BRB Nos. 05-0603 BLA
and 05-0603 BLA-A

ROGER D. FIELDS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/22/2006
	)	
	)	
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 on Remand of Rudolf L. Jansen, 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.

Helen H. Cox and Richard A. Seid (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 on Remand (02-BLA-5075) of Administrative Law Judge Rudolf L. Jansen 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 February 5, 2001[2] and is before the Board for the second time.

In the initial decision, Administrative Law Judge Rudolf L. Jansen (the administrative law judge) found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge also found that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge, therefore, found that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. Accordingly, the administrative law judge denied benefits.

By Decision and Order dated September 29, 2004, the Board affirmed the administrative law judge's findings that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Fields v. Shamrock Coal Co.*, BRB Nos. 04-0104 BLA and 04-0104 BLA-A (Sept. 29, 2004) (unpublished). The Board also affirmed the administrative law judge's findings

[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 relevant procedural history of this case is as follows: Claimant initially filed a claim for benefits on September 24, 1993. Director's Exhibit 29. In a Decision and Order dated July 22, 1996, Administrative Law Judge Rudolf L. Jansen (the administrative law judge) found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) (2000). *Id.* The administrative law judge also found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Id.* Accordingly, the administrative law judge denied benefits. *Id.* By Decision and Order dated March 31, 1997, the Board affirmed the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000). *Fields v. Shamrock Coal Co.*, BRB No. 96-1408 BLA (Mar. 31, 1997) (unpublished). The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.* There is no indication that claimant took any further action in regard to his 1993 claim.

Claimant filed a second claim on February 5, 2001. Director's Exhibit 1.

that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). *Id.* Consequently, the Board affirmed the administrative law judge's finding pursuant to 20 C.F.R. §725.309; *i.e.*, the administrative law judge's finding that none of the applicable conditions of entitlement had changed since the date upon which claimant's prior claim became final. *Id.* The Board, therefore, affirmed the administrative law judge's denial of benefits. *Id.* The Board, however, vacated the administrative law judge's finding that claimant's 2001 subsequent claim was timely filed. *Id.* The Board remanded the case to the administrative law judge to reconsider whether claimant's 2001 claim was barred by the time limitations set forth in 20 C.F.R. §725.308. *Id.* However, the Board instructed the administrative law judge that, even if he found that claimant's 2001 claim was timely filed, he must nevertheless deny benefits. *Id.*

On November 4, 2004, while the case was on remand from the Board, employer filed a "Motion to Dismiss Claim as Untimely," wherein he argued that claimant's 2001 claim was untimely filed. Claimant filed a response brief wherein he urged the administrative law judge to deny employer's motion.

In a Decision and Order dated March 21, 2005, the administrative law judge found that claimant's 2001 claim was timely filed. However, in accordance with the Board's remand instructions, the administrative law judge denied benefits. On appeal, claimant argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Claimant also argues that the administrative law judge erred in finding that the newly submitted evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant additionally contends 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 that the administrative law judge erred in finding that claimant's 2001 claim was timely filed. In response to employer's cross-appeal, the Director argues that the administrative law judge properly found that claimant's 2001 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).

We initially address employer's contention, raised in its cross-appeal, that claimant's application for benefits is barred by the time limitations set forth in 20 C.F.R. §725.308.[3] Claims for black lung benefits are presumptively timely. 20 C.F.R. §725.308(c). To be timely, a claim must have been filed before three years after a "medical determination of total disability due to pneumoconiosis" is communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

In his initial decision, the administrative law judge stated that:

> Under Section 725.308(a), a claim of a living miner is timely filed if it is filed "within three years after a medical determination of total disability due to pneumoconiosis" has been communicated to the miner. The three-year period of limitation applies only to an initial claim for benefits, and Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. *See Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990).[4] Because the record contains no evidence that Claimant received the requisite notice more than three years prior to filing his initial claim for benefits, I find that his claim was timely filed.

2003 Decision and Order at 4 (footnote added).

On original appeal, employer argued that the administrative law judge erred in applying *Andryka*. Because the instant case arises within the jurisdiction of the United

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[3]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 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.

[4]In *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), the Board held that the statute of limitations at 20 C.F.R. §725.308 applies only to the first claim filed.

States Court of Appeals for the Sixth Circuit, employer argued that the administrative law judge should have applied *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

In *Kirk*, 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*, 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 its 2004 Decision and Order, the Board agreed with employer's contention. The Board stated that:

> The administrative law judge, applying *Andryka*, found claimant's second claim to be timely filed "[b]ecause the record contains no evidence that Claimant received the requisite notice more than three years prior to filing his initial claim for benefits." Decision and Order at 4. As employer asserts, because the administrative law judge erroneously applied *Andryka*, and not *Kirk*, to this case, the administrative law judge did not render any factual findings to determine if the record contains a medical determination which is sufficient to trigger the statute of limitations pursuant to Section 725.308. The Sixth Circuit has held that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case[.]" *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). Accordingly, we vacate the administrative law judge's Section 725.308 finding and remand this case to the administrative law judge for him to reconsider this issue. We instruct the administrative law judge to determine on remand whether the record contains "a medical determination of total disability due to pneumoconiosis that has been

> communicated to the miner" in accordance with Section 725.308 and the Sixth Circuit's holding in *Kirk*. *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). Although we affirm the administrative law judge's denial of benefits on the merits, *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.

Fields, slip op. at 5-6.

On remand, the administrative law judge reconsidered whether claimant's 2001 claim was timely filed. Applying *Kirk*, the administrative law judge found that employer failed to rebut the presumption of the timeliness of claimant's 2001 claim. Decision and Order on Remand at 6-7. The administrative law judge, therefore, found that claimant's 2001 subsequent claim was timely filed. *Id.*

Employer argues that Dr. Baker's 1993 reports, submitted in claimant's original claim, are sufficient to have triggered the statute of limitations set forth at 20 C.F.R. §725.308. Employer, therefore, contends that claimant's 2001 subsequent claim must be dismissed under the reasoning set forth in *Kirk*. The Director disagrees, contending that the administrative law judge properly found that Dr. Baker's 1993 opinions are insufficient to support a finding of total disability due to pneumoconiosis and, therefore, are insufficient to start the Section 725.308 statute of limitations clock.

The administrative law judge found that the 1993 reports of Dr. Baker are insufficient to support a finding of total disability due to pneumoconiosis. *See* Decision and Order on Remand at 6-7. Dr. Baker submitted three reports in connection with claimant's initial claim for benefits.

Dr. Baker examined claimant on February 24, 1993. In a report dated March 2, 1993, Dr. Baker diagnosed coal workers' pneumoconiosis based upon a positive x-ray interpretation and a significant duration of exposure. Director's Exhibit 29. Dr. Baker also diagnosed bronchitis. *Id.* Dr. Baker indicated that claimant was not physically able, from a pulmonary standpoint, to perform his usual coal mine employment. *Id.* Dr. Baker explained that:

> Patient should have no further exposure to coal dust, rock dust or similar noxious agents due to his coal workers' pneumoconiosis and bronchitis. He may have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions.

Director's Exhibit 29. Because a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989), Dr. Baker's opinion, as set out in his March 2, 1993 report, is insufficient to support a finding of total disability.

Dr. Baker's November 5, 1993 report and supplemental December 9, 1993 report also fail to diagnose the existence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. In his November 5, 1993 report, Dr. Baker diagnosed a minimal pulmonary impairment.[5] Director's Exhibit 29. In his December 9, 1993 report, Dr. Baker, not only retracted his diagnosis of pneumoconiosis based upon x-ray, he also opined that claimant had "no impairment except for chronic bronchitis…."[6] *Id.* Because Dr. Baker did not characterize the extent of the claimant's pulmonary impairment, his opinion is insufficient to support a finding of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis.

Because the administrative law judge permissibly found that Dr. Baker's 1993 opinions are insufficient to constitute a "medical determination of total disability due to

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[5]Dr. Baker re-examined claimant on November 5, 1993. In a report dated November 5, 1993, Dr. Baker diagnosed coal workers' pneumoconiosis and chronic bronchitis. Director's Exhibit 29. Dr. Baker characterized claimant's pulmonary impairment as "minimal." *Id.*

[6]In a supplemental letter dated December 9, 1983, Dr. Baker stated:

> I have reviewed the chart as well as the x-ray on [claimant]. He alleges history of 20-22 years in the surface mines and also has approximately 25 pack year history of smoking, with symptom complex of chronic bronchitis as well as dyspnea on exertion. His PFTs and ABGs are within normal limits. I interpreted his x-ray as showing coal workers' pneumoconiosis, category 1/0. Two other "B" readers read the film as negative. On review of the film, I feel that it probably is more 0/1 than 1/0 on this particular film.
>
> In summary, [claimant] does have opacities present of a low degree of profusion, probably 0/1 and would thereby not have coal workers' pneumoconiosis on this x-ray. He has no impairment except for mild bronchitis which is related significantly to his cigarette smoking history as well as, to some extent, his history of dust exposure in the surface mines.

Director's Exhibit 9.

pneumoconiosis," these opinions cannot be used to trigger the running of the Section 725.308 statute of limitations. The administrative law judge, therefore, properly found that employer failed to rebut the presumption of the timeliness of claimant's 2001 subsequent claim. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). We, therefore, affirm the administrative law judge's finding that claimant's 2001 subsequent claim was timely filed.[7]

We now turn our attention to claimant's contentions of error raised in his appeal. Claimant argues that the administrative law judge erred in finding the newly submitted evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). The Board previously affirmed the administrative law judge's denial of benefits on the merits. *Fields v. Shamrock Coal Co.*, BRB Nos. 04-0104 BLA and 04-0104 BLA-A (Sept. 29, 2004) (unpublished). The Board remanded this case to the administrative law judge for the sole purpose of determining whether claimant's 2001 subsequent claim was timely filed pursuant to 20 C.F.R. §725.308.[8] *Id.* Consequently, we decline to address claimant's contentions of error regarding the merits of entitlement.

For the first time in this appeal, claimant alleges that the Director failed to provide him with a complete, credible pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. Because claimant failed to raise this issue when the case was previously before the Board, we also decline to address this contention. *See Bernardo v. Director, OWCP*, 9 BLR 1-97 (1986) (holding that a claimant who failed to argue an issue during his first appeal to the Board could not subsequently raise the issue before the Board).

[7]Given our affirmance of the administrative law judge's finding that Dr. Baker's opinions are insufficient to constitute a "medical determination of total disability due to pneumoconiosis," we need not address employer's contention that, for purposes of 20 C.F.R. §725.308, communication to a miner's attorney is equivalent to communication to the miner. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[8]The Board specifically instructed the administrative law judge that if, on remand, he found that claimant's 2001 claim was timely filed, "he must deny benefits." *Fields v. Shamrock Coal Co.*, BRB Nos. 04-0104 BLA and 04-0104 BLA-A (Sept. 29, 2004) (unpublished), slip op. at 12.

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge