BRB No. 07-0706 BLA

M.O.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WHITAKER COAL CORPORATION	)	
	)	
and	)	
	)	
SUN COAL COMPANY	)	DATE ISSUED: 05/29/2008
	)	
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 – Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd and Lloyd), Washington, D.C., for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 – Awarding Benefits (2004-BLA-6797) of Administrative Law Judge Ralph A. Romano (the administrative law judge) with respect to 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). The miner's subsequent claim was filed on April 14, 2003.[1] Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited the miner with twenty-two years of coal mine employment, based on a stipulation of the parties. In addition, the administrative law judge determined that the claim was timely filed pursuant to 20 C.F.R. §725.308, finding that the three-year statute of limitations is not applicable to subsequent claims. Based on employer's concession that the existence of pneumoconiosis arising out of coal mine employment was established, the administrative law judge found the evidence sufficient to establish a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). Addressing the merits of the miner's claim, the administrative law judge found the medical evidence of record sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). In addition, the administrative law judge found the medical evidence sufficient to establish that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the miner's subsequent claim was timely filed. Employer further argues that the miner's subsequent claim should be time barred because the miner received a medical determination of total disability due to pneumoconiosis more than three years prior to filing this claim. Employer also contends that the administrative law judge erred in finding the evidence was sufficient to establish that the miner's total disability was due to

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[1] Claimant filed his initial claim for benefits on December 6, 1995, which was denied by the district director. Director's Exhibit 1. Following a formal hearing, Administrative Law Judge Alfred Lindeman issued a Decision and Order denying benefits, based on his finding that claimant failed to establish the existence of pneumoconiosis. *Id.* The Board affirmed Judge Lindeman's denial of benefits. [*M.O.*] *v. Whitaker Coal Corp*., BRB No. 97-1760 BLA (Sept. 11, 1998)(unpub.); Director's Exhibit 1. Claimant then filed a request for modification on October 8, 1998. Director's Exhibit 1. Administrative Law Judge Thomas F. Phalen denied claimant's request for modification, finding that claimant failed to establish either a change in conditions or a mistake in a determination of fact. Director's Exhibit 1. The Board affirmed Judge Phalen's denial. [*M.O.*] *v. Whitaker Coal Corp.*, BRB No. 00-1077 BLA (July 1, 2000)(unpub.); Director's Exhibit 1.

pneumoconiosis pursuant to Section 718.204(c). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, agreeing that the administrative law judge did not properly apply Section 725.308, but maintaining that the error is harmless, as the medical report identified by employer did not initiate the beginning of the three-year limitations period set forth at Section 725.308.[2] In a reply brief, employer reiterates its position that the subsequent claim was not timely filed because claimant received a medical determination of total disability due to pneumoconiosis more than three years prior to filing this subsequent claim. In addition, employer contends that Section 725.308 is invalid because it contains requirements not set forth in Section 422(f) of the Act, 30 U.S.C. §932(f).

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.[3] 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 that the administrative law judge erred in finding that claimant's subsequent claim was timely filed pursuant to Section 725.308. The administrative law judge noted that employer contended that this claim was untimely because a medical determination of total disability due to pneumoconiosis was communicated to the miner more than three years prior to the filing of this subsequent claim, but nonetheless found that the three-year statute of limitations period does not apply to subsequent claims, citing *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR

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[2] The parties do not challenge the administrative law judge's decision to credit claimant with twenty-two years of coal mine employment, his finding that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a), 718.203, and, therefore, that a change in an applicable condition of entitlement was established under 20 C.F.R. §725.309(d). The parties also do not allege error in the administrative law judge's finding that the evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). We, therefore, affirm these findings as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4.

1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990). Decision and Order at 3. Consequently, the administrative law judge found this subsequent claim was timely filed. *Id.*

On appeal, employer contends that the administrative law judge erred in finding that the three-year statute of limitations does not apply in subsequent claims. In particular, employer contends that, in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge must apply the holding in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), that the three-year statute of limitations is triggered the first time a medical determination of total disability due to pneumoconiosis is communicated to claimant. Herein, employer argues that the medical opinion of Dr. Varghese, associated with claimant's 1995 claim, was sufficient to trigger the three-year limitation period. Employer's Brief at 10-11. In response, the Director agrees with employer that the administrative law judge erred in finding that the statute of limitations does not apply in subsequent claims. Director's Letter Brief at 2. However, the Director argues that the administrative law judge's error is harmless because the record does not establish that Dr. Varghese's medical opinions were communicated to claimant at the time they were obtained in the first claim. The Director asserts, specifically, that communication of the diagnosis to claimant's legal representation is not sufficient to trigger the three-year limitation period. *Id.* at 3. Employer, in a reply brief, reiterates its position that claimant's subsequent claim is time-barred. In addition, employer contends that Section 725.308 is invalid because the statute, Section 422(f), 30 U.S.C. §932(f), does not contain a provision requiring that the medical determination be communicated to the miner in order to trigger the three-year limitations period. Employer's Reply Brief at 7-8.

The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis. . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner. . . ," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). With respect to the time limitation set forth in Section 725.308, the Sixth Circuit held in *Kirk* that "[t]he 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. . . ." *Kirk,* 264 F.3d at 608, 22 BLR at 2-298.[4]

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[4] The Director, Office of Workers' Compensation Programs (the Director), takes the position that the language in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), indicating that the denial of a prior claim does not reset the limitations period for subsequent claims, is dicta. Director's Brief at 3. The Board, however, has rejected the Director's position, and applies *Kirk* in all cases arising within

As employer and the Director both correctly contend, the administrative law judge erred in finding that, in this subsequent claim arising within the Sixth Circuit, the three-year statute of limitations does not apply. *Furgerson v. Jericol Mining*, 22 BLR 1-216, 1-222 (2002) (*en banc*); *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002) (*en banc*). Consequently, we vacate the administrative law judge's finding that this claim was timely filed and remand the case for the administrative law judge to determine whether employer has established rebuttal of the presumption of timeliness pursuant to Section 725.308.[5] 20 C.F.R. §725.308; *Kirk,* 264 F.3d at 608, 22 BLR at 2-298. On remand, the administrative law judge must consider whether a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years before he filed this claim. Specifically, if the administrative law judge determines that claimant received the reports of Dr. Varghese, as argued by employer, he must determine if they constitute the reasoned opinion of a medical professional diagnosing claimant as totally disabled due to pneumoconiosis pursuant to Section 725.308. 20 C.F.R. §725.308; *see Kirk*, 264 F.3d at 607, 22 BLR at 2-298; *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159, 1-166 (2006) (*en banc).*

Although we have vacated the administrative law judge's award of benefits and are remanding this case to the administrative law judge for further consideration at Section 725.308, in the interest of judicial economy we will address employer's arguments on the merits of entitlement. Employer contends that the administrative law judge erred in finding the medical evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c).

Pursuant to Section 718.204(c), the administrative law judge considered the opinions of Drs. Simpao, Myers, Crouch, Dahhan and Rosenberg, as well as the hospital records associated with claimant's right lung transplant in September 2004, and his follow-up care.[6] Decision and Order at 9-11, 12. In weighing this evidence, the

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the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Furgerson v. Jericol Mining*, 22 BLR 1-216, 1-222 (2002) (*en banc*).

[5] We decline to hold, as the Director suggests, that the administrative law judge's error under 20 C.F.R. §725.308 is harmless. The administrative law judge as fact-finder must address this issue *de novo* and render the necessary determinations of fact and law. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

[6] Dr. Simpao examined claimant on June 9, 2003 and diagnosed coal workers' pneumoconiosis, 1/2, and that claimant's multiple years of coal dust exposure are medically significant in his severe pulmonary impairment. Director's Exhibits 10, 16. Dr. Myers, in conjunction with claimant's Kentucky state workers' compensation claim,

administrative law judge found that the opinions of Drs. Crouch, Dahhan and Rosenberg were entitled to little probative weight because they "fail[ed] to explain how they can completely rule out coal dust exposure as a contributing factor to the Claimant's pulmonary impairment when the Claimant had a coal mine employment history of at least twenty-two years." Decision and Order at 12; Director's Exhibit 19; Employer's Exhibits 1, 4-7. The administrative law judge further found these opinions "not entirely consistent, given their acknowledgement of Claimant's impairment and the fact that his coal mine employment could be of sufficient duration to cause pneumoconiosis." Decision and Order at 12. Rather, the administrative law judge found that Drs. Simpao

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examined claimant on November 29, 2000, and diagnosed coal workers' pneumoconiosis, 1/2; chronic obstructive pulmonary disease (COPD); and, "above associated with Class III obstructive/restrictive defects in ventilation." Director's Exhibit 14; Claimant's Exhibit 1. Dr. Myers further opined that claimant's disease was the result of coal dust exposure and that claimant's impairment was also the result of his coal dust exposure. *Id*. Dr. Crouch, a Board-certified pathologist, reviewed eight lung tissue slides obtained from claimant's right lung transplant performed on September 11, 2004, and opined that the slides showed a mixed pattern emphysema and mild simple pneumoconiosis. Employer's Exhibits 6, 7. Dr. Crouch further opined that the coal dust related changes seen on the slides were insufficient to cause a clinically significant degree of impairment and that claimant's disability was due to severe emphysema and fibrosis, which was due to claimant's smoking history. *Id*. Dr. Dahhan examined claimant on March 9, 2004 and also reviewed medical reports from claimant's current and former claim, and opined that there were insufficient objective findings to justify a diagnosis of coal workers' pneumoconiosis, but that claimant was suffering from a moderately severe ventilatory impairment, which resulted from his cigarette smoking history and was also contributed to by his serious coronary artery disease. Director's Exhibit 16. However, after reviewing Dr. Rosenberg's medical report following claimant's lung transplant, Dr. Dahhan, in his deposition, opined that the pathology evidence established the existence of simple coal workers' pneumoconiosis, but that it is not disabling. Employer's Exhibit 5. Rather, Dr. Dahhan opined that claimant's respiratory impairment was due to claimant's lung transplant, which was due to his smoking related obstructive lung disease and emphysema, and not related to claimant's pneumoconiosis. *Id*. Dr. Rosenberg examined claimant on February 3, 2005 and diagnosed emphysema in the left lung, but that the right lung was functioning normally after the lung transplant, while prior to the lung transplant it had shown severe airflow obstruction. Employer's Exhibits 1, 4. Dr. Rosenberg opined that claimant's pulmonary impairment was due to his lung transplant, which was necessitated by the development of emphysema due to cigarette smoking, and not to coal dust exposure, based on the area of lung affected by the emphysema. *Id*.

and Myers opined that claimant's history of coal mine employment is a significant contributing cause of claimant's pulmonary impairment, Decision and Order at 11; Director's Exhibits 10, 14, 16; Claimant's Exhibit 1, and, therefore, concluded that the evidence is sufficient to meet claimant's burden of establishing total disability causation. Decision and Order at 12.

On appeal, employer contends that the administrative law judge erred in failing to provide a rational basis for his conclusion that the miner's total disability was due to pneumoconiosis. Specifically, employer contends that the administrative law judge did not explain why he credited the opinions of Drs. Simpao and Myers, but merely recited their conclusions without determining whether these opinions were reasoned and documented. Employer's Brief at 16, 22-23. Rather, employer contends, the administrative law judge shifted the burden to employer to establish the absence of causation by requiring that the contrary opinions of record explain why coal dust exposure did not cause claimant's pulmonary impairment. Employer's Brief at 16-20. Specifically, employer contends that each of these physicians, Drs. Crouch, Dahhan and Rosenberg, provided a thorough analysis of the evidence and provided a rational basis for opining that coal dust exposure did not contribute to claimant's total disability. Employer's Brief at 18-22. There is merit to employer's contentions.

As employer correctly contends, the administrative law judge has not provided an adequate rationale for his determination that the medical evidence is sufficient to establish disability causation. Rather, he summarily credited the opinions of Drs. Simpao and Myers without making a finding as to whether these opinions are reasoned and documented. Decision and Order at 11. Accordingly, we vacate the administrative law judge's findings under Section 718.204(c) and remand the case to the administrative law judge for a more detailed explanation of his conclusions with respect to these opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Moreover, we vacate the administrative law judge's finding that the opinions of Drs. Crouch, Dahhan and Rosenberg are entitled to little probative weight because the administrative law judge also has not adequately explained the basis for his finding. *Id*. The administrative law judge found that these opinions were "not entirely consistent" because the physicians diagnosed a pulmonary impairment and coal mine employment of sufficient duration to cause pneumoconiosis, but did not find that pneumoconiosis caused the miner's pulmonary impairment. Decision and Order at 12. The administrative law judge, therefore, accorded them little weight. *Id*. However, the administrative law judge did not discuss the specific bases each of the physicians gave for finding that pneumoconiosis was not a contributing cause of claimant's total disability. Consequently, we remand the case for the administrative law judge to more fully discuss his findings, taking into account the relative qualifications of the physicians, the

persuasiveness and detail of the physicians' explanations, the underlying documentation, and the significance of any flaws in the opinions, such as inaccurate smoking histories. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see generally Martin v. Ligon Preparation Co*., 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge