

BRB No. 07-0857 BLA

W.C.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BENHAM COAL, INCORPORATED)	DATE ISSUED: 07/18/2008
)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices), Harlan, Kentucky, for claimant.

Emily Goldberg-Kraft (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the June 15, 2007 Decision and Order (2006-BLA-05249) of Administrative Law Judge Robert D. Kaplan dismissing a subsequent claim¹ filed

¹ Claimant's original claim was filed on May 22, 1986. In a Decision and Order issued on January 5, 1990, Administrative Law Judge Richard E. Huddleston denied benefits, finding that the evidence was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202, or total respiratory disability pursuant to

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 determined that the medical report of Dr. Clarke, dated November 27, 1985, was sufficient to constitute a reasoned diagnosis of total disability due to pneumoconiosis that had been communicated to claimant to start the running of the three-year statute of limitations pursuant to 20 C.F.R. §725.308. As the present subsequent claim was filed on December 9, 2004, the administrative law judge dismissed the claim as untimely filed pursuant to Section 725.308(c).

On appeal, claimant contends that the evidence of record is insufficient to establish rebuttal of the presumption of timeliness at Section 725.308(c), and thus, the administrative law judge erred in dismissing the claim. Specifically, claimant challenges the administrative law judge's finding that Dr. Clarke's opinion was communicated to claimant. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of claimant's contentions.

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.² 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).

The Act and its implementing regulation require 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. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). In order to trigger the running of the three-year statute of limitations, the medical determination must be a reasoned opinion of a medical professional. *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (*en banc*). Additionally, the regulation provides 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

20 C.F.R. §718.204. Director's Exhibit 1 at 1-1, 1-10. Claimant took no further action until the filing of his current claim on December 9, 2004. Director's Exhibit 3.

² This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 6-8.

administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

In the present case, both claimant and the Director maintain that there is no evidence in the record to support a finding that Dr. Clarke's diagnosis of total disability due to pneumoconiosis was ever communicated to the miner in a manner that would trigger the running of the three-year statute of limitations pursuant to Section 725.308(a). We agree. After finding that Dr. Clarke's opinion was a reasoned determination of total disability due to pneumoconiosis by a medical professional, the administrative law judge concluded that the opinion triggered the three-year statute of limitations, at least fifteen years before the current claim was filed, because "the report is in the evidentiary record and was communicated to Claimant's attorney on or about November 27, 1985, and to Claimant himself at least by [Administrative Law] Judge [Richard E.] Huddleston's Decision and Order on or about January 5, 1990." Decision and Order at 3-4. In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), however, 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. As the record reflects no evidence that claimant actually received the report, but only that Dr. Clarke's report was addressed to the attorney representing claimant at the time the opinion was rendered, communication of the report to claimant cannot be established. Additionally, claimant testified at the hearing but was not questioned with regard to his receipt of Dr. Clarke's opinion, and the record contains no evidence that Dr. Clarke communicated his opinion directly to the miner.

Similarly, while the record reflects that Judge Huddleston's Decision and Order was mailed to claimant, there is no evidence that claimant received it. Moreover, although the regulation at Section 725.308 is silent on the issue, the case law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, suggests that a summary description of the physician's opinion which is contained in a legal determination does not constitute a medical determination. *See Ken Lick Coal Co. v. Director, OWCP [Lacy]*, No. 06-4512 (6th Cir. Nov. 2, 2007)(unpub.). Thus, we hold that the issuance of an administrative law judge's Decision and Order to a miner, describing a reasoned opinion of total disability due to pneumoconiosis by a physician, without more, is insufficient to trigger the running of the three-year statute of limitations pursuant to Section 725.308 and *Kirk*. As the record herein contains no evidence to support a finding that Dr. Clarke's opinion was communicated to the miner, employer has failed to satisfy its burden to rebut the presumption of timeliness. Consequently, we reverse the administrative law judge's finding that the instant claim was untimely filed pursuant to Section 725.308, and remand this case to the administrative law judge for a

determination as to whether new evidence submitted in support of this subsequent claim is sufficient to demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and consideration of the merits of entitlement, if reached. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Accordingly, the administrative law judge's Decision and Order Dismissing the Claim is reversed, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I concur in the result, but write for purposes of clarification. The true holding in this case is that neither communication with claimant's counsel, nor issuance of a judicial opinion without evidence of receipt by claimant, constitutes communication to claimant for purposes of 20 C.F.R. §725.308(a). The statute of limitations issue in this case, as presented by claimant, and briefed by the parties, was whether there was communication to claimant. Whether the opinion of a physician which is set out in a judicial opinion may constitute a medical determination was not an issue raised before us, and, whatever the merits, deserves proper briefing and consideration.

JUDITH S. BOGGS
Administrative Appeals Judge