BRB Nos. 06-0723 BLA
and 06-0723 BLA-A

JOHN HENRY SIZEMORE	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 05/24/2007
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY, C/O ACORDIA EMPLOYERS SERVICE	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Rita Roppolo (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand-Denying Benefits (03-BLA-0176) of Administrative Law Judge Thomas F. Phalen, Jr., 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). The procedural history of this case was set out in the Board's prior decision. *Sizemore v. Shamrock Coal Co.*, BRB Nos. 04-0681 BLA and 04-0681 BLA-A (June 7, 2005)(unpub.).

In that decision, the Board held that *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) is controlling law on the issue of the timeliness of this claim, vacated the administrative law judge's finding that the claim was timely filed, and remanded the case for consideration pursuant to *Kirk*. *Sizemore*, slip op. at 3-6. Additionally, the Board instructed the administrative law judge to identify the evidence submitted by each party that was admissible pursuant to 20 C.F.R. §725.414, and to either admit, based on a finding of good cause, or exclude, any medical evidence submitted in excess of the limitations. 20 C.F.R. §725.456(b)(1); *Sizemore*, slip op. at 6-7. Because the administrative law judge's evidentiary rulings could affect his weighing of the evidence and his findings pursuant to 20 C.F.R. §729.309(d), the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.304, and 725.309.[1] *Sizemore*, slip op. at 7.

On remand, the administrative law judge applied *Kirk* and determined that this claim was timely filed. The administrative law judge next admitted into evidence the parties' medical evidence that he found complied with the evidentiary limitations of Section 725.414. However, the administrative law judge did not find "good cause" established to admit, in excess of the limitations, the x-ray interpretations of Drs. Wheeler and Wiot. Decision and Order on Remand at 5.

[1] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Sizemore v. Shamrock Coal Co.*, BRB Nos. 04-0681 BLA and 04-0681 BLA-A, slip op. at 2 n.1 (June 7, 2005)(unpub.).

Pursuant to Section 725.309(d), the administrative law judge noted that claimant's prior claim was denied because he did not establish that he was totally disabled, and considered whether the new evidence established this element of entitlement. The administrative law judge found that the preponderance of the newly submitted evidence was negative for complicated pneumoconiosis and that, therefore, the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304 did not apply. The administrative law judge further determined that claimant failed to prove, by a preponderance of the newly submitted medical opinion evidence, that he is totally disabled pursuant to Section 718.204(b)(2)(iv). The administrative law judge also considered his prior findings that the newly submitted evidence pursuant to Section 718.204(b)(2)(i)-(iii) did not establish total disability. The administrative law judge therefore found that claimant did not establish that he is totally disabled from a respiratory standpoint, and thus, did not demonstrate a change in the applicable condition of entitlement as required by Section 725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding the medical opinion evidence insufficient to establish total disability. Claimant also contends that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete, credible pulmonary evaluation as required by the Act. Employer responds, urging affirmance of the denial of benefits. In response to claimant's appeal, the Director alleges error in the administrative law judge's analysis of Dr. Lockey's opinion that claimant is totally disabled, and urges that the case be remanded for further consideration pursuant to Section 718.204(b). Employer responds to the Director's response, asserting that the Director's arguments regarding Dr. Lockey's opinion must be rejected, because they are not in support of the Decision and Order below, and because the Director waived these arguments.

Employer has also filed a cross-appeal. Employer asserts that the administrative law judge erred in finding that this claim was timely filed. Employer also asserts that the administrative law judge erred by excluding the x-ray interpretations of Drs. Wheeler and Wiot. In addition, employer asserts that the Department of Labor's failure to notify employer's insurance carrier of the claim mandates the dismissal of employer and transfer of liability to the Black Lung Disability Trust Fund.

Claimant has not responded to employer's cross-appeal. The Director responds, urging affirmance of the finding that this claim was timely filed. The Director also contends that the exclusion of the x-ray interpretations of Drs. Wheeler and Wiot was

proper, and that the administrative law judge did not err in declining to consider the issue of notice to the insurance carrier. Employer has filed a reply brief, restating its position.[2]

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).

Timeliness of the subsequent claim

In our prior decision, we instructed the administrative law judge to apply *Kirk*, and determine whether Dr. Myers rendered a well reasoned diagnosis of total disability due to pneumoconiosis that was communicated to claimant. *Sizemore*, slip op. at 5-6. On remand, the administrative law judge noted that, in the adjudication of the prior claim, Adminstrative Law Judge Frank D. Marden found Dr. Myers's July 6, 1992 report insufficiently reasoned to support a finding of total disability, because Dr. Myers did not explain his opinion.[3] The administrative law judge reviewed Dr. Myers's report, agreed with Judge Marden's conclusion, and found that Dr. Myers's report was not a reasoned opinion.[4] The administrative law judge also found that the fact that Dr. Myers's opinion was in the record or in the possession of claimant's attorney did not establish that it was communicated to claimant. The administrative law judge concluded:

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[2] The administrative law judge's finding that the newly submitted evidence is insufficient to establish invocation of the presumption at 20 C.F.R. §718.304, is not challenged on appeal. This finding is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Upon review of claimant's appeal of the denial of his prior claim, the Board agreed with Judge Marden's finding that Dr. Myers provided no explanation of his opinion that claimant was totally disabled. *Sizemore v. Shamrock Coal Co.*, BRB No. 94-2827 BLA, slip op. at 3 (March 30, 1995)(unpub.).

[4] Dr. Myers examined claimant in 1992 and diagnosed coal workers' pneumoconiosis, Category 1/1 pt; chronic obstructive pulmonary disease; recurrent pleural effusion, etiology undetermined, rule out tuberculosis, sarcoidosis or asbestosis; calcified granulomata, right lower lung, etiology undetermined; and arteriosclerotic heart disease with angina, Class III by history. In response to the form question, "is the miner physically able, from a pulmonary standpoint, to do his usual coal mine employment or comparable and gainful work in a dust free environment," Dr. Myers checked the "no" box, and explained that this was "due to the above diagnoses." Director's Exhibit 1.

> Dr. Myers' report is not a well-reasoned opinion diagnosing total disability due to pneumoconiosis. In addition . . . such a diagnosis was never directly communicated to Claimant. As either of these findings is independently sufficient to defeat Employer's timeliness contention, I find that this claim was timely filed.

Decision and Order on Remand at 4.

Employer contends that the administrative law judge erred in finding that Dr. Myers's opinion did not trigger the statute of limitations because it was not well reasoned and was not communicated to claimant. We affirm the administrative law judge's permissible determination that Dr. Myers's opinion was not well reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Moreover, the three-year statute of limitations "relies on the 'trigger of the reasoned opinion of a medical professional.'" *Brigance v. Peabody Coal Co*. 23 BLR 1-170, 1-175 (2006)(*en banc*), quoting *Kirk*, 264 F.3d at 607, 22 BLR at 2-297-98; s*ee also Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159 (2006)(*en banc*). Therefore, contrary to employer's contention, the administrative law judge permissibly found that Dr. Myers's opinion was not a well reasoned diagnosis of total disability due to pneumoconiosis that would start the running of the statute of limitations. Thus, we affirm the administrative law judge's finding that employer did not rebut the presumption of Section 725.308(c) that this claim was timely filed.[5]

Employer's challenge to the administrative law judge's evidentiary rulings

Employer asserts that the administrative law judge erred by excluding the x-ray interpretations of Drs. Wheeler and Wiot. The administrative law judge determined that, pursuant to 20 C.F.R. §725.414(3)(ii), Dr. Wheeler's x-ray interpretation, designated as rehabilitative evidence by employer, could not be used to rehabilitate Dr. Dahhan's negative x-ray interpretation, which claimant rebutted with Dr. Alexander's positive interpretation. Turning to Dr. Wiot's x-ray interpretation, the administrative law judge found no basis to conclude that employer's claim, that it was not at fault for obtaining Dr. Wiot's interpretation, established "good cause." The administrative law judge rejected employer's assertion that Dr. Wiot's x-ray interpretation was a part of Dr. Lockey's pulmonary evaluation, and that thus, Dr. Lockey, not employer, obtained the interpretation. The administrative law judge therefore concluded that good cause did not exist for the admission of these interpretations in excess of the limitations.

[5] Consequently, we need not address employer's contention that Dr. Myers's opinion was communicated to claimant.

We affirm the administrative law judge's decision to exclude Dr. Wheeler's x-ray interpretation. The regulation addressing rehabilitative x-ray evidence provides that "where the claimant has submitted rebuttal evidence under paragraph (a)(2)(ii) of this section, the responsible operator shall be entitled to submit an additional statement *from the physician who originally interpreted the chest x-ray* . . . ." 20 C.F.R. §725.414(a)(3)(ii)(emphasis added). In view of the clear language of the regulation, the administrative law judge properly excluded Dr. Wheeler's x-ray interpretation, as it could not be admitted to rehabilitate Dr. Dahhan's x-ray interpretation.

We also reject employer's assertion that the administrative law judge erred by finding that it had not established "good cause" for the admission of Dr. Wiot's x-ray interpretation. On the facts and arguments before us, we detect no abuse of discretion by the administrative law judge in determining that employer did not demonstrate "good cause" for exceeding the limits of Section 725.414, based on employer's claim that its examining physician, not employer, had obtained Dr. Wiot's reading. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004)(*en banc*).

Challenges to the administrative law judge's findings pursuant to Section 725.309(d)

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . 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, 1-3 (2004). The applicable conditions of entitlement are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing that he is totally disabled, to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3).

Claimant contends that the administrative law judge erred in finding that the new medical opinion evidence did not establish total disability pursuant to Section 718.204(b)(2)(iv). Claimant cites *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), and asserts that a single medical opinion may be sufficient to invoke the presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption at 20 C.F.R. §727.203(a). Because this case arises under the permanent regulations at 20 C.F.R. Part 718, the Part 727 regulations are not relevant.

Claimant asserts that the administrative law judge did not give a sufficient basis for discounting Dr. Hussain's opinion that claimant is totally disabled from performing

his usual coal mine employment.[6] We disagree. The administrative law judge permissibly accorded little weight to Dr. Hussain's opinion, because the physician did not explain how the non-qualifying pulmonary function study and blood gas study values reveal total disability, and because the administrative law judge found that "subjectively reported symptomatology (severe dyspnea) does not constitute a medically acceptable clinical or laboratory diagnostic technique for diagnosing total pulmonary disability under subsection (b)(2)(iv)." Decision and Order on Remand at 9; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Moreover, contrary to claimant's additional assertion, although Dr. Hussain did not discuss the exertional requirements of claimant's usual coal mine employment, the administrative law judge considered the exertional requirements of claimant's usual coal mine employment when discussing Dr. Hussain's opinion. Decision and Order at 8-9. We therefore reject claimant's allegations of error.

Claimant argues further that because pneumoconiosis is a progressive disease, it can be concluded that his pneumoconiosis has worsened since it was diagnosed and thus, has adversely affected his ability to perform his usual coal mine work. Claimant's Brief at 9. We reject claimant's argument, "as an administrative law judge's findings must be based solely on the medical evidence contained in the record." *White*, 23 BLR at 1-7, n.8.

The Director, in his response brief, argues that the administrative law judge erred in giving "less weight to Dr. Lockey's diagnosis of total disability because the doctor failed to explain his diagnosis in light of the fact that, while the pulmonary function study results established disability by regulation pre-medication, the results were non-qualifying following administration of a bronchodilator." Director's letter dated August 28, 2006, at 1. The Director maintains that in making disability determinations, the question is whether the miner "is able to perform his job, not whether he is able to perform his job after he takes medication."[7] *Id*. (emphasis in original).

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[6] Dr. Hussain diagnosed a "severe impairment." Dr. Hussain indicated that claimant does not have the respiratory capacity to perform the work of a miner, or comparable work in a dust-free environment, and as a rationale for this opinion, he stated "severe dyspnea and pulmonary impairment." Director's Exhibit 12.

[7] The Director's brief responds to claimant's general allegation that the administrative law judge erred in failing to award benefits. Therefore, employer's contention that the Director's argument cannot be addressed by the Board lacks merit and is rejected. *See Barnes v. Director, OWCP*, 19 BLR 1-71, 1-74-75 (1995)(*en banc*)(Smith, J., dissenting). Additionally, contrary to employer's contention, the

Because the administrative law judge did not discredit Dr. Lockey's opinion for the reason stated by the Director, we reject the Director's argument. Dr. Lockey identified numerous respiratory conditions and opined that claimant is not able to perform his usual coal mine employment. Employer's Exhibit 5.

The administrative law judge found that, although Dr. Lockey did not explain why he found claimant to be totally disabled in light of the reversibility with bronchodilator, Dr. Lockey nevertheless based his opinion on objective evidence, his opinion was "well-reasoned and well-documented," and it was "bolstered by his advanced credentials." Decision and Order on Remand at 10. The administrative law judge therefore accorded Dr. Lockey's opinion "probative weight." *Id*. In weighing Dr. Lockey's opinion against Dr. Dahhan's opinion,[8] the administrative law judge found that the physicians were equally qualified and rendered well-reasoned and documented opinions meriting probative weight. Finding these opinions to be "equally convincing," the administrative law judge concluded that claimant did not "prove by a preponderance of the newly submitted evidence that he suffers from a total pulmonary disability under §718.204(b)(2)(iv)." *Id.* Thus, since the administrative law judge did not accord less weight to Dr. Lockey's opinion for failing to explain the reversibility after the administration of a bronchodilator, we reject the Director's allegation of error.

Based on the foregoing, we affirm the administrative law judge's finding that the newly submitted evidence did not demonstrate total disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge's finding that all of the evidence weighed together did not establish total disability at Section 718.204(b)(2) is not challenged on appeal. It is therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Claimant contends that because the administrative law judge discounted the diagnosis of total disability contained in Dr. Hussain's March 21, 2001 opinion provided by the Department of Labor, the Director failed to provide claimant with a complete, credible pulmonary evaluation. The Director does not respond to claimant's contention.

Director has timely raised this argument regarding the administrative law judge's weighing of the medical opinions on remand.

[8] Dr. Dahhan stated that there were no objective findings to indicate any pulmonary disability, and he opined that claimant had the physiological capacity to perform his usual coal mine employment. Director's Exhibit 9.

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); *see also Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994). The regulations provide that a complete pulmonary evaluation "includes a report of physical examination, a pulmonary function study, a chest roentgenogram and, unless medically contraindicated, a blood gas study." 20 C.F.R. §725.406(a).

Dr. Hussain conducted a physical examination, took an x-ray, obtained pulmonary function and arterial blood gas study results, and he completed a report, addressing all of the relevant issues of entitlement. Director's Exhibit 12. Because Dr. Hussain performed a complete pulmonary evaluation, we hold that the Director satisfied his obligation under the Act. Moreover, we note that the obligation to provide claimant with a complete pulmonary evaluation does not require the Director to provide claimant with the most persuasive medical opinion in the record. *See generally Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Although the administrative law judge accorded Dr. Hussain's opinion less weight, he did not find the opinion devoid of probative value. Therefore, we reject claimant's argument that Dr. Hussain's opinion did not satisfy the Director's obligation under the Act.

Because claimant failed to establish total disability, the element of entitlement that was previously adjudicated against him, we affirm the administrative law judge's denial of benefits.[9] *See* 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-7.

[9] Because we affirm the denial of benefits, we need not address employer's argument that its insurance carrier was not notified of the claim. The Board instructed the administrative law judge to consider this issue only if he awarded benefits. *Sizemore*, slip op. at 8.

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge