BRB Nos. 08-0345 BLA
and 08-0345 BLA-A

P.J.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 12/23/2008
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Janice K. Bullard, 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 LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (05-BLA-

5667) of Administrative Law Judge Janice K. Bullard denying benefits 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] This case involves a subsequent claim filed on April 28, 2004.[2] After crediting claimant with fourteen years of coal mine employment,[3] the administrative law judge found that the new evidence did not establish

[1] The Department of Labor (DOL) 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 (2008). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] Claimant initially filed a claim for benefits on October 8, 1986. Director's Exhibit 1. In a Decision and Order dated September 7, 1989, Administrative Law Judge Bernard J. Gilday, Jr. found that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000). *Id.* However, Judge Gilday found that the evidence did not establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). *Id.* Accordingly, Judge Gilday denied benefits. *Id.*

Claimant filed a second claim on March 13, 1997. Director's Exhibit 1. In a Decision and Order dated May 26, 1999, Administrative Law Judge Joseph E. Kane found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(c) (2000), thereby establishing a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Judge Kane, therefore, considered claimant's 1997 claim on the merits. Although Judge Kane found that the evidence established the existence of pneumoconiosis and that claimant was totally disabled, he found that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, Judge Kane denied benefits. *Id.* Pursuant to claimant's appeal, the Board affirmed Judge Kane's finding that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). [*P.W.J.*] *v. Whitaker Coal Corp.*, BRB No. 99-1030 BLA (June 28, 2000) (unpub.). The Board, therefore, affirmed Judge Kane's denial of benefits. *Id.*

Claimant filed a third claim on October 7, 2002. However, this claim was denied by reason of abandonment on March 26, 2003. Director's Exhibit 2.

[3] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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 (1989)(*en banc*).

that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Employer responds in support of the administrative law judge's denial of benefits. The Director has filed a limited response to claimant's appeal, arguing that he provided claimant with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim, as required by the Act. Employer has filed a cross-appeal, contending, *inter alia*, that the administrative law judge erred in finding that claimant's 2004 subsequent claim was timely filed. In response to employer's cross-appeal, the Director argues that the administrative law judge properly found that claimant's 2004 claim was timely filed.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Timeliness of Claimant's 2004 Subsequent Claim

Employer argues that claimant's application for benefits is barred by the time limitations set forth in 20 C.F.R. §725.308.[5]

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[4] As discussed *infra*, the administrative law judge mistakenly characterized this claim as a "duplicate" claim rather than a "subsequent" claim.

[5] Section 725.308 provides in relevant part that:

> (a) A claim for benefits . . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been

Claims for black lung benefits are presumptively timely. 20 C.F.R. §725.308(c). To be timely, the claim must have been filed within three years after a "medical determination of total disability due to pneumoconiosis" which has been communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit held that:

> 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* [*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. 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 (footnote omitted).

In her decision, the administrative law judge addressed employer's contention that claimant's 2004 claim was not timely filed. The administrative law judge stated that:

> Employer's argument is based solely on Claimant's testimony in which he, "essentially admitted he thought he was disabled when he quit work, since he admitted at that time that his breathing was failing him, but he has offered no apparent reason for waiting to file his CM-911." (Employer's

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> 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.

> Brief at 17). Employer also stated that Claimant testified that Dr. Charles Hieronymous "told him that he had black lung and that he was totally and permanently disabled for employment in a dusty environment." However, a miner's testimony regarding physicians' opinions not otherwise of record is not sufficient to trigger the limitation period. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170 [(2006)] (*en banc*). Pursuant to *Ferguson v. Jericol Mining Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) [(unpub.)], whether the statute of limitations is triggered, "an administrative law judge must determine if (the physician) rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a 'medical determination of total disability due to pneumoconiosis which has been communicated to the miner'" under §725.308 of the regulations. *Ferguson v. Jericol Mining Inc.*, BRB Nos. 03-0798 BLA and 03-0798 BLA-A (Sept. 20, 2004) [(unpub.)].
>
> Employer has not provided a report or other evidence to demonstrate that Dr. Hieronymous's diagnosis was satisfactory within the understanding of the *Ferguson* opinion. As such, I find that Claimant's initial claim was timely filed.

Decision and Order at 9.

Employer argues that the administrative law judge erred in finding that claimant's 2004 subsequent claim was timely filed pursuant to Section 725.308. Specifically, employer argues that Dr. Hieronymous's October 20, 1986 report, submitted in claimant's original claim, is sufficient to have triggered the statute of limitations set forth at 20 C.F.R. §725.308. Employer, therefore, contends that claimant's 2004 subsequent claim must be dismissed under the reasoning set forth in *Kirk*. The Director disagrees, contending that Dr. Hieronymous's opinion is insufficient to support a finding of total disability due to pneumoconiosis and, therefore, is insufficient to start the Section 725.308 statute of limitations clock.

Dr. Hieronymous examined claimant on October 14, 1986. In an October 20, 1986 report, Dr. Hieronymous diagnosed coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and small airway disease. Director's Exhibit 1. Dr. Hieronymous further stated:

> It is my opinion that the diagnosed conditions are related to dust exposure during [claimant's] coal mining employment and that he is totally and permanently disabled for employment in a dusty environment due to his pulmonary disease. Any further exposure to dust or noxious fumes would

increase the severity of his pulmonary condition.

Director's Exhibit 1.

In this case, the administrative law judge did not address whether Dr. Hieronymous's October 20, 1986 written report contained a medical determination which is sufficient to trigger the statute of limitations pursuant to Section 725.308. An administrative law judge is required to consider all relevant evidence in the record. *See* Administrative Procedure Act, 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Since it is the administrative law judge's duty to make factual determinations, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.308 and remand this case to the administrative law judge for her to reconsider this issue. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). On remand, the administrative law judge is instructed 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 20 C.F.R. §725.308 and the Sixth Circuit's holding in *Kirk. Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*).

Although we affirm the administrative law judge's denial of benefits, *see* discussion *infra*, it is necessary to remand this case for the administrative law judge to reconsider whether the present claim was timely filed, because a determination that this claim is untimely would preclude claimant from filing any future claims unless he resumes work as a coal miner.

Section 725.309

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.*, 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 miner's prior claim was denied because he did not establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that his total disability was due to pneumoconiosis to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Because no party challenges the administrative law judge's finding that the new evidence did not establish that claimant's total disability was due to pneumoconiosis

pursuant to 20 C.F.R. §718.204(c), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). In light of this holding, we also affirm the administrative law judge's finding that claimant did not establish that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final.[6] *See* 20 C.F.R. §725.309(d). We, therefore, affirm the administrative law judge's denial of benefits.[7]

Complete Pulmonary Evaluation

Claimant's sole contention of error is that the Director failed to provide him with a complete, credible pulmonary evaluation, sufficient to constitute an opportunity to substantiate the claim. The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84 (1994).

In this case, claimant selected Dr. Simpao to perform his Department of Labor sponsored pulmonary evaluation. *See* Director's Exhibit 9. The record reflects that Dr. Simpao examined claimant on June 10, 2004, conducted the full range of testing required by the regulations, and addressed each element of entitlement.[8] Director's Exhibit 10.

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[6] Because the new evidence did not establish that claimant's total disability was due to pneumoconiosis, the administrative law judge found that the claimant did not establish a "material change" in conditions. Decision and Order at 14. As previously noted, claimant's 2004 claim is a subsequent claim pursuant to 20 C.F.R. §725.309, not a duplicate claim pursuant to 20 C.F.R. §725.309 (2000). However, the administrative law judge's mischaracterization is harmless in light of the fact that her finding that the new evidence did not establish that claimant's total disability was due to pneumoconiosis supports a finding that claimant did not establish that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final pursuant to 20 C.F.R. §725.309. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] In light of our affirmance of the administrative law judge's finding pursuant to 20 C.F.R. §725.309(d), we need not address employer's contentions that the administrative law judge erred in finding that the existence of pneumoconiosis and a totally disabling pulmonary impairment were established by Judge Kane's prior decision. *Larioni*, 6 BLR at 1-1278.

[8] Dr. Simpao diagnosed coal workers' pneumoconiosis; opined that claimant suffered from a mild pulmonary impairment; and opined that that claimant's "multiple years of coal dust exposure is medically significant in his pulmonary impairment."

In her consideration of whether the new evidence established that claimant's total disability was due to pneumoconiosis, the administrative law judge stated:

> The report of Dr. Simpao does not address the issue of whether Claimant is totally disabled. Although the physician acknowledged that Claimant's "mild" impairment is caused by pneumoconiosis, he does not state whether Claimant is totally disabled. A physician's report that is silent as to a particular issue is not probative of that issue. *Island Creek Coal Co. v. Compton*, 211 F.3d 203 (4th Cir. 2000). As such, I find that Dr. Simpao's report is silent as to the issue of total disability and, therefore, is not probative of whether Claimant is totally disabled due to pneumoconiosis.

Decision and Order at 13-14.

The only issue before the Board is whether the Director satisfied his obligation to provide claimant with a complete pulmonary evaluation. Claimant argues that the Director did not fulfill his obligation because the administrative law judge found that Dr. Simpao's report was not probative on the issue of disability causation. The Director, however, contends that the administrative law judge's finding was in error. We agree with the Director. Dr. Simpao's failure to directly address whether claimant was totally disabled does not preclude his report from constituting probative evidence on the issue of disability causation on the facts of this case. *See Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-75 (2004) (holding that a physician's report indicating a mild impairment due to pneumoconiosis may be used to establish disability causation).

The relevant issue before the administrative law judge was whether the new evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), thereby establishing that an applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). Dr. Simpao addressed this issue, opining that claimant's "multiple years of coal dust exposure is medically significant in his pulmonary impairment." Director's Exhibit 10. Consequently, under the facts of this case, we hold

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Director's Exhibit 10.

that a remand for further development of the evidence is not necessary as the Director provided claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim.[9] *See* 30 U.S.C. §923(b); 20 C.F.R. §725.406; *Hodges*, 18 BLR at 1-93.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and 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

BETTY JEAN HALL
Administrative Appeals Judge

[9] Based on our holding that the Director, Office of Workers' Compensation Programs, fulfilled his statutory obligation to provide claimant with a complete, credible pulmonary evaluation, we need not address employer's argument that claimant waived this issue by failing to raise it earlier. *See Larioni*, 6 BLR at 1-1278.