BRB No. 03-0663 BLA

CAROL W. DUKES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 06/23/2004
	)	
Employer/Carrier-Petitioners	)	
	)	
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 – Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand – Award of Benefits (97-BLA-0563) of Administrative Law Judge Robert L. Hillyard in a miner's duplicate 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 is before the Board for the second time. Initially, Administrative Law Judge Donald W. Mosser determined that this claim was timely filed and that Peabody Coal Company was properly named as the responsible operator. Decision and Order at 3-4. Judge Mosser credited claimant with nineteen years of coal mine employment. *Id.* at 3. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new x-ray evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(1) (2000) and, therefore, sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). *Id.* at 5-6. The administrative law judge next considered all the evidence of record and found that claimant[2] established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). *Id.* at 12-16. Accordingly, benefits were awarded, commencing August 1995. *Id.* at 17.

In response to employer's appeal, the Board affirmed Judge Mosser's finding that the instant claim is timely filed and rejected employer's assertion that claimant's duplicate claim is barred pursuant to 20 C.F.R. §725.308 (2000) because claimant did not show that he returned to coal mine employment after the denial of his initial claim.[3] *See*

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[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]Claimant is Carol W. Dukes, the miner, who filed his present claim for benefits on August 10, 1995. Director's Exhibit 1. Claimant's previous claim for benefits, filed on February 17, 1988, was finally denied on August 29, 1989. Director's Exhibits 31-137, 31-25.

[3]The Board affirmed, as unchallenged, Judge Mosser's findings regarding the length of coal mine employment and pursuant to 20 C.F.R. §718.204(c)(1)-(c)(3) (2000). *See Dukes v. Peabody Coal Company,* BRB Nos. 98-0590 BLA, 98-0590 BLA-A (Sept.

Dukes v. Peabody Coal Company, BRB Nos. 98-0590 BLA, 98-0590 BLA-A (Sept. 9, 1999)(unpub.). The Board also rejected employer's assertions pursuant to Section 725.309(d) (2000) and affirmed Judge Mosser's finding that claimant established a material change in conditions. *Dukes*, slip op. at 5-6. Additionally, the Board affirmed Judge Mosser's finding that claimant established total disability due to pneumoconiosis and, therefore, affirmed the award of benefits. *Dukes*, slip op. at 7-9. The Board summarily denied employer's Motion for Reconsideration on November 28, 2000.

Employer appealed to the United States Court of Appeals for the Sixth Circuit. Initially, the Sixth Circuit court affirmed the Board's holding that claimant's appeal was timely filed for reasons different from those stated by the Board. *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed.Appx. 140, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(Batchelder, J., dissenting). However, the court vacated the Board's affirmance of Judge Mosser's award of benefits because Judge Mosser did not provide sufficient analysis, as required by *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), to support his finding that claimant established a material change in conditions pursuant to Section 725.309(d) (2000). *Dukes*, 48 Fed.Appx. at 141, 150, 2002 WL 31205502 at *2, 8.

Subsequently, the Board issued an order remanding this case to the Office of Administrative Law Judges for further consideration consistent with the Sixth Circuit court's decision. On remand, Robert L. Hillyard (hereinafter, the administrative law judge) found that claimant established a material change in conditions between the filing of his first claim and the filing of his second claim. Decision and Order on Remand at 7. The administrative law judge adopted Judge Mosser's findings that claimant established entitlement to benefits, commencing August 1995. *Id.* at 7. Accordingly, benefits were again awarded.

In its present appeal to the Board, employer initially notes its disagreement with the Sixth Circuit court's decision that claimant's second claim was timely filed. Employer's Brief at 3 n.1. Employer also asserts that the administrative law judge erred in finding that claimant has established a material change in conditions. Employer's Brief at 12-19. Additionally, employer contends that the administrative law judge's finding of entitlement impermissibly relies on Dr. Simpao's opinion regarding total disability and disability causation. Employer's Brief at 19-22. Claimant responds, urging affirmance of

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9, 1999)(unpub.). Additionally, the Board affirmed, as unchallenged, Judge Mosser's finding that the x-ray evidence of record, old and new, established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). *Dukes, slip op.* at 6-7 n.6.

the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's assertions. Employer has filed a reply brief, reiterating the arguments set forth in its Petition for Review and brief.

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 the Director's assertion that in light of the Sixth Circuit's decision in this case, the Board should overrule its decisions in *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*) and *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). Director's Brief at 2. The crux of the Director's contention is that the Sixth Circuit's decision in the present case makes clear that certain language in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) is *dicta*, but that the Board held in *Furgerson* and *Abshire* that the *Kirk* language was not *dicta*. Director's Brief at 2. In its Petition for Review and brief, employer notes its disagreement with the Sixth Circuit court's holding in this case that Section 725.308[4] does not bar a claimant's duplicate claim when this claimant was "misdiagnosed" in his original claim. Employer's Brief at 3. Employer further states that "it believes that Kirk, Furgerson and Abshire should control here with respect to the statute of limitations."[5] Employer's Brief at 3 n.1.

In *Furgerson* and *Abshire*, the Board quoted the Sixth Circuit court's language in *Kirk* that:

> Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of

[4]During the litigation of this claim, the Department of Labor amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. However, no changes were made to 20 C.F.R. §725.308 (2000).

[5]In Employer's Reply Brief, it expresses its disagreement with the request of the Director, Office of Workers' Compensation Programs (the Director), that the Board overrule *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*) and *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). Employer's Reply Brief at 8. Employer asserts that the Sixth Circuit's unpublished decision in *Dukes* presents no basis for the Board to ignore the Sixth Circuit's published opinion in *Kirk* and to overrule its decisions in *Furgerson* and *Abshire*. Employer's Reply Brief at 8-9.

> 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.

Abshire, 22 BLR at 1-208; *Furgerson*, 22 BLR at 1-222, citing *Kirk*, 264 F.3d at 608, 22 BLR at 2-298. The Board rejected the Director's suggestion that the *Kirk* language was *dicta* and held that it was not dicta. *Abshire*, 22 BLR at 1-208; *Furgerson*, 22 BLR at 1-222. However, in its unpublished decision in the instant case, the Sixth Circuit also cited the exact language from *Kirk*, quoted above, and held that the language *is dicta*. *Dukes*, 48 Fed.Appx. at 147, 2002 WL 31205502 at *6. In light of the Sixth Circuit's holding in this case, the Director urges the Board to overrule *Furgerson* and *Abshire* because these decisions are "clearly wrong" and "were issued before the Sixth Circuit issued its decision in the present case." Director's Brief at 2. The Director asserts, citing *Managed Health Care Associates, Inc. v. Kethan*, 209 F.3d 923, 929 (6th Cir. 2000), that the Board should not "hesitate to follow the 'persuasive reasoning' of an unpublished case." Director's Brief at 2.

The Director's reliance on *Kethan*, as support for the Board to rely on the Sixth's Circuit's unpublished decision in this case to overturn the Board's decisions in *Furgerson* and *Abshire*, is misplaced. In *Kethan*, the Sixth Circuit stated that Sixth Circuit Rule 28(g) "does not preclude [it] from considering the persuasive reasoning of unpublished cases." *Kethan*, 209 F.3d at 929. However, the Director is not urging the Board to merely consider the reasoning of an unpublished case. The Director asserts that the Board should overrule its previous decisions in *Furgerson* and *Abshire* based on the holding of the Sixth Circuit court's unpublished decision in the instant case, which directly conflicts with a statement the Sixth Circuit made in its published decision in *Kirk*.[6] Because *Kirk* is a published case, it constitutes the controlling authority on the

[6]In *Dukes*, the majority held that *Kirk* indicated in *dicta*, rather than in its holding, that where a medically supported claim is denied, three years after such a denial, 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." *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed.Appx. 140, 147, No. 01-3043, 2002 WL 31205502, at *6 (6th Cir. Oct. 2, 2002)(Batchelder, J., dissenting), citing *Kirk*, 264 F.3d at 608, 22 BLR at 2-299.

The Sixth Circuit court in *Dukes* agreed with the reasoning of the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) and held:

timeliness issue whereas *Dukes,* the instant case, is unpublished and, as such, has no precedential value. 6 Cir.R.206(c);[7] *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).

Notwithstanding the court in *Dukes* held that the *Kirk* language the Board quoted in *Furgerson* and *Abshire* is *dicta,* we decline to overrule our prior decisions in these two cases. The Board has not previously applied the Sixth Circuit's unpublished decision in *Dukes* to overrule statements made in its published decision in *Kirk*, *e.g.*, *Booth v. Wolf Creek Collieries, Inc.*, BRB No. 03-0440 BLA (Mar. 23, 2003)(unpub.); *Dye v. Farwest Coal Co.*, BRB No. 02-0189 BLA (Nov. 27, 2002)(unpub.)(McGranery, J., concurring and dissenting), and the Director has not provided the Board with a persuasive reason for us to do so now.

Employer asserts that the administrative law judge erred in finding a material change in conditions pursuant to Section 725.309(d)(2000) by failing to follow the remand instructions of the Sixth Circuit. Employer's Brief at 12-17. Specifically, employer contends that the present administrative law judge "offers no more valid or permissible reason or explanation in support of his new decision than Judge Mosser did."

> that a misdiagnosis does not equate to a "medical determination" under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation[s] purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a *proper* medical determination.

Dukes, 48 Fed.Appx. at 146, 2002 WL 31205502 at *5.

[7]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.

6 Cir.R. 206(c).

Employer's Brief at 15. Employer's contentions have merit. The Sixth Circuit remanded this case because Judge Mosser "never analyzed the substantive differences between the new evidence and the 1988 evidence." *Dukes*, 48 Fed.Appx. at 150, 2002 WL 31205502 at *8. The court stated that Judge Mosser simply accepted Dr. Bassali's opinion, finding pneumoconiosis on the latest x-ray, but did not provide any "discussion on whether the disease had progressed since 1987." *Id.* Because Judge Mosser's material change in conditions finding lacked the kind of analysis required by *Ross*, the Sixth Circuit court remanded this case for further proceedings. The court instructed Judge Mosser "to compare the 1988 evidence with the 1995 evidence and grant [claimant's] claim if and only if the evidence shows his condition had worsened since the initial denial." *Id.*

When this case was remanded to the Office of Administrative Law Judges it was transferred, without objection, to the present administrative law judge. With regard to a material change in conditions, the administrative law judge on remand stated:

> I find that the evidence submitted prior to OWCP's July 25, 1988 denial of benefits, as compared with the evidence considered by Judge Mosser, is qualitatively different. The evidence before Judge Mosser was the most recent medical evidence and showed that the Claimant's condition had progressed since the prior denial. The most recent evidence is more probative in the diagnosis of pneumoconiosis because pneumoconiosis is a latent and progressive disease. Since pneumoconiosis is a progressive disease, later medical evidence is the most probative.

Decision and Order on Remand at 6. Therefore, the administrative law judge found that claimant demonstrated a material change in conditions "between the denial of his first claim and the filing of his second claim." *Id.* at 6-7.

As employer asserts, although the administrative law judge found the evidence submitted with claimant's second claim to be "qualitatively different" than the evidence submitted with his first claim, the administrative law judge did not provide any comparative analysis detailing why he found the later evidence to be "qualitatively different." *Id.* at 6. The administrative law judge supported his determination of a material change in conditions by merely stating that because "pneumoconiosis is a progressive disease, later medical evidence is the most probative." *Id.* Accordingly, we vacate the administrative law judge's finding of a material change in conditions and remand this case to the administrative law judge for him to reconsider all the evidence of record pursuant to Section 725.309(d) (2000). We instruct the administrative law judge on remand to reconsider the old and new evidence and determine whether claimant has established a material change in conditions in accordance with the Sixth Circuit court's remand instructions in the instant case, providing a detailed rationale for his findings on

remand. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Additionally, pursuant to Section 725.309(d) (2000), employer asserts that the administrative law judge's reliance on the progressivity of pneumoconiosis is inconsistent with the black lung regulations as construed by the United States Court of Appeals for the District of Columbia Circuit in *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, --- BLR --- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001). Employer's Brief at 17-19. Employer contends that the Department of Labor conceded in *National Mining Ass'n* that latent and progressive pneumoconiosis is rare and, therefore, employer asserts that the progressivity of pneumoconiosis "must be proved affirmatively and not through presumption or inference." Employer's Brief at 17-18. The Director responds, asserting that the Board should reject employer's arguments regarding the progressive nature of pneumoconiosis. Director's Brief at 2-4.

Contrary to employer's assertions, the concept of the progressivity of pneumoconiosis is not inconsistent with 20 C.F.R. §718.201(c), as construed by the District of Columbia Circuit court in *National Mining Ass'n*. In upholding the validity of Section 718.201(c), the District of Columbia Circuit adopted, in *National Mining Ass'n*, their reading of this regulation to the effect that pneumoconiosis *may* be latent and progressive. *National Mining Ass'n*, 292 F.3d at 869. Further, *National Mining Ass'n* does not require that a claimant prove that his pneumoconiosis is one of the rare forms of pneumoconiosis that is latent and progressive. As the Director asserts, in order to receive benefits, a claimant must prove the existence of pneumoconiosis "based on the evidence and methods described in 20 C.F.R. §718.202." Director's Brief at 4 n.2, citing 20 C.F.R. §725.202(d)(2)(i). A claimant need only establish that he has pneumoconiosis as defined by the Black Lung Act and 20 C.F.R. §718.201, which defines clinical and legal pneumoconiosis. Director's Brief at 4. Under the regulations, either clinical or legal pneumoconiosis is sufficient to prove pneumoconiosis for the purposes of the Act. *Id.* The regulations do not impose upon claimant an additional burden of proving his pneumoconiosis is latent and progressive after he has established the existence of clinical or legal pneumoconiosis. *Id.*

After finding a material change in conditions, the administrative law judge did not render any findings regarding claimant's entitlement on the merits. The administrative law judge in his Decision and Order on Remand adopted Judge Mosser's finding that claimant established total respiratory disability due to pneumoconiosis pursuant to Section 718.204 (2000). Decision and Order on Remand at 1. Employer asserts that Judge Mosser's finding of total respiratory disability due to pneumoconiosis "can no longer withstand scrutiny." Employer's Brief at 20. Employer maintains that Judge

Mosser, in reaching that finding, relied on the opinion of Dr. Simpao and the Sixth Circuit has ruled that this physician's opinion is a "misdiagnosis." *Id.* Judge Mosser found total respiratory disability demonstrated based on the 1995 opinion of Dr. Simpao, as supported by the 1997 opinion of Dr. Selby and the medical opinion evidence submitted with claimant's prior claim. Decision and Order at 14. Judge Mosser found total respiratory disability due to pneumoconiosis also based on Dr. Simpao's later opinion, as supported by the medical opinion evidence developed in connection with claimant's first claim. Decision and Order at 16.

With regard to the determination of a misdiagnosis, the Sixth Circuit in this case reiterated its statement in *Ross* that the statute of limitations does not exist to bar premature claims because a claimant must be able "to reapply for benefits if his first filing was premature." *Dukes*, 48 Fed.Appx. at 145, 2002 WL 31205502 at *5. The court acknowledged that a premature filing "includes all situations in which the miner has filed a claim but has not yet contracted the disease – including claims filed on the basis of a misdiagnosis." *Id.* The court concluded that "[claimant's] condition was, for legal purposes, misdiagnosed" because his 1988 claim was denied and that "none of the opinions of Dukes's 1988 doctors constituted a 'medical determination.'" *Dukes*, 48 Fed.Appx. at 145, 147, 2002 WL 31205502 at *5, 6.

Employer asserts that because the Sixth Circuit determined that Dr. Simpao's 1988 opinion was a misdiagnosis, this opinion cannot be relied upon to support entitlement. Employer's Brief at 20. Employer further contends that because "Dr. Simpao's 1995 opinion does not differ from his 1988 opinion," this physician's "1995 opinion must also be a misdiagnosis and thus not capable of establishing . . . eligibility." *Id.* Nothing in the Sixth Circuit court's opinion in this case supports employer's position that Dr. Simpao's 1995 opinion must also be deemed a "misdiagnosis." To the contrary, the court noted that claimant "did not receive a 'medical determination' until 1995 when he was *properly* diagnosed with the disease." *Dukes*, 48 Fed.Appx. at 147, 2002 WL 31205502 at *6. This statement by the court supports the position that Judge Mosser reasonably relied on Dr. Simpao's 1995 opinion. Accordingly, we reject employer's assertion.

Additionally, employer asserts that in light of *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), Judge Mosser improperly relied on Dr. Simpao's opinion to find total respiratory disability because this physician had "no knowledge of the extertional requirements of [the] miner's last work." Employer's Brief at 20-21. Employer further contends that although Dr. Simpao noted that claimant was a welder, he did not "indicate any familiarity with the requirements for [claimant's] last work." Employer's Brief at 21. In his 1995 opinion, Dr. Simpao indicated that claimant has a moderate to total degree of impairment and, in 1997, opined that claimant is unable to perform his previous coal mine work. Director's Exhibits 8, 9; Claimant's Exhibit 1.

Dr. Simpao noted claimant's usual coal mine work[8] as a welder in his report. Director's Exhibit 8.

The Sixth Circuit discussed in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), that a physician who has opined that claimant has some degree of respiratory impairment, *i.e.*, mild to moderate, should have knowledge of the exertional requirements of claimant's coal mine work before rationally determining whether claimant is or is not totally disabled from performing his usual coal mine employment. In a later opinion in *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002), the Sixth Circuit held that because the claimant's position as a repairman "has a precise meaning in the context of coal mining, the ALJ could rationally conclude that [the physicians] understood the demands of working as a repairman." Therefore, the *Napier* court concluded, "even if [the physicians] did not convey a precise knowledge of the demands of Napier's job, the ALJ could rationally conclude that an inability to perform physically demanding work . . . prevents Napier from working as a coal miner." *Napier*, 301 F.3d at 713, 22 BLR at 2-552-553. In light of *Cornett* and *Napier*, we vacate Judge Mosser's Section 718.204(c)(4) (2000) finding. We instruct the administrative law judge on remand to reconsider Dr. Simpao's opinion in conjunction with the Sixth Circuit's holdings in *Cornett* and *Napier*. In doing so, the administrative law judge should consider whether Dr. Simpao was aware of the exertional requirements of claimant's usual coal mine work or whether the work of a welder "has a precise meaning in the context of coal mining," in determining the weight to be accorded to his opinion regarding total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv)[9] on remand.

Employer also contends that Judge Mosser erred in relying on Dr. Simpao's opinion pursuant to Section 718.204 (2000) because this physician failed to provide any explanation for his diagnosis, relied on pulmonary function studies that were invalid, and

[8]Claimant testified that when he was last employed with Peabody Coal Company he worked as a welder. Hearing Transcript at 15-20. Judge Mosser noted that claimant was a "pit welder" during "the last few years of his employment with Peabody Coal Company." Decision and Order at 3. Judge Mosser characterized this work as "strenuous labor" because claimant "was required to lift heavy amounts of equipment as well as sledge hammers." *Id.*

[9]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) in the new regulations, while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c) in the new regulations.

ignored the significance of claimant's substantial smoking history. Employer's Brief at 21-22. We hold that employer's contentions are without merit. As the Board previously held in this case, Judge Mosser, "in weighing this opinion, noted the invalidation reports, but, nonetheless, reasonably exercised his discretion in finding that Dr. Simpao's opinion was supported by its underlying documentation." *Dukes*, slip op. at 7, citing *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983). Additionally, the Board previously rejected employer's contentions regarding claimant's smoking history by holding that "Dr. Simpao related an accurate smoking history in his 1995 medical opinion, which [Judge Mosser] noted in his discussion of this report" and "acted within his discretion in crediting Dr. Simpao's opinion as reasoned and documented." *Dukes*, slip op. at 8-9.

In summary, we decline to overrule our prior decisions in *Furgerson* and *Abshire*. Pursuant to 725.309(d) (2000), we vacate the administrative law judge's finding of a material change in conditions because the administrative law judge failed to adequately explain his rationale in accordance with the Sixth Circuit's decision in this case. On the merits, we reject employer's contention that Dr. Simpao's 1995 opinion should not be considered because the Sixth Circuit court, in deciding the timeliness of claimant's claim, found Dr. Simpao's earlier opinion to be a "misdiagnosis." Lastly, in light of *Cornett* and *Napier*, we vacate Judge Mosser's Section 718.204(c)(4) (2000) finding. We instruct the administrative law judge on remand to reconsider Dr. Simpao's opinion, in conjunction with the Sixth Circuit's holdings in *Cornett* and *Napier*, in order to determine if this physician's opinion is sufficient to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Accordingly, the administrative law judge's Decision and Order awarding benefits is vacated, and the 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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BETTY JEAN HALL
Administrative Appeals Judge