BRB Nos. 06-0572 BLA
and 06-0572 BLA-A

WALTER DENNIS MORGAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED, C/O ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 01/11/2007
	)	
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 – Denial of Benefits of Daniel J. Roketenetz, 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.

Helen H. Cox (Howard M. Radzely, 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, and employer cross-appeals, the Decision and Order on Remand – Denial of Benefits (03-BLA-6020) of Administrative Law Judge Daniel J. Roketenetz on 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). This case is before the Board for the second time. Initially, the administrative law judge credited the miner with eleven years of coal mine employment pursuant to the parties' stipulation, 2004 Hearing Transcript at 11. The administrative law judge also found that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. 725.308. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found that the new evidence was insufficient to establish the existence of coal workers' pneumoconiosis and total respiratory disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge, therefore, found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

In response to claimant's appeal and employer's cross-appeal, the Board vacated the administrative law judge's denial of benefits and remanded the case for further consideration. *Morgan v. Shamrock Coal Co.*, BRB Nos. 05-0278 BLA and 05-0278 BLA-A (Oct. 24, 2005)(unpub.). Specifically, the Board vacated the administrative law judge's finding that claimant's subsequent claim was timely filed because the administrative law judge did not address the opinion of the United States Court of Appeals for the Sixth Circuit[2] in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) when considering whether claimant's subsequent claim was

[1]Claimant filed his second claim on May 10, 2001. Director's Exhibit 3. Claimant filed a prior claim for benefits on April 2, 1993, which was denied by Administrative Law Judge Edward J. Murty. *Id.* In his Decision and Order dated July 17, 1995, Judge Murty denied benefits because claimant failed to establish the existence of pneumoconiosis and total respiratory disability. Director's Exhibit 1.

[2]The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Tennessee. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

timely filed. The Board affirmed the administrative law judge's finding that the new evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). The Board also affirmed, as unchallenged on appeal, the administrative law judge's findings that the new evidence fails to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2)-(3) and total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iii). However, the Board vacated the administrative law judge's finding of total respiratory disability pursuant to Section 718.204(b)(2)(iv) because he erred by failing to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's finding of a Class III respiratory impairment, in accordance with *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Additionally, the Board held that Dr. Hussain's opinion satisfied the statutory obligation of the Director, Office of Workers' Compensation Programs (the Director), to provide claimant with a complete and credible pulmonary evaluation.

On remand, the administrative law judge found that employer failed to meet its burden to rebut the presumption of timeliness pursuant to Section 725.308(c) based on Dr. Clarke's 1992 report. The administrative law judge also found, however, that the new medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(a)(2)(iv). Accordingly, the administrative law judge denied benefits.

In the present appeal, claimant contends that the administrative law judge erred in failing to find total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Claimant further asserts that the Director failed to provide him with a complete pulmonary evaluation, as required by the Act. The Director responds, asserting that remand for a complete pulmonary evaluation is not needed in this case. Employer responds, urging affirmance of the administrative law judge's denial of benefits. Employer also cross-appeals, asserting that the administrative law judge erred in determining that claimant's subsequent claim was timely filed pursuant to Section 725.308. The Director responds to employer's cross-appeal, asserting that the administrative law judge properly found that Dr. Clarke's opinion was unreasoned and, therefore, insufficient to rebut the presumption of timeliness. Employer has filed a reply to the Director's response to its cross-appeal. In its reply brief, employer asserts that a "reasoned" opinion is not required in the statute and the regulations to rebut the presumption of timeliness.

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).

We first address employer's assertion on cross-appeal that the 1992 report by Dr. Clarke "constitutes a 'medical determination' of total disability due to pneumoconiosis

within the requirements of *Kirk*." Employer's Brief on Cross-Appeal at 7. Employer argues that "the fact that the report of Dr. Clarke was not credited, or was against the weight of the evidence in the original proceeding does not stop it from starting the three year statute of limitations" because a physician's opinion need not be well reasoned to trigger the statute of limitations. *Id.* Employer further argues that, notwithstanding the fact that Dr. Clarke's opinion was "outweighed by more credible evidence," it satisfies the minimal requirements for an opinion to be documented and reasoned[3] and, therefore, is sufficient to start the tolling of the three-year statute of limitations. The Director asserts that *Kirk* requires a reasoned physician's opinion to trigger the three-year limitations period and that the administrative law judge permissibly concluded that Dr. Clarke's opinion was not reasoned because Dr. Clarke failed to adequately explain his disability conclusion. The Director, therefore, contends that the administrative law judge "appropriately held that Dr. Clarke's report did not satisfy *Kirk*, and [employer] failed to rebut the timeliness presumption." Director's Brief in Response to Employer Cross-Appeal at 6. In its reply brief, employer argues that the Director's requirement that a physician's report be reasoned is at odds with the plain language of Section 422(f) of the Act, 30 U.S.C. §932(f), 20 C.F.R. §725.308 and the Sixth's Circuit's decision in *Kirk*.

In our October 24, 2005 Decision and Order, we instructed the administrative law judge to determine whether the 1992 report of Dr. Clarke[4] was reasoned and, therefore, sufficient under *Kirk* to trigger the statute of limitations. On remand, the administrative law judge noted that Administrative Law Judge Edward J. Murty, in his 1993 denial of claimant's prior claim, discredited Dr. Clarke's opinion of total disability due to pneumoconiosis. The administrative law judge stated that, in doing so, Judge Murty found that the positive x-ray reading that Dr. Clarke relied upon was outweighed by negative readings rendered by physicians with superior qualifications, and that Dr. Clarke "did not perform an arterial blood gas study, his pulmonary function study reflected normal values and the Claimant was still employed in coal mine employment." Decision

[3]Employer cites *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984) to support its position that Dr. Clarke's opinion is reasoned because *Fuller* states that a physician's opinion "need merely to set forth clinical findings, observation and testing upon which the physician relies" to be a documented and reasoned opinion. Employer's Brief on Cross-Appeal at 7. As the administrative law judge noted in his Decision and Order on Remand, notwithstanding employer's assertion that Dr. Clarke's opinion was sufficient to rebut the presumption of timeliness, employer later characterized Dr. Clarke's report as "poorly supported" in its brief on remand, Employer's Brief on Remand at 18. Decision and Order on Remand at 4.

[4]In his report dated December 21, 1992, Dr. Clarke opined that claimant is totally disabled for all manual labor due to coal workers' pneumoconiosis. Director's Exhibit 1.

and Order on Remand at 4. The administrative law judge found that his "review of Dr. Clarke's opinion does not result in a different conclusion." *Id.* Specifically, the administrative law judge found that "Dr. Clarke's positive x-ray reading was re-read as negative by more highly qualified physicians" and that his "opinion of total disability was not supported by his objective medical evidence." *Id.* The administrative law judge further found that "[w]ithout regard to the other medical evidence of record, that clearly outweighed Dr. Clarke's opinion, it is clear that Dr. Clarke's opinion cannot stand on its own as a reasoned medical opinion." *Id.* at 4-5. The administrative law judge concluded that "[g]iven the poor reasoning and lack of documentation for [Dr. Clarke's] opinion it was little more than gratuitous" and, therefore, insufficient to rebut the presumption of timeliness.[5] *Id.* at 5.

The administrative law judge permissibly found Dr. Clarke's report to be insufficient to rebut the presumption of timeliness pursuant to Section 725.308(c). As discussed above, the administrative law judge, within his discretion, found that Dr. Clarke's opinion "cannot stand on its own as a reasoned medical opinion." *Id*; *see Maddaleni v. Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *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). Moreover, we find no merit in employer's argument that the requirement that a physician's report be reasoned is at odds with the plain language of Section 422(f) of the Act, 30 U.S.C. §932(f), 20 C.F.R. §725.308, and the Sixth Circuit's decision in *Kirk*. The Board considered and rejected arguments similar to those raised by employer in *Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006). As the Board stated in *Brigance*, "[i]n defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit court, in *Kirk*, stated that the statute relies on the 'trigger of the *reasoned* opinion of a medical professional.'" *Brigance*, 23 BLR at 1-175 (emphasis added). Therefore, we affirm the administrative law judge's finding that claimant's subsequent claim was timely filed.

The instant claim, which is claimant's second claim, was filed on May 10, 2001. 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). Claimant's first claim was denied because claimant failed to establish the

[5]The administrative law judge initially rejected claimant's contention, on remand, that Dr. Clarke's report had not been communicated to him.

existence of pneumoconiosis and total respiratory disability. 20 C.F.R. §§718.202(a), 718.204(b).

In our 2005 Decision and Order, we instructed the administrative law judge to reconsider all of the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv). In particular, we instructed the administrative law judge, on remand, to compare the exertional requirements of claimant's usual coal mine employment with Dr. Baker's diagnosis of a Class III respiratory impairment, in accordance with *Cornett*. Claimant now argues that the administrative law judge erred in finding Dr. Baker's opinion insufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). Specifically, claimant contends that the administrative law judge "made no mention of the claimant's usual coal mine work in conjunction with Dr. Baker's opinion of disability." Claimant's Brief at 5.

Claimant's assertions lack merit.[6] We affirm as rational, supported by substantial evidence, and in accordance with law, the administrative law judge's finding that Dr. Baker's opinion is not supportive of a finding of total disability pursuant to Section 718.204(b)(2)(iv). In his March 31, 2001 report, Dr. Baker opined that claimant "has a Class III impairment based on the FEV1 [being] between 41% and 59% of predicted. This is based on Table 5-12, Page 107, Chapter Five, Guides to the Evaluation of Permanent Impairment, Fifth Edition." Director's Exhibit 16. On remand, the administrative law judge reconsidered Dr. Baker's opinion in accordance with the Board's instructions. In doing so, the administrative law judge noted that Dr. Baker related that claimant worked for six years as a mining machine operator and for six years as a roof bolter operator. The administrative law judge further noted that Dr. Baker did not describe or discuss the exertional requirements of either job. The administrative law judge stated that in rendering his opinion regarding disability, Dr. Baker noted that claimant has a Class III impairment, but did not explain "what comprises a 'Class III' impairment. There are no lifting, stooping, bending or walking limitations specified." Decision and Order on Remand at 6. The administrative law judge found that "[a]s a

[6]Citing *Meadows v. Westmoreland Coal Co.*, 6 BLR 1-773 (1984), claimant contends that the Board has held that a single medical opinion may be sufficient to invoke a presumption of total disability. The *Meadows* decision addressed invocation of the interim presumption found at 20 C.F.R. §727.203(a). Because this case is properly considered pursuant to the permanent regulations at 20 C.F.R. Part 718, the 20 C.F.R. Part 727 regulations are not relevant. Moreover, even were the Part 727 regulations applicable, the United States Supreme Court in *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988), held that all evidence relevant to a particular method of invocation must be weighed by the administrative law judge before the presumption can be found to be invoked by that method.

result, I do not have a basis on which to compare the exertional requirements of the Claimant's duties with the degree of disability envisioned by a 'Class III' impairment." *Id.*

Moreover, the administrative law judge discussed claimant's testimony regarding the exertional requirements of his duties as a roof bolt operator and a miner operator at the hearing held before him and at the hearing held before Judge Murty. The administrative law judge found claimant's last coal mine employment to be as a miner operator because claimant testified at the hearing before Judge Murty that the last coal mine job he performed was as a continuous miner operator. Decision and Order on Remand at 7. The administrative law judge noted that as a miner operator, claimant testified that he "operated [this machine] by a remote box that weighed ten pounds and that he was also required to take care of cable and curtains." *Id.* at 6 (citing June 8, 1995 Hearing Transcript at 15-16). The administrative law judge also noted that "[a]lthough claimant stated he would not be able to return to his job as a continuous miner operator because it involved too much shoveling and greasing, there is no description in the record as to the actual physical requirements of those apparent ancillary duties." *Id.* The administrative law judge noted that at the hearing held before him, claimant testified that he did not perform very much heavy lifting in running the miner operator or roof bolter. Decision and Order on Remand at 7 (citing March 16, 2004 Hearing Transcript at 16). Based on claimant's testimony, the administrative law judge found that "Claimant's job as a miner operator did not involve heavy manual labor on a regular measurable basis." Decision and Order on Remand at 7.

The administrative law judge considered claimant's testimony regarding his coal mine job as a miner operator in conjunction with Dr. Baker's opinion. The administrative law judge found that "significantly lacking from Dr. Baker's report was the more important assessment by him as to whether the Claimant was totally disabled in view of the Claimant's last coal mine duties, which, as found by me, did not include heavy labor."[7] *Id.* at 9. Additionally, the administrative law judge stated that he found the qualifying pulmonary function study performed by Dr. Baker on March 31, 2001 to be unreliable because it did not conform to the quality standards at 20 C.F.R. §718.103 and

[7]The administrative law judge stated that Dr. Baker also opined that claimant has a second impairment based on his finding that claimant should limit further exposure to coal dust or similar dusty occupations. The administrative law judge rationally determined that Dr. Baker's opinion merely advised claimant to avoid further coal dust exposure. The administrative law judge reasonably found that this portion of Dr. Baker's opinion is thus insufficient to establish total respiratory disability under Section 718.204(b)(2)(iv). *See 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).

was found to be invalid by Dr. Fino. *Id.* at 8. The administrative law judge further stated that the notation "tracings are not reproducible" on the test itself "indicates unacceptable variations by the Claimant in the performance of the test which undermine its credibility and, thus Dr. Baker's reliance upon it in reaching his ultimate conclusion as to total disability."[8] *Id.* Based on the foregoing, the administrative law judge concluded that Dr. Baker's opinion on claimant's disability "is neither well-reasoned nor well-documented." *Id.* at 9.

Considering all of the new medical opinion evidence,[9] the administrative law judge found Dr. Baker's report "to be clearly outweighed by the great preponderance of medical evidence in this record that reached the opposite conclusion." Decision and Order on Remand at 10. As claimant has not raised any assertions of error by the administrative law judge with respect to his treatment of the medical opinions of Drs. Hussain, Dahhan, Fino, and Broudy pursuant to Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that the new medical opinion evidence is insufficient to establish total respiratory disability.[10] *See Coen v. Director, OWCP*, 7 BLR 1-30

[8]Contrary to claimant's contention, the administrative law judge did not reject Dr. Baker's medical report "solely because it is based on nonconforming pulmonary function studies." Claimant's Brief at 4. Rather, the administrative law judge, within his discretion, used the quality standards at 20 C.F.R. §718.103 as an indicator of the reliability of the March 31, 2001 pulmonary function study relied upon by Dr. Baker. *Casey v. Director, OWCP*, 7 BLR 1-873, 1-877 (1985).

[9]In his July 25, 2001 report, Dr. Hussain concluded that claimant does not have the respiratory capacity to perform his last coal mine employment. Director's Exhibit 15. However, at his April 17, 2002 deposition, Dr. Hussain testified that claimant was able to return to coal mine employment from a respiratory standpoint based on the pulmonary function study values that he and Dr. Broudy obtained. Director's Exhibit 18 at 8. Dr. Hussain also testified that claimant would not be totally disabled based on the black lung regulations. *Id.* at 18. Dr. Dahhan found no evidence of total or permanent pulmonary disability. Director's Exhibit 17; Employer's Exhibit 1 at 11. Dr. Fino stated that claimant has a mild respiratory impairment but found that claimant is not totally disabled from returning to his last coal mine employment. Employer's Exhibits 4, 9 at 13. Dr. Broudy opined that claimant retains the respiratory capacity to perform his last coal mine employment. Employer's Exhibits 7, 10 at 10-11.

[10]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 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-

(1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Because claimant has failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(i)-(iv), claimant has failed to establish total respiratory disability pursuant to Section 718.204(b), based on all the relevant new medical evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *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*). In our 2005 Decision and Order, we affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Accordingly, we affirm the administrative law judge's finding that this claim must be denied because claimant has not established that one of the applicable conditions of entitlement has changed since the date of the denial of the prior claim. *See* 20 C.F.R. §725.309.

Lastly, claimant contends that because Dr. Hussain initially found claimant to be totally disabled, but then recanted at his deposition, based on different smoking and coal mine employment histories for claimant, the Director failed to provide claimant with a complete pulmonary evaluation, as required under Section 413(b) of the Act, 30 U.S.C. §923(b).[11] Claimant argues that for Dr. Hussain's opinion to be complete and "[i]n order for Dr. Hussain to reach a clear and unequivocal diagnosis, it would seem only logical that he would require a new examination in conjunction with the new smoking and coal mine employment histories that he was provided" at the hearing. Claimant's Brief at 2-3. We hold that there is no merit in claimant's assertion that Dr. Hussain's opinion does not satisfy the Director's statutory obligation. Although Dr. Hussain changed his opinion regarding total respiratory disability at his deposition, his opinion still satisfies the Director's statutory obligation to provide a complete and credible pulmonary evaluation because it is complete and it has not been discredited by the administrative law judge. *See generally Cline v. Director, OWCP*, 917 F.2d 9, 14 BLR 2-102 (8th Cir. 1990); *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84, 1-87 (1994); *Pettry v. Director, OWCP*, 14 BLR 1-98 (1990)(*en banc*); *Hall v. Director, OWCP*, 14 BLR 1-51, 1-54 (1990)(*en banc*). Therefore, we decline to remand this case on that basis.

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147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985).

[11]Claimant selected Dr. Hussain to perform his Department of Labor-sponsored pulmonary evaluation. Director's Exhibit 13.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of 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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JUDITH S. BOGGS
Administrative Appeals Judge