

BRB Nos. 05-0278 BLA
and 05-0278 BLA-A

WALTER DENNIS MORGAN)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
SHAMROCK COAL COMPANY, INCORPORATED)	DATE ISSUED: 10/24/2005
)	
Employer/Carrier-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 Daniel J. Roketenetz, 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.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 the Decision and Order – Denial of Benefits (03-BLA-6020) of Administrative Law Judge Daniel J. Roketenetz on 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). Claimant filed his subsequent claim on May 10, 2001.¹ Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on February 28, 2003. Director's Exhibit 41. Claimant requested a hearing, which was held on March 16, 2004. In his Decision and Order dated November 4, 2004, the administrative law judge accepted the parties' stipulation that claimant worked eleven years in coal mine employment, and also found that claimant's subsequent claim was timely filed. On the merits, the administrative law judge found that the new evidence was insufficient to establish either the existence of coal workers' pneumoconiosis or that claimant was totally disabled by a respiratory or pulmonary impairment. The administrative law judge thus found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §718.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erroneously weighed the x-ray and medical opinion evidence in finding that he failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4).² Because the administrative law judge rejected Dr Hussain's opinion at Section 718.202(a)(4), claimant asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to satisfy his obligation to provide claimant with a complete and credible pulmonary evaluation as required by 30 U.S.C. §923(b), *see* 20 C.F.R. §725.406(c). Claimant further challenges the administrative law judge's finding that he is not totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Employer responds, urging

¹ Claimant filed a prior claim for benefits on April 2, 1993, which was denied by Administrative Law Judge Edward J. Murty. In his Decision and Order dated July 17, 1995, Judge Murty found that claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. He specifically credited the negative x-ray readings and medical opinions stating that claimant did not have pneumoconiosis. *Id.* Dr. Murty also noted that the record included only one medical opinion from Dr. Clark, who opined that claimant was totally disabled. *Id.* Judge Murty, however, rejected Dr. Clarke's opinion because he found that the physician did not perform any objective testing to support his disability finding. Director's Exhibit 1.

² Because there was no biopsy evidence of record, the administrative law judge found that claimant was unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 9. He also determined that claimant was not eligible for any of the available presumptions for establishing the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(3). *Id.* The administrative law judge's findings with respect to Sections 718.202(a)(2), (3) are affirmed as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

affirmance of the denial of benefits. Employer has also filed a cross-appeal, challenging the administrative law judge's finding that claimant's subsequent claim was timely filed. Employer requests that the claim be dismissed as a matter of law or the claim be remanded for the administrative law judge to address *Consolidation Coal Co. v. Kirk*, 264 F. 3d 602, 22 BLR 2-288 (6th Cir. 2001).

The Director has also filed a brief in response to both appeals. The Director argues that the Department of Labor satisfied its obligation to provide claimant with a complete and credible pulmonary evaluation. With respect to employer's cross-appeal of the timeliness issue, the Director asserts that any error committed by the administrative law judge by failing to address *Kirk* is harmless. *See Kirk*, 264 F.3d at 602, 22 BLR at 2-288; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Brief at 3. The Director asserts that a remand is unnecessary in this instance because "employer's argument relies on an unreasoned medical opinion [from Dr. Clarke] to trigger the limitation period." Director's Brief at 3. The Director argues that, insofar as Administrative Law Judge Edward J. Murty determined in his adjudication of the prior claim that Dr. Clarke's opinion was unreasoned, then pursuant to *Kirk*, Dr. Clark's opinion is legally insufficient to toll the three-year statute of limitations. *Id.*

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

A. TIMELINESS

We first address employer's assertion on cross-appeal that the administrative law judge erred in failing to consider the *Kirk* decision and whether the 1992 report by Dr. Clarke triggered the tolling of the three-year statute of limitations for the filing of claimant's subsequent claim, thereby rendering the subsequent claim untimely filed pursuant to 20 C.F.R. §725.308. We note that in *Kirk*, the United States Court of Appeals for the Sixth Circuit held that the three-year statute of limitations "clock" imposed by Section 725.308 on the filing of a claim, "begins to tick the first time that a miner is told by a physician that he is totally disabled due to pneumoconiosis." *Kirk*, 264 F.3d at 608, 22 BLR at 2-298. This clock is not stopped by the resolution of the miner's claim or claims, and may only be turned back if the miner returns to the mines after a denial of benefits. *See Id.* Because *Kirk* is controlling law in this case, we decline to adopt the Director's view that we can make the necessary factual finding that Dr. Clarke's opinion was unreasoned and therefore insufficient under *Kirk* to trigger the statute of limitations. Such a factual finding in the instant case is up to the administrative law judge based on his review of the prior decision of Judge Murty and the medical evidence of record. *See*

generally *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Thus, because the administrative law judge did not address *Kirk*, we vacate the denial of benefits, and remand this case for further consideration of the timeliness issue.

B. MERITS OF ENTITLEMENT:

In the interest of judicial economy, we further address the merits of claimant's appeal. In this case, claimant's prior claim was denied because he failed to establish all of the requisite elements of entitlement. See 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 1. The regulation at 20 C.F.R. §725.309(d) provides that a subsequent claim must be denied on the grounds of the prior denial of benefits unless claimant is able to establish a change in one of the applicable conditions of entitlement since the prior denial. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Sixth Circuit has held that, in a case involving the prior regulations, in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him.³ See *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.*

1. Existence of Pneumoconiosis

Claimant asserts on appeal that the administrative law judge "may have" selectively analyzed the x-ray evidence at 20 C.F.R. §718.202(a)(1). Claimant's Brief at 3. We disagree. Contrary to claimant's assertion, in considering the new evidence, the administrative law judge properly considered the conflicting x-ray readings in light of the credentials of the readers and found that the June 24, 2002 x-ray was positive for pneumoconiosis, while the x-rays dated March 31, 2001, July 25, 2001, and February 17, 2004 were negative for pneumoconiosis. See *Staton v. Norfolk & Western Railroad 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 10. The administrative law judge thus found that the preponderance of the new x-ray evidence was negative for the

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

existence of pneumoconiosis.⁴ Because substantial evidence supports the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis based on the x-ray evidence, the administrative law judge's finding at 20 C.F.R. §718.202(a)(1) is affirmed.

We also reject claimant's argument that the administrative law judge erred in his consideration of the newly submitted opinions of Drs. Baker and Hussain at 20 C.F.R. §718.202(a)(4). Claimant's Brief at 4-5. In addressing whether claimant established clinical pneumoconiosis, the administrative law judge permissibly assigned less probative weight to the opinions of Drs. Baker and Hussain, since he found that they offered no explanation for their diagnoses of pneumoconiosis, other than to cite a positive reading and claimant's history of coal dust exposure. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-265 (6th Cir. 2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); 20 C.F.R. §718.101(d)(5); Director's Exhibit 14; Decision and Order at 11. On the issue of whether claimant established legal pneumoconiosis, the administrative law judge likewise properly rejected the opinions of Drs. Baker and Hussain, that claimant had a respiratory condition due in part to coal dust exposure. The administrative law judge specifically noted that Dr. Baker relied on a "totally erroneous smoking history," and that Dr. Hussain considered "a much smaller smoking history" than testified to by claimant or found by the administrative law judge upon review of the record evidence. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); Decision and Order at 13-14. The administrative law judge similarly noted that Dr. Hussain's opinion was undermined by the fact that he based his diagnosis of pneumoconiosis and chronic obstructive pulmonary disease (COPD) due to coal dust exposure on an inflated coal mine employment history. *See Long v. Director, OWCP*, 7 BLR 1-254 (1984); Decision and Order at 14. Conversely, the administrative law judge properly credited the opinions of Drs. Broudy and Dahhan, that claimant did not have pneumoconiosis, since he found their opinions were better reasoned and better supported by the objective evidence. *See*

⁴ The administrative law judge properly noted that the record contained eight readings of four x-rays dated March 31, 2001, July 25, 2001, June 24, 2002, and February 17, 2004. Of these eight readings, there were three positive and five negative readings for pneumoconiosis, and one quality reading. Decision and Order at 6-9. The administrative law judge specifically noted that: the February 17, 2004 x-ray was read as negative by Dr. Broudy, a B-reader; that the June 24, 2002 x-ray was read as negative by Dr. Dahhan, a B-reader and positive by Dr. Alexander a Board-certified radiologist and B-reader; that the July 25, 2001 x-ray was read as positive by Dr. Hussain, but negative by Sargent, a Board-certified radiologist and B-reader; and that the March 31, 2001 x-ray was read as positive by Dr. Baker and negative by Dr. Scott, a Board-certified radiologist and B-reader. Decision and Order at 7-8; Director's Exhibits 16, 17; Claimant's Exhibit 1; Employer's Exhibits 2, 10.

King v. Consolidation Coal Co., 8 BLR 1-262 (1985); Employer's Exhibits 1, 2; Decision and Order at 14-15. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁵

2. Complete Pulmonary Evaluation

We also reject claimant's assertion that he is entitled to a new pulmonary examination.⁶ Contrary to claimant's contention, the Director's obligation to provide him with a complete pulmonary evaluation is not tantamount to an obligation to provide claimant with an examining physician's opinion that is given controlling weight by the administrative law judge. Director's Exhibit 23; Decision and Order at 10. Claimant is not entitled to a new pulmonary examination simply because the administrative law judge found Dr. Hussain's opinion, relevant to the existence of pneumoconiosis, to be less well-reasoned than the contrary opinions of Drs. Broudy, Dahhan, and Fino, who opined that claimant did not have pneumoconiosis. Decision and Order at 14. The mere fact that the administrative law judge found Dr. Hussain's opinion less persuasive than the opinions of Drs. Broudy, Dahhan, and Fino, does not mean that the Director failed to satisfy his statutory obligation. We thus hold that the Director satisfied his obligation under the Act to provide claimant with a complete, credible pulmonary evaluation. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1992); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

3. Total Disability

Although we reject claimant's arguments with respect to the existence of pneumoconiosis and whether he received a complete pulmonary evaluation, we agree with claimant that the administrative law judge erred in his consideration of the new medical opinion evidence relevant to the issue of total disability. In weighing the new submitted medical opinions at 20 C.F.R. §718.204(b)(2)(iv),⁷ the administrative law

⁵ Claimant does not specifically challenge the weight accorded the opinions of Drs. Broudy, Dahhan, and Fino at 20 C.F.R. §718.202(a)(4).

⁶ The Department of Labor has a statutory duty to provide a miner with a complete, credible pulmonary examination sufficient to constitute an opportunity to substantiate the claim. *See* 30 U.S.C. §923(b); 20 C.F.R. §§718.101, 718.401, 725.405(b); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994).

⁷ The administrative law judge found that claimant failed to establish a totally disabling respiratory or pulmonary impairment based on the pulmonary function study

judge noted that, while Dr. Baker opined that claimant was disabled for work, Dr. Baker's opinion was insufficient to satisfy claimant's burden of proof because it amounted to no more than "an opinion of the inadvisability of returning to coal mine employment because of pneumoconiosis and was not the equivalent of a finding of total disability." Decision and Order at 18, *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 258 (6th Cir. 1989). He then stated:

Drs. Dahhan, Broudy and Fino determined that [c]lamaint is not disabled from a pulmonary standpoint. I find the reports of Drs. Hussain and Baker to be neither well-reasoned nor well-documented. Based upon the opinions of Drs. Dahhan, Broudy and Fino...I find that total disability has not been established pursuant to Section 718.204(b)(iv).

Decision and Order at 18.

Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), claimant correctly points out that the administrative law judge failed to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's diagnosis of a Class III respiratory impairment prior to finding that claimant was not totally disabled. Claimant's Brief at 8. Under *Cornett*, a finding of Class III respiratory impairment may warrant a finding of total disability if the administrative law judge finds that the Class III respiratory impairment precludes claimant from performing his usual coal mine duties.⁸ *Id.* Because the administrative law judge did not address Dr. Baker's

evidence at 20 C.F.R. §718/204(b)(2)(i). In considering the conflicting arterial blood gas study results, the administrative law judge credited the most recent study dated February 17, 2004, which was qualifying for total disability. The administrative law judge thus found that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2)(ii). Because there was no evidence of record that claimant suffered from cor pulmonale with right-sided congestive heart failure, the administrative law judge also found that claimant failed to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). The parties do not challenge these findings so they are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 9.

⁸ The administrative law judge noted that Dr. Baker's diagnosis of Class III respiratory impairment was based on the results of the March 31, 2001 pulmonary function test, which revealed an FEV₁ between 41 and 59 percent. Director's Exhibit 16; Decision and Order at 10. The administrative law judge further noted that Dr. Baker's pulmonary function study results were invalidated by Dr. Fino on the basis of poor effort; however, the administrative law judge did specifically state why he chose to credit Dr. Fino's invalidation report over Dr. Baker's opinion. Decision and Order at 16.

opinion as required by *Cornett*, we must vacate his denial of benefits. Additionally, we note that the administrative law judge's overall discussion of the newly submitted conflicting medical opinions relevant to the issue of total disability is cursory and fails to adequately explain the weight accorded the conflicting medical opinion evidence.⁹ See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80. We therefore vacate the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv) and remand the claim for further consideration of whether the new medical opinion evidence is sufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment.

Consequently, on remand, the administrative law judge must determine whether claimant's subsequent claim was timely filed, and whether the new evidence is sufficient to establish disability at 20 C.F.R. §718.204(b)(2), and therefore an applicable condition of entitlement pursuant to 20 C.F.R. §718.309. If so, the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. See *Ross*, 42 F.3d at 997-998, 19 BLR at 2-19.

⁹ The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented...." 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 U.S.C. §932(a).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge