BRB Nos. 04-0104 BLA
and 04-0104 BLA-A

ROGER D. FIELDS	)	
	)	
Claimant-Petitioner	)	
Cross- Respondent	)	
	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 09/29/2004
	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
	)	
	)	
Party-in-Interest	)	

Appeal of the Decision and Order – Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

John Hunt Morgan (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; 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.

Claimant[1] appeals, and employer cross-appeals, the Decision and Order - Denying Benefits (02-BLA-5075) of Administrative Law Judge Rudolf L. Jansen in a miner's 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 administrative law judge credited the miner with fifteen years of coal mine employment pursuant to the parties' stipulation, 2003 Hearing Transcript at 10. Decision and Order at 3. Initially, the administrative law judge found claimant's subsequent claim to be timely filed in accordance with 20 C.F.R. §725.308. Pursuant to 20 C.F.R. §725.414, the administrative law judge considered only the objective studies associated with Dr. Rosenberg's report and excluded from his consideration Dr. Rosenberg's deposition testimony. *Id.* at 5. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *Id.* at 10-13. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(1) and Section 718.202(a)(4). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find that claimant has established total respiratory disability based on the medical opinion evidence. *Id.* at 6-8. Employer responds, urging affirmance of the denial of benefits. Employer also cross-appeals, asserting that the administrative law judge erred in determining that claimant's second claim was timely filed pursuant to Section 725.308. Employer's Brief in Support of Cross-Petition for Review at 7-10. Additionally, employer contends that the limitations on the development of medical evidence contained at Section 725.414 are invalid. *Id.* at 10-14. Employer further asserts, assuming *arguendo* that the regulations are valid, that the administrative law judge erred in his application of Section 725.414 to exclude from consideration portions of the medical opinion of Dr. Rosenberg and Dr. Rosenberg's deposition testimony. *Id.* at 15-19. The Director, Office of Workers' Compensation Programs (the Director), has filed a response[2] to employer's cross-appeal.[3]

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[1]Claimant is Roger D. Fields, the miner, who filed his second claim for benefits on February 5, 2001. Director's Exhibit 1. Claimant's first claim for benefits was filed on September 24, 1993. Director's Exhibit 29. Administrative Law Judge Rudolf L. Jansen denied claimant's first claim for benefits on July 22, 1996, and claimant appealed. *Id.* On March 31, 1997, the Board affirmed Judge Jansen's finding that claimant failed to establish total respiratory disability and, therefore, the Board affirmed his denial of benefits. *Id.*

[2]The Director, Office of Workers' Compensation Programs (the Director), requests that the Board affirm the administrative law judge's finding that claimant's subsequent claim was timely filed, but on grounds different from those provided by the

Initially, we address whether the administrative law judge properly determined that this claim was timely filed. In its cross-appeal, employer asserts that the administrative law judge erred in applying *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990)[4] to find that claimant's second claim was timely filed. Employer's Brief in Support of Cross-Petition for Review at 7-10. Employer contends that the administrative law judge should have applied *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), to this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit.[5] *Id.* at 7-8. Moreover, employer contends that Dr. Baker's 1993 opinion is sufficient to constitute a medical determination of total disability due to pneumoconiosis which would start the running of the three year statute of limitations and render claimant's second claim, filed in 2001, untimely. *Id.* at 9-10.

The Director contends that the Board should affirm the administrative law judge's finding that claimant's duplicate claim is timely on grounds different from those provided by the administrative law judge. Director's Brief at 6-11. In doing so, the Director states

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administrative law judge. Director's Brief at 6-11. Additionally, the Director urges the Board to reject employer's assertion that the evidentiary limitations at 20 C.F.R. §725.414 are invalid. Director's Brief at 11-17. However, the Director asserts that the Board should vacate the administrative law judge's *sua sponte* exclusion of portions of Dr. Rosenberg's opinion and this physician's deposition testimony as an abuse of discretion. Director's Brief at 18-19.

[3]We affirm the administrative law judge's finding of fifteen years of coal mine employment and his findings that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(2)-(a)(3) and that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i)-(b)(2)(iii) because these findings are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]In *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), the Board held that "the statute of limitations at 20 C.F.R. §725.308 applies only to the first claim filed."

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

that employer failed to address the implications of the holding of the Sixth Circuit's unpublished case in *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), issued subsequent to *Kirk*. Director's Brief at 7. Specifically, the Director maintains that because *Dukes* held that the specific language regarding Section 725.308 discussed in *Kirk* was *dicta*, and further held that a miner's duplicate claim should not be dismissed as untimely merely because of a misdiagnosis that occurred in an earlier rejected claim, the Board should affirm the administrative law judge's ultimate conclusion that claimant's claim was timely filed.[6] *Id.* at 7-11.

The Sixth Circuit in *Kirk* held 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 . . . . 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[7] will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

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[6]Many of the assertions raised by the Director in his Response Brief were addressed and rejected by the Board in its unpublished case in *Dukes v. Peabody Coal Co.*, BRB No. 03-0663 BLA (June 22, 2004)(unpub.).

In the present case, the Director urges the Board to reconsider its holdings in *Andryka* and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990), that the Black Lung Benefits Act's statute of limitations does not apply to duplicate claims. Director's Brief at 9 n.4. In cases arising within the jurisdiction of the Sixth Circuit, the Board will apply the statute of limitations to duplicate claims in accordance with *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). Because the instant case arises within the jurisdiction of the Sixth Circuit, where *Kirk* is controlling, the Board need not address the Director's assertions regarding *Andryka* and *Faulk*. *See Bibb v. Clinchfield Coal Co.*, 7 BLR 1-134, 1-136 (1984); *Creggar v. U.S. Steel Corp.*, 6 BLR 1-1219, 1-1222 (1984).

[7]The record contains no evidence that claimant subsequently worked in the mines after retiring in 1992.

Kirk, 264 F.3d at 608, 22 BLR at 2-298. Employer contends that, in accordance with *Kirk*, "[e]vidence from Dr. Baker dating back to 1993," is sufficient to start the running of the statute of limitations. Employer's Brief in Support of Cross-Petition for Review at 9. The record contains three reports issued by Dr. Baker in 1993. In his March 2, 1993 report, Dr. Baker found claimant to have an occupational lung disease caused by his coal mine employment and found claimant is unable to perform his coal mine employment "due to these conditions."[8] Director's Exhibit 29. In his November 5, 1993 report, Dr. Baker opined that claimant has coal workers' pneumoconiosis 1/0, based on an abnormal chest x-ray and a significant history of coal dust exposure, that claimant has chronic bronchitis, and that claimant has a minimal impairment "due to these conditions." *Id.* However, in a letter, dated December 9, 1993, Dr. Baker reconsidered his diagnoses. *Id.* Therein, Dr. Baker stated:

> [Claimant] does have opacities present of a low degree of profusion, probably 0/1 and would thereby not have coal workers' pneumoconiosis on this x-ray. He has no impairment except for mild bronchitis which is related significantly to his cigarette smoking history as well as, to some extent, his history of dust exposure in the surface mines.

Id.

The administrative law judge, applying *Andryka*, found claimant's second claim to be timely filed "[b]ecause the record contains no evidence that Claimant received the requisite notice more than three years prior to filing his initial claim for benefits." Decision and Order at 4. As employer asserts, because the administrative law judge erroneously applied *Andryka*, and not *Kirk*, to this case, the administrative law judge did not render any factual findings to determine if the record contains a medical determination which is sufficient to trigger the statute of limitations pursuant to Section

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[8]Dr. Baker's March 1993 report is somewhat unclear regarding the etiology of claimant's total respiratory disability. Director's Exhibit 29. Dr. Baker left unanswered the question regarding the etiology of claimant's impairment, but later stated that:

> Patient should have no further exposure to coal dust, rock dust or similar noxious agents due to his coal workers' pneumoconiosis and bronchitis. He may have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions.

Id.

725.308. The Sixth Circuit has held that "[w]hen the ALJ fails to make important and necessary factual findings, the proper course for the Board is to remand the case[.]" *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). Accordingly, we vacate the administrative law judge's Section 725.308 finding and remand this case to the administrative law judge for him to reconsider this issue. We instruct the administrative law judge to determine on remand whether the record contains "a medical determination of total disability due to pneumoconiosis that has been communicated to the miner" in accordance with Section 725.308 and the Sixth Circuit's holding in *Kirk. Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002)(*en banc*); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). Although we affirm the administrative law judge's denial of benefits on the merits, *see* discussion *infra*, it is necessary to remand this case for the administrative law judge to reconsider whether the present claim was timely filed, because a determination that this claim is untimely would preclude claimant from filing any future claims unless he resumes work as a coal miner.

Claimant has raised specific allegations of error regarding the administrative law judge's denial of benefits. In the interest of judicial economy, we will address those allegations now.

Claimant's second claim was filed on February 5, 2001, shortly after the amended regulations took effect. The regulations state that a subsequent claim is a claim filed more than one year after the effective date of a final order denying a claim previously filed by the claimant. In addition, the regulations provide that a subsequent claim "shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement (see §§725.202(d) . . .) has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). *White v. New White Coal Co.*, 23 BLR 1-1 (2004). In claimant's first claim, the administrative law judge denied benefits because claimant failed to establish the existence of pneumoconiosis and total respiratory disability.

Pursuant to Section 718.202(a)(1), the administrative law judge noted that the new evidence contains six readings of four x-rays, of which four interpretations were negative and two interpretations were positive. Decision and Order at 10. The administrative law judge stated that three of the negative interpretations were rendered by physicians who are B readers[9] and Board-certified radiologists, one negative interpretation was by a B

[9]A "B reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director,*

reader, and both the positive readings were rendered by physicians who are neither B readers nor Board-certified radiologists. *Id.* The administrative law judge relied on the negative x-ray interpretations because these readings "constitute the majority of interpretations and are verified by more, highly-qualified physicians." *Id.* Therefore, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis by the new x-ray evidence. *Id.*

Claimant contends that the administrative law judge erred in considering the qualifications of the physicians in weighing the x-ray evidence, in placing substantial weight on the numerical superiority of the x-ray readings, and in selectively analyzing the x-ray evidence. Claimant's Brief at 3-4. Contrary to claimant's assertion, it was permissible for the administrative law judge to consider the radiological qualifications of the x-ray readers. *See Johnson v. Island Creek Coal Co.*, 846 F.2d 364, 11 BLR 2-161 (6th Cir. 1988); *Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Similarly, because the administrative law judge also considered the x-ray readers' qualifications, he did not rely solely on the numerical superiority of the negative readings in rendering his finding. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995). Additionally, claimant's bald assertion that the administrative law judge selectively analyzed the x-ray evidence is without merit inasmuch as the administrative law judge considered all the x-ray evidence submitted with claimant's subsequent claim. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984); *see generally Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Therefore, we reject claimant's contentions and affirm the administrative law judge's Section 718.202(a)(1) finding.

Pursuant to Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Baker, Hussain, Dahhan, and Vuskovich. Decision and Order at 10-11. Drs. Baker and Hussain found the existence of pneumoconiosis, whereas Drs. Dahhan and Vuskovich did not. Director's Exhibits 9, 20, 21; Employer's Exhibit 1. The administrative law judge found that Dr. Baker's opinion was not well documented and reasoned. Decision and Order at 10-11. The administrative law judge found Dr. Hussain's opinion "to be well documented and reasoned regarding the existence of pneumoconiosis." *Id.* at 11. The administrative law judge, however, stated that "the opinions of Drs. Dahhan and Vuskovich outweigh the opinion of Dr. Hussain and the

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OWCP, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

lesser-weighted opinion of Dr. Baker." *Id.* Specifically, the administrative law judge, within his discretion as trier-of-fact, found that the opinions of Drs. Dahhan and Vuskovich are "more thorough" than the opinion of Dr. Hussain because both Drs. Dahhan and Vuskovich reviewed the medical evidence of record which gave them "a more complete picture of Claimant's health." *Id.*; *Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

Claimant contends that the administrative law judge erred in discrediting Dr. Baker's opinion because he found it to be based only on an x-ray reading. Claimant's Brief at 5. In considering Dr. Baker's opinion, the administrative law judge noted that Dr. Baker diagnosed pneumoconiosis, chronic obstructive airway disease, and chronic bronchitis. Decision and Order at 10-11. The administrative law judge found that Dr. Baker's finding of pneumoconiosis was "based on a positive chest x-ray and history of coal dust exposure" and determined that an opinion based on an x-ray and a coal dust exposure history "alone is not a well documented and reasoned opinion." *Id.* at 11. Moreover, the administrative law judge stated that although Dr. Baker diagnosed chronic obstructive airway disease and chronic bronchitis, he did not "discuss the etiology of these conditions."[10] *Id.* Therefore, the administrative law judge properly accorded less weight to Dr. Baker's opinion because he found it "to be poorly documented and reasoned and incomplete."[11] *Id.*; *Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984); *Shaffer v. Consolidation Coal Co.*, 17 BLR 1-56 (1992); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). We reject claimant's assertions[12] and affirm the administrative law judge's finding that claimant failed to

[10]In his report, Dr. Baker attributed only the abnormal x-ray changes to claimant's coal dust exposure. Director's Exhibit 21.

[11]The administrative law judge stated that claimant testified that Dr. Baker has been his treating physician for one and one-half years. Decision and Order at 11. The administrative law judge properly declined to assign additional weight to Dr. Baker's opinion on this basis because he has deemed this physician's opinion to be "poorly documented, unreasoned and incomplete." *Id.*; 20 C.F.R. §718.104(d)(5); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002).

[12]Additionally, claimant asserts that the administrative law judge erred in interpreting medical tests and in substituting his conclusions for those of the physician. Claimant's Brief at 5. However, claimant has not provided any support for that assertion,

establish the existence of pneumoconiosis based on the new evidence pursuant to Section 718.202(a)(4).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the new medical opinion evidence. Decision and Order at 12-13. Claimant asserts that the administrative law judge erred in rejecting the opinions of Drs. Baker and Hussain. Claimant's Brief at 7-9. Specifically, claimant contends that "it is error to reject a medical opinion solely because it is based on nonconforming pulmonary function studies." *Id.* at 7. Claimant further contends that the administrative law judge erred in finding that claimant is able to perform his usual coal mine employment "without considering the physical requirements of such work." *Id.* at 8.

We hold that claimant's assertions lack merit[13] and affirm, as rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Dr. Baker's opinion is non-supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). Dr. Baker examined claimant on October 10, 2001. Director's Exhibit 21. In his 2001 report, Dr. Baker indicated that claimant's pulmonary function studies demonstrated a "mild obstructive ventilatory defect" and that claimant has a "Class 2 impairment with the FEV1 between 60% and 79% of predicted." *Id.* Dr. Baker noted that because claimant has developed pneumoconiosis he "should limit further exposure to the offending agent," additionally stating: "This would imply the patient is 100% occupationally disabled for work in coal mining or similar dusty occupations." *Id.* The administrative law judge rationally determined that Dr. Baker's opinion merely advised claimant to avoid further coal dust exposure. Decision and Order at 12. The administrative law judge reasonably found that Dr. Baker's opinion is thus insufficient to establish total disability under Section 718.204(b)(2)(iv). *Zimmerman v. Director, OWCP*, 871 F. 2d 564, 12 BLR 2-254 (6th Cir. 1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988).

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nor does a review of the evidence and the administrative law judge's Decision and Order reveal that the administrative law judge interpreted medical tests or substituted his conclusions for those of the physicians of record.

[13]Citing *Bentley v. Director, OWCP*, 7 BLR 1-612 (1984), claimant asserts that the administrative law judge erred in failing to mention his age, education, or work experience in conjunction with the administrative law judge's assessment that claimant was not totally disabled. Claimant's Brief at 8. Claimant's age, education, and work experience are relevant to establishing total respiratory disability at 20 C.F.R. Part 410. Because claimant filed his claim subsequent to March 31, 1980, however, the provisions of 20 C.F.R. Part 718, rather than 20 C.F.R. Part 410, are to be applied. 20 C.F.R. §718.2; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

We reject claimant's contention that the administrative law judge erred in failing to accord determinative weight to Dr. Hussain's opinion as sufficient to establish total disability. Dr. Hussain examined claimant on May 9, 2001. Director's Exhibit 9. Dr. Hussain, who administered a pulmonary function study and an arterial blood gas study, both of which were non-qualifying,[14] found a moderate impairment and that claimant is unable to perform work as a coal miner. *Id*. The administrative law judge assigned "less weight" to Dr. Hussain's opinion because he found it to be "poorly documented and reasoned." Decision and Order at 13. In doing so, the administrative law judge pointed out that "Dr. Hussain's opinion contains no information about Claimant's previous work history" and that "[i]t is unclear from his opinion whether Dr. Hussain considered the exertional requirements of Claimant's former coal mine employment." *Id.*

The administrative law judge permissibly found the opinions of Drs. Dahhan and Vuskovich, who opined that claimant has no pulmonary impairment and that claimant retains the respiratory capacity to perform his usual coal mine employment, to be "well documented and reasoned and entitled to full weight." *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47. The administrative law judge stated that Dr. Dahhan based his opinion "on the normal values resulting from the pulmonary function and arterial blood gas studies" and "found no convincing evidence from the previous exams to justify a finding of total disability." Decision and Order at 13. Additionally, the administrative law judge noted that Dr. Vuskovich "based [his] opinion on a review of the medical evidence of record demonstrating normal pulmonary function and arterial blood gas studies." *Id.* Contrary to claimant's suggestion, the administrative law judge was not required to consider, in conjunction with the medical opinions of Drs. Dahhan and Vuskovich, the exertional requirements of claimant's usual coal mine work, which included operating heavy machinery. Because Drs. Dahhan and Vuskovich found that claimant has no pulmonary impairment, Director's Exhibit 20; Employer's Exhibit 1, it was unnecessary for these physicians to demonstrate knowledge of the physical requirements of claimant's usual coal mine employment before opining that claimant is not totally disabled from performing his usual coal mine work. *See Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986).

Additionally, we reject claimant's assertion that the administrative law judge erred in not finding him totally disabled in light of the progressive and irreversible nature of

[14]A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values in Appendix B to 20 C.F.R. Part 718. A "non-qualifying" study yields values that exceed those values.

pneumoconiosis. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). For the reasons discussed above, we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to demonstrate total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In considering all of the relevant newly submitted evidence pursuant to Section 718.204(b), the administrative law judge properly found that claimant failed to establish total respiratory disability by a preponderance of the evidence. Decision and Order at 13; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Therefore, we affirm the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to Section 718.204(b) based on the new medical evidence. *See Fields*, 10 BLR at 1-21; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*).

We affirm the administrative law judge's finding that this claim fails pursuant to Section 725.309 because claimant has not established that one of the applicable elements of entitlement has changed, since the date of the denial of the prior claim. Accordingly, we affirm the denial of benefits. Because we affirm the denial of benefits, we need not address the arguments, regarding 20 C.F.R. §725.414, raised in employer's cross-appeal.[15]

In conclusion, we vacate the administrative law judge's finding that claimant's subsequent claim was timely filed. On remand, the administrative law judge must reconsider the relevant evidence to determine whether the record contains "a medical determination of total disability due to pneumoconiosis that has been communicated to the miner" pursuant to Section 725.308 and the Sixth Circuit's holding in *Kirk.* If, on

[15]Employer asserts that if claimant's claim is not deemed to be untimely filed, "it is likely that the claimant will request modification . . . . [Therefore, i]t will greatly complicate the modification proceedings if the evidentiary issues in the original claim are left unresolved." Employer's Brief in Support of Cross-Petition for Review at 18. We reject employer's assertion that the Board must address employer's contentions pursuant to 20 C.F.R. §725.414, raised on cross-appeal. Because we affirm the administrative law judge's denial of benefits, *see* discussion, *supra*, it is not necessary for the adjudication of this appeal to address the issues arising under Section 725.414.

remand, the administrative law judge finds that claimant's subsequent claim was timely filed, then he must deny benefits.

Accordingly, the administrative law judge's Decision and Order – Denying Benefits is affirmed, but this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge