BRB Nos. 03-0615 BLA
and 03-0615 BLA-A

WILLIAM O. DEMPSEY	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	DATE ISSUED: 06/28/2004
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	*EN BANC*

Appeal and Cross-Appeal of the Decision and Order-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James M. Phemister, Mary Z. Natkin (Washington and Lee University School of Law, Legal Practice Clinic), Lexington, Virginia, for claimant.

Douglas A. Smoot, Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner, Timothy S. Williams (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, SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order-Awarding Benefits (2002-BLA-5357) of Administrative Law Judge Daniel L. Leland 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).[1] Claimant's prior application for benefits filed on April 27, 1989 was finally denied on August 15, 1989. Director's Exhibit 1. On February 8, 2001, claimant filed his current application, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3. The district director awarded benefits and employer requested a hearing, Director's Exhibits 33, 41, which was held before the administrative law judge on February 6, 2003.

In a Decision and Order-Awarding Benefits issued on May 30, 2003, the administrative law judge credited claimant with twenty-three years of coal mine employment[2] and found that the subsequent claim was timely filed. The administrative law judge found that the medical evidence developed since the prior denial of benefits established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that CT-scan evidence was in equipoise and did not establish the existence of pneumoconiosis, and that the weight of the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing the chest x-rays and medical opinions together, the administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R.

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[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.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§718.204(b),(c). Accordingly, the administrative law judge awarded benefits as of February 1, 2001, the month in which the subsequent claim was filed.

On appeal, employer contends that the administrative law judge erred in finding claimant's subsequent claim to be timely. Employer further asserts that the administrative law judge abused his discretion in excluding evidence submitted by employer in excess of the limitations set forth at 20 C.F.R. §725.414. Employer argues that the administrative law judge erred in finding a change in an applicable condition of entitlement established, and erred in his analysis of the medical evidence when he found that claimant established the existence of pneumoconiosis and that his total disability is due to pneumoconiosis. Employer also contends that the administrative law judge erred in finding the month of the subsequent claim's filing established the onset date. Claimant responds, urging affirmance of the administrative law judge's evidentiary rulings under Section 725.414 and the award of benefits. Claimant also cross-appeals, challenging the administrative law judge's admission of certain exhibits submitted by employer. Employer responds to claimant's cross-appeal, urging affirmance of the administrative law judge's rulings admitting evidence. The Director, Office of Workers' Compensation Programs (the Director), responds to both appeals, urging affirmance of most of the administrative law judge's evidentiary rulings under Section 725.414, and urging affirmance of the findings that the subsequent claim was timely, that a change in an applicable condition of entitlement was established, and that February 1, 2001 is the onset date. Employer has filed a reply brief reiterating its contentions.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Timeliness of the Subsequent Claim

Employer contends that the administrative law judge erred in finding that this subsequent claim constitutes a timely application for benefits. Employer argues that the subsequent claim, filed on February 8, 2001, does not meet the three-year statute of limitations for filing a claim provided at Section 422(f) of the Act, 30 U.S.C. §932(f),

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[3] On April 13, 2004, the Board held oral argument in this case in Charleston, West Virginia, to address the issues raised concerning the administrative law judge's application of revised 20 C.F.R. §725.414. Employer and the Director submitted oral argument briefs in support of their positions.

because it was filed more than three years after claimant received a medical determination of total disability due to pneumoconiosis. The administrative law judge applied the Board's holding that the statute of limitations at Section 422(f) of the Act, as implemented by 20 C.F.R. §725.308, applies only to the first claim filed, *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990), and found claimant's subsequent claim to be timely. Decision and Order at 13. Employer argues that the administrative law judge erred by failing to follow *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), and *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*)(a case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit in which the Board applied *Kirk*).[4]

Employer's contention lacks merit. Because this claim arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, we are not obliged to apply the Sixth Circuit court's reasoning in *Kirk* to the present case. Director's Exhibit 5; *see Shupe*, 12 BLR at 1-202. Although decisions rendered by a circuit court can provide guidance in cases that do not arise within its geographical jurisdiction, the Board has declined to apply the language in *Kirk* regarding the statute of limitations beyond the boundaries of the Sixth Circuit, as it is not apparent that the court's holding is mandated by the Act or implementing regulations. *See Faulk*, 14 BLR at 1-21-22 (holding that limiting the statute of limitations to the initial claim "satisfies the purpose of the statute of limitations by ensuring that employer is provided with notice of the current claim and of the potential for liability for future claims, in view of the progressive nature of pneumoconiosis"). For this reason, and because the Fourth Circuit court has not adopted the approach set forth in *Kirk*, we decline to apply it in this case. We therefore affirm the administrative law judge's finding that claimant's subsequent claim was timely filed. *See Andryka*, 14 BLR at 1-36-37; *Faulk*, 14 BLR at 1-20-22.

Evidentiary Limitations of Section 725.414

Employer contends that the administrative law judge erred by excluding medical evidence submitted by employer in excess of the evidentiary limits imposed by revised

[4] In *Kirk*, which involved a duplicate claim under the former 20 C.F.R. §725.309(d)(2000), the Sixth Circuit court held that the three-year statute of limitations is triggered "*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 . . . the clock may only be turned back if the miner returns to the mines after a denial of benefits." *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 BLR 2-288, 2-298 (6th Cir. 2001)(emphasis in original).

20 C.F.R. §725.414.[5] Employer argues that Section 725.414 is invalid. Employer argues further that the administrative law judge erred in his application of Section 725.414.

Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can submit into the record. 20 C.F.R. §§725.414; 725.456(b)(1). The claimant and the responsible operator may each "submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by" the opposing party "and by the Director pursuant to §725.406."[6] 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit "an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing," and, where a medical report is undermined by rebuttal evidence, "an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence." *Id.* "Notwithstanding the limitations" of Section 725.414(a)(2),(a)(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1).

Employer submitted forty-one x-ray readings, six CT-scan readings, three physical examination reports, three sets of pulmonary function testing and blood gas study results, two consultation reports, four depositions, and several sets of medical records that employer described as treatment records. Employer also submitted pulmonary function and blood gas studies that employer stated were associated with claimant's state claim for benefits filed in 1976. Prior to the hearing claimant moved to exclude several of these items pursuant to Section 725.414. Employer responded, *inter alia*, that Section 725.414 is an invalid regulation and that in any event, good cause existed to exceed the evidentiary limits because the excess evidence was relevant and would assist the

[5] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on February 8, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

[6] Pursuant to 20 C.F.R. §725.406, the Director provides a complete pulmonary evaluation of the miner, the results of which are "not . . . counted as evidence submitted by the miner under §725.414." 20 C.F.R. §725.406(b).

physicians in determining whether claimant's lung disease constituted idiopathic pulmonary fibrosis (IPF) or pneumoconiosis. Employer argued that claimant's motions to exclude were premature, but employer nevertheless designated which specific items of evidence constituted its affirmative case and rebuttal evidence.

The administrative law judge found that it was not premature to rule on claimant's motions to exclude. The administrative law judge admitted into the record the two specific x-ray readings, pulmonary function studies, blood gas studies, and medical reports identified by employer as its affirmative case pursuant to Section 725.414(a)(3)(i), and admitted the specific items of rebuttal evidence that employer identified pursuant to Section 725.414(a)(3)(ii). The administrative law judge additionally found that although Section 725.414 does not specifically limit CT-scan readings, "the evidentiary limitations of §725.414 apply equally to CT scans . . . ." Order, Jan. 10, 2003 at 4. The administrative law judge thus limited employer to two CT-scan readings in its affirmative case. The administrative law judge also excluded the state claim pulmonary function and blood gas studies submitted by employer. The administrative law judge further determined that the exhibits proffered by employer as treatment records were inadmissible because they were "not records of hospitalizations or medical treatment, but [were] merely pulmonary function studies and arterial blood gas tests that Claimant has been administered over the years." Order, Jan. 27, 2003, at 1-2. The administrative law judge concluded that employer did not demonstrate good cause for why evidence exceeding the limitations of Section 725.414 should be admitted into the record pursuant to Section 725.456(b)(1) and accordingly, excluded employer's remaining evidence from the record.

Validity of Section 725.414

Employer contends that Section 725.414 is invalid because it conflicts with the Act's requirement that "all relevant evidence shall be considered . . . ." 30 U.S.C. §923(b). We reject employer's contention. Employer does not address the statutory authority under which the Department of Labor acted when it promulgated Section 725.414. Specifically, the Department of Labor relied upon other language in Section 923(b) which incorporates a provision of the Social Security Act authorizing the agency to regulate "the nature and extent of the proofs and evidence . . . ." 30 U.S.C. §923(b), incorporating 42 U.S.C. §405(a); Regulations Implementing the Federal Coal Mine Health and Safety Act of 1969, as Amended, 62 Fed. Reg. 3338, 3358 (Jan. 22, 1997). Additionally, the Department of Labor relied upon Section 556(d) of the Administrative Procedure Act (APA), which empowers the agency to "provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence" as "a matter of policy." 5 U.S.C. §556(d), 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); 62 Fed. Reg. at 3359. These statutory provisions were cited by the United States Court of Appeals for the District of Columbia Circuit when it

upheld Section 725.414 as a valid regulation. *Nat'l Mining Ass'n v. Dept. of Labor*, 292 F.3d 849, 873-74 (D.C. Cir. 2002). Therefore, we reject employer's contention that Section 725.414 is invalid because it is in conflict with Section 923(b) of the Act.

Employer argues further that Section 725.414 is invalid because it imposes arbitrary limits on evidence in violation of the APA. Employer contends that the APA "authorizes each party to submit whatever evidence that party thinks is needed to prove its case or defense." Employer's Brief at 20. The United States Court of Appeals for the District of Columbia Circuit rejected the identical argument as "flatly contradicted by the statute itself, which empowers agencies to 'exclu[de] . . . irrelevant, immaterial, or unduly repetitious evidence' as 'a matter of policy . . . .'" *Nat'l Mining*, 292 F.3d at 873-74. Similarly, the Fourth Circuit court has recognized that the APA does not require "the wholesale admission of all evidence . . . ." *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 388, 21 BLR 2-639, 2-647 (4th Cir. 1999). Consequently, we reject employer's contention that Section 725.414 is invalid because it conflicts with the APA.

Employer contends that Section 725.414 is invalid because it conflicts with *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), and argues that the administrative law judge erred in declining to apply *Underwood* in ruling on the admissibility of employer's evidence. Employer's argument lacks merit. In *Underwood*, which was decided prior to the regulatory revisions, the Fourth Circuit court set a standard for administrative law judges to apply in exercising their discretion to exclude unduly repetitious evidence under Section 556(d) of the APA, while considering all relevant evidence under Section 923(b) of the Act. The court held that administrative law judges "must consider all relevant evidence, erring on the side of inclusion, but . . . they should exclude evidence that becomes unduly repetitious in the sense that the evidence provides little or no additional probative value." *Underwood*, 105 F.3d at 951, 21 BLR at 2-32. Because the issue in *Underwood* concerned case-by-case rulings by administrative law judges under Section 556(d) of the APA, the court did not decide the issue of the Department of Labor's authority to impose limits on the admission of evidence in black lung claims. Subsequent to *Underwood*, the Department of Labor exercised its authority to, "as a matter of policy . . . provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence," 5 U.S.C. §556(d), and replaced the ad hoc determinations of administrative law judges with a bright-line rule in Section 725.414, including a "good cause" exception at Section 725.456(b)(1). In *Underwood*, the court recognized "the discretion reposed in agencies when it comes to deciding whether to permit the introduction of particular evidence at a hearing," so long as the agency "is not arbitrary . . . ." *Underwood*, 105 F.3d at 950, 21 BLR at 2-30-32 (citations omitted). Consequently, we reject employer's argument that Section 725.414 is invalid because it conflicts with *Underwood*. To the extent the administrative law judge in this case was addressing the admissibility of x-ray readings, pulmonary function studies, blood gas studies, and

medical reports, which are categorically limited by Section 725.414, he did not err in applying Section 725.414 in ruling on the evidence.

Administrative Law Judge's Application of Section 725.414 to Exclude CT-Scans

Employer contends that the administrative law judge erred in automatically applying the affirmative-case evidentiary limitations of Section 725.414 to CT-scan readings. CT-scans are admissible as "[o]ther medical evidence" under 20 C.F.R. §718.107(a), which provides for the submission of "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis," its sequela, "or a respiratory or pulmonary impairment." 20 C.F.R. §718.107(a). Unlike Section 725.414, Section 718.107(a) contains no specific numerical limits. If a party submits other medical evidence pursuant to Section 718.107, Section 725.414 provides that the opposing party may "submit one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. §725.414(a)(2)(ii),(a)(3)(ii). Thus, by its terms, revised Section 725.414 imposes no numerical limits on CT-scan readings submitted as a party's affirmative case. In this case, however, the administrative law judge ruled that "the evidentiary limitations of §725.414 apply equally to CT scans," and for that reason he limited employer to two readings of an October 31, 2002 CT-scan in its affirmative case. Order, Jan. 10, 2003 at 4, Order Jan. 27, 2003 at 2. This was error, as the affirmative-case limitations of Section 725.414 do not extend to CT-scans. The Director agrees that an administrative law judge "cannot apply the x-ray reading limitations of Section 725.414 to CT-scan readings." Director's Oral Argument Brief at 12. We are unable to conclude that the error was harmless, because the CT-scan evidence, which the administrative law judge found to be "in equipoise" with two readings per side, Decision and Order at 17, had to be included in the weighing of all relevant evidence regarding the existence of pneumoconiosis pursuant to *Compton*. Therefore, we vacate the administrative law judge's ruling as to the CT-scan readings and instruct him to consider their admissibility within his own discretion under APA Section 556(d), in accordance with *Underwood*. If the administrative law judge admits additional CT-scan readings, he must reconsider whether the CT-scans support a finding of the existence of pneumoconiosis.

Exclusion of Proffered Treatment Records

Employer contends that the administrative law judge erred by excluding exhibits proffered by employer as treatment records under Section 725.414(a)(4), based on a finding that the records contained pulmonary function studies and blood gas studies exceeding the limits of Section 725.414. Section 725.414(a)(4) provides that "notwithstanding the limitations" of Section 725.414(a)(2), (a)(3), "any record of a

miner’s hospitalization for . . . or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.” 20 C.F.R. §725.414(a)(4). The provision does not define what constitutes a record of a miner’s hospitalization or treatment for a respiratory or pulmonary or related disease.

In response to interrogatories from employer, claimant reported that he was examined, tested, and treated for “breathing problems” by physicians in Charleston and Summersville, West Virginia. Director's Exhibit 24 at 8-10. Employer obtained and submitted the associated records, which contained, *inter alia*, pulmonary function and blood gas studies. Director's Exhibits 37-40. The administrative law judge ruled that the proffered records were merely pulmonary function and blood gas studies that employer classified as treatment records to “circumvent the limitations of this subsection . . . .” Order, Jan. 27, 2003 at 2. The Director concedes that some of the records submitted by employer constituted treatment records for a respiratory or pulmonary or related disease under Section 725.414(a)(4) and were incorrectly excluded by the administrative law judge merely because they contained pulmonary function and blood gas studies which the administrative law judge believed exceeded the limits of Section 725.414. Director’s Oral Argument Brief at 18-19. The Director argues, however, that their improper exclusion was harmless error because the records do not address whether claimant has pneumoconiosis or is totally disabled due to pneumoconiosis. We are unable to conclude that the error was harmless, in view of the fact that the administrative law judge discredited the opinion of Dr. Renn since “a majority” of the “pulmonary function studies, and arterial blood gas tests that Dr. Renn relied upon were excluded from the record because they exceeded the evidentiary limitations of the new regulations.” Decision and Order at 19. Dr. Renn considered and analyzed the disputed treatment records in formulating his opinion. Employer's Exhibit 9 at 5; Employer's Exhibit 32 at 18-19, 50-51. Therefore, and because the administrative law judge did not make a particularized determination as to the admissibility of the proffered records, we vacate the administrative law judge’s ruling and instruct him to analyze each set of records and make a specific finding as to its admissibility under Section 725.414(a)(4).

Exclusion of State Claim Medical Evidence

Employer contends that the administrative law judge abused his discretion in excluding from the record December 1977 pulmonary function and blood gas studies that employer argues were admissible because they were associated with claimant’s state claim for benefits. Pulmonary function and blood gas studies are specifically limited by Section 725.414. 20 C.F.R. §725.414(a)(2),(a)(3). The state claim evidence employer sought to admit consisted solely of pulmonary function and blood gas studies administered in December 1977. Director's Exhibit 37. Such items do not fall within the exception for hospitalization or treatment records, *see* 20 C.F.R. §725.414(a)(4), nor are they covered by the exception for prior federal black lung claim evidence. *See* 20 C.F.R.

§725.309(d)(1). Thus, the administrative law judge properly excluded the 1977 pulmonary function and blood gas studies under Section 725.414, as employer had already reached its limit of two pulmonary function and blood gas studies in its affirmative case. Director's Exhibit 35; Employer's Exhibit 9.

"Good Cause" under Section 725.456(b)(1)

Employer argues that the administrative law judge erred in finding that no good cause existed under Section 725.456(b)(1) for exceeding the limits of Section 725.414 with additional x-ray readings, pulmonary function studies, blood gas studies, and medical reports.

The administrative law judge did not abuse his discretion in determining that employer did not establish good cause under Section 725.456(b)(1). *Clark*, 12 BLR at 1-153. Employer argued to the administrative law judge that good cause existed because the excess evidence was "relevant," and because "it [was] helpful and necessary for the physicians to have as much information as possible . . . to make an accurate diagnosis," as some physicians diagnosed claimant with IPF.[7] Employer's Response, Jan. 17, 2003 at 8. The administrative law judge found the assertion that the excess evidence was relevant to be insufficient to establish good cause. Order, Jan. 10, 2003 at 5. The administrative law judge's finding was reasonable. *Cf. Conn v. White Deer Coal Co.*, 6 BLR 1-979, 1-981-82 (1984)(holding that a mere assertion that evidence is relevant does not establish good cause for a party's failure to timely submit the evidence under the former Section 725.456(b)(2)(2000)). The administrative law judge additionally found that employer did not explain why the admitted evidence of record was insufficient to distinguish IPF from coal workers' pneumoconiosis, or indicate how additional x-rays, pulmonary function studies, blood gas studies, or medical reports would assist the physicians. Order, Jan. 27, 2003 at 2-3. It was employer's burden to demonstrate good cause. *See* 20 C.F.R. §725.456(b)(1); 65 Fed. Reg. 79920, 80000 (Dec. 20, 2000)(stating that a party must "convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence"). On the facts and arguments presented, we detect no abuse of discretion in the administrative law judge's

[7] Employer argued that IPF mimics coal workers' pneumoconiosis and that thus more medical information was necessary for Drs. Wiot and Renn to distinguish the two conditions. Employer's Response, Jan. 17, 2003 at 8. Review of these physicians' opinions reveals testimony that IPF and coal workers' pneumoconiosis are distinct disease processes on x-ray. Employer's Exhibit 31 at 20; Employer's Exhibit 32 at 52.

determination that employer did not demonstrate good cause for exceeding the limits of Section 725.414.[8] *Clark*, 12 BLR at 1-153.

Remaining Evidentiary and Procedural Issues

Employer argues that the administrative law judge abused his discretion and violated employer's due process rights by forcing employer to "prematurely" disclose its affirmative case more than twenty days before the February 6, 2003 hearing. Employer's Brief at 19. Contrary to employer's contention, it was not an abuse of discretion for the administrative law judge to rule on claimant's motions to exclude and order employer to identify which items of evidence it would rely on as its affirmative case pursuant to Section 725.414(a)(3)(i).[9] *Clark*, 12 BLR at 1-153. Additionally, once employer selected the medical reports of Drs. Renn and Bellotte for its affirmative case, the administrative law judge did not abuse his discretion in refusing to permit employer to withdraw Dr. Bellotte's medical report at the hearing and substitute Dr. Crisalli's report. The administrative law judge reasonably considered claimant's objection that he had relied on employer's prior designation of its two medical reports in developing his medical evidence. Tr. at 7-9; *see Clark*, 12 BLR at 1-153. Additionally, in view of the administrative law judge's broad discretion to handle procedural matters, we detect no abuse of discretion in his decision not to retain the large number of excluded exhibits with the record. The procedural regulations do not impose a duty to associate with the record proffered exhibits that are not admitted as evidence. *See* 20 C.F.R. §§725.456(b)(1), 725.464; 29 C.F.R. §§18.47, 18.52(a). Further, the administrative law judge acted within his discretion when he found that good cause excused claimant's submission of evidence less than twenty days before the hearing pursuant to Section 725.456(b)(3), because claimant explained that he was unable to proceed with development of admissible evidence under Section 725.414 until his motions to exclude excess evidence were decided. Tr. at 14; *see* 20 C.F.R. §725.414(a)(2)(ii)(providing for claimant's rebuttal of the opposing party's affirmative case), and

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[8] Because it was employer's burden to demonstrate good cause, we also reject its contention that the administrative law judge was required to review each of employer's proffered exhibits to determine whether there was good cause for its admission. The administrative law judge did not abuse his discretion in requiring employer to convince him at the hearing that good cause existed, rather than asking him "to read the depositions to find out if there is good cause." Tr. at 38; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

[9] Moreover, employer identifies no prejudice as a result of the administrative law judge's order; employer ultimately disclosed its affirmative case and rebuttal evidence on January 17, 2003, twenty days before the hearing.

§725.414(a)(2)(i)(requiring that a medical report refer only to admissible medical evidence). Moreover, the administrative law judge left the record open for forty-five days for employer to respond, *see* 20 C.F.R. §725.456(b)(4), and admitted two of the four items of post-hearing evidence that employer submitted in response to claimant's late evidence. The administrative law judge found that two post-hearing items that employer submitted constituted "cumulative rebuttal evidence" in excess of that permitted employer under Section 725.414. Order, Apr. 8, 2003 at 2. Contrary to employer's contention, the administrative law judge did not abuse his discretion in excluding employer's proffered re-reading of an August 13, 2001 x-ray submitted by the Director, because employer had already reached the limit of its permitted rebuttal of the Director's August 13, 2001 x-ray. *See* 20 C.F.R. §725.414(a)(3)(ii)(permitting "no more than one . . . interpretation of each chest x-ray . . . submitted by . . . the Director"). The administrative law judge also excluded a proffered reading of the October 31, 2002 CT-scan, based on his prior finding that Section 725.414 limited employer to two CT-scan readings in its affirmative case. Order, Apr. 14, 2003 at 2. As we have vacated that prior finding, the administrative law judge must reconsider the admissibility of Employer's Exhibit 34.

We also reject the allegations of procedural error raised by claimant on cross-appeal. Claimant contends that the administrative law judge erred in allowing employer to substitute Dr. Wiot's reading of an October 1, 2002 x-ray for that of Dr. Bellotte. The administrative law judge did not abuse his discretion in this regard. *Clark*, 12 BLR at 1-153. Employer submitted too many readings of this x-ray. Consistent with Section 725.414(a)(3)(i), the administrative law judge required employer to select two readings for its affirmative case.[10] For the same reason, the administrative law judge acted within his discretion when he permitted employer to select which two of its three medical reports employer would submit as its affirmative case. *Clark*, 12 BLR at 1-153. Because claimant submitted to the third physical examination scheduled by employer and conducted by Dr. Renn, the administrative law judge properly found claimant's argument that employer was not entitled to obtain a third examination to be moot. *See* 20 C.F.R. §725.414(a)(3)(i)(barring only "unreasonabl[e]" refusal to submit to an evaluation requested by the responsible operator); Tr. at 54 (observing that "I can not very well undo the fact that [claimant] went to three examinations"). Finally, because Dr. Renn's medical report was admitted into evidence as part of employer's affirmative case, claimant's contention that the administrative law judge erred in admitting Dr. Renn's deposition testimony lacks merit. 20 C.F.R. §725.414(c)(providing that "[a] physician who prepares a medical report admitted under this section may testify . . . by deposition").

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[10] Claimant does not argue that he uniquely relied on Dr. Bellotte's reading in developing his rebuttal of the October 2, 2002 x-ray.

Change in an Applicable Condition of Entitlement under Section 725.309(d)

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim 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. §725.309(d); *White v. New White Coal Co., Inc.*, 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). The administrative law judge determined that claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2),(d)(3); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). The administrative law judge found that the new evidence developed with the subsequent claim established that claimant is totally disabled by a respiratory impairment from performing the heavy labor required by his job as a belt repairman, thereby establishing a change in an applicable condition of entitlement.

Employer contends that the administrative law judge misidentified the element of entitlement previously adjudicated against claimant. Employer asserts that to establish a change in an applicable condition of entitlement, claimant had to demonstrate that he is totally disabled *due to pneumoconiosis* pursuant to Section 718.204(c). We disagree. The district director's August 15, 1989 denial letter indicated summary findings that claimant established the existence of pneumoconiosis arising out of coal mine employment, but that "the evidence in your claim . . . does not show that you are totally disabled by the disease." Director's Exhibit 1. The letter informed claimant that the pulmonary function studies and blood gas studies of record were non-qualifying,[11] and advised him to submit tests meeting the standards for "total disability." *Id*. The 1989

[11] A "qualifying" objective study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B and C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

medical opinion that was considered by the district director did not diagnose total disability or express specific limitations on claimant's ability to perform his usual coal mine employment. In light of the 1989 claim evidence, the administrative law judge reasonably interpreted the terse denial letter as containing a finding that claimant did not establish that he was totally disabled. Consequently, the administrative law judge correctly inquired whether the new evidence established this element of entitlement. 20 C.F.R. §725.309(d)(2). Employer does not challenge the administrative law judge's finding that the new evidence establishes that claimant is totally disabled pursuant to Section 718.204(b). We therefore affirm that finding, *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983), and we affirm the administrative law judge's attendant finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d).

Merits of Entitlement

Pursuant to Section 718.202(a)(1), employer contends that the administrative law judge did not provide valid reasons for the weight he accorded to the various x-ray readings when he found that a preponderance of the x-ray evidence established the existence of pneumoconiosis. Employer's contention lacks merit. The administrative law judge considered fourteen readings of nine x-rays. There were nine positive readings and five negative readings. The administrative law judge considered the readings in light of the physicians' radiological qualifications, deferring to the readings of physicians dually-qualified as Board-certified radiologists and B-readers. Decision and Order at 16; *see Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). The administrative law judge permissibly found that the negative readings by the dually-qualified Dr. Wiot were countered by the positive readings of Drs. Alexander and Patel, who are also dually-qualified. The administrative law judge considered Dr. Wiot's opinion that claimant's chest x-rays reflected IPF because the opacities were located in the lower lung zones, but found Dr. Wiot's observation outweighed because "every physician [who] noted the location of the opacities on their interpretations found opacities in all six lung zones." Decision and Order at 16. The administrative law judge permissibly found that "the cumulative opinions of these physicians, which include a dually-qualified physician, a board-certified radiologist, and two B-readers, outweigh Dr. Wiot's opinion that the chest x-rays reveal" IPF. *Id*.; *see Adkins*, 958 F.2d at 52, 16 BLR at 2-66. Contrary to employer's suggestion, the administrative law judge was not required to defer to Dr. Wiot's radiological experience or to his status as a professor of radiology. *See Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-261 (2003). Substantial evidence supports the administrative law judge's finding pursuant to Section 718.202(a)(1), which we therefore affirm.

Pursuant to Section 718.202(a)(4), employer contends that the administrative law judge erred in giving less weight to Dr. Renn's opinion because it was based partly on evidence excluded under Section 725.414. Section 725.414 provides that "[a]ny chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph or paragraph (a)(4) of this section." 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). The administrative law judge gave "little weight" to Dr. Renn's opinion that claimant does not have pneumoconiosis because "a majority of the chest x-ray interpretations, pulmonary function studies, and arterial blood gas tests that Dr. Renn relied upon were excluded from the record because they exceeded the evidentiary limitations . . . ." Decision and Order at 19. We have vacated the administrative law judge's ruling excluding most of the pulmonary function studies and blood gas studies that were reviewed by Dr. Renn. Consequently, we also vacate the administrative law judge's finding according less weight to Dr. Renn's opinion as based on those excluded items, and instruct him to reweigh Dr. Renn's opinion. Additionally, employer validly argues that substantial evidence does not support the administrative law judge's finding that Dr. Renn's diagnosis of IPF was equivocal. Review of Dr. Renn's opinion reflects that he was unequivocal in stating that claimant has IPF. Employer's Exhibit 9 at 6; Employer's Exhibit 32 at 15-16, 28-29, 48, 56-57. The small portion of his opinion quoted by the administrative law judge was a statement that a biopsy was necessary to determine which of four different types of IPF claimant has so that an appropriate treatment plan can be devised. Employer's Exhibit 9 at 7; Employer's Exhibit 32 at 48-49, 62. Based on the foregoing, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4).

Employer contends that the administrative law judge erred in declining to consider Dr. Bellotte's opinion regarding the existence of pneumoconiosis because it was based on an x-ray reading excluded pursuant to Section 725.414. Dr. Bellotte, a B-reader, initially read a July 19, 2001 x-ray as 1/1, Director's Exhibit 34, but later testified that the findings on that x-ray indicated fibrosis unrelated to coal dust exposure. Director's Exhibit 36 at 14-16, 23. Employer opted not to utilize Dr. Bellotte's x-ray reading as one of the two permitted in its affirmative case, and relied instead on Dr. Wiot's negative readings of the July 19, 2001 and October 1, 2002 x-rays. Director's Exhibit 35; Employer's Exhibit 12; Tr. at 44-45. The administrative law judge declined to consider Dr. Bellotte's opinion that claimant does not have coal workers' pneumoconiosis, because the administrative law judge found the opinion "inextricably tied to [Dr. Bellotte's] chest x-ray interpretation, which was previously excluded from the record." Decision and Order at 17. As noted, Section 725.414 provides that any x-ray referenced in a medical report must be admissible. 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). The same restriction applies to a physician's testimony. 20 C.F.R. §§725.457(d), 725.458. The regulations do not specify what is to be done with a medical report or testimony that references an inadmissible x-ray. Review of Dr. Bellotte's opinion reflects that his opinion regarding

the absence of coal workers' pneumoconiosis was closely linked to his reading of the July 19, 2001 x-ray. Director's Exhibit 36 at 14-16, 23. On these facts, we hold that the administrative law judge did not abuse his discretion in declining to consider Dr. Bellotte's opinion regarding the existence of pneumoconiosis, when he found the opinion "inextricably tied" to an inadmissible x-ray reading. Decision and Order at 17; *Clark*, 12 BLR at 1-153.

Employer's reliance on *Peabody Coal Co. v. Durbin*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), is misplaced. *Durbin* held, under the former Part 718 regulations, that an administrative law judge erred by discrediting an expert opinion as based on evidence outside the record. *Durbin*, 165 F.3d at 1128-29, 21 BLR at 2-543-44. In reaching its holding, the Seventh Circuit court emphasized the absence of any regulation imposing limits on expert testimony in black lung claims. *Durbin*, 165 F.3d at 1129, 21 BLR at 2-544. The revised regulations limit the scope of expert testimony to admissible evidence. 20 C.F.R. §§725.414(a)(2)(i),(a)(3)(i), 725.457(d), 725.458. Therefore, we decline to apply *Durbin* and we reject employer's allegation of error in the administrative law judge's analysis of Dr. Bellotte's opinion.

Employer contends that the administrative law judge did not explain why he credited the opinions of Drs. Cohen, Gaziano, Rasmussen, and Wantz, which employer asserts are not well-reasoned. Employer's contentions lack merit, as the administrative law judge explained why he credited the opinions, Decision and Order at 17-19, and substantial evidence supports his discretionary determination that the opinions were reasoned. *See Compton*, 211 F.3d at 213, 22 BLR at 2-175-76. Employer additionally argues that the administrative law judge did not consider Dr. Renn's criticism of the opinions of Drs. Cohen and Gaziano, and did not discuss the impact of the physicians' comparative credentials on his weighing of the evidence. We agree that on remand, the administrative law judge should explicitly address these considerations when weighing the medical opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Pursuant to Section 718.204(c), employer challenges the administrative law judge's determination to accord less weight to the disability causation opinion of Dr. Renn because he did not diagnose pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his disability causation finding and instruct him to reweigh the medical opinions after he has reassessed the existence of pneumoconiosis.

Onset of Total Disability Due to Pneumoconiosis

Finally, employer contends that the administrative law judge erred in determining that February 1, 2001 is the date on which claimant's entitlement to benefits commenced, as the administrative law judge automatically selected the month of filing.

As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-50 (1990). Here, the administrative law judge did not attempt to ascertain when claimant became totally disabled due to pneumoconiosis but merely stated that the date of onset was February 1, 2001, without assessing the medical evidence or making specific findings. *See* 5 U.S.C. §557(c)(3)(A). Accordingly, we vacate the administrative law judge's onset determination and hold that if benefits are awarded on remand, the administrative law judge must address the relevant evidence and make specific findings, if possible, regarding the date of onset. If such analysis does not establish the month of onset, then benefits will be payable beginning with the month during which the claim was filed. 20 C.F.R. §725.503(b).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge