to the appropriate standard, the administrative law judge must analyze whether the new evidence submitted with the duplicate claim differs qualitatively from the evidence submitted with the previously denied claim. *See Kirk, supra*; *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(*en banc*); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997). In the instant case, the administrative law judge has not addressed whether the new evidence differs qualitatively from the evidence submitted with the prior claim. Accordingly, we vacate the administrative law judge's determination that the evidence submitted since the prior denial supports a finding of a material change in conditions pursuant to Section 725.309 (2000). On remand, if

[11]The administrative law judge determined that all of the physicians interpreting the x-rays were either B-readers, Board-certified radiologists or dually qualified; and that six of the newly submitted x-ray interpretations were positive for the existence of pneumoconiosis and four were negative. Decision and Order at 9; Director's Exhibits 5, 8, 9; Claimant's Exhibits 1, 2, 4, 5; Employer's Exhibits 1, 2.

the administrative law judge finds that claimant's duplicate claim was timely filed and remains viable, the administrative law judge must then reconsider whether the newly submitted evidence is sufficient to establish a material change in conditions in a manner consistent with the holdings in *Kirk*, *Ross*, *Stewart* and *Flynn*.

Employer further argues that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Employer specifically contends that, in finding the x-ray evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge failed to offer a valid reason for assigning greater weight to the more recent x-ray evidence and discounting the volume of evidence that shows the absence of pneumoconiosis.[12] Employer's Brief at 22-25. Contrary to employer's contention, the administrative law judge, within a proper exercise of his discretion, may accord greater weight to the more recent x-ray evidence of record. *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990); *Clark, supra*. In addition, the United States Supreme Court, as well as the Sixth Circuit, accepted the Department of Labor's view that pneumoconiosis is progressive. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Ross*, *supra*; *Woodward, supra; Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Stewart, supra*; *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995) (pneumoconiosis is a latent and progressive disease which may not become manifest until long after coal dust exposure ceases). Thus, the administrative law judge permissibly relied upon the more recent x-ray evidence.

[12]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law or discretion presented on the record . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

Employer also contends that the administrative law judge erred in finding the medical opinion evidence in equipoise in his consideration of the evidence pursuant to Section 718.202(a)(4). Employer argues that, "when properly considered, the preponderance of the evidence demomstrates the absence of pneumoconiosis". Employer's Brief at 26. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge, in this instance, set forth all of the relevant evidence of record, noting that Drs. Sundaram, Mettu, Sutherland and Younes diagnosed the existence of pneumoconiosis, while Drs. Dahhan, Broudy, Castle, Branscomb and Fino opined that the miner did not suffer from the disease. Decision and Order at 10-11; Director's Exhibits 5, 8, 9, 43, 44. The administrative law judge, considered the recency of the medical reports, the status of Drs. Sutherland and Sundaram as claimant's treating physicians, and the credentials of Drs. Dahhan, Castle, Fino and Broudy, and as the finder-of-fact, rationally determined within his discretion, that the evidence was in equipoise and did not unequivocally show either the existence or non-existence of pneumoconiosis pursuant to Section 718.202(a)(4).[13]

[13]Although Dr. Younes stated that his diagnosis of pneumoconiosis was based upon his x-ray interpretation, the physician also diagnosed chronic obstructive pulmonary disease primarily due to cigarette smoking and secondarily due to occupational coal dust exposure, based upon a physical examination, objective tests and the miner's social, medical and occupational histories. Director's Exhibit 5. This diagnosis is sufficient to establish the presence of pneumoconiosis within the meaning of the regulations, and thus we reject employer's contention that this opinion is just a restatement of a positive x-ray and therefore insufficient to meet claimant's burden. *See* 20 C.F.R. §§725.102(a)(25), 718.201(a)(2); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *Taylor v. Director, OWCP*, 9 BLR 1-22 (1986).

Cole v. East Kentucky Collieries, 20 BLR 1-50 (1996). As the administrative law judge need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his own conclusions and inferences, we reject employer's contention that the administrative law judge erred in finding the medical opinion evidence to be in equipoise. *See Jericol Mining, Inc. v. Napier*, F.3d , 2002 WL 1988221 (6th Cir., Aug. 30, 2002); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Therefore, we affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See Director, OWCP v. Greenwich Collieries, [Ondecko*] 512 U.S. 267, 18 BLR 2A-1 (1994).

We further reject employer's assertion that the administrative law judge is required to determine if the presence of pneumoconiosis is established pursuant to Section 718.202(a) by weighing the x-ray evidence against the other evidence of record, including the medical opinion evidence, in light of the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Employer's Brief at 21. In *Compton*, the United States Court of Appeals for the Fourth Circuit held that, despite the fact that Section 718.202(a) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Compton, supra.* Although decisions rendered by a circuit court may provide guidance in cases that do not arise within its geographical jurisdiction, we have declined to apply *Compton* beyond the boundaries of the Fourth Circuit, as it is not apparent that the court's holding is mandated by the Act and the implementing regulations. Furthermore, the Sixth Circuit has often approved the independent application of the subsections of Section 718.202(a) to determine whether claimant has established the existence of pneumoconiosis. *E.g., Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-119 (6th Cir. 2000); *Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 BLR 2-192, 2-199 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 216, 20 BLR 2-360, 2-369 (6th Cir. 1996). Thus, inasmuch as the instant case arises within the jurisdiction of the Sixth Circuit on this issue, *see* n. 5, *supra*, and the Sixth Circuit has not adopted the reasoning of the Fourth Circuit, we decline to apply the holding of *Compton* in this case. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *contra Compton supra*; *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

Employer also asserts that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability and disability causation pursuant to Sections 718.204(b)(2)(iv) and 718.204(c). Employer contends that the administrative law judge failed to explain why he discounted the contrary evidence of record in favor of Dr. Sutherland's opinion. Employer's Brief at 28-39. We agree.

The administrative law judge found that total disability was established as he accorded greater probative weight to the opinion of Dr. Sutherland "because of his familiarity with claimant's condition over the last decade," and because the opinion was supported by the "examination report" of Dr. Younes. Decision and Order at 15. While the Sixth Circuit has held that the credible opinions of treating physicians should be given their proper deference, *see Wolf Creek Collieries v. Director, OWCP [Stephens],* F.3d , 2002 WL 1769283 (6th Cir., Aug. 2, 2002); *Napier, supra*; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), in this instance, the administrative law judge did not discuss the reasoning and documentation in the opinions of Drs. Sutherland and Younes on the issue of total disability. The administrative law judge also failed to specifically address the credibility of the remaining contrary opinions of record by examining physicians, and to assign them appropriate weight.[14] Decision and Order at 14-15. Further, although the administrative law judge cited to *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), he failed to weigh the contrary probative evidence in determining if the miner was totally disabled pursuant to Section 718.204(b)(2). Decision and Order at 13-15. We therefore vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv), and remand the case to the administrative law judge to specifically set forth his basis for finding the opinion of Dr. Sutherland reasoned and documented, and to discuss the credibility of this opinion in light of the administrative law judge's prior finding and the contrary evidence of record. *See Napier, supra*; *Groves, supra*; *Fields, supra; Shedlock, supra.*

Employer further argues, with respect to Section 718.204(c), that the administrative law judge violated the APA in finding that claimant's total disability was due to pneumoconiosis in that he mischaracterized Dr. Broudy's opinion. Employer's Brief at 37-38. We agree. In finding that claimant established that his disability was due to pneumoconiosis, the administrative law judge determined that Dr. Sutherland consistently and unequivocally related claimant's disability to his past coal mine employment. Decision and Order at 15. The administrative law judge further found that the most recent opinion by Dr. Broudy, as well as the older reports by the other pulmonary specialists, found that claimant had no pneumoconiosis and no disability, and the administrative law judge thus

[14]Dr. Broudy, who is Board-certified in pulmonary diseases, examined claimant most recently on July 7, 1999 and "based on the same objective testing and history as Dr. Younes," concluded that there was no evidence of pneumoconiosis and no significant pulmonary disease or respiratory impairment from claimant's coal mine employment, and that claimant retained the respiratory capacity to perform the work of an underground coal miner or similarly arduous labor. Dr. Broudy reported that he had seen claimant on three previous occasions for evaluations. Director's Exhibits 8, 9.

concluded that these opinions were entitled to less probative weight on the issue of causation.[15] Decision and Order at 15.

[15]Contrary to employer's contention, an administrative law judge may permissibly accord less weight to an opinion regarding causation where it is based on a faulty underlying premise regarding the presence or absence of pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1989); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

The record, however, indicates that Dr. Broudy, who is Board-certified in pulmonary diseases, also opined that even if claimant suffered from coal workers' pneumoconiosis, his opinion with respect to claimant's pulmonary difficulties would not change.[16] Director's Exhibits 8, 9. Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis does not coincide with the evidence of record, the basis for the administrative law judge's credibility determinations in this particular case cannot be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). We therefore vacate the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis. If the administrative law judge reaches this issue on remand, he must reconsider all relevant medical evidence to determine whether it satisfies the requirements of Section 718.204(c) and the applicable case law. 20 C.F.R. §718.204(c); *see Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In weighing the medical opinion evidence, the administrative law judge must determine whether each opinion is adequately reasoned and documented with regard to the issue of total disability causation and must set forth the rationale underlying his findings. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Accordingly, the administrative law judge's Decision and Order awarding benefits in this duplicate claim is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[16]Dr. Broudy stated that claimant suffered from no respiratory or pulmonary impairment due in whole or in part to the inhalation of coal mine dust. The physician opined that claimant's respiratory difficulties were due to chronic obstructive airways disease caused by cigarette smoking, his sleep apnea condition and his obesity. Director's Exhibits 8, 9.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge