BRB Nos. 06-0426 BLA
and 06-0426 BLA-A

J.B. KILBOURNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	DATE ISSUED: 01/26/2007
	)	
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 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.

Jeffrey S. Goldberg (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 – on Remand (2003-BLA-5701) of Administrative Law Judge Joseph E. Kane denying benefits on a miner's subsequent 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). This case is before the Board for the second time. Initially, the administrative law judge credited the miner with twenty-eight years of qualifying coal mine employment and found that the claim was timely filed pursuant to 20 C.F.R. §725.308. Applying the regulations pursuant to 20 C.F.R. Part 718, based on the claim's filing date of April 2, 2001, the administrative law judge found that the new evidence submitted in support of this subsequent claim was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant, and thus claimant had failed to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal and employer's cross-appeal, the Board affirmed the administrative law judge's findings on the merits of entitlement and affirmed the denial of benefits. However, the Board vacated the administrative law judge's finding that this subsequent claim was timely filed, and remanded this case for the sole purpose of having the administrative law judge determine, consistent with *Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), whether the medical reports of Dr. Baker dated September 1, 1993 and Dr. Wright dated October 2, 1993, rendered in conjunction with claimant's prior claim, were sufficient to constitute reasoned diagnoses of total disability due to pneumoconiosis, and whether the diagnoses had been communicated to claimant to start the tolling of the three-year statute of limitations at Section 725.308.[1] *Kilbourne v. Whitaker Coal Corp.*, BRB Nos. 05-0199 BLA and 05-0119 BLA-A (Aug. 16, 2006)(unpub.).

On remand, the administrative law judge found that employer had failed to meet its burden to rebut the presumption of timeliness pursuant to Section 725.308(c) because neither Dr. Baker nor Dr. Wright had provided a reasoned diagnosis of total disability due to pneumoconiosis at least three years before the filing of the current claim, and there was no evidence that the opinions had been communicated to the claimant. Consequently, the administrative law judge did not dismiss the claim, but reinstated his denial of benefits.

In the present appeal, claimant again challenges the administrative law judge's finding that the newly-submitted medical opinions of record were insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Employer responds, urging reaffirmance of the administrative law judge's denial of benefits based on the law of the case doctrine. Employer also cross-appeals, asserting that the administrative law

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge erred in determining that claimant's subsequent claim was timely filed pursuant to Section 725.308. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's cross-appeal, urging affirmance of the administrative law judge's finding of timeliness at Section 725.308, to which employer has filed a reply in support of its position.

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 assertion on cross-appeal that the 1993 reports of Drs. Wright and Baker satisfy the requirements of *Kirk* and constitute medical determinations of total disability due to pneumoconiosis under the Act and regulations. Employer maintains that a "reasoned" medical opinion is not required in the statute and the regulations to rebut the presumption of timeliness, and argues that, under *Kirk*, the fact that the reports of Drs. Wright and Baker were not credited in the original proceeding does not prevent them from starting the three-year statute of limitations. Employer further argues that the opinions of Drs. Wright and Baker meet the minimum standards for valid doctors' opinions under the regulations, as both doctors cited the medical bases for their conclusions; however, employer contends that any requirement that a physician's report be reasoned is at odds with the plain language of Section 422(f) of the Act, 30 U.S.C. §932(f), 20 C.F.R. §725.308, and the Sixth Circuit's decision in *Kirk*. Employer's Brief on Cross-Appeal at 6-9; Employer's Reply Brief at 7-8. The Director counters that *Kirk* requires a reasoned physician's opinion to trigger the three-year limitations period, and asserts that the administrative law judge permissibly concluded that the opinions of Drs. Wright and Baker were not reasoned because neither physician adequately explained his disability conclusion. The Director, therefore, contends that the administrative law judge appropriately held that the opinions of Drs. Wright and Baker did not satisfy *Kirk*. Director's Brief at 7.

After review of the administrative law judge's determination on this issue, the relevant evidence, and the arguments on appeal, we affirm the administrative law judge's finding as it is rational and supported by substantial evidence. In our August 16, 2005 Decision and Order, we specifically instructed the administrative law judge to determine whether the 1993 reports of Drs. Wright and Baker were reasoned and thus sufficient under *Kirk* to trigger the statute of limitations. We find no merit in employer's argument that the plain language of Section 422(f) of the Act, 30 U.S.C. §932(f), 20 C.F.R. §725.308, and the Sixth Circuit's decision in *Kirk* impose no requirement that a physician's report be reasoned. In *Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006), the Board considered and rejected arguments similar to those raised by employer herein.

As the Board stated in *Brigance*, "[i]n defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit court, in *Kirk*, stated that the statute relies on the 'trigger of the *reasoned* opinion of a medical professional.'" *Brigance*, 23 BLR at 1-175 (emphasis added).

On remand, the administrative law judge noted that Administrative Law Judge Donald W. Mosser, in his 1996 denial of claimant's prior claim, had discredited the opinions of Drs. Wright and Baker as unreasoned, and that the Board had upheld Judge Mosser's findings on appeal. Decision and Order on Remand at 3 n. 1, 2. The administrative law judge accurately reviewed both opinions and acted within his discretion in finding that neither opinion constituted a reasoned medical determination of total disability due to pneumoconiosis, in accordance with Section 725.308 and *Kirk*, because each physician merely provided an unexplained and unsupported medical conclusion.[2] Decision and Order on Remand at 7; *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-16 (1985). The administrative law judge thus permissibly found that the reports of Drs. Wright and Baker were insufficient to rebut the presumption of timeliness pursuant to Section 725.308(c). As substantial evidence

[2] The administrative law judge determined that Dr. Wright diagnosed pneumoconiosis, chronic bronchitis, hypertension and obesity; he attributed claimant's impairment to smoking, obesity and coal mine employment; and he opined that claimant was unable to perform his usual coal mine employment from a respiratory standpoint based on unspecified abnormalities found on physical examination and spirometry. Decision and Order on Remand at 3; Director's Exhibit 1. The administrative law judge permissibly concluded that Dr. Wright's opinion was unreasoned because the physician did not identify the abnormalities he found or the role they played in rendering claimant disabled, and the objective testing did not support Dr. Wright's conclusions. *Id.; see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, the administrative law judge determined that Dr. Baker diagnosed pneumoconiosis, chronic bronchitis, chronic obstructive airway disease with a mild obstructive defect based on pulmonary function study results, and mild resting hypoxemia on blood gas testing, and stated that, due to these conditions, claimant "should have no further exposure to coal dust….[and] would have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment…." Decision and Order on Remand at 3; Director's Exhibit 1. As the objective testing produced non-qualifying values and Dr. Baker did not explain how his underlying documentation would support a finding of total disability, the administrative law judge properly concluded that Dr. Baker's opinion was unreasoned. *Id.*; *see Clark*, 12 BLR 1-149; *see also Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 1-254 (6th Cir. 1989).

supports this finding, which is independently sufficient to defeat rebuttal at Section 725.308(c), we affirm the administrative law judge's finding that claimant's subsequent claim was timely filed, and need not reach employer's arguments on the issue of whether the opinions of Drs. Wright and Baker were communicated to claimant. Decision and Order on Remand at 4; *Kirk*, 264 F.3d 602, 22 BLR 2-288; *Brigance*, 23 BLR 1-170.

Turning to claimant's appeal on the merits, claimant contends that the administrative law judge erred in reinstating his denial of benefits. Specifically, claimant asserts that the diagnoses of totally disabling pneumoconiosis by Drs. Hussain and Broudy are sufficient to establish entitlement to benefits. As the Board had previously addressed and rejected all of claimant's arguments, however, and had remanded this case for the sole purpose of having the administrative law judge determine whether this subsequent claim was timely filed pursuant to Section 725.308, and as no exception to the law of the case doctrine has been demonstrated, we reaffirm the administrative law judge's denial of benefits. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

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

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