

BRB Nos. 05-0119 BLA
and 05-0119 BLA-A

J.B. KILBOURNE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
WHITAKER COAL CORPORATION)	DATE ISSUED: 08/16/2005
)	
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 – Denying Benefits of Joseph E. Kane, 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.

Jeffrey S. Goldberg (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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denying Benefits (03-BLA-5701) of Administrative Law Judge Joseph E. Kane with respect to 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). Claimant

filed his subsequent claim on April 2, 2001.¹ Director's Exhibit 3. The district director issued a Proposed Decision and Order Denying Benefits on December 11, 2002.² Director's Exhibit 25. Claimant requested a hearing, which was held on October 8, 2003. The administrative law judge initially determined that claimant's subsequent claim was timely filed, and that claimant had worked at least eighteen years in coal mine employment. The administrative law judge, however, considered the new evidence and found that claimant failed to establish that he had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), and therefore, that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in weighing the medical opinion evidence relevant to whether he established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).³ Claimant's Brief at 2-6. Employer responds, urging

¹ Claimant first filed a claim for benefits on June 21, 1995, which was denied by Administrative Law Judge Donald W. Mosser on November 4, 1996. Director's Exhibit 1. In his Decision and Order, Judge Mosser specifically found that while claimant worked 31 years in coal mine and suffered from coal worker's pneumoconiosis, he failed to establish that he had a totally disabling respiratory or pulmonary impairment. *Id.* The administrative law judge rejected the opinions of Drs. Baker and Wright that claimant was totally disabled because he found that they failed to adequately explain the basis for their diagnoses. On appeal, the Board affirmed the denial of benefits, *see Kilbourne v. Whitaker Coal Corp.*, BRB No. 04-0637 BLA (Nov. 18, 1997) (unpub.). *Id.* Claimant took no further action until filing his subsequent claim on April 2, 2001.

² On April 4, 2002, employer requested that the district director dismiss the claim on the grounds that it was untimely filed. Director's Exhibit 21. The district director denied employer's motion on April 12, 2002. Director's Exhibit 22. The issue of timeliness of the claim remained a contested issue by employer. Director's Exhibits 29, 30.

³ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). Claimant's brief incorrectly cites the old Section 718.204(c) provisions on total disability, rather than the amended Section 718.204(b) provisions.

We affirm the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i)-(iii) relevant to the issue of total disability, as those findings are unchallenged on appeal. *See* Decision and Order at 11-12.

affirmance of the denial of benefits. Employer's Brief in Response to Claimant's Petition for Review at 9. In its cross-appeal, employer argues that the administrative law judge erred by not finding that claimant's subsequent claim was time barred by the terms of 20 C.F.R. §725.308. Employer's Brief in Support of Cross-Appeal at 4-9. Employer requests that the Board dismiss this claim as untimely filed as a matter of law. Employer's Brief in Support of Cross-Appeal at 9. In the alternative, employer requests that the denial of benefits be affirmed but the case remanded for the administrative law judge to rule on the timeliness issue under the proper legal standard. *Id.* The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in response to both appeals, but declined to address the merits of entitlement. The Director urges the Board to reject, as without merit, employer's assertions that the subsequent claim was not timely filed. Director's Brief at 5-10.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's argument on cross-appeal that the subsequent claim was not timely filed. In his Decision and Order, the administrative law judge made a cursory finding that claimant timely filed his subsequent claim. In this regard, the administrative law judge noted that 20 C.F.R. §725.308(a) "creates a rebuttable presumption that every claim for benefits is timely filed." Decision and Order at 3. He then summarily found that claimant's subsequent was timely filed "because the record contain[ed] no evidence that claimant received the requisite notice [a medical determination of total disability due to pneumoconiosis] more than three years prior to filing his claim for benefits." *Id.* Employer, however, correctly points out that, in considering the timeliness issue, the administrative law judge failed to address whether the earlier medical reports of Dr. Baker dated September 1, 1993 and Dr. Wright dated October 2, 1993, rendered in conjunction with claimant's prior claim, were sufficient to constitute a reasoned medical determination of total disability due to pneumoconiosis, and whether the opinions were communicated to claimant to start the tolling of the three year statute of limitations at Section 725.308.⁴ Because the administrative law judge's

⁴ Employer maintains that their opinions were communicated to claimant more than three years before he filed his current subsequent claim, and thus that employer rebutted the Section 725.308(c) presumption that claimant timely filed his claim. Employer maintains that notice to claimant's attorney and claimant's participation in the litigation of the prior claim satisfied the communication requirement and served to trigger the tolling of the statute of limitations. Employer's Brief in Support of Cross-Appeal at 6-7. The Director argues that Dr Baker did not provide a clear diagnosis of disabling

Decision and Order does not reflect his consideration of *Consolidation Coal Co. v. Kirk*, 264 F. 3d 602, 22 BLR 2-288 (6th Cir. 2001), or a proper resolution of the timeliness issue, we agree with employer that the matter must be remanded for further consideration.⁵ We therefore vacate the administrative law judge's Decision and Order and remand the case for consideration of whether claimant's subsequent claim was timely filed.

Notwithstanding our holding with respect to 20 C.F.R. §725.308, in the interest of judicial economy, and to narrow the scope of the remand order, we will address the merits of claimant's appeal, which challenges the administrative law judge's denial of benefits. We note that claimant's prior claim was denied because he failed to establish that he was totally disabled. See 20 C.F.R. §718.204(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986); Director's Exhibit 1. The United States Court of Appeals for the Sixth Circuit has held that in order to determine whether a material change in conditions was established under 20 C.F.R. §725.309(d) (2000), the administrative law judge must consider all of the newly submitted evidence and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. See *Sharondale Corp. v. Ross*, 42 F.3d 993, 997-998, 19 BLR 2-10, 2-19 (6th Cir. 1994). If claimant proves that one element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all of the evidence of record, including the evidence submitted with claimant's prior claim, supports a finding of entitlement to benefits. *Id.*

In this case, the administrative law judge considered the new evidence and found that claimant failed to establish total disability, the element of entitlement previously adjudicated against claimant in his prior claim. On appeal, claimant maintains that the administrative law judge "may have" selectively analyzed the medical opinions at 20 C.F.R. §718.204(b)(2)(iv). Claimant notes that the administrative law judge made no mention of claimant's usual coal mine work in conjunction with Dr. Hussain's opinion of disability. Claimant's Brief at 5. Citing *Bentley v. Director, OWCP*, 7 BLR 1-612

pneumoconiosis sufficient to trigger the tolling of the statute of limitations period. Director's Brief at 6-7. The Director also maintains that employer failed to rebut the presumption that claimant's claim was timely filed because the record fails to show that either of the physicians' reports were sent to claimant or that the physicians' diagnoses were otherwise communicated to claimant. Director's Brief at 7-10.

⁵ Because claimant's coal mine employment occurred in Kentucky, this claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

(1984), claimant further notes that the administrative law judge made no mention of claimant's age or work experience in conjunction with his assessment that claimant was not totally disabled. *Id.*

We reject claimant's contention that the administrative law judge erred in his consideration of the medical opinions at Section 718.202(b)(2)(iv). The administrative law judge thoroughly discussed the opinions of Drs. Hussain, Broudy and Dahhan, noting that the physicians were equally qualified and that their opinions were well-reasoned, but that they offered conflicting diagnoses as to whether claimant was totally disabled. Decision and Order at 7-8. Taking into consideration his earlier findings that the most recent objective pulmonary function study was non-qualifying, and that the preponderance of the blood gas study evidence was non-qualifying for total disability, the administrative law judge credited Dr. Dahhan's opinion that claimant was not totally disabled by a respiratory or pulmonary impairment. Decision and Order at 13. The administrative law judge had discretion to assign greatest probative weight to Dr. Dahhan's opinion, as compared to the contrary opinions of Drs. Hussain and Broudy, because the administrative law judge found Dr. Dahhan's opinion to be better supported by the objective evidence as a whole. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); Decision and Order at 13.

Furthermore, we reject claimant's assertion that the administrative law judge erred by not comparing the exertional requirements of claimant's coal mine employment with the assessments of claimant's physical limitations by Drs. Hussain and Broudy, to find that he was totally disabled. In his Decision and Order, the administrative law judge specifically credited Dr. Dahhan's opinion that claimant retained the respiratory capacity to return to his usual coal mine work as a roof bolter. Employer's Exhibit 3; Decision and Order at 13. Because Dr. Dahhan indicated his knowledge of the nature of claimant's usual coal mine work, it was not necessary for the administrative law judge to further discuss the physical demands of claimant's last coal mine job. *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon.*). Moreover, claimant's assertion of vocational disability based on his age and limited education and work experience does not support a finding of total respiratory or pulmonary disability compensable under the Act.⁶ *See* 20 C.F.R. §718.204; *Carson v. Westmoreland Coal Co.*, 19 BLR 1-18 (1994).

⁶ Claimant's reliance on *Bentley v. Director, OWCP*, 7 BLR 1-612 (1982), is misplaced. In *Bentley*, the Board held that age, work experience and education are only relevant to claimant's ability to perform comparable and gainful work, an issue which did not need to be reached in that case in light of the administrative law judge's finding that claimant did not establish that he had any impairment which disabled him from his usual coal mine employment.

We therefore affirm as supported by substantial evidence, the administrative law judge's finding that the newly submitted evidence was insufficient to establish total respiratory or pulmonary disability under Section 718.204(b). We thus affirm the administrative law judge's denial of benefits.

In light of our affirmance of the administrative law judge's findings on the merits of entitlement, we remand this case for the sole purpose of having the administrative law judge address the timeliness issue at 20 C.F.R. §725.308. The administrative law judge must specifically determine whether the opinions of Drs. Baker and Wright constitute a reasoned diagnosis of total disability due to pneumoconiosis, and whether either of their opinions was communicated to claimant, such to have tolled the statute of limitations for the filing of his subsequent claim. *See Kirk*, 264 F.3d at 602, 22 BLR at 2-288. On remand, if the claim is found to have been untimely filed then the administrative law judge must dismiss the claim. In the alternative, if the claim is found to have been timely filed, the administrative law judge's denial of benefits should be reinstated.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge