BRB Nos. 04-0651 BLA
and 04-0651 BLA-A

JAY BOWLING	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 04/14/2005
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

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

Barry H. Joyner (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 and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (03-BLA-5346) of Administrative Law Judge Alice M. Craft 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 18, 1991, was denied on June 29, 1993 by Administrative Law Judge Frederick D. Neusner because claimant did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibits 1, 2. On March 13, 2001, claimant filed his current application,[2] 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.

In a Decision and Order Denying Benefits dated April 16, 2004, the administrative law judge initially found that the instant claim was timely filed. Decision and Order at 4. The administrative law judge then credited claimant with thirty-three years of coal mine

[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 current claim is claimant's third. Claimant's first application for benefits, filed on July 9, 1987, was informally denied on December 7, 1987 because claimant failed to establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Claimant took no further action on the claim, and it became finally denied. Director's Exhibit 17. Claimant's second claim for benefits, filed on April 18, 1991, was denied on June 29, 1993 by Administrative Law Judge Frederick D. Neusner because although claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d), and further established the existence of pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202, claimant did not establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204. On appeal, in a decision dated September 13, 1994, the Board affirmed the administrative law judge's finding that claimant did not establish the existence of a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c)(1)-(4) (2000). *Bowling v. Whitaker Coal Co.*, BRB No. 93-2117 BLA (Sept. 13, 1994)(unpub.). Director's Exhibit 26. On December 6, 1994, claimant filed a request for modification and submitted additional evidence. Director's Exhibits 33, 35. On modification, Judge Neusner again denied benefits in a decision dated June 3, 1996. On appeal, in a decision dated May 30, 1997, the Board affirmed in part and vacated in part Judge Neusner's denial on the grounds that all relevant evidence had not been considered. *Bowling v. Whitaker Coal Co.*, BRB No. 96-1293 BLA (May 30, 1997)(unpub.). Director's Exhibit 26. On remand, in a Decision and Order dated October 7, 1997, Judge Neusner again denied benefits. Claimant did not appeal.

employment[3] and found that the medical evidence developed since the prior denial of benefits did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge therefore found that claimant did not demonstrate a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant specifically contests the administrative law judge's evaluation of the medical opinion evidence on the issue of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer responds, urging affirmance. Employer also cross-appeals, asserting that the administrative law judge erred in failing to consider whether the miner's March 13, 2001 subsequent claim was timely filed pursuant to the holding of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in claimant's appeal, but responds to employer's cross-appeal, disagreeing with employer's assertion that *Kirk* is controlling in the instant claim, and instead asserts that the unpublished case of *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) controls the outcome of this case.

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).

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

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibits 4-6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3); *Sharondale Corp v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him).

We first address employer's assertion on cross-petition for review, that the administrative law judge erred in failing to consider whether the miner's March 13, 2001 subsequent claim was timely filed under the standard set forth by the decision of the Sixth Circuit in *Kirk*, 264 F.3d at 602, 22 BLR at 2-288. Employer specifically asserts that pursuant to *Kirk*, the three-year statute of limitations clock imposed by 20 C.F.R. §725.308 on the filing of a claim, begins to tick the first time that a miner is told by a physician that he is totally disabled due to pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the clock may only be turned back if the miner returns to the mines after a denial of benefits. Employer asserts that because the miner never returned to the mines after the denial of his prior claim, the three year statute of limitations started running in September 1993 when Drs. Sundarum, Baker and Myer diagnosed total disability due to pneumoconiosis.[4] Employer's Brief at 11; Director's Exhibits 23, 24; Employer's Exhibit 1. Employer asserts that the miner's 2001 claim, filed more than three years after these 1993 reports, was, therefore, untimely filed. Employer's Brief at 11. Employer further asserts that, contrary to the administrative law judge's finding, employer raised this argument at the first available opportunity, consistent with *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-217, 1-220 (2002)(*en banc*) and *Abshire v. D&L Coal Co.*, 22 BLR 1-203, 1-206-207 (2002)(*en banc*), by letters to the Office of Workers' Compensation Programs dated November 28, 2001 and October 18, 2002, prior to the claim's referral for a hearing, and further preserved his challenge to the issue of timeliness at the hearing before the administrative law judge. Director's Exhibits 20, 25, 26; Employer's Brief at 13; Hearing Transcript at 6. Therefore, employer asserts that a remand of the case is required to allow the administrative law judge to reconsider whether the miner's 2001 subsequent claim was timely filed.

[4] Drs. Baker and Sundarum diagnosed pneumoconiosis and opined that claimant is not physically able, from a respiratory standpoint, to perform his usual coal mine work or comparable dust free work. Director's Exhibits 24, 35. Dr. Myer diagnosed pneumoconiosis and opined that the miner had a class II respiratory impairment which would prohibit arduous manual labor. Director's Exhibit 23.

Employer's argument has merit. Contrary to the Director's arguments, *Kirk* constitutes the controlling authority on this issue and *Dukes*, which is an unpublished case, has no precedential value. 6 Cir.R. 206(c);[5] *Lopez v. Wilson*, 355 F.3d 931 (6th Cir. 2004); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Furgerson*, 22 BLR at 1-222. Therefore, as employer raised the timeliness issue when the case was pending before the administrative law judge, as the Board has held, contrary to the Director's argument, that *Kirk*, not *Dukes*, constitutes controlling authority, and as the record contains medical reports diagnosing total disability due to pneumoconiosis, we vacate the administrative law judge's denial of benefits and remand the case for the administrative law judge to consider whether the miner's subsequent claim, filed on March 13, 2001, was timely filed pursuant to the holding in *Kirk*. In doing so, the administrative law judge must also determine, pursuant to 20 C.F.R. §725.308(a), whether the 1993 opinions of Drs. Sundarum, Baker and Myer, Director's Exhibit 27, p 84-88, constitute a "medical determination of total disability due to pneumoconiosis which has been communicated to the miner…" 20 C.F.R. §725.308(a). Because we vacate the administrative law judge's finding of timeliness, we need not address claimant's petition for review of the merits of entitlement.

[5] Rule 206(c) of the Sixth Circuit regarding Publication of Decisions indicates:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

Of particular note is the fact that the United States Court of Appeals for the Sixth Circuit denied the motion filed by the Director, Office of Workers' Compensation Programs, to publish the decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge