BRB Nos. 06-0728 BLA
and 06-0728 BLA-A

JOE BARRETT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	DATE ISSUED: 03/28/2007
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
	)	
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-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.

Jeffrey S. Goldberg (Jonathan L. Snare, Acting 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-Denial of Benefits (04-BLA-5852) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on a 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).[1] Claimant filed this claim on July 6, 2001.[2] Director's Exhibit 2.

The administrative law judge initially found that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge then credited claimant with at least sixteen years of coal mine employment[3] as stipulated by the parties, Transcript at 8-9, and as supported by the evidence, Director's Exhibits 3-5. The administrative law judge also found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) since the newly submitted evidence established a totally disabling respiratory or pulmonary impairment, a finding upon which the prior denial was based. Addressing the merits of claimant's subsequent claim, the administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Because claimant did not establish the existence of pneumoconiosis, the administrative law judge found moot the issues of

[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 filed his first claim on September 18, 1992, which was denied by Administrative Law Judge J. Michael O'Neill on April 21, 1994. Director's Exhibit 1. Claimant appealed, and the Board affirmed Judge O'Neill's finding that total disability was not established pursuant to 20 C.F.R. §718.204(c) (2000). *Barrett v. Shamrock Coal Co.*, BRB No. 94-2393 BLA (Jan. 24, 1995)(unpub.). Subsequently, claimant requested modification on February 23, 1995, Director's Exhibit 10, which was denied by Judge O'Neill in a decision dated November 26, 1996. Director's Exhibit 1. Claimant appealed, and in a decision dated November 24, 1997, the Board affirmed the denial of benefits on the grounds that claimant failed to establish total disability at Section 718.204(c) (2000) and, therefore, did not establish a basis for modification pursuant to 20 C.F.R. §725.310 (2000). *Barrett v. Shamrock Coal Co.*, BRB No. 97-0460 BLA (Nov. 24, 1997)(unpub.); Director's Exhibit 1.

[3] The record indicates that claimant's coal mine employment occurred in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

whether claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) and whether he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1). Moreover, claimant 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. However, employer has filed a cross-appeal, contending that the administrative law judge erred in finding that claimant's 2001 claim was timely filed. The Director responds that the administrative law judge properly found that claimant's 2001 claim was timely filed, and that Dr. Baker's report satisfies his obligation to provide claimant with a complete, credible pulmonary evaluation. Employer replies that claimant's subsequent claim was not timely filed.

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 initially address employer's contention, raised in its cross-appeal, that claimant's 2001 claim for benefits is barred by the time limitations set forth in 20 C.F.R. §725.308.[4] 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

[4] 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.

"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 decision, the administrative law judge stated that:

> Under §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. Section 725.308(c) creates a rebuttable presumption that every claim for benefits is timely filed. This statute of limitations does not begin to run until a miner is actually diagnosed by a doctor, regardless of whether the miner believes he has the disease earlier. *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602 [22 BLR 2-288](6th Cir. 2001). In addition [in *Kirk*], the court stated:
>
> 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. [Footnote omitted.] 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 added]. Decision and Order at 3-4. Applying *Kirk*, the administrative law judge found that claimant's 2001 subsequent claim was timely filed because Dr. Varghese's 1995 opinion was equivocal and thus poorly reasoned, and insufficiently documented because Dr. Varghese failed to specify the x-ray he considered in reaching his conclusion. Decision and Order at 4; Director's Exhibit 10.

Employer argues that Dr. Varghese's 1995 report, submitted in connection with claimant's request for modification of his initial claim, is sufficient to have triggered the statute of limitations set forth at Section 725.308. Employer, therefore, contends that claimant's 2001 subsequent claim must be dismissed under the reasoning set forth in *Kirk*. Employer's Brief at 5. The Director disagrees, contending that the administrative law judge properly found that Dr. Varghese's 1995 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. In any event, the Director asserts that Dr. Varghese's 1995 report is insufficient to trigger the statute of limitations because it does not establish that the miner's total disability is due to pneumoconiosis. Employer replies that Dr. Varghese's report is a medical determination of total disability due to pneumoconiosis sufficient to trigger the three year statute of limitations.

The administrative law judge found that the 1995 report of Dr. Varghese, submitted in connection with claimant's request for modification of his initial claim for benefits, is insufficient to support a finding of total disability due to pneumoconiosis. Decision and Order at 4-5. Dr. Varghese addressed a letter dated February 13, 1995 to claimant's counsel, at that time, in which he stated:

> To Whom It May Concern
>
> Joe Barrett is a sixty-three-year-old male who worked in the coal mines for about 15 years. The patient has cough and difficulty breathing. Physical examination shows bilateral emphysema. Chest x-ray showed granulomatous changes seen in the lung with evidence of emphysema. The patient is getting treatment for pulmonary emphysema probably from blacklung. The patient is disabled with his blacklung and emphysema.
>
> If you need any more details, please contact me.

Director's Exhibit 10. The administrative law judge permissibly found that Dr. Varghese's opinion as to the existence of pneumoconiosis was equivocal. *See Island Creek Coal Co. v. Holdman,* 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); Decision and Order at 4; Director's Exhibit 10.

Because the administrative law judge thus permissibly found that Dr. Varghese's February 13, 1995 report is insufficient to constitute a "medical determination of total disability due to pneumoconiosis," this opinion cannot be used to trigger the running of the Section 725.308 statute of limitations. *Kirk,* 264 F.3d at 607, 22 BLR at 2-298, *Brigance v. Peabody Coal Co.,* 23 BLR 1-170, 1-175 (2006)(*en banc*); *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-160, 1-166 (2006)(*en banc*)(McGranery, J., concurring in part and dissenting in part); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95, 1-99 (1993). 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.[5]

[5] Given our affirmance of the administrative law judge's finding that Dr. Varghese's February 13, 1995 report is insufficient to constitute a "medical determination

We now address claimant's appeal. To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant argues that the administrative law judge erred in finding that the sole positive x-ray reading of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant asserts that the administrative law judge was not required to defer to the numerical superiority of the x-ray interpretations by physicians with superior qualifications, and erred in "selectively analyzing" the x-ray evidence.

In addressing the merits of claimant's subsequent claim, the administrative law judge found that pneumoconiosis was not established pursuant to Section 718.202(a)(1), crediting the newly submitted x-ray evidence, which the administrative law judge found was negative for pneumoconiosis, as more probative than the previously submitted readings. Decision and Order at 17-18. The administrative law judge rationally determined that the September 14, 2001 x-ray, interpreted by Dr. Baker, a B reader, as positive for pneumoconiosis, and reread by Dr. Scott, a Board-certified radiologist and B-reader, as negative for pneumoconiosis, was negative for pneumoconiosis based on Dr. Scott's superior qualifications. *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); Decision and Order at 18; Director's Exhibits 8, 24. Although an administrative law judge is not required to defer to the numerical superiority of the x-ray interpretations by physicians with superior qualifications, he may do so. *Id.* Because claimant raises no other arguments at Section 718.202(a)(1), we affirm the administrative law judge's finding that claimant did not establish pneumoconiosis by x-ray pursuant to Section 718.202(a)(1).[6] Consequently, we affirm the administrative law judge's finding

---

of total disability due to pneumoconiosis," we need not address employer's contention that the administrative law judge erred in finding that Dr. Varghese's February 13, 1995 report was not communicated to the miner, as any error would be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Claimant has provided no support for his assertion that the administrative law judge may have "selectively analyzed" the x-ray evidence, and thus we do not address this issue.

that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a).[7]

Claimant also contends that he is entitled to a remand of the case for the Director to provide him with a complete, credible pulmonary evaluation because the administrative law judge found that Dr. Baker's opinion regarding the existence of pneumoconiosis is not reasoned. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101(a), 725.406. The administrative law judge found that Dr. Baker's diagnosis of clinical pneumoconiosis is not a reasoned opinion because it was based solely on a positive chest x-ray, citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Decision and Order at 19-20. The administrative law judge found that Dr. Baker did not diagnose legal pneumoconiosis. *Id*.

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), implemented by 20 C.F.R. §§718.101(A), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete" or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n. 3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 1-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984).

Dr. Baker examined claimant on December 20, 2001, and recorded coal mine employment and smoking histories, interpreted claimant's September 14, 2001 x-ray as positive for pneumoconiosis, but advised that he was unable to perform any testing on claimant because claimant is "vent dependent and essentially paralyzed." Director's Exhibit 8. Based on his evaluation, Dr. Baker diagnosed claimant with coal workers' pneumoconiosis 1/0 based on the abnormal chest-ray and coal dust exposure, and related claimant's coal workers' pneumoconiosis to his coal dust exposure. Dr. Baker also diagnosed claimant with chronic respiratory failure secondary to amyotropic lateral sclerosis (ALS), etiology unknown. Dr. Baker indicated that claimant had a severe pulmonary impairment, explained that claimant was vent dependent secondary to ALS, and related claimant's pulmonary impairment to his ALS. Dr. Baker further indicated that claimant did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment because he was vent dependent.

[7] We affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) as unchallenged on appeal. *See Larioni,* 6 BLR at 1-1276.

We agree with the position of the Director, whose duty it is to ensure the proper enforcement and lawful administration of the Act, *Hodges*, 18 BLR at 1-89-90, that a remand of this case is not warranted based upon the facts of this case. In this case, Dr. Baker's report is complete in that he addressed all issues of entitlement and is *prima facie* credible because it accurately reflects the information provided to Dr. Baker. The fact that the administrative law judge chose not to accept Dr. Baker's opinion on the issue of pneumoconiosis does not render the report either incomplete or inherently incredible as the Director is not required to provide claimant with a dispositive pulmonary evaluation. *Cline*, 917 F.2d at 11, 14 BLR at 2-105. Consequently, the administrative law judge properly denied the claim pursuant to 20 C.F.R. Part 718.[8] *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *Trent*, 11 BLR at 1-27.

Accordingly, the administrative law judge's Decision and Order-Denial of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[8] Based on our holding that the Director 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 1-1276.