

BRB Nos. 03-0798 BLA
and 03-0798 BLA-A

BILLY RALPH FURGERSON)	
)	
Claimant-Petitioner)	
Cross-Respondent)	
)	
v.)	
)	
JERICOL MINING INCORPORATED)	
)	DATE ISSUED: 09/20/2004
Employer-Respondent)	
Cross-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

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

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for
claimant.

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

Michael J. Rutledge and Timothy S. Williams (Howard M. Radzely,
Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank
James, Deputy Associate Solicitor), Washington, D.C., for the Director,
Office of Workers’ Compensation Programs, United States Department of
Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals from the Decision and Order on Remand – Denial of Benefits (2001-BLA-0128) of Administrative Law Judge Thomas F. Phalen, Jr., with respect to 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).¹ This is the second time that this case has been before the Board. In its prior Decision and Order, the Board vacated the award of benefits and remanded the case to the administrative law judge for consideration of whether claimant’s 1999 application for benefits was timely filed under 20 C.F.R. §725.308 in light of the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).² The Board also vacated the administrative law judge’s finding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000) and instructed the administrative law judge to determine whether the newly submitted evidence differed qualitatively from the evidence submitted with the previously denied claim.³ In addition, the Board vacated the administrative law

¹ Claimant filed claims for benefits in 1995, 1996, and 1997. Director’s Exhibits 24, 25. Each claim was denied on the ground that claimant failed to establish any of the elements of entitlement. Claimant filed a fourth application for benefits on June 18, 1999. This claim was denied by the district director on July 6, 2000. The district director found that although the new evidence established the existence of pneumoconiosis arising out of coal mine employment and, therefore, a material change in conditions, claimant did not establish that he was totally disabled due to pneumoconiosis. Director’s Exhibits 1, 23. Claimant requested a formal hearing and the case was referred to the Office of Administrative Law Judges on October 20, 2000 and assigned to Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge). Director’s Exhibit 26. After determining that the instant claim was a duplicate claim pursuant to 20 C.F.R. §725.309 (2000), the administrative law judge found that the newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis and, thus, concluded that claimant established a material change in conditions. The administrative law judge also determined that the evidence of record was sufficient to establish the existence of totally disabling pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(b), (c). Accordingly, benefits were awarded.

² This claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment occurred in the Commonwealth of Kentucky. Director’s Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³ The amended version of 20 C.F.R. §725.309 does not apply to claims, such as the present one, that were filed before January 19, 2001. 20 C.F.R. §725.2.

judge's findings under 20 C.F.R. §§718.202(a)(4) and 718.204 and instructed the administrative law judge to reconsider Dr. Baker's opinion. *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216 (2002).

On remand, the administrative determined that claimant's 1999 application for benefits was timely filed under Section 725.308. The administrative law judge also found that although the newly submitted evidence was sufficient to establish the existence of pneumoconiosis and a totally disabling pulmonary impairment, claimant did not demonstrate a material change in conditions pursuant to Section 725.309(d) (2000), as the newly submitted evidence did not differ qualitatively from the previously submitted evidence. Accordingly, benefits were denied.

Claimant argues on appeal that the administrative law judge erred in failing to find a material change in conditions established under Section 725.309(d) (2000). Employer urges affirmance of the administrative law judge's finding on this issue, but has filed a cross-appeal in which it asserts that the administrative law judge erred in determining that claimant's 1999 duplicate claim was timely filed pursuant to Section 725.308. The Director, Office of Workers' Compensation Programs (the Director), has responded and asserts that the administrative law judge properly determined that the most recent duplicate claim was not time-barred. The Director also concurs with claimant's argument regarding the administrative law judge's finding that the newly submitted evidence regarding total disability did not establish a material change in conditions.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Initially, we will address the timeliness issue presented in employer's cross-appeal. Pursuant to Section 725.308, and in accordance with the Board's instructions, the administrative law judge initially considered on remand whether the 1994 report in which Dr. Kabani diagnosed total disability due to obstructive lung disease caused in part by coal dust exposure was sufficient to begin the running of the statute of limitations set forth in Section 725.308(a).⁴ Decision and Order on Remand at 7; Director's Exhibit 24.

⁴ 20 C.F.R. §725.308 provides in pertinent part:

(a) A claim for benefits. . .shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner. . .

The administrative law judge initially discussed the holding in the unpublished decision of the United States Court of Appeals for the Sixth Circuit in *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), which was issued subsequent to the Board's Decision and Order remanding the case to the administrative law judge. The majority in *Dukes* determined that although Section 725.308 applies to duplicate claims, a medical report submitted in support of a claim that is denied for failure to establish one or more elements of entitlement is treated, "for legal purposes," as containing a misdiagnosis. 20002 WL 31205502, slip op. at 7, citing *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996). The majority held, therefore, that such a report does not constitute a medical determination of total disability that had been communicated to the miner and, therefore, it does not trigger the running of the statute of limitations. *Id.* In her dissent, Judge Batchelder stated that the majority's interpretation of the regulation at Section 725.308(a) is contrary to its plain language. *Id.* The administrative law judge, however, relied upon the majority's reasoning to find that because it was proffered in support of a denied claim, Dr. Kabani's report did not trigger the running of the three year time period. Decision and Order on Remand at 7.

Employer argues that the administrative law judge erred in relying upon the holding in *Dukes*, as the case has not been published and its holding is in conflict with the holding in *Kirk*. These contentions have merit. Pursuant to the rules of the United States Court of Appeals for the Sixth Circuit, *Kirk* constitutes controlling authority by virtue of its status as a published decision.⁵ 6 Cir.R. 206(c); *Lopez v. Wilson*, 355 F.3d 931 (6th

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However . . .the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

⁵ Rule 206(c) of the Sixth Circuit regarding Publication of Decisions provides that:

Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.

6 Cir.R. 206(c). The court rejected the motion of the Director, Office of Workers' Compensation Programs, to have the decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) published.

Cir. 2004); *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). In addition, the rationale underlying the court's disposition of the timeliness issue in *Kirk* differs from that relied upon by the panel in *Dukes*. In *Kirk*, the court stated 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. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination...and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Kirk, 264 F.3d at 608, 22 BLR at 2-298 (emphasis in original), citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Thus, unlike the majority in *Dukes*, the *Kirk* court would treat a credible medical determination of total disability due to pneumoconiosis, which is communicated to the miner, as sufficient to trigger Section 725.308 regardless of the outcome of the claim which the physician's opinion sought to support.

Accordingly, we must vacate the administrative law judge's finding that Dr. Kabani's 1994 opinion did not begin the running of the three year limitation set forth in Section 725.308(a). This case is therefore remanded to the administrative law judge for reconsideration of this issue pursuant to the holding in *Kirk*. In addressing Dr. Kabani's report on remand, the administrative law judge must determine if Dr. Kabani rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a "medical determination of total disability due to pneumoconiosis which has been communicated to the miner[.]" 20 C.F.R. §725.308(a). If the administrative law judge determines that Dr. Kabani's report satisfies the terms of Section 725.308(a) and, therefore, that employer has rebutted the presumption that claimant's 1999 duplicate claim is timely, entitlement to benefits is precluded and the administrative law judge need not address either Section 725.309(d) (2000) or the merits of this case. *Kirk*, 264 F.3d 602, 22 BLR 2-288.

We will now address the parties' arguments concerning the administrative law judge's findings under Section 725.309(d) (2000) in order to avoid the possibility of repetition of error on remand if this issue is reached. The administrative law judge considered the newly submitted medical opinions of Drs. Baker, Ahmad, Smiddy, and Younes under Section 718.202(a)(4). The administrative law judge determined that the report in which Dr. Baker diagnosed chronic obstructive pulmonary disease (COPD) and chronic bronchitis caused by a combination of smoking and coal dust exposure was the only reasoned and documented opinion. Accordingly, he concluded that it was sufficient to establish that claimant has legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge further determined, however, that the newly submitted evidence of pneumoconiosis did not establish a material change in conditions pursuant to Section 725.309 (2000).

With respect to the administrative law judge's determination that the new evidence supported a finding of pneumoconiosis under Section 718.202(a)(4), employer contends that the administrative law judge erred in crediting Dr. Baker's opinion and in failing to admit and consider Dr. Castle's medical opinion, which employer proffered on remand. We affirm the administrative law judge's determination that Dr. Baker's diagnosis of legal pneumoconiosis is reasoned and documented, as it is rational and supported by substantial evidence.⁶ Decision and Order on Remand at 12; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Contrary to employer's argument, Dr. Baker did not rely solely on a positive x-ray reading and claimant's history of coal dust exposure to diagnose legal pneumoconiosis, but rather referred to the results of claimant's pulmonary function tests, claimant's work history, and symptoms. Director's Exhibit 8.

Regarding Dr. Castle's opinion, however, there is nothing in the record indicating that the administrative law judge addressed employer's motion to admit Dr. Castle's opinion. The administrative law judge must rule on employer's motion on remand. If Dr. Castle's report is admitted into the record, the administrative law judge must reconsider his finding that the newly submitted evidence is sufficient to establish legal pneumoconiosis under Section 718.202(a)(4).

⁶ Dr. Baker examined claimant on July 20, 1999 at the request of the Department of Labor. Dr. Baker diagnosed chronic obstructive pulmonary disease, chronic bronchitis, and hypoxemia. He attributed each of these conditions to smoking and coal dust exposure. Director's Exhibit 8.

In finding that the newly submitted evidence of legal pneumoconiosis did not support a finding of a material change in conditions, the administrative law judge stated that:

A comparison of the newly submitted evidence with the previously submitted evidence does not establish that claimant's conditions worsened. The prior x-ray evidence was negative, just as the newly submitted x-ray evidence was negative. From 1994 to February 1996, Drs. Kabani and Dahhan found that claimant suffered from a moderate degree of COPD, chronic bronchitis, and resting hypoxemia. In 1999, Dr. Baker found a moderate level of COPD and chronic bronchitis. Thus, from 1994 to 1999, claimant's moderate COPD and chronic bronchitis arising out of smoking and coal dust exposure remained the same; there was no physical change. Claimant reported essentially the same subjective symptoms from 1984 through 1996 as he did in 1999 and 2000. I find that the newly submitted evidence is not substantially different than the previous evidence. I also find that claimant has not established a worsening of his condition. Therefore, I find that claimant has not established a material change in conditions under §725.309(d) through evidence of pneumoconiosis.

Decision and Order on Remand at 13. Claimant argues that the administrative law judge's finding of pneumoconiosis, an element of entitlement previously adjudicated against claimant, is sufficient to establish a material change in conditions pursuant to Section 725.309 (2000). Employer responds, urging affirmance of the administrative law judge's finding, as the administrative law judge properly determined that because there was no significant qualitative difference between the newly submitted evidence and the evidence submitted with the prior claims, claimant did not demonstrate a material change in conditions in accordance with the case law of the Sixth Circuit.

The United States Court of Appeals for the Sixth Circuit has discussed the burden of proof that applies under Section 725.309 (2000) in three key decisions. In *Sharondale*, the court held that a material change in conditions is demonstrated when a claimant establishes at least one of the elements previously adjudicated against him and the newly submitted evidence is qualitatively different from the earlier evidence and proves that claimant's condition has worsened. *Sharondale*, 42 F.3d 993, 19 BLR 2-10.

The court further explained its view of a claimant's burden of proof under Section 725.309 in *Kirk*. Like the panel in *Sharondale*, the court in *Kirk* emphasized the importance of distinguishing between a request for modification, which must be filed within one year of a final decision and which may be granted if the petitioner can establish either a change in conditions *or* a mistake in a determination of fact, 20 C.F.R. §725.310 (2000), and a duplicate claim, which is filed more than a year after the prior

denial and can proceed only if the claimant establishes a material change in conditions. The court held that in order to ensure that an award of benefits on a duplicate claim is not premised upon an error in the previous adjudication, a material change can be found “only if the new evidence both establishes the element *and* is substantially more supportive of claimant.” *Kirk*, 264 F.3d at 609, 22 BLR at 2-300 (emphasis in original). The court further indicated that the “change...is the actual difference between the bodies of evidence” and that “the ‘materiality’ of the change is marked by the fact that this difference has the capability of converting an issue determined against the claimant into one determined in his favor.” *Id.* n. 6.

In *Flynn*, 353 F.3d 467, 23 BLR 2-44 , the Sixth Circuit reaffirmed its adoption of a standard that requires a claimant to establish at least one of the elements of entitlement previously decided against him *and* that the new evidentiary record is qualitatively different from that considered in the prior adjudication. The court further stated that evidence reflecting a degree of worsening in the claimant’s condition satisfies the requirement that the two bodies of evidence be qualitatively different.

The Board has applied *Sharondale* in published decisions in which it affirmed findings of a material change in conditions pursuant to Section 725.309(d) (2000) when the administrative law judge determined that the newly submitted evidence was qualitatively different from the earlier evidence and showed a worsening of claimant’s condition. *Stewart v. Wampler Bros. Coal Co.*, 22 BLR 1-80 (2000); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997), *aff’d sub nom. Grundy Mining Co. v. Flynn*, 353 F.3d 467, 22 BLR 2-44 (6th Cir. 2003). In cases like the present one, the Board has remanded claims for reconsideration of the issue of a material change in conditions under the standards set forth in both *Sharondale* and *Kirk*. *Furgerson*, 22 BLR 1-216; *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*).

In light of these decisions and based upon the particular facts of this case, we hold that the administrative law judge’s determination that the newly submitted evidence establishing the existence of legal pneumoconiosis does not support a finding of a material change in conditions pursuant to Section 725.309(d) (2000) is rational, supported by substantial evidence and in accordance with applicable law. As prescribed by the Sixth Circuit, the administrative law judge went beyond his determination that claimant established one of the elements of entitlement previously adjudicated against him and compared the body of evidence submitted with the prior claims to the newly submitted evidence. Decision and Order on Remand at 13. The administrative law judge’s conclusion that there is no significant, qualitative difference between the two sets of evidence is rational, as Dr. Kabani’s 1994 diagnosis of occupational lung disease and a moderate obstructive impairment caused by coal dust exposure and smoking is very similar to Dr. Baker’s 1999 diagnosis of COPD caused by smoking and coal dust exposure. In light of the similarity between these opinions, a finding of a material change

in conditions in this case would appear to “allow...relitigation of [a case] in which the new and old medical evidence were essentially the same, but in which there had been a legal error in the previous adjudication.” *Kirk*, 264 F.3d at 609, 22 BLR at 1-300. We affirm, therefore, the administrative law judge’s determination that the newly submitted evidence of legal pneumoconiosis is insufficient to establish a material change in conditions under Section 725.309(d) (2000).

With respect to the issue of total disability, the administrative law judge determined that the newly submitted pulmonary function studies and medical opinions were sufficient to establish that claimant is suffering from a totally disabling pulmonary impairment, an element of entitlement adjudicated against claimant in the three prior denied claims. Decision and Order on Remand at 16-17. Regarding whether the newly submitted evidence relevant to total disability is sufficient to establish a material change in conditions, the administrative law judge stated that:

The newly submitted evidence establishes that claimant suffers from a moderate pulmonary impairment and mild resting hypoxemia that prevents him from performing his usual coal mine employment. Claimant’s PFT values have declined from the first PFT of record in 1984 through the last PFT performed on 3/30/00. However, claimant has aged 16 years over that time period. Claimant began complaining of dyspnea on exertion, a productive cough, and wheezing in 1984, and he was still reporting the same symptoms at the time of the hearing. I find that the newly submitted evidence does not establish a worsening of claimant’s condition. By 1996, claimant was unable to perform his usual coal mine employment due to a moderate obstructive impairment, which is exactly what the newly submitted evidence establishes.

Decision and Order on Remand at 17.

Claimant argues that the administrative law judge erred in failing to find a material change in conditions pursuant to Section 725.309(d) (2000) based upon the newly submitted evidence. Claimant contends specifically that because all of the valid pulmonary function studies proffered in the earlier claims produced nonqualifying results while all of the valid new pulmonary function studies produced qualifying values, the administrative law judge should have determined that he established a material change in conditions. The Director concurs with claimant and maintains that in finding that claimant’s advancing age accounted for the decline in claimant’s pulmonary function test results, the administrative law judge ignored the fact that the table values in Appendix B to Part 718 are adjusted for age and, thus, relied upon his own medical opinion.

These contentions have merit. Because the administrative law judge improperly discounted claimant's pulmonary function study results based on his age, we vacate his finding that claimant did not demonstrate a material change in conditions under Section 725.309(d) (2000). *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986). On remand, if the administrative law judge has determined that claimant's 1999 claim was timely filed pursuant to Section 725.308, he must reconsider whether the newly submitted evidence regarding the element of total respiratory or pulmonary disability is sufficient to establish a material change in conditions pursuant to Section 725.309(d) (2000) under the holdings in *Sharondale*, *Kirk*, and *Flynn*. If the administrative law judge finds that claimant has established a material change in conditions, he must then determine whether the evidence of record as a whole is sufficient to establish entitlement to benefits on the merits.

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge