BRB No. 06-0568 BLA

LEAMON HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLACKFIELD COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 04/18/2007
	)	
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 – Granting Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Bobby Steve Belcher, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer and carrier.

Sarah M. Hurley (Jonathan L. Snare, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Granting Benefits (2004-BLA-6574) of Administrative Law Judge Joseph E. Kane rendered on 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). The administrative law judge credited claimant with twenty-one years of qualifying coal mine employment, and found that the claim was timely filed pursuant to 20 C.F.R. §725.308. Applying the regulations pursuant to 20 C.F.R. Part 718, based on the claim's filing date of June 30, 2003, the administrative law judge found that the new evidence submitted in support of this subsequent claim was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), the element of entitlement previously adjudicated against claimant, and thus claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Weighing all of the evidence of record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that this subsequent claim was timely filed pursuant to Section 718.308; in finding a change in an applicable condition of entitlement established without performing a qualitative comparison of the old and new evidence pursuant to Section 725.309(d); in relying on claimant's revised description of the exertional requirements of his usual coal mine employment rather than his original 1991 description to find a change in an applicable condition of entitlement established at Section 725.309(d) and total respiratory disability established at Section 718.204(b)(2)(iv); and in finding disability causation established at Section 718.204(c) without weighing the contrary probative evidence. Claimant responds, urging affirmance, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, declining to address the merits of this appeal but urging the Board to reject employer's arguments on the issues of timeliness at Section 725.308 and the standard for establishing a change in an applicable condition of entitlement at Section 725.309(d), to which employer replies in support of its position.[1]

[1] We affirm, as unchallenged on appeal, the administrative law judge's findings with regard to the length of claimant's coal mine employment; his finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b); and his finding that the weight of the evidence, old and new, was insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer initially challenges the administrative law judge's finding that the 1991 medical opinions of Drs. Myers and Baker were insufficient to trigger the running of the statute of limitations pursuant to Section 725.308 because they were unreasoned and had not been communicated to claimant. Employer asserts that because they were incorporated into the record in claimant's original claim filed on July 1, 1991 and in his second claim filed on February 12, 2001, the opinions of Drs. Myers and Baker were necessarily communicated to claimant by virtue of his status as a party to the earlier proceedings, and through notice to his attorney. Employer further maintains that the opinions constitute medical determinations of total disability due to pneumoconiosis, and that nothing in the statute, regulations, or case law requires that a medical opinion be reasoned or credible in order to start the running the statute of limitations. Employer's arguments lack merit.

Section 725.308 requires that a living miner's claim for benefits be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner or a party responsible for the care of the miner. 20 C.F.R. §725.308(a); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).[2] The regulation also provides that there is a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to Section 725.308(a) involves factual findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the Board held that "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins*, 19 BLR at 1-43. The Board reiterated this principle in *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993), in which it held that receipt of a medical determination of total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner. *Daugherty*, 18 BLR at 1-101. In accordance with these holdings, regardless of whether Drs. Myers and Baker

[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 Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

provided reasoned and credible medical opinions indicating that claimant was totally disabled due to pneumoconiosis, the administrative law judge rationally determined that because there is no evidence that these opinions were communicated to claimant in any form, employer failed to rebut the presumption of timeliness set forth in Section 725.308(c). Decision and Order at 4-5; *Adkins*, 19 BLR at 43; *Daugherty*, 18 BLR at 1-101.

We also find no merit in employer's assertion that 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* do not require that a physician's report be reasoned in order to begin the statutory limitations period. In *Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006), the Board considered and rejected arguments similar to those raised by employer herein, noting that "[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). In the case at bar, the administrative law judge acted within his discretion in finding that the 1991 opinions of Drs. Myers and Baker were unreasoned, as neither physician discussed the exertional requirements of claimant's usual coal mine employment; Dr. Myers did not explain why he concluded that claimant was totally disabled in light of his non-qualifying objective test results; and Dr. Baker's objective tests did not conform to regulatory requirements.[3] Decision and Order at 26; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc)*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). As substantial evidence supports the administrative law judge's findings pursuant to Section 725.308(c), they are affirmed.

Employer next maintains that any analysis of changed conditions pursuant to Section 725.309(d) must include consideration of the qualitative difference between the earlier evidence and the new evidence, consistent with *Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); and *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). We disagree. The Sixth Circuit precedent relied on by employer construed the prior version of Section 725.309, while the current claim was filed after the effective date of the amendments to this regulation. Under the revised

[3] The administrative law judge additionally found that Dr. Baker's opinion, that claimant would have difficulty performing sustained manual labor on an 8-hour basis and should have no further coal dust exposure due to pneumoconiosis, chronic obstructive pulmonary disease, chronic bronchitis and resting hypoxemia, was not the equivalent of a finding of total respiratory disability. Decision and Order at 26; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989).

version of Section 725.309, claimant no longer has the burden of proving a "material change in condition;" rather, claimant must show that one of the applicable conditions of entitlement has changed since the prior denial by submitting new evidence developed in connection with the current claim that establishes an element of entitlement upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2), (3); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).[4]

In the present case, the administrative law judge found that claimant had established a change in an applicable condition of entitlement pursuant to Section 725.309(d) because new evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv), an element of entitlement previously adjudicated against claimant. Decision and Order at 14-18. Employer additionally argues, however, that claimant's degree of respiratory impairment has remained moderate since the prior denial, and that the administrative law judge's finding of disability rests upon a conclusory and erroneous characterization of claimant's duties as involving heavy manual labor, which in turn is based upon a revised description of the exertional requirements of claimant's usual coal mine employment.[5] As a consequence of the administrative law judge's characterization of claimant's duties, employer asserts that the administrative law judge improperly discounted the opinions of Drs. Fino and

[4] The Director notes that, in revising 20 C.F.R. §725.309, the Department of Labor intended to afford full effect to the Fourth Circuit's decision in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), which rejected the Sixth Circuit's requirement that the factfinder consider the qualitative difference between earlier and current evidence. Director's Brief at 6; *see* 65 Fed. Reg. 79968 (Dec. 20, 2000); 64 Fed. Reg. 54984 (Oct. 8, 1999).

[5] We reject employer's argument that claimant is bound by the description of his employment duties provided in his original claim, and that the administrative law judge is precluded from considering claimant's later description of his employment duties through application of the doctrines of collateral estoppel and/or judicial estoppel. Collateral estoppel forecloses the relitigation of issues that are identical to issues that have been actually determined and necessarily decided in prior litigation in which the party against whom issue preclusion is asserted had a full and fair opportunity to litigate, *see Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999)(*en banc*), while judicial estoppel precludes a party from gaining an advantage twice by taking a position in a later proceeding that is inconsistent with one successfully and unequivocally asserted by that same party in an earlier proceeding. *See Warda v. C.I.R.*, 15 F.3d 533, 538 (6th Cir. 1994). In the present case, the Director correctly maintains that neither doctrine is applicable because claimant's previous claims were denied and the issue of the exertional requirements of claimant's coal mine employment was not litigated in them.

Westerfield on the issue of total respiratory disability at Section 718.204(b)(2)(iv). Employer's arguments have merit.

Noting that claimant had chosen not to testify at the hearing but had submitted an employment questionnaire indicating that his duties required lifting and carrying at least fifty pounds throughout the day, the administrative law judge concluded that claimant's last coal mine employment involved heavy manual labor. Decision and Order at 2; Director's Exhibit 6. Employer correctly maintains, however, that claimant's original employment questionnaire, filed in July 1991 following claimant's retirement in March 1991, provided contradictory information regarding the exertional requirements of claimant's job duties.[6] Moreover, the description of exertional requirements that claimant provided to Dr. Rasmussen in 2003[7] differed significantly from claimant's indication to Dr. Fino in 2001 that "there was no heavy labor involved with his last job," Director's Exhibit 2 at 67. As the administrative law judge failed to acknowledge the inconsistent descriptions of the exertional requirements of claimant's coal mine employment contained in the record, resolve the conflicts in this evidence, and provide a rationale for his findings that comports with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), we vacate the administrative law judge's findings pursuant to Section 725.309(d), and remand this case for further findings. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Additionally, as the administrative law judge's determination regarding the exertional requirements of claimant's job duties impacted his weighing of the medical opinions on the issue of total respiratory disability, we also vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv) for a reevaluation of the evidence thereunder. On remand, the administrative law judge must consider all of the relevant evidence and determine the exertional requirements of claimant's usual coal mine employment, then compare those requirements with the physicians' assessments, and

[6] Claimant's 1991 employment questionnaire listed his job title as mechanic and buggy operator from 1990 to 1991, and described the physical activity required by the job as: sitting for 30 minutes per day; crawling all day back and forth through the mine for 7-1/2 hours per day; lifting 10-12 pounds 3-4 times per day; lifting 100 pounds per day with help; and carrying not applicable. Director's Exhibit 1. Claimant's 2001 and 2003 employment questionnaires listed the physical activity required by the job as: sitting 30 minutes per day for lunch; crawling 4 hours per day; lifting 50 pounds all day except lunch; and carrying 50 pounds 200-300 feet all day. Director's Exhibits 2, 6.

[7] Dr. Rasmussen reported that claimant's last job required him to carry tools, perform heavy lifting, set timbers, rock dust with 50-pound bags, and shovel ribs, which involved considerable heavy manual labor and some very heavy manual labor. Director's Exhibit 10.

determine whether claimant has established total respiratory disability at Section 718.204(b)(2)(iv) and a change in an applicable condition of entitlement at Section 725.309(d). *See Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

Lastly, employer challenges the administrative law judge's finding of disability causation at Section 718.204(c). After determining that Dr. Rasmussen provided the only well-reasoned opinion on the issue of total respiratory disability, the administrative law judge found that claimant's disability was caused by legal pneumoconiosis based on Dr. Rasmussen's conclusion that coal dust exposure was a major contributing factor in the disability, along with smoking. Decision and Order at 27. Employer correctly maintains, however, that the administrative law judge failed to address the conflicting opinion of Dr. Westerfield, who diagnosed clinical pneumoconiosis by x-ray but concluded that coal dust was a negligible contributor to claimant's pulmonary dysfunction, which was caused by smoking with some contribution from prior tuberculosis. Director's Exhibit 15. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(c), and instruct him to address and weigh all relevant evidence on the issue of disability causation if, on remand, total respiratory disability is established. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

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