BRB No. 03-0363 BLA

GENERAL LEE ADAMS, JR.	)	
	)	
Claimant-Petitioner	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	DATE ISSUED: 03/17/2004
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-0703) of Administrative Law Judge Robert L. Hillyard (the administrative law judge) on a duplicate 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] The administrative law judge found that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, concluded that the newly submitted evidence was insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000). Accordingly, the administrative law judge denied benefits.

The relevant procedural history of this case is as follows: Claimant filed his first claim with the Department of Labor (DOL) on March 29, 1978. This claim was denied by the district director on June 28, 1979, on the basis that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment and failed to establish total disability due to pneumoconiosis. Director's Exhibit 34. Claimant did not appeal from this determination, and the district director determined that this claim was abandoned, and thus, the denial became final. Director's Exhibit 34. Claimant filed his second claim with DOL on June 5, 1981. This claim was denied by the district director on July 1, 1981, because he found that claimant established none of the elements of entitlement. Claimant did not appeal this determination and the district director determined that this claim had been abandoned. Director's Exhibit 34. Claimant took no further action on this claim and the denial became final. Claimant filed his third claim with DOL on March 21, 1983. This claim was denied by the district director on May 17, 1983, on the basis that the evidence did not establish any of the elements of entitlement. Director's Exhibit 35. On July 26, 1983, the district director determined that this claim was abandoned. *Id.* The record reflects that claimant took no further action on the claim and the denial became final. On February 6, 1989, claimant filed his fourth claim with DOL. Director's Exhibit 36. After DOL informally denied the claim, claimant requested a hearing with the Office of Administrative Law Judges. Following a hearing, Administrative Law Judge J. Michael O'Neill issued a Decision and Order dated April 5, 1996. *Id.* Judge O'Neill found that the evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000) and failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(2000). The record reflects that claimant took no further action on the claim and the denial became final. Claimant filed his fifth claim for benefits with DOL on May 16, 1987. Director's Exhibit 37. This claim was denied by the district director on August 14, 1988 on the basis that the evidence failed to establish the existence of pneumoconiosis arising out of coal mine employment and failed to establish total disability due to pneumoconiosis. Director's Exhibit

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[1]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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

37. The record reflects that claimant took no further action on the claim and the denial became final. *Id*. Claimant then filed his sixth claim, the instant claim, with the DOL on January 14, 2000. Director's Exhibit 1. Following a hearing, the administrative law judge issued a Decision and Order dated January 31, 2003, wherein he found that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), and thereby failed to establish a material change in conditions pursuant to Section 725.309(d)(2000). Claimant then filed the instant appeal with the Board.

On appeal, claimant challenges the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and thereby failed to establish a material change in conditions pursuant to Section 725.309(d)(2000). Claimant also asserts that the administrative law judge erred by failing to render a finding as to whether the newly submitted evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204, and, thereby, a material change in conditions pursuant to Section 725.309(d)(2000). Employer/Carrier (employer) responds, urging affirmance of the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and thus failed to establish a material change in conditions pursuant to Section 725.309(d)(2000). Employer asserts that the administrative law judge's failure to render findings at Section 718.204(b), (c) is harmless as the newly submitted evidence fails to establish total disability due to pneumoconiosis at Section 718.204(b), (c). Finally, employer cites *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) for the premise that claimant's instant claim is time-barred as he filed it more than three years from the time he received a medical determination that he was totally disabled due to pneumoconiosis.[2] The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.[3]

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

[3] Because no party has challenged the administrative law judge's findings that the evidence established six years and five months of qualifying coal mine employment, that the evidence established a thirty-one pack year smoking history, that employer is the responsible operator, and that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) – (3), we affirm these findings. *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant initially challenges the administrative law judge's finding that the newly submitted medical opinion evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and thereby a material change in conditions pursuant to Section 725.309(d)(2000). Claimant asserts that the administrative law judge mischaracterized the evidence and provided inadequate rationale for discounting the newly submitted medical opinions that support a finding of the existence of pneumoconiosis.

The record contains five relevant newly submitted medical opinions. Dr. Simpao opined that claimant has coal workers' pneumoconiosis by x-ray and stated "multi (sic) years of coal dust exposure is medically significant in his pulmonary impairment." Director's Exhibit 11. Although Dr. Simpao classified claimant's impairment as mild, he stated that claimant does not have the respiratory capacity to perform the work of a coal miner. Director's Exhibits 11, 31. Dr. Chavda, in a report dated December 10, 1999, opined that claimant has chronic obstructive pulmonary disease due to chronic smoking. Director's Exhibit 8; Claimant's Exhibit 1. Dr. Chavda stated further that "working in the mines has contributed in worsening [the miner's] lung condition." Director's Exhibit 8. In a report dated December 3, 2001, Dr. Chavda opined that claimant suffers from chronic obstructive pulmonary disease due to chronic bronchitis and pneumoconiosis. Claimant's Exhibit 1. At deposition, Dr. Chavda testified that "coal mine dust may be one of the causes of chronic obstructive pulmonary disease besides smoking." Director's Exhibit 29, p.27. When questioned by claimant's counsel at deposition, Dr. Chavda stated that coal mine dust was actually a cause of claimant's chronic obstructive pulmonary disease. *Id.* However, when questioned by employer's counsel on redirect examination, Dr. Chavda stated that "it (pneumoconiosis) could be causing some damage which may be aggravated by his (claimant's) chronic smoking." Director's Exhibit 29, p.34. Dr. Chavda also stated that claimant could not be employed in the mines as a coal mine worker due to poor lung function. Director's Exhibit 29, p. 28. Dr. Bentsen opined that claimant suffers from chronic obstructive pulmonary disease with moderate severe airways obstruction and stated that the chronic obstructive pulmonary disease and pulmonary impairment "may have been due in part to exposure to coal dust but may also be due to other occupational exposures, [may also have been due to] his history of cigarette smoking." Claimant's Exhibit 7. At deposition, Dr. Bentsen was asked whether claimant had clinical pneumoconiosis. Dr. Bentsen replied that claimant "could qualify for that diagnosis." Employer's Exhibit 2, p. 31. Dr. Bentsen further stated that "it is very much a judgment call at this point." Employer's Exhibit 2, pp. 31-32. Dr. Bentsen also testified that claimant "was certainly not qualified for disability,"

Employer's Exhibit 2, p.35, but he later testified that claimant was not physically capable of performing the work of an underground miner. Employer's Exhibit 2, p. 38. Dr. Taylor, recognized by the administrative law judge as a treating physician, Decision and Order at 15, opined that claimant suffers from chronic obstructive pulmonary disease and chronic bronchitis due in part to exposure to coal dust. Director's Exhibit 8; Claimant's Exhibits 3, 5. Dr. Taylor concluded his report by affirmatively stating that the lung condition was related to coal dust. *Id*. At deposition, when questioned by employer's counsel, Dr. Taylor stated that "cigarette exposure is probably more important in the aggravation of the lung condition than the coal dust." Employer's Exhibit 3, p. 25. Dr. Taylor further testified that while coal dust exposure was only a small factor in claimant's lung condition, he refused employer's counsel's suggestion to label the contribution as *de minimus*. Employer's Exhibit 3, pp. 27-28. Dr. Taylor described claimant's smoking history only to state that claimant was a "former moderate smoker but quit in 1991." Employer's Exhibit 3, p. 6. Finally, Dr. O'Bryan opined that claimant did not suffer from pneumoconiosis. Director's Exhibit 26. Dr. O'Bryan stated that claimant's x-ray revealed no evidence of pneumoconiosis and opined that claimant suffers from asthmatic bronchitis due to his smoking history. *Id.* Dr. O'Bryan stated that he would not recommend that claimant return to the mines due to his back injury, dyslipedema, and hypertension. *Id*.

In considering the newly submitted medical reports of record, the administrative law judge weighed all of the opinions and discounted those of Drs. Simpao, Chavda, Bentsen and Taylor. Thus, the administrative law judge concluded that the newly submitted evidence of record failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and thereby failed to establish a material change in conditions pursuant to Section 725.309(d)(2000). Decision and Order at 14-16.

With respect to Dr. Simpao's opinion, claimant asserts that the administrative law judge erroneously found that Dr. Simpao did not identify the studies he relied upon to render his diagnoses. Claimant asserts that Dr. Simpao did, in fact, identify these studies. Next, claimant asserts that the administrative law judge improperly discounted Dr. Simpao's opinion because Dr. Simpao interpreted his own x-ray as negative for pneumoconiosis. Claimant contends that such a finding violates the express language of Section 718.202(a)(4), which provides that pneumoconiosis may be found notwithstanding a negative x-ray. Claimant asserts that the administrative law judge substituted his own opinion for that of Dr. Simpao when he interpreted the doctor's assessment of improvement as inconsistent with, and thus not supportive of, a finding of either clinical or legal pneumoconiosis. Finally, claimant asserts that the administrative law judge mischaracterized Dr. Simpao's opinion.

The administrative law judge found that Dr. Simpao opined that claimant had a mild impairment related to pneumoconiosis, despite a negative chest x-ray and pulmonary function studies that improved over time. Decision and Order at 15. The administrative law judge

stated that Dr. Simpao did not identify which studies he relied upon to support his diagnosis of pneumoconiosis, as both the x-ray and the pulmonary function studies tended to negate, rather than support, a diagnosis of pneumoconiosis. *Id*. The administrative law judge properly discounted Dr. Simpao's opinion because he determined that it was not reasoned, as Dr. Simpao failed to explain his findings in light of the results of his own objective studies. Director's Exhibits 7, 11, 31; s*ee Trumbo v. Reading Anthracite* Co., 17 BLR 1-85 (1993); *Pettry v. Director,* OWCP, 14 BLR 1-98 (1990); *Wilt v. Wolverine Mining Co.,* 14 BLR 1-70 (1990). Further, the administrative law judge permissibly found Dr. Simpao's opinion was not well documented, nor supported by the objective evidence, as Dr. Simpao's own testimony was that claimant's pulmonary condition improved, and Dr. Simpao did not explain his findings in light of that testimony. *See* Director's Exhibit 31, p. 8; *Trumbo*, 17 BLR at 1-88, 89; *Pettry*, 14 BLR at 1-100; *Wilt*, 14 BLR at 1-79. Moreover, we specifically reject claimant's contention that the administrative law judge substituted his own opinion for that of Dr. Simpao. Rather, the administrative law judge cited and interpreted Dr. Simpao's own testimony and permissibly found it to be not reasoned and not documented. *See discussion, supra.* We hold that such a finding constitutes a permissible use of the administrative law judge's discretion, and we affirm the administrative law judge's decision to discount Dr. Simpao's opinion at Section 718.202(a)(4). *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co,* 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Next, claimant asserts that the administrative law judge improperly discounted Dr. Chavda's opinion on the basis that Dr. Chavda failed to state what portion of claimant's impairment was due to coal dust exposure and what portion was due to the effects of smoking. *Id.* Claimant contends that Dr. Chavda is not required to provide such an apportionment. Claimant also asserts that Dr. Chavda was fully aware of claimant's smoking history.

In his first report, dated December 10, 1999, Dr. Chavda diagnosed chronic obstructive pulmonary disease due to cigarette smoking, but opined that working in the mines worsened claimant's lung condition. Director's Exhibit 8. In a report dated December 3, 2001, Dr. Chavda opined that claimant suffered from pneumoconiosis. Claimant's Exhibit 1.[4] In a subsequent report dated December 11, 2001, Dr. Chavda described a "*possible* history of pneumoconiosis" without further elaboration. *Id.* (emphasis added). The administrative law judge permissibly discounted Dr. Chavda's opinion because he found it to

[4]The administrative law judge erroneously cited Dr. Chavda's reports as Claimant's Exhibit 2, when, in fact, they are marked as Claimant's Exhibit 1. Although the administrative law judge misidentified the exhibit numbers for these reports, he correctly quoted the text of these reports.

be vague and unexplained, and thus, unreasoned. *See Trumbo*, 17 BLR at 1-88,89; *Pettry*, 14 BLR at 1-100; *Wilt*, 14 BLR at 1-79. While claimant is correct in contending that the administrative law judge's decision to discount Dr. Chavda's opinion because he did not apportion what percentage of claimant's impairment was due to coal dust exposure is error, s*ee Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997), this error is harmless as the administrative law judge provided an independent, affirmable basis for discounting Dr. Chavda's opinion, namely that it is unreasoned. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). We also hold, therefore, that it is unnecessary to address claimant's allegation that the administrative law judge erred in failing to credit Dr. Chavda's report despite an incorrect smoking history. *Larioni*, 6 BLR at 1-1278; *Kozele*, 6 BLR at 1-382-383, n.4. We affirm, therefore, the administrative law judge's decision to discount Dr. Chavda's opinion at Section 718.202(a)(4).

Claimant next challenges the administrative law judge's decision to discount Dr. Bentsen's opinion. Claimant recognizes that the administrative law judge quoted the conclusion contained within Dr. Bentsen's report and found it to be equivocal, but asserts that Dr. Bentsen clarified his opinion at deposition and unequivocally opined that coal mine dust was a significant factor causing claimant's pulmonary impairment. Claimant's Brief at 14. The administrative law judge found that Dr. Bentsen initially stated that claimant's impairment may have been due in part to coal dust exposure. Claimant's Exhibit 7; Decision and Order at 14. At deposition, Dr. Bentsen testified that claimant "could" qualify for a diagnosis of clinical pneumoconiosis. Employer's Exhibit 2, p. 31. Moreover, when asked by claimant's counsel whether claimant had pneumoconiosis, Dr. Bentsen stated that "it is very much a judgment call at this point." Employer's Exhibit 2, pp. 31-32. Given this evidence, we affirm the administrative law judge's decision to discount Dr. Bentsen's opinion on the basis that it is equivocal, as a permissible exercise of the administrative law judge's discretion. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

Claimant next contends that the administrative law judge improperly discounted the opinion of Dr. Taylor, whom the administrative law judge found treated claimant. Decision and Order at 15. Claimant specifically asserts that the administrative law judge incorrectly found that Dr. Taylor was not aware of claimant's smoking history. Claimant contends that Dr. Taylor expressed his knowledge of claimant's smoking history at his deposition. Claimant thus argues that the administrative law judge mischaracterized Dr. Taylor's opinion. Claimant further asserts that the administrative law judge improperly discounted Dr. Taylor's opinion on the basis that he did not specify what portion of claimant's impairment was due to coal dust exposure.

The record reflects that Dr. Taylor did not take, record, or specify any smoking history for claimant in any of his reports. Director's Exhibit 8; Claimant's Exhibit 5. Moreover, the only reference to claimant's smoking history in Dr. Taylor's deposition was Dr. Taylor's description of claimant as a "former moderate smoker, but [that he] quit in 1991." Employer's Exhibit 6, p. 3. Dr. Taylor also testified at deposition that "cigarette smoking history is probably more important in the aggravation of claimant's lung condition than the coal dust." Employer's Exhibit 3, pp. 25-26. Further, Dr. Taylor indicated at deposition that coal dust exposure was "only a small factor" contributing to claimant's lung condition. Employer's Exhibit 3, pp. 27-28. Thus, Dr. Taylor's deposition testimony does not reflect that he was cognizant of claimant's actual cigarette smoking history. We affirm, therefore, the administrative law judge's decision to discount Dr. Taylor's opinion on the basis that he did not report a specific smoking history, as a permissible exercise of his discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). In light of the foregoing, we hold that the administrative law judge's decision to discount Dr. Taylor's opinion on the basis that he failed to apportion the contribution of coal dust exposure to claimant's lung condition is harmless error, as the administrative law judge provided an alternative, independent, and proper basis for discounting Dr. Taylor's opinion. *Larioni*, 6 BLR at 1-1278; *Kozele*, 6 BLR at 1-382-383, n.4.

Next, claimant argues that the administrative law judge improperly credited Dr. O'Bryan's opinion that claimant did not suffer from pneumoconiosis at Section 718.202(a)(4). Claimant's Brief at 12-14. We need not address this contention, as the administrative law judge permissibly discounted all of the newly submitted medical opinions of record which could have arguably supported a finding of pneumoconiosis at Section 718.202(a)(4), and thereby, a material change in conditions pursuant to Section 725.309(d)(2000). Therefore, claimant's contention is rendered moot. *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). We affirm, therefore, the administrative law judge's finding that the newly submitted evidence failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), and thereby failed to establish a material change in conditions pursuant to Section 725.309(d)(2000).

Claimant next contends that the administrative law judge erred by failing to render a finding as to whether the newly submitted evidence established total disability pursuant to Section 718.204, and thereby established a material change in conditions pursuant to Section 725.309(d)(2000). Claimant's last claim was denied on the basis that the evidence failed to establish any of the elements of entitlement, including total disability pursuant to Section 718.204. Director's Exhibit 37. Pursuant to the standard set forth in *Sharondale Corp. v. Ross*, 42 F. 3d 993, 19 BLR 2-10 (6th Cir. 1994), claimant can establish a material change in conditions based on newly submitted evidence which establishes any of the elements of

entitlement previously adjudicated against him, including total disability due to pneumoconiosis pursuant to Section 718.204. The administrative law judge failed to make such a determination. Based on this fact and the fact that the record contains evidence which, if credited, could arguably support a finding of total disability due to pneumoconiosis pursuant to Section 718.204, we remand the case to the administrative law judge for him to make the necessary findings pursuant to Section 718.204, and the standard set forth in *Ross*. We reject employer's argument that the administrative law judge's error in failing to make these findings is harmless because the evidence fails to establish entitlement. The administrative law judge is required to make such findings, pursuant to the holding of the United States Court of Appeals for the Sixth Circuit in *Ross*, and has not yet done so. 20 C.F.R. §718. 204; s*ee also Adams v. Director, OWCP*, 886 F. 2d 818, 13 BLR 2-52 (6th Cir. 1989).

Finally, employer, in a footnote in its response brief, contends that this claim, the sixth claim filed by claimant, is time barred by Section 422(f) of the Act and Section 725.308 of the regulations. 30 U.S.C. §932(f); 20 C.F.R. §725.308. Employer's Brief at 2-3, n. 2. Employer argues that claimant is therefore time-barred from filing additional claims more than three years after the date of the first medical report which communicates to claimant that he is totally disabled due to pneumoconiosis. *Tennessee Consolidation Coal Co. v. Kirk*, 264 F. 3d 602, 22 BLR 2-288 (6th Cir. 2001). Employer asserts that because claimant had received, and submitted, a medical opinion diagnosing total disability due to pneumoconiosis in a previous claim, the present claim, having been filed more than three years after that opinion, is untimely filed in accordance with *Kirk*. Employer argues, therefore, that claimant's instant claim, filed January 14, 2001, is time-barred pursuant to the terms of Section 422(f) of the Act and Section 725.308 of the regulations.

In *Kirk,* the Sixth Circuit held:

> 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. [footnote omitted]. 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, 244 F. 3d at 608, 22 BLR at 2-298-299.

Section 725.308 includes a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). Whether the evidence in a particular case is sufficient to establish rebuttal of this presumption involves substantial *factual* findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 , 1-153 (1989)(*en banc*)(emphasis added). Moreover, the Sixth Circuit has held that "[w]hen the administrative law judge fails to make important and necessary factual findings, the proper course for the Board is to remand the case…" *Director, OWCP v. Rowe*, 710 F. 2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Peabody Coal Co. v. Greer*, 62 F. 3d 801, 19 BLR 2-235 (6th Cir. 1995); *Harlan Bell Coal Co. v. Lemar*, 904 F. 2d 1042, 14 BLR 2-1 (6th Cir. 1990). As it is the administrative law judge's duty to make factual determinations, we remand the case to the administrative law judge for further consideration of the issue of the timeliness of claimant's instant application for benefits in light of the holding in *Kirk*. *See* 20 C.F.R. §§725.413(b)(3)(2000); 725.463; *Kirk*, 244 F. 3d at 608, 22 BLR at 2-298-299; *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994); *Clark*, 12 BLR at 1-153. If, on remand, the administrative law judge finds that the evidence of record is sufficient to establish rebuttal of the presumption that the claim was timely filed, then he must allow claimant the opportunity to demonstrate if any extraordinary circumstances exist that may avoid dismissal of the claim pursuant to the express terms of Section 725.308(c). 20 C.F.R. §725.308(c).

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

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