BRB Nos. 04-0970 BLA
and 04-0970 BLA-A

KENNETH CALDWELL)
)
Claimant-Petitioner)
Cross-Respondent)
)
v.)
)
SHAMROCK COAL COMPANY,) DATE ISSUED: 08/31/2005
INCORPORATED, c/o ACORDIA)
EMPLOYERS SERVICE)
)
and)
)
SUN COAL COMPANY,)
INCORPORATED)
)
Employer/Carrier-)
Respondents)
Cross-Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Joseph E. Kane, 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.

Rita Roppolo (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-5590) of Administrative Law Judge Joseph E. Kane on a subsequent claim[1] 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).[2] The administrative law judge initially found that the claim was timely filed. The administrative law judge then found that the newly submitted evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202, total respiratory or pulmonary disability at 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge thus determined that the newly submitted evidence does not demonstrate a change in one of the applicable conditions of entitlement since the prior denial of benefits. Accordingly, benefits were denied. On appeal, claimant alleges error in the administrative law judge's findings at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(b)(2). Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation. Employer responds, and urges affirmance of the decision below. The Director responds, and asserts that he has met his statutory obligation to provide claimant with a complete, credible pulmonary evaluation by virtue of Dr. Hussain's

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[1] Claimant filed the instant claim on April 4, 2001. Director's Exhibit 3. Claimant's first claim, filed on January 11, 1994, was denied by Administrative Law Judge J. Michael O'Neill by Decision and Order dated December 30, 1996. Director's Exhibit 1. Judge O'Neill found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202 (2000) and total disability at 20 C.F.R. §718.204(c) (2000). *Id.* The Board affirmed Judge O'Neill's denial of benefits based on claimant's failure to establish the existence of pneumoconiosis. *Caldwell v. Shamrock Coal Co.,* BRB No. 97-0564 BLA (Nov. 24, 1997)(unpublished); Director's Exhibit 1.

[2] 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.

opinion. Employer has filed a cross-appeal, contending that the administrative law judge erred in finding that the instant claim was timely filed. The Director has filed a brief in response to employer's cross-appeal.

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).

We first address employer's argument, asserted on cross-appeal, that the administrative law judge erred in finding that the instant claim was timely filed. A miner must file a claim within three years of receiving a diagnosis of total disability due to pneumoconiosis. 30 U.S.C. §932(f); 20 C.F.R. §725.308. In his Decision and Order, the administrative law judge determined the timeliness issue pursuant to the unpublished decision of the United States Court of Appeals for the Sixth Circuit in *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(unpublished), and not pursuant to the Sixth Circuit's published decision in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), although he discussed both cases. Decision and Order at 4. The administrative law judge indicated that the prior denial was based on claimant's failure to establish "the existence of pneumoconiosis or total disability arising therefrom." *Id*. Applying the Sixth Circuit's holding in *Dukes*, the administrative law judge found that, "[a]ccordingly, any medical opinions finding total disability due to pneumoconiosis were rendered invalid and the Claimant was handed 'a clean slate for statute of limitations purposes.'" *Id.* The administrative law judge found Dr. Baker's March 24, 2001 medical opinion to be "the first medical opinion constituting a medical determination of total disability due to pneumoconiosis" that followed the prior denial of benefits. *Id.* Because the instant claim was filed within three years of Dr. Baker's March 24, 2001 medical opinion, the administrative law judge found that the instant claim was timely filed.

Employer argues that the administrative law judge erred by failing to apply controlling precedent, namely *Kirk*, to determine whether the instant claim must be dismissed as untimely filed under 20 C.F.R. §725.308. We agree. The administrative law judge erred by determining the timeliness issue pursuant to *Dukes,* where *Kirk,* not *Dukes,* constitutes controlling precedent in all cases, such as the instant case, which arise within the jurisdiction of the Sixth Circuit. *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-217 (2002). Based on the foregoing, we vacate the administrative law judge's finding that the instant claim was timely filed, and remand the case. We instruct the administrative law judge on remand to determine whether the record contains "a medical determination of total disability due to pneumoconiosis that has been communicated to

the miner" in accordance with the regulation at 20 C.F.R. §725.308 pursuant to *Kirk,* 264 F.3d at 602, 22 BLR at 2-288.

Notwithstanding our decision to remand the case for a redetermination of the timeliness issue, in the interest of judicial economy, and to narrow the scope of the remand order, we will address the parties' arguments in claimant's appeal of the administrative law judge's denial of benefits in the instant subsequent claim. The prior denial was based on claimant's failure to establish the existence of pneumoconiosis or total respiratory or pulmonary disability, both of which are essential elements of entitlement. Director's Exhibit 1; s*ee* 20 C.F.R. §§718.202, 718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). It is claimant's burden to demonstrate a change in one of these applicable conditions of entitlement. 20 C.F.R. §725.309(d); *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant meets this burden, then the administrative law judge must consider whether the evidence of record, including the evidence submitted with the prior claim, supports a finding of entitlement to benefits. *Id*.

At 20 C.F.R. §718.202(a)(1), claimant contends that the administrative law judge "relied almost solely on the qualifications of the physicians providing the x-ray interpretations," "placed substantial weight on the numerical superiority of x-ray interpretations," and "may have 'selectively analyzed' the x-ray evidence."[3] Claimant's Brief at 3. Claimant's contentions lack merit. The administrative law judge properly relied on the negative x-ray readings rendered by the physicians with superior radiological qualifications to find the newly submitted x-ray evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Staton v. Norfolk & Western Ry. 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). Further, claimant provides no support for his assertion that the administrative law judge "may have 'selectively analyzed' the x-ray evidence," and a review of the administrative law judge's Decision and Order does not reveal selective analysis of the x-ray evidence. *White v. New White Coal Co.,* 23 BLR 1-1, 1-5 (2004). We, therefore, affirm the administrative law judge's finding at 20 C.F.R. §718.202(a)(1).

With regard to 20 C.F.R. §718.202(a)(4), claimant argues that the administrative law judge erred in finding that Dr. Baker's March 24, 2001 opinion is unreasoned. The administrative law judge found Dr. Baker's diagnosis of coal workers' pneumoconiosis is

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[3] We affirm, as unchallenged on appeal, the administrative law judge's findings at 20 C.F.R. §§718.202(a)(2), (a)(3), 718.204(b)(2)(i)-(iii), and 718.204(c). *Coen v. Director, OWCP,* 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

based solely on an x-ray reading and claimant's history of coal dust exposure, and thus found that Dr. Baker's opinion does not constitute a reasoned medical opinion under *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Decision and Order at 13, 14. The administrative law judge also determined that Dr. Baker's opinion was outweighed by the reasoned and documented medical opinions of Drs. Dahhan and Repsher. Claimant asserts that Dr. Baker's opinion is reasoned and documented and should not have been rejected by the administrative law judge. Claimant also states that the administrative law judge "appears to have" substituted his opinion for that of a medical expert. Claimant's Brief at 5.

Claimant's contentions lack merit. The administrative law judge properly found the x-ray underlying Dr. Baker's March 24, 2001 opinion to be outweighed by the negative re-reading of that x-ray by Dr. Scott, a dually qualified physician. *Winters v. Director, OWCP,* 6 BLR 1-877, 1-881 n.4 (1984). Moreover, the administrative law judge properly found Dr. Baker's opinion to be inadequately explained and outweighed by the contrary opinions of Drs. Dahhan and Repsher. *Cornett,* 227 F.3d at 569, 22 BLR at 2-107; *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988). The administrative law judge permissibly found that Drs. Dahhan and Repsher "provide detailed and well-reasoned medical opinions regarding the etiology of Claimant's impairment and whether he suffers from coal workers' pneumoconiosis."[4] Decision and Order at 14; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). Further, claimant fails to provide any support for his assertion that the administrative law judge substituted his opinion for that of a medical expert at 20 C.F.R. §718.202(a)(4), and a review of the administrative law judge's Decision and Order reveals no instance wherein the administrative law judge substituted his opinion for that of a medical expert.

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[4] In a footnote, the Director, Office of Workers' Compensation Programs (the Director), suggests that employer may have exceeded the number of medical opinions allowable under 20 C.F.R. §725.414(a)(3)(i). Director's Response Brief at 2 n.1. At the hearing, the administrative law judge admitted the medical reports of Drs. Dahhan and Rosenberg and the medical report and deposition of Dr. Repsher, and agreed to admit depositions of Drs. Hayes and Hussain, all submitted by employer. Hearing Transcript at 8-10. The depositions of Drs. Hayes, Rosenberg and Hussain were formally admitted post-hearing. Decision and Order at 2. The administrative law judge properly found that both opinions relied upon by claimant, namely the reports of Drs. Baker and Hussain, are unreasoned and undocumented. *See* discussion, *supra.* Accordingly, we hold harmless any error with respect to applying the evidentiary limitations as it cannot affect the outcome of the case. *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984).

Claimant argues that, given the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) that Dr. Hussain's opinion is neither reasoned nor documented, the Director failed to provide him with a complete, credible pulmonary evaluation as required under Section 413(b) of the Act.[5] 30 U.S.C. §923(b). The Director argues that he has met his statutory obligation to provide claimant with a complete and credible pulmonary evaluation, by virtue of Dr. Hussain's September 19, 2001 evaluation of claimant. We defer to the position taken by the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act. *Hodges v. Bethenergy Mines, Inc.,* 18 BLR 1-84, 1-87 (1994); *Pendley v. Director, OWCP,* 13 BLR 1-23 (1989) (Order) (*en banc*). Accordingly, we decline to remand this case pursuant to 30 U.S.C. §923(b).

Claimant additionally asserts that Dr. Baker's 2001 report "may be sufficient for invoking the presumption of total disability." Claimant's Brief at 7. Claimant's assertion lacks merit. The presumption of total disability due to pneumoconiosis, provided in 20 C.F.R. Part 727, is inapplicable to this claim. *See* 20 C.F.R. §727.203(a). Because the instant claim was filed after March 31, 1980, the administrative law judge properly applied the permanent criteria under 20 C.F.R. Part 718 to the claim, filed on April 4, 2004. *See* 20 C.F.R. §§718.1(b), 718.2; Director's Exhibit 3.

Claimant argues that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability." Claimant's Brief at 8. Claimant asserts that Dr. Baker's report is reasoned and documented and, when compared to the exertional requirements of claimant's usual coal mine employment as an electrician, establishes that claimant is totally disabled due to pneumoconiosis. Claimant also asserts that the administrative law judge should not have rejected Dr. Baker's report for the reasons he provided. Claimant's Brief at 7. At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge discredited Dr. Baker's opinion regarding disability as he found that it amounts to an opinion advising against a return to

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[5] By report dated September 19, 2001, Dr. Hussain diagnosed pneumoconiosis and chronic obstructive pulmonary disease based on a positive x-ray reading, and attributed these conditions to coal dust exposure and tobacco smoking. Director's Exhibit 12 at 8, 9. Dr. Hussain indicated that claimant has a mild impairment, to which pneumoconiosis contributed sixty percent and chronic obstructive pulmonary disease contributed forty percent. *Id.* at 9. In a separate report also dated September 19, 2001, Dr. Hussain indicated that claimant has a mild impairment due to pneumoconiosis and has the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. *Id.* at 10.

coal mine employment. Decision and Order at 16. The administrative law judge also found Dr. Baker's opinion outweighed by the contrary evidence of record. *Id.*

Claimant's contentions lack merit. The administrative law judge properly determined that Dr. Baker's opinion amounts to an opinion of the inadvisability of returning to coal mine employment, which is not equivalent to a finding of total disability under the Act. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988). Further, the administrative law judge permissibly found Dr. Baker's opinion on the issue of total disability to be outweighed by the contrary opinions of Drs. Dahhan, Repsher and Hussain, which, the administrative law judge found, "are well-supported by the pulmonary and blood gas testing."[6] Decision and Order at 16; *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Claimant also contends that the administrative law judge "made no mention of the claimant's age, education or work experience in conjunction with his assessment that the claimant was not totally disabled." Claimant's Brief at 9. These factors, however, have no role in making disability determinations under Part C of the Act. *Ramey v. Kentland-Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (6th Cir. 1985).

Claimant asserts that pneumoconiosis is proven to be a progressive and irreversible disease, and because a considerable amount of time has passed since claimant was first diagnosed with pneumoconiosis, it can be concluded that claimant's condition has worsened, adversely affecting his ability to perform his usual coal mine employment or comparable and gainful work. Claimant's Brief at 9. Claimant's assertion lacks merit. An administrative law judge's findings must be based solely on the medical evidence contained in the record. *See* 20 C.F.R. §725.477(b); *White*, 23 BLR at 1-7 n.8.

Based on the foregoing, we affirm the administrative law judge's finding that the newly submitted evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Because the newly submitted evidence fails to establish either the existence of pneumoconiosis or total respiratory or pulmonary disability, we affirm the administrative law judge's finding that claimant failed to demonstrate a change in an applicable

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[6] The newly submitted pulmonary function studies and blood gas studies are uniformly non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); Director's Exhibits 12, 14, 18; Employer's Exhibit 5.

condition of entitlement since the prior denial. 20 C.F.R. §725.309(d). We thus affirm the administrative law judge's denial of benefits and the claim.

In light of our affirmance of the administrative law judge's denial of benefits and the claim, we remand the case solely for the administrative law judge to address the issue of the timeliness of the claim at 20 C.F.R. §725.308, pursuant to *Kirk*, 264 F.3d at 602, 22 BLR at 2-288. If the administrative law judge, on remand, finds that the claim was untimely filed, then he must dismiss the claim. Alternatively, if the administrative law judge finds that the claim was timely filed, in light of the foregoing, benefits are denied.

Accordingly, the administrative law judge's Decision and Order – Denying 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

JUDITH S. BOGGS
Administrative Appeals Judge