BRB No. 08-0482 BLA

H.C. Claimant-Respondent v. W & C COAL COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/29/2009 DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 – Awarding Benefits (2007-BLA-5315) of Administrative Law Judge Ralph A. Romano 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 fourteen and three-quarters years of coal mine employment, and determined that this subsequent claim, filed on May 10, 2004, was subject to the regulatory provisions at 20 C.F.R. §725.309(d). The administrative law judge determined that claimant's previous claim had been denied because claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or total disability due to pneumoconiosis.[1] The administrative law judge concluded that the evidence of record in the prior claim was entitled to significantly diminished weight because it was twelve years older, at best, than the new record evidence, and he found that the weight of the evidence was sufficient to establish both 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), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the current claim was timely filed, and in calculating the length of claimant's qualifying coal mine employment. Employer also contends that the administrative law judge failed to conduct the required analysis under Section 725.309(d), and challenges the administrative law judge's weighing of the evidence on the merits of the claim on the issues of the existence of pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the miner's subsequent claim was timely filed. Employer has filed a reply brief to claimant's response, as well as a reply to the Director.

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,

[1] Claimant's first claim for benefits, filed on February 2, 1988, was denied by the district director on July 14, 1988, because claimant failed to establish any element of entitlement. Administrative Law Judge Charles W. Campbell issued an order dismissing the claim on August 18, 1992 due to claimant's failure to appear at the hearing. Director's Exhibit 1-11.

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).

Initially, employer contends that the administrative law judge erred in finding the miner's subsequent claim to be timely filed. Employer asserts that claimant's testimony and the 1987 medical report of Dr. Potter are sufficient to rebut the presumption of timeliness. Employer's Brief at 12-13. We disagree.

The Black Lung Benefits Act 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. 30 U.S.C. §932(f);[3] 20 C.F.R. §725.308(a);[4] *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). In order to trigger the running of the three-year statute of limitations, the medical determination must be a

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[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

[3] 30 U.S.C. §932(f) provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later-
> (1) a medical determination of total disability due to pneumoconiosis; or
> (2) March 1, 1978.

[4] 20 C.F.R. §725.308 was promulgated to implement 30 U.S.C. §932(f). It provides in relevant part:

> (a) A claim for benefits filed under this part by, or on behalf of, a miner shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

reasoned opinion of a medical professional.[5] *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). In the present case, the administrative law judge considered the medical reports associated with claimant's previous claim, and properly determined that "there was no well reasoned physician opinion in evidence that concluded that claimant had a total pulmonary disability due to pneumoconiosis." Decision and Order at 6; *see Kirk*, 264 F.3d at 607, 22 BLR at 2-296. The Director correctly notes that Dr. Potter's 1987 report diagnosed pneumoconiosis, but not a totally disabling respiratory impairment due to pneumoconiosis; rather, the physician checked boxes indicating that claimant should not return to underground coal mining because of pneumoconiosis and that he would not pass claimant on a pre-employment physical for underground coal mining or comparable work. Director's Exhibit 13 at 19. Further, claimant's testimony that Dr. Potter "recommended me to quit the coal mines," and that claimant agreed with the statement that Dr. Potter "told [claimant] that [he was not] able to return to working in the coal mines," even if accepted, does not establish that Dr. Potter communicated to claimant that he lacked the respiratory capacity to perform his usual coal mine employment or similar work due to pneumoconiosis. Director's Exhibit 19 at 14; *see Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308.

Employer next challenges the administrative law judge's method of computing claimant's years of coal mine employment as being neither reasonable nor supported. Employer's Brief at 11. Employer's argument lacks merit. The administrative law judge acted within his discretion in relying on the Social Security Administration (SSA) records to credit claimant for each calendar quarter in which he earned $50.00 or more from a coal company.[6] The administrative law judge also permissibly credited claimant with an

[5] Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year time limit for filing a claim if it was discredited or found to be outweighed by contrary evidence in a prior adjudication. *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, ___ BLR ___ (6th Cir. 2009)(a misdiagnosis is not legally distinguishable from a non-diagnosis or self-diagnosis).

[6] Relying on the Social Security Administration (SSA) records, the administrative law judge credited claimant with three-quarters of a year of employment with Mustang Coal Co. between 1968 and 1970; one-quarter year of employment with Moe Coal Co. in 1973; three-quarters of a year of employment with Incoal Co. in 1975; one-quarter year of employment with employer, W&C Coal Co., in 1975, and an additional 12 years

additional one-half year based on claimant's testimony and employment history form. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); Decision and Order at 4; Director's Exhibit 9. Because the administrative law judge's determination is based on a reasonable method of computation, we affirm the administrative law judge's finding that claimant has established fourteen and three-quarters years of coal mine employment, as supported by substantial evidence. *See Tackett v. Director, OWCP*, 6 BLR 1-839 (1984); *Combs v. Director, OWCP*, 2-BLR 1-904 (1980).

Employer next challenges the administrative law judge's finding that the weight of the medical opinions of record was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). Employer contends that the administrative law judge provided no valid reason for according the greatest weight to Dr. Baker's diagnosis of pneumoconiosis,[7] which employer asserts is neither well-reasoned nor sufficient to establish the existence of legal pneumoconiosis or disability causation as a matter of law, and for according less weight to the contrary opinions of Drs. Jarboe and Rosenberg, who

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between 1976 and 1988; and one-quarter year of employment with L & L Coal Co. in 1980, for a total of 14.25 years. Director's Exhibit 9. The administrative law judge also credited claimant's testimony that he worked for Atkinson Coal Co. for one-half year in 1974, for a total of 14.75 years. Although employer maintains that the administrative law judge should have credited claimant's testimony that he last worked for employer on October 18, 1986, Employer's Brief at 11-12, the administrative law judge permissibly relied instead on the SSA records, which were consistent with claimant's testimony that he worked approximately 12-1/2 to 13 years for employer. *See* Hearing Transcript at 11; Director's Exhibits 2, 7. Employer also challenges the administrative law judge's crediting of six quarters of coal mine employment during periods when claimant earned greater amounts in non-coal mine employment. Employer's Brief at 11. Employer has not demonstrated reversible error, however, and even without credit for the challenged quarters, claimant has established more than ten years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[7] Dr. Baker diagnosed coal workers' pneumoconiosis, 1/0, based on x-ray and 13-1/2 years of underground coal dust exposure. He further diagnosed chronic obstructive pulmonary disease (COPD) with severe obstructive defect, based on claimant's pulmonary function study, due to "coal dust exposure/question cigarette smoking." Director's Exhibit 51-146. Dr. Baker opined in an addendum to his report that claimant's obstructive airway disease is caused primarily by his cigarette smoking history, with a minimal or an insignificant contribution from his coal dust exposure. Director's Exhibit 51-147. The doctor further attributed claimant's Class 4 impairment, indicating a disability of 50% to 100% of the whole person, to all of the diagnosed cardiopulmonary illnesses. Director's Exhibit 51.

diagnosed neither clinical nor legal pneumoconiosis. Employer's Brief at 14-15. Some of employer's arguments have merit.

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2),[8] is sufficient to support a finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In evaluating the conflicting medical opinions, the administrative law judge summarized the physicians' findings, noting that Dr. Baker and claimant's treating physician, Dr. Potter, diagnosed claimant with pneumoconiosis, emphysema, and/or chronic obstructive pulmonary disease (COPD) attributable to a combination of coal dust exposure and smoking, while Drs. Wicker,[9] Jarboe[10] and Rosenberg[11] diagnosed emphysema and COPD due to asthma

[8] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Arising out of coal mine employment" is defined to include any chronic pulmonary or respiratory disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[9] Dr. Wicker performed a pulmonary evaluation for the Department of Labor on June 11, 2004, and opined that claimant does not have a chronic respiratory or pulmonary disease caused by his coal dust exposure. He diagnosed disabling COPD secondary to cigarette abuse. Director's Exhibits 14, 17.

[10] Dr. Jarboe examined claimant on September 6, 2007, and diagnosed chronic bronchitis, severe pulmonary emphysema, coronary artery disease, angina pectoris, and hypertension. He opined that claimant was totally and permanently disabled from a respiratory or pulmonary standpoint due to smoking and asthma, and stated that claimant's condition was not caused by, aggravated by, or substantially contributed to, by coal dust exposure. Dr. Jarboe explained that, while claimant had a sufficient exposure history to contract coal workers' pneumoconiosis, the absence of any demonstrable dust on CT scan argued very strongly against emphysema caused by inhalation of coal dust, as simple pneumoconiosis would not cause this degree of emphysema and hyperinflation and impairment of diffusion. Employer's Exhibits 3, 4.

[11] Dr. Rosenberg examined claimant on August 10, 2004, and although he acknowledged that claimant had a sufficient coal dust exposure history to contract coal workers' pneumoconiosis, he diagnosed disabling smoking-related COPD that was not caused or aggravated by coal mine dust exposure, as the abnormalities evidenced on physical examination, x-ray, pulmonary function testing, or blood gas testing were not related to the inhalation of coal mine dust. Dr. Rosenberg explained that claimant's marked decrease in the ratio of FEV_1/FVC, combined with marked bronchodilator response, diffuse emphysematous changes without focal emphysema, low diffusing

and smoking, but unrelated to coal dust exposure. Decision and Order at 16. The administrative law judge set forth the regulatory definition of legal pneumoconiosis, and found that Dr. Baker "clearly makes a diagnosis of pneumoconiosis" because, although he reported that smoking was the more significant contributor to claimant's impairment, the physician indicated that there was a significant contribution from coal dust exposure as well. Decision and Order at 15-16. Employer correctly notes, however, that the administrative law judge misconstrued Dr. Baker's opinion and failed to address the discrepancy between Dr. Baker's report, attributing claimant's pulmonary diagnoses to "coal dust exposure/question cigarette smoking," Director's Exhibit 51-146, and the addendum, wherein the physician diagnosed clinical pneumoconiosis and "possible legal pneumoconiosis as well," and indicated that claimant "may have legal pneumoconiosis;" that coal dust exposure "may be a minimal contributing factor to [claimant's] obstructive airway disease and moderate resting arterial hypoxemia;" and that the contribution of coal dust exposure to claimant's pulmonary impairment was "minimal or insignificant." Director's Exhibit 51-147; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *see also Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Rather, the administrative law judge determined that Dr. Baker's opinion was well-reasoned because "his report's underlying documentation in addition to the Claimant's treatment history and hospital records for COPD, emphysema, and pneumoconiosis thoroughly support his conclusions." Decision and Order at 16. The administrative law judge then found that Dr. Baker's opinion was entitled to determinative weight because it was "better explained," and because Drs. Wicker, Jarboe and Rosenberg "do not explain as to why they have ruled out Claimant's history of coal mine dust exposure as a potential etiology or aggravating factor, despite acknowledging several years of coal mine employment." *Id*. However, the administrative law judge mischaracterized the opinions of Drs. Jarboe and Rosenberg, whose reports and deposition testimony provided explanations for their conclusions, as summarized by the administrative law judge. *See Tackett*, 7 BLR at 1-706; Decision and Order at 12-14; Employer's Exhibits 1-4, 9. Moreover, the administrative law judge failed to subject all of the conflicting medical opinions to the same scrutiny, as he did not explain how the underlying documentation and medical records better supported Dr. Baker's diagnoses of "possible" legal pneumoconiosis and clinical pneumoconiosis based on a positive x-ray, in light of the administrative law judge's finding that the x-ray evidence and CT scan evidence were negative for pneumoconiosis, and in light of the regulatory definition of pneumoconiosis. 20 C.F.R. §718.201(a), (b); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge also did not indicate the appropriate weight to be accorded the opinion of Dr. Potter pursuant to the regulatory provisions at 20 C.F.R.

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capacity, airtrapping and CO_2 retention, showed that claimant's pattern of obstruction was not that seen with coal dust exposure or legal pneumoconiosis, but rather was characteristic of a smoking-related form of airways disease. Employer's Exhibits 1, 2, 9.

§718.104(d). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Consequently, we must vacate the administrative law judge's findings at Section 718.202(a)(4), and remand this case for a reevaluation and weighing of the conflicting medical opinions of record on the issue of the existence of pneumoconiosis. Furthermore, because the administrative law judge's assessment of the medical opinion evidence of record affects his findings on the issue of disability causation, we also vacate his findings at Section 718.204(c) for a reassessment of the evidence thereunder on remand, if reached.

Lastly, employer maintains that the administrative law judge failed to conduct the requisite analysis under Section 725.309(d),[12] and applied a presumption of progressivity, rather than analyzing all of the evidence of record. Employer's Brief at 13. While acknowledging that this is a subsequent claim, the administrative law judge did not render an explicit finding that claimant had established a change in an applicable condition of entitlement; rather, he adjudicated the merits of the claim after noting the progressive nature of pneumoconiosis and finding the persuasive value of the earlier evidence of record to be severely diminished due to its age. Decision and Order at 7. Because this case must be remanded for a reassessment and reweighing of the medical evidence of record, the administrative law judge is instructed, on remand, to determine whether the weight of the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement at Section 725.309(d) before proceeding to the merits of the claim based on all the evidence of record. *See White v. New White Coal Co.*, 23 BLR 1-1 (2004). We note, however, that the earlier evidence may properly be entitled to diminished weight due to its age. *See Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(*en banc*).

[12] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge 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