BRB Nos. 07-0534 BLA
and 07-0534 BLA-A

C.G. Claimant-Petitioner Cross-Respondent v. KARST ROBBINS COAL COMPANY, INCORPORATED/KARST ROBBINS MACHINE SHOP, INCORPORATED and BITUMINOUS CASUALTY CORPORATION Employer/Carrier-Respondents Cross-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/29/2008 DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

C.G., Ben Hur, Virginia, *pro se*.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for carrier.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] and carrier cross-appeals the Decision and Order Denying Benefits (05-BLA-5525) of Administrative Law Judge Pamela Lakes Wood 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*. Claimant's prior application for benefits, filed on January 2, 1998, was denied on April 19, 2001, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 2. Claimant filed a request for modification of the denial on October 1, 2001, which was denied by the district director on May 7, 2002. Claimant took no further action on this prior claim. On July 14, 2003, claimant filed his current application, his fourth, which is considered a "subsequent claim for benefits" because it was filed more than one year after the final denial of a previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 5.

In a Decision and Order dated February 15, 2007, the administrative law judge initially found that the current claim was timely filed. The administrative law judge further denied carrier's motion to be dismissed as the responsible carrier, and to rescind its insurance policy with Karst Robbins Coal Company. The administrative law judge then credited claimant with seventeen years of coal mine employment[2] and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that claimant established the existence of pneumoconiosis

[1] Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to vacate the denial of benefits and remand the case to the district director for further evidentiary development. In support of his request, the Director states that he has failed to fulfill his statutory duty, pursuant to Section 413(b) of the Act, 30 U.S.C. §932(b), to provide claimant with a complete pulmonary evaluation. Carrier responds, urging the Board to deny the Director's request for a remand, and to affirm the denial of benefits. Carrier also cross-appeals, contending that the administrative law judge erred in finding that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. Carrier further asserts that the administrative law judge erred in finding a change in an applicable condition of entitlement established without performing a qualitative comparison of the old and new evidence pursuant to 20 C.F.R. §725.309(d), and further erred in evaluating the evidence relevant to the existence of pneumoconiosis and the cause of claimant's disabling respiratory condition pursuant to 20 C.F.R. §§718.202(a), 718.204(c). Finally, carrier contends that the administrative law judge erred in denying its motion to be dismissed as the responsible carrier and to rescind its insurance policy with Karst Robbins Coal Company. Employer has not filed a brief in this appeal. The Director has filed a brief in response to carrier's arguments raised on cross-appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Initially, we address carrier's contention that the administrative law judge erred in finding that claimant's duplicate claim was timely filed. The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner . . . ," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). Further, with respect to the time limitation of 20 C.F.R. §725.308, the United States Court of Appeals for the Sixth Circuit held, in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001), that "[t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis . . . ." *Kirk*, 244 F.3d at 608, 22 BLR at 2-298.

Before the administrative law judge, carrier contended that claimant's deposition testimony, that Dr. Joseph Smiddy informed him that he was totally disabled due to pneumoconiosis in 1990, approximately thirteen years prior to the filing of the current claim, established that the current claim is untimely. The administrative law judge rejected employer's contention, because claimant's testimony was too ambiguous to establish that the communication from Dr. Smiddy occurred in 1990, and because the record contained no 1990 medical reports from Dr. Smiddy informing claimant of his disability. Decision and Order at 11; Director's Exhibit 2. The administrative law judge further found that, even assuming that there was such a report in the record, under the standard set forth in *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), and under the facts of this case, the report would constitute a misdiagnosis and would not be sufficient to trigger the running of the statue of limitations.[3] Decision and Order at 11. Therefore, the administrative law judge

[3] In *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), the United States Court of Appeals for the Sixth Circuit agreed with the holding of the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), that when a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of the time he became aware or should have become aware of the determination. The Sixth Circuit court also agreed with the holding that a final finding by an Office of Workers' Compensation Programs adjudicator that the claimant is not totally disabled due to pneumoconiosis, repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations. *Dukes*, slip op. at 5. Applying this standard, the administrative law judge found that because claimant's prior claims were denied for failure to establish the existence of

concluded that employer failed to rebut the presumption of timeliness set forth at 20 C.F.R. §725.308(c). Decision and Order at 11.

On appeal, carrier contends that in finding this claim to be timely, the administrative law judge failed to consider all of the relevant evidence of record. Carrier further asserts that the administrative law judge erred in applying the unpublished case of *Dukes* to this claim. Carrier's Brief at 12, 16-21. The Director responds, agreeing with carrier that the administrative law judge failed to consider all relevant evidence on the timeliness issue, necessitating a remand to the administrative law judge.[4] Director's Response to Carrier's Cross-Appeal at 6. Carrier's contentions have merit.

First, we agree with carrier that *Kirk* constitutes the controlling authority on the issue of timeliness, and that, therefore, the administrative law judge erred in applying *Dukes*, which is an unpublished case and has no precedential value. 6th Cir. R. 206(c);[5] *Sturgill v. Bell County Coal Corp.*, 23 BLR 1-159, 1-165 and n. 10 (2006)(*en banc*)(McGranery, J., concurring and dissenting).

In addition, as carrier asserts, and the Director agrees, although the administrative law judge found no medical report from Dr. Smiddy dating from 1990, the administrative law judge erred in failing to analyze Dr. Smiddy's remaining reports to determine if they supported a finding that a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the filing of this claim. Carrier's Brief at 19-21; Director's Response to Carrier's Cross-Appeal at 6.

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pneumoconiosis, any medical reports to the contrary could be construed as misdiagnoses. Decision and Order at 11.

[4] We note the Director's disagreement with employer that the administrative law judge erred in applying *Dukes* to this claim. Director's Response to Carrier's Cross-Appeal at 6 n.3. However, for the reasons set forth in this decision, we reject the Director's contention.

[5] Rule 206(c) of the United States Court of Appeals for the Sixth Circuit regarding Publication of Decisions indicates:

> 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.

6th Cir. R. 206(c).

Specifically, the record contains medical reports from Dr. Smiddy dated December 15, 1987, August 7, 1991, and October 28, 1997, as well as a May 5, 1999 letter from Dr. Smiddy to claimant, "certify[ing]" that claimant was "100% totally and permanently disabled by coal workers' pneumoconiosis."[6] Carrier's Brief at 19-21; Director's Exhibit 2. In light of the fact that claimant testified that Dr. Smiddy told him that he was totally disabled due to pneumoconiosis, and as Dr. Smiddy's reports and letter are all dated more than three years prior to the filing date of the current claim, we hold that the administrative law judge erred in failing to analyze this evidence in finding this claim timely.[7] Therefore, we vacate the administrative law judge's finding that this claim was timely filed pursuant to 20 C.F.R. §725.308. On remand, the administrative law judge should reevaluate Dr. Smiddy's reports and letter to determine if they contain a "reasoned opinion of a medical professional" sufficient to trigger the running of the statute of limitations under the standard set forth in *Kirk*. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006).

[6] In his report dated December 15, 1987, Dr. Smiddy stated that "this patient has chronic obstructive pulmonary disease and coal workers' pneumoconiosis. He is sufficiently impaired that he is totally and permanently disabled for any type of gainful employment." Director's Exhibit 2. In his report dated August 7, 1991, Dr. Smiddy stated: "It remains my opinion that this patient has significant pneumoconiosis and that the patient has sufficient respiratory impairment to preclude the type of activity required for underground coal mine employment." *Id*. In a report dated October 28, 1997, Dr. Smiddy stated: "It remains my opinion that this patient is 100% totally and permanently disabled by a combination of coal workers' pneumoconiosis, asthma and COPD." *Id*. Finally, in a May 5, 1999 letter addressed to claimant at his personal mailing address, Dr. Smiddy stated: "Dear Mr. Garrett, This letter is to certify that you are 100% totally and permanently disabled by coal workers' pneumoconiosis." *Id*.

[7] We reject, however, employer's contention that a communication of total disability to claimant's counsel is sufficient to start the limitations period. In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the Board held that "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins*, 19 BLR at 1-43. The Board reiterated this principle in *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993), in which it held that receipt of a medical determination of total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner. *Daugherty*, 18 BLR at 1-101. However, as employer asserts, Dr. Smiddy's October 28, 1997 report was submitted into the record by claimant at a time when he was not represented by legal counsel. On remand, the administrative law judge should consider this fact in reevaluating the evidence on the issue of timeliness.

We next address carrier's contention that the administrative law judge erred in finding a change in an applicable condition of entitlement established pursuant to 20 C.F.R. §725.309(d) without performing a qualitative comparison of the old and new evidence.

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim shall 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 the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant was required to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Carrier maintains that any analysis of changed conditions pursuant to 20 C.F.R. §725.309(d) must include consideration of whether there is a qualitative difference between the earlier evidence and the new evidence, consistent with *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Carrier's Brief at 21-22 n.8. We disagree. The Sixth Circuit precedent relied on by carrier construed the prior version of 20 C.F.R. §725.309, while the current claim was filed after the effective date of the amendments to this regulation. Director's Exhibit 5. Under the revised version of 20 C.F.R. §725.309, claimant no longer has the burden of proving a "material change in conditions;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based.[8] *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). Therefore, we reject employer's argument that the administrative law judge was required to conduct a qualitative comparison of the old and new evidence under 20 C.F.R. §725.309(d).

Turning to the merits of entitlement, having found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R.

[8] We note that, in revising 20 C.F.R. §725.309, the Department of Labor intended to afford full effect to the decision of the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), which rejected the Sixth Circuit's requirement that the factfinder consider the qualitative difference between earlier and current evidence. *See* 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999).

§718.202(a)(1), 718.203(b), and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found, pursuant to 20 C.F.R. §718.204(c), that there was no credible evidence that claimant's disability was due to pneumoconiosis. Specifically, the administrative law judge found that Dr. Paranthaman, who examined claimant on behalf of the Department of Labor, did not address the issue.[9] Decision and Order at 27; Director's Exhibit 17. In addition, the administrative law judge discredited the opinions of Drs. Fino and Dahhan, that claimant was not totally disabled due to pneumoconiosis, because neither physician diagnosed pneumoconiosis, contrary to the administrative law judge's own findings, and because neither physician provided sufficient reasoning for his alternative conclusion that, even assuming the existence of pneumoconiosis, it would not have contributed to claimant's disability. Decision and Order at 27; Employer's Exhibits 3, 5, 7.

The Director now concedes that Dr. Paranthaman "failed to adequately address the issues of the existence of legal pneumoconiosis and the cause of claimant's disability."[10] Director's Response to Claimant's Appeal at 1, 4. Therefore, the Director requests that the denial of benefits be vacated and the case remanded to the district director "for Dr. Paranthaman to provide a supplemental report explaining his findings regarding the existence of legal pneumoconiosis and the cause of the miner's disability." Director's Response to Claimant's Appeal at 4. Employer opposes the Director's request for a remand. Upon review, we conclude that this case should be remanded to the district director in view of the Director's concession that Dr. Paranthaman's opinion fails to meet the Director's statutory obligation to provide claimant with a complete pulmonary evaluation sufficient to substantiate his claim. *See Hodges v. BethEnergy Mines Inc*., 18 BLR 1-84, 1-93 (1994)(granting the Director's motion to remand for a complete

[9] Dr. Paranthaman diagnosed chronic bronchitis and emphysema, "probably related to the combined effect of 20 years of cigarette smoking and 20 years of coal mine employment, if documented," and early changes of coal workers' pneumoconiosis . . . due to coal dust exposure," and opined that claimant had a totally disabling respiratory impairment. Director's Exhibit 17. The administrative law judge properly found that when asked to indicate the extent to which each of his diagnoses contributed to claimant's impairment, Dr. Paranthaman answered "N/A." The administrative law judge further found that Dr. Paranthaman's opinion regarding the etiology of claimant's chronic bronchitis and emphysema was too equivocal to be entitled to any weight. Decision and Order at 19, 26; Director's Exhibit 17.

[10] The Director states that, although the administrative law judge found clinical pneumoconiosis established, the etiology of claimant's chronic bronchitis and emphysema is relevant to the determination of whether coal dust exposure contributed to claimant's disability. Director's Response to Claimant's Appeal at 4.

pulmonary evaluation to be provided); *Pettry v. Director, OWCP*, 14 BLR 1-98, 1-100 (1990)(*en banc*)(same); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-53 (1990)(*en banc*)(same).

For the foregoing reasons, we vacate the administrative law judge's denial of benefits, and remand this case first to the administrative law judge for her to analyze the evidence of record to determine whether employer has met its burden to rebut the presumption that this claim was timely filed. If, on remand, the administrative law judge finds that this claim was timely filed, she must then remand this case to the district director for a complete pulmonary evaluation. In light of our holdings herein, we decline to address, as premature, carrier's additional contentions in its cross-appeal.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion, and if the claim is found timely, for a further remand to the district director for a complete pulmonary evaluation to be provided to claimant, and for reconsideration of his claim in light of the new evidence.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge