

BRB No. 01-0956 BLA

ARTHUR BOOTH)	
)	
Claimant-Respondent)	
)	
v.)	
)	
WOLF CREEK COLLIERIES)	DATE ISSUED:
)	
and)	
)	
ZEIGLER COAL HOLDING COMPANY)	
)	
)	
Employer/Carrier-)	
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-Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (Eugene Scalia, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

Employer appeals the Decision and Order on Remand-Award of Benefits (98-BLA-0766) of Administrative Law Judge Daniel J. Roketenetz 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.* (the Act).¹ This case is before the Board for a second time.²

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.

² The procedural history of this case is as follows. Claimant initially filed a claim for benefits on October 3, 1988, which was finally denied by the district director on March 29, 1989. Director's Exhibit 41. No further action was taken until the filing of the instant claim on August 11, 1997. On July 20, 1999, the administrative law judge issued a Decision and Order awarding benefits. The administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), and that based on the entirety of the evidence of record, claimant established the presence of complicated pneumoconiosis and also the presence of simple pneumoconiosis based on the physicians' opinions. Based on the finding of complicated pneumoconiosis, an award of benefits was

Subsequent to the Board's remand, *see* discussion, fn. 2, the administrative law judge again found that claimant established the presence of complicated pneumoconiosis and was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Decision and Order on Remand at 3-7. Accordingly, benefits were awarded.

made. Subsequent to an appeal by employer, the Board vacated the award of benefits and remanded the claim to the administrative law judge for further consideration. *Booth v. Wolf Creek Collieries*, BRB No. 99-1166 BLA (Aug 21, 2000)(unpub.). Specifically, the Board held that the administrative law judge erred in finding that the existence of complicated pneumoconiosis was established and remanded the claim in order for the administrative law judge to provide "a more complete rationale" in weighing all evidence on the issue of complicated pneumoconiosis. *Booth*, slip op. at 6. The Board further held that if on remand, the administrative law judge found that claimant was unable to establish the existence of complicated pneumoconiosis, the administrative law judge was to consider the remaining elements of entitlement. *Booth*, slip op. at 6.

On appeal, employer relies upon *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), because the case at bar arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Employer asserts that pursuant to the holding of *Kirk* claimant's instant duplicate claim must be denied as a matter of law because it was not timely filed pursuant to 20 C.F.R. §725.308, as it was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner, specifically the opinion of Dr. Fritzhand. Director's Exhibit 41. Employer further contends that, even assuming the duplicate claim was timely filed, the administrative law judge erred in finding that the newly submitted evidence established a "material" change in conditions. Alternatively, employer asserts that in considering the merits of entitlement, the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis. Claimant responds, urging that the award of benefits be affirmed. Specifically, claimant argues that employer waived its right to assert the statute of limitations issue because, while employer raised the issue when the case was before the district director and in the first proceeding before the administrative law judge, it did not raise the issue when the case was previously before the Board on appeal. Further, claimant contends that because Dr. Fritzhand did not opine that claimant's total disability was due to pneumoconiosis or that it was directly communicated to claimant, it is insufficient to rebut the presumption of timeliness pursuant to Section 725.308. Claimant also argues that the administrative law judge properly found a material change in conditions established and that, in any case, employer is barred from raising it as an issue in this appeal as it was already considered and decided by the Board in its prior Decision and Order in this case. Finally, claimant contends that the administrative law judge properly found that the existence of complicated pneumoconiosis was established.³ The Director, Office of Workers' Compensation Programs (the Director), also responds, urging that the administrative law judge's award of benefits be affirmed. Specifically, the Director asserts that the medical opinion of Dr. Fritzhand did not constitute a medical determination of total disability due to pneumoconiosis within the meaning of Section 725.308(a) because it did not establish the requisite causal link between pneumoconiosis and disability, and that the Sixth Circuit court's "observations" on the issue of the statute of limitations at Section 725.308 constitute *dicta* hence they are not binding in this proceeding. Lastly, the Director argues that the administrative law judge properly found a material change in conditions established.⁴ Director's Brief at 3.

The Board's scope of review is defined by statute. If the administrative law judge's

³ Employer has filed a "Reply Brief" in response to claimant's brief.

⁴ Employer has filed a "Reply to Director's Response Letter" in response to the Director's brief.

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).

Employer initially argues that based on the Sixth Circuit’s holding in *Kirk, supra*, claimant’s application for benefits in this case must be denied as a matter of law as it was not timely filed and is thus barred by the three-year statute of limitations. See 20 C.F.R. §725.308.

We turn first to employer’s argument that the Sixth Circuit’s holding in *Kirk, supra*, bars the consideration of this duplicate claim as it was untimely filed. Section 725.308 provides in pertinent part that:

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

(b) There shall be a rebuttable presumption that every claim for benefits is timely filed.

20 C.F.R. §725.308.⁵ To constitute a “medical determination” that was “communicated to the miner” so as to trigger the statutory time limit for filing a claim, a medical report or workers’ compensation board finding must be adequately documented and reasoned and must clearly indicate a determination that the miner is totally disabled due to pneumoconiosis. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34 (1993).

Subsequent to the issuance date of the Decision and Order on Remand in the instant case, the Sixth Circuit issued its decision in *Kirk* in which it held 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. This clock is not stopped by the resolution of

⁵ The statutory authority for 20 C.F.R. §725.308 is found at Section 422(f) of the Act, 30 U.S.C. §932(f), which was amended by the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat 95 (1978), to provide, *inter alia*, miners the option of a filing deadline based on the later of either three years after a medical determination of total disability due to pneumoconiosis or three years after March 1, 1981, the effective date of the Reform Act.

the miner's claim or claims , and, pursuant to [*Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits.

264 F.3d at 608 (emphasis in original).⁶ The Sixth Circuit distinguished between “premature claims that are unsupported by a medical determination” which do not trigger the statute of limitations, and “[m]edically supported claims” which do trigger the statutory period. *Id.*

In the instant case, employer asserts that the record contains a medical opinion from Dr. Fritzhand, dated October 19, 1988, in which the physician opined that claimant suffered from simple pneumoconiosis arising out of coal mine employment and a mild pulmonary impairment which would prevent him from returning to coal mine employment, Director's Exhibit 41. Employer asserts that this opinion constitutes a medical determination of total disability due to pneumoconiosis communicated to the miner under the holding in *Kirk*, and, as such, the opinion “suffices to begin the ticking of the three-year limitations clock,” Employer's Brief at 15. Employer thus argues that the instant duplicate claim which was filed on August 1, 1997, Director's Exhibit 1, is barred by the statute of limitations. Because the administrative law judge has not addressed this issue, we must vacate his award of benefits and remand the case to the administrative law judge for consideration of whether the instant claim was timely filed pursuant to the holding in *Kirk*. See 20 C.F.R. §725.308; see also *Ferguson v. Jericol Mining, Inc.*, BLR , BRB No. 01-0728 BLA (Sep. 24, 2001). For purposes of determining whether Dr. Fritzhand's opinion is one that triggers the statute of limitations at Section 725.308, on remand the administrative law judge must specifically

⁶ As *Kirk, supra*, represents a significant change in the interpretation of the law regarding Section 725.308 and was issued subsequent to the issuance of the Decision and Order on Remand - Award of Benefits in this case, we are unable to say that employer has waived its right to contest this timeliness issue. See 20 C.F.R. §725.308(c) (time limits in are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances); but see *Cabral v. Eastern Associated Coal Co.*, 18 BLR 1-25 (1993).

address whether the physician's opinion, that claimant suffered from chronic obstructive pulmonary disease caused by coal dust exposure and a mild pulmonary impairment which would prevent him from performing his last coal mine employment, Director's Exhibit 41, constitutes a well reasoned opinion of total disability due to pneumoconiosis. *See* 20 C.F.R. §725.308(a); *Adkins, supra*. The administrative law judge must further determine whether the opinion was communicated to the miner. *See* 20 C.F.R. §725.308(a).⁷

In order to avoid any repetition of error on remand, we shall address employer's remaining contentions. Employer asserts that the administrative law judge erred in concluding that the newly submitted evidence, *i.e.*, that evidence submitted since the prior denial of benefits, established a material change in conditions because it merely established the presence of pneumoconiosis which had already been established. Employer argues that the Sixth Circuit clarified in *Kirk, supra*, the meaning of the material change in conditions standard enunciated in *Ross, supra, i.e.*, that there must there be not only a "change" in the miner's condition, but also that the change must be "material," and that the newly submitted positive x-ray evidence in this case did not establish a "material" change because it merely confirmed the presence of pneumoconiosis, the existence of which had already been shown by an x-ray and medical opinion. Hence, the denial of benefits by the district director in the original claim on this ground was mistaken. Employer contends that the administrative law judge's determination that a material change in conditions was established, and the Board's subsequent affirmance of that determination, must be vacated because the material change determination was based on a finding which should have been made previously, based upon the evidence in the record, and could not, therefore, establish a "material" change pursuant to *Kirk*.

We reject employer's argument. In *Kirk*, the Sixth Circuit, explained its holding in *Ross, supra*, stating that "in order to measure a 'change in conditions' the [administrative law judge] must compare the sum of the new evidence with the sum of earlier evidence on which the denial of the claim had been premised. A 'material change' exists only if the new evidence both establishes the element and is substantially more supportive of claimant." 264 at 608, 22 BLR at 2-300. Employer in this case is making the same argument found to be disingenuous by the Sixth Circuit in *Kirk*, because it points to a diagnosis of pneumoconiosis in the prior claim while overlooking the finding that the weight of the evidence established that claimant did not have pneumoconiosis. 264 at 608, 22 BLR at 2-301. The Sixth Circuit found this argument to be "disingenuous, however, because the [*Ross*] standard requires only

⁷ No such determination was made by the administrative law judge when this case was previously before him.

a substantial difference in the bodies of evidence, not a complete absence of evidence at an earlier time.” 264 at 608, 22 BLR at 2-301(emphasis added). Thus, we affirm our prior holding that the new evidence in this case establishes the existence of simple pneumoconiosis because that element had been properly previously adjudicated against claimant and was now found to have been established by “the vast preponderance of positive readings by numerous B-readers and board-certified physicians.” Administrative Law Judge’s Decision and Order dated July 27, 1999.

Lastly, employer contends that the administrative law judge erred in concluding that claimant established the existence of complicated pneumoconiosis at Section 718.304 and was, therefore, entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Employer asserts that the administrative law judge erred in concluding that the x-ray interpretations of complicated pneumoconiosis rendered by Drs. Aycoth and Barrett were entitled to the greatest weight inasmuch as Dr. Aycoth, a B-reader, was among the least qualified physicians to review the x-ray evidence and inasmuch as both of these physicians, unlike the other highly qualified physicians of record, merely noted a Category A opacity without indicating how the mass seen in the x-ray represented complicated pneumoconiosis and without addressing alternative diagnoses for the opacity. Thus, employer argues that the administrative law judge erred in crediting the reports of physicians who offered the least explanation regarding their findings. Employer’s Brief at 19. Employer also argues that the administrative law judge erred in discrediting those x-ray interpretations which diagnosed only the existence of simple pneumoconiosis, *i.e.*, the readings of Drs. Sargent, Abramowitz and Halbert, Employer’s Exhibits 1, 2. In addition, employer argues that the administrative law judge erred in concluding that the CT scan evidence supported a diagnosis of complicated pneumoconiosis as the administrative law judge failed to discuss the fact that Drs. Scott and Wheeler, both of whom read the CT scan as negative for complicated pneumoconiosis, Employer’s Exhibit 6, possessed radiological qualifications superior to those physicians who read the CT scans as positive for the presence of pneumoconiosis. Employer also argues that the administrative law judge erred in crediting the reports of the physicians who read the CT scans as positive for complicated pneumoconiosis because they failed to account for any alternative diagnoses. Claimant’s Exhibit 3. Finally, employer contends that the administrative law judge erred in failing to address other relevant evidence showing the absence of complicated pneumoconiosis.

When this case was previously before the Board, it vacated the administrative law judge’s finding that the existence of complicated pneumoconiosis was established. *Booth*, slip op. at 6. The Board remanded the case in order for the administrative law judge to address the x-ray readings of record in their entirety and to give “special consideration...to the readers’ comments as to whether or not the changes represented complicated

pneumoconiosis or neoplasm or cancer or other disease processes.” *Booth*, slip op. at 6.⁸

⁸ Section 718.304 provides in relevant part:

There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:

- (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
- (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
- (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition

which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original]. See *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, , BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

On remand, the administrative law judge found that the record contained thirty-four readings of five x-rays, twenty-six of which were interpreted as showing complicated pneumoconiosis and/or large opacities. Decision and Order on Remand at 5. Of these twenty-six interpretations, the administrative law judge concluded that twenty were equivocal as to the existence of complicated pneumoconiosis or some other disease process and were thus, of little weight. Decision and Order on Remand at 5. Of the remaining six x-ray interpretations, the administrative law judge accorded greatest weight to the interpretations of complicated pneumoconiosis rendered by Drs. Aycoth and Barrett, based on their superior qualifications,⁹ and the fact that they rendered definitive statements that the interpretations were positive for complicated pneumoconiosis. Decision and Order at 5. This was rational. Further, the administrative law judge found that Dr. Sargent's interpretation of the August 22, 1997 x-ray was equivocal on the issue of complicated pneumoconiosis because the physician's reading supported a finding of complicated pneumoconiosis and the physician stated that he "could not rule out old tuberculosis as a cause of the mass in the upper right lung." Decision and Order on Remand at 6. The administrative law judge, therefore, permissibly found Dr. Sargent's reading equivocal, and permissibly accorded the interpretation little weight. See *Justice v. Island Creek Coal Co.*, 11 BLR 1-191 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). Moreover, the administrative law judge permissibly accorded little weight to the x-ray interpretations of Drs. Sundaram and Younes, Director's Exhibits 14, 18, for the same reason, as the physicians failed to render a medical opinion as to the cause of a large opacity in the upper right lung. Decision and Order on Remand at 6. Further, on the same basis, contrary to employer's assertion, the administrative law judge permissibly accorded less weight to the x-ray interpretations of Drs. Abramowitz and Halbert, as the physicians failed to fully account for the existence of the large opacity demonstrated on their x-ray interpretations. Decision and Order on Remand at 5-6. We hold, therefore, that the administrative law judge rationally accorded greatest weight to the opinions of Drs. Aycoth and Barrett and thus, permissibly concluded that the x-ray evidence of record supported a finding of complicated pneumoconiosis pursuant to Section 718.304(a).

We further hold that the administrative law judge permissibly found that the CT scan evidence supports a finding of complicated pneumoconiosis. In reaching this conclusion, the administrative law judge assigned greatest weight to the CT scan interpretations of complicated pneumoconiosis rendered by Drs. Cappiello and Miller, Claimant's Exhibit 3. The administrative law judge found that the contrary CT scan interpretations of Drs. Scott and Wheeler were outweighed because of their failure to acknowledge at least the presence of simple pneumoconiosis, the existence of which is demonstrated by the "bulk of the

⁹ Drs. Barrett and Aycoth are B-readers and board-certified radiologists. Director's Exhibit 16; Claimant's Exhibit 1.

medical evidence.” Decision and Order on Remand at 7; *see generally Scott v. Mason Coal Co.*, 289 F.3d 263, BLR 2- (4th Cir. 2002).

Employer’s assertions with regard to the CT scan evidence is tantamount to a request that the Board reweigh the evidence of record, a role outside our authority. *See* 33 U.S.C. §921(b)(3); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988). We are unable to conclude that the administrative law judge’s decision to accord greatest weight to the CT scan interpretations of complicated pneumoconiosis constitutes an abuse of discretion as the administrative law judge has provided an affirmable basis for such a determination, *i.e.*, their opinions are unequivocal statements and consistent with the rest of the medical opinion evidence of record. *See generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). We affirm, therefore, the administrative law judge’s determination that the weight of the CT scan evidence supports a finding of complicated pneumoconiosis.

Lastly, we reject employer’s assertion that the administrative law judge erred in failing to consider medical opinions and objective tests demonstrating the absence of a disabling respiratory impairment. Contrary to employer’s assertion, evidence pertaining to the extent of a miner’s disability is not in and of itself relevant to the existence of complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-626 (6th Cir. 1999); *see also Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, BLR (4th Cir. 1999); *see generally Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 7 (1976). Accordingly, if reached, we affirm, as supported by substantial evidence, the administrative law judge’s determination that claimant established the existence of complicated pneumoconiosis. 20 C.F.R. §718.304.

Accordingly, the administrative law judge’s Decision and Order On Remand-Award of Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeal Judge

BETTY JEAN HALL
Administrative Appeals Judge