BRB Nos. 04-0681 BLA
and 04-0681 BLA-A

JOHN HENRY SIZEMORE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 06/07/2005
	)	
and	)	
	)	
SUN COAL COMPANY, c/o ACORDIA EMPLOYERS SERVICE	)	
	)	
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 – Denial of Benefits of Thomas F. Phalen, Jr., 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: SMITH, McGRANERY, and HALL, Administrative Appeals

Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals from the Decision and Order – Denial of Benefits (2003-BLA-176) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), with respect to 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). The administrative law judge accepted the stipulation of the parties that claimant had thirty years of qualifying coal mine employment, and determined that this subsequent claim, filed on February 2, 2001, was timely filed pursuant to 20 C.F.R. §725.308(a), and that claimant's initial claim, filed on July 31, 1991, was denied by Administrative Law Judge Frank D. Marden on June 14, 1994, on the ground that claimant failed to establish total disability. The administrative law judge found that the new evidence was insufficient to establish either invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), and therefore that claimant had failed to establish a change in a condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge erred in allowing employer to exceed the evidentiary limitations at 20 C.F.R. §725.414, and that this error affected his weighing of the evidence at Section 718.304. Claimant further contends that the administrative law judge erred in finding that claimant failed to establish total respiratory disability at Section 718.204(b)(2)(iv) by a preponderance of the evidence. Employer responds, urging affirmance of the denial of benefits, and filing a cross-appeal in which it contends that the administrative law judge erred in determining that the instant subsequent claim was timely filed pursuant to Section 725.308. Employer additionally maintains that the administrative law judge failed to address the issue of whether imposition of liability on the Black Lung Disability Trust Fund (Trust Fund) was warranted based on the lack of notice of the claim to employer's insurance carrier. The Director, Office of Workers' Compensation (the Director), has filed a limited response, declining to address the merits of this appeal but asserting that the administrative law judge properly determined that this subsequent claim was not time-barred. The Director further maintains that if the Board does not affirm the denial of benefits, the administrative law judge should be instructed on remand to determine when claimant ceased his employment with employer and then rule on whether transfer of liability to the Trust Fund is appropriate. Employer has also filed a reply brief in support of its position.[1]

[1] The administrative law judge's finding that the weight of the evidence is insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii) is

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, we will address the timeliness issue presented in employer's cross-appeal. To be timely, a claim must be filed within 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). Noting that this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge summarized controlling precedent on the issue as set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993 19 BLR 2-10 (6th Cir. 1994), and *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). The administrative law judge also discussed the holdings of an unpublished decision, *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir., Oct. 2, 2002), wherein the majority determined that although Section 725.308 applies to duplicate claims, a medical report submitted in support of a claim that is denied for failure to establish one or more elements of entitlement is treated, "for legal purposes," as containing a misdiagnosis. 20002 WL 31205502, slip op. at 7, citing *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). The majority in *Dukes* held that such a report does not constitute a medical determination of total disability that has been communicated to the miner and, therefore, it does not trigger the running of the statute of limitations. *Id.*

The administrative law judge acknowledged that *Dukes* was not binding precedent, but found the reasoning employed therein to be significantly persuasive regarding the definition of a medically supported claim. The administrative law judge determined that since claimant filed his subsequent claim on February 2, 2001, employer was required to show that a medical determination of total disability due to pneumoconiosis was communicated to claimant prior to February 2, 1998, in order to rebut the presumption of timeliness pursuant to Section 725.308.[2] Decision and Order at

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affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] 20 C.F.R. §725.308 provides in pertinent part:

> (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. . .

9. The administrative law judge reviewed the record and determined that the only medical opinion issued prior to that date in which claimant was found to be totally disabled was rendered by Dr. Myers; however, Judge Marden had discredited the opinion, and his denial of benefits was subsequently upheld by the Board.[3] Decision and Order at 9-10. The administrative law judge then relied upon the reasoning of *Dukes* to find that because Dr. Myers's report was proffered in support of a denied claim, the opinion constituted a misdiagnosis which did not trigger the running of the three-year time period. Decision and Order at 10.

Employer argues that the administrative law judge erred in relying upon the holding in *Dukes*, as the case has not been published and its holding is in conflict with the holding in *Kirk*. These contentions have merit. Pursuant to the rules of the United States Court of Appeals for the Sixth Circuit, *Kirk* constitutes controlling authority by virtue of its status as a published decision.[4] 6th Cir.R. 206(c); *Lopez v. Wilson*, 355 F.3d 931 (6th

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> (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.

[3] Dr. Myers diagnosed coal workers' pneumoconiosis, Category 1/1 pt; chronic obstructive pulmonary disease; recurrent pleural effusion, etiology undetermined, rule out tuberculosis, sarcoidosis or asbestosis; calcified granulomata, right lower lung, etiology undetermined; and arteriosclerotic heart disease with angina, Class III by history. In response to the form question, "is the miner physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust free environment," Dr. Myers checked the "no" box, and explained that this was "due to the above diagnoses." Director's Exhibit 1. In his Decision and Order denying benefits issued on June 14, 1994, Administrative Law Judge Frank D. Marden found that Dr. Myers's opinion was against the great weight of the medical evidence; that it was contrary to the findings upon blood gas and pulmonary function testing, a discrepancy the physician failed to explain; that Dr. Myers's report was unpersuasive in light of the contrary probative evidence; and that the report did not constitute a reasoned opinion. Director's Exhibit 1.

[4] Rule 206(c) of the Sixth Circuit regarding Publication of Decisions provides that:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court

Cir. 2004); *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996). In addition, the rationale underlying the court's disposition of the timeliness issue in *Kirk*, differs from that relied upon by the panel in *Dukes*. In *Kirk*, the court stated 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 (emphasis in original), citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Thus, unlike the majority in *Dukes*, the *Kirk* court would treat a credible medical determination of total disability due to pneumoconiosis which is communicated to the miner as sufficient to trigger Section 725.308 regardless of the outcome of the claim which the physician's opinion sought to support.

Accordingly, we must vacate the administrative law judge's finding that Dr. Myers's 1992 opinion did not begin the running of the three-year limitation set forth in Section 725.308(a). This case is remanded to the administrative law judge for reconsideration of the issue pursuant to the holding in *Kirk*. In addressing Dr. Myers's report on remand, the administrative law judge must determine if Dr. Myers 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

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> *en banc* consideration is required to overrule a published opinion of the court.

6th Cir.R. 206(c). The court rejected the motion of the Director, Office of Workers' Compensation Programs, to publish the decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002).

been communicated to the miner..." 20 C.F.R. §725.308(a); *see Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216 (2002); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002) (*en banc*). If the administrative law judge determines that Dr. Myers's report satisfies the terms of Section 725.308(a) and, therefore, that employer has rebutted the presumption that claimant's subsequent claim was timely filed, entitlement to benefits is precluded and the administrative law judge need not reach the remaining issues in this case. *Kirk*, 264 F.3d 602, 22 BLR 2-288.

We will now address claimant's contention that the administrative law judge erred in failing to enforce the evidentiary limitations set forth at Section 725.414.[5] Specifically, claimant asserts that because more than two x-ray interpretations submitted by employer were admitted into the record, the administrative law judge's weighing of the evidence on the issue of complicated pneumoconiosis at Section 718.304 was impacted in employer's favor. Claimant's arguments have some merit.

The record reflects that prior to the hearing, all parties presented their evidence as delineated in Section 725.414, setting forth in an Evidence Summary Form the evidence submitted as their case-in-chief, 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i), (a)(3)(iii), as well as the medical evidence submitted as rebuttal or rehabilitative evidence, 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(2), (a)(3). Although there was no objection to the introduction of any evidence at the hearing, *see* Hearing Transcript at 6-10, both claimant and employer requested and were granted time to file closing briefs, see Hearing Transcript at 26-27, and in his Position Statement, claimant explicitly objected to "any evidence submitted by the employer that is in excess of the guidelines set forth in §725.414." As medical evidence "in excess of the limitations contained in §725.414 shall not be admitted into the hearing record in the absence of good cause," *see* 20 C.F.R. §725.456(b)(1), if this issue is reached on remand, the administrative law judge is instructed to identify the evidence submitted by each party which is admissible pursuant to Section 725.414, and, within his discretion, either admit any medical evidence submitted in excess of the regulatory limitations, pursuant to a finding that the party submitting the evidence has established good cause for the submission of the additional evidence, or exclude such evidence.[6] 20 C.F.R. §725.456(b)(1); *see Dempsey v. Sewell*

[5] We reject employer's argument that the evidentiary limitations at 20 C.F.R. §725.308 are invalid. *See Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 23 BLR 2-124 (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 (D.D.C. 2001).

[6] Although employer asserts that all of the x-ray evidence it submitted falls within the spirit of the Section 725.414 restrictions, the record reflects that, in addition to the x-ray interpretations of Drs. Dahhan and Lockey submitted by employer under Section 725.414(a)(3)(i), *see* Director's Exhibit 9; Employer's Exhibit 7, and Dr. Scott's x-ray

Coal Co., 23 BLR 1-47 (2004); *Smith v. Martin County Coal Corp.*, BRB No. 04-0126 BLA Oct. 27, 2004)(pub.).

As the administrative law judge's evidentiary rulings necessarily may impact his weighing of the evidence and his findings pursuant to Section 725.309(d), and as it appears that the administrative law judge based his findings under both Sections 718.304 and 718.204(b)(2)(iv) on a numerical preponderance of the evidence, *see* Decision and Order at 11, 13, we vacate the administrative law judge's findings pursuant to Sections 725.309(d), 718.304 and 718.204(b)(2)(iv) for a reassessment of the evidence on remand, if reached. The administrative law judge must make a qualitative, not just a quantitative, evaluation of the evidence, taking into consideration the qualifications of the physicians as well as the reasoning and support underlying their opinions, and provide a rationale for concluding that any given medical opinion is documented and reasoned. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Collins v. J&L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). The administrative law judge is further instructed to separately adjudicate the issues of total respiratory or pulmonary disability pursuant to Section 718.204(b)(2)(iv), *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and disability causation at Section 718.204(c), *see Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). If the administrative law judge finds that the weight of the new evidence establishes an element of entitlement previously adjudicated against claimant, he must then compare the sum of the newly submitted evidence against the sum of the previously submitted evidence to determine whether the new evidence is substantially more supportive of claimant. *See Kirk*, 264 F.3d at 609, 22 BLR at 2-300; *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003).

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interpretation submitted under Section 725.414(a)(3)(ii), *see* Director's Exhibit 24, the administrative law judge considered an x-ray interpretation by Dr. Wiot which was included within Dr. Lockey's medical evaluation report, *see* Employer's Exhibit 5. The administrative law judge also considered an x-ray interpretation by Dr. Wheeler, *see* Director's Exhibit 10, which was originally submitted to the district director by employer, but which was not listed on any of the evidence summary forms filed by the parties. Moreover, while employer submitted the medical report and deposition testimony of Dr. Fino under Section 725.414(a)(3)(ii) for rebuttal of Dr. Hussain's pulmonary function and blood gas studies only, *see* Employer's Exhibits 2, 3, 8, the administrative law judge considered Dr. Fino's conclusion, that claimant did not have pneumoconiosis or any respiratory impairment, in weighing the medical opinion evidence under Section 718.204(b)(2)(iv). *See* Decision and Order at 6, 13.

Lastly, employer contends that the administrative law judge erred by failing to rule on the issue of whether the Department of Labor's failure to notify employer's insurance carrier of the claim necessitates imposition of liability on the Trust Fund for any payment of benefits.[7] Employer maintains that because the district director determined that claimant was last employed by employer on July 8, 1991, *see* Director's Exhibit 26, and the record reflects that American Resources Insurance Company provided coverage for employer between June 1, 1991 and June 1, 1992, *see* Director's Exhibit 29, the lack of notice to the insurer as a party to this claim mandates the transfer of liability to the Trust Fund as a matter of law. We disagree. The Director correctly maintains that the district director's findings are not binding on the administrative law judge, *see Trent v. Director, OWCP*, 12 BLR 1-26 (1986), and that the conflict in the record as to the last date of claimant's employment with employer must be resolved by the administrative law judge as the trier-of-fact. Consequently, if benefits are awarded on remand, the administrative law judge must determine the ending date of claimant's employment with employer and then rule on whether a transfer of liability to the Trust Fund is appropriate. *See* 33 U.S.C. §919(b), 20 C.F.R. §725.360; *Warner Coal Co. v. Director, OWCP [Warman]*, 804 F.2d 346 (6th Cir. 1986); *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999).

[7] Employer notes that this issue was raised before the district director (Director's Exhibit 29), contested before the Office of Administrative Law Judges (Director's Exhibit 30), discussed at the hearing (Hearing Transcript at 11-12) and addressed in employer's post-hearing brief (Brief at 15-16).

Accordingly, the Decision and Order of the administrative law judge is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge