U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0511 BLA

FARRELL REED	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DICKENSON-RUSSELL COAL COMPANY, LLC	)	
	)	
	)	DATE ISSUED: 08/21/2018
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Maia S. Fisher (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05874) of Administrative Law Judge Patrick M. Rosenow rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on July 29, 2013.

Based on employer's concession, the administrative law judge credited claimant with 35.48 years of underground coal mine employment. The administrative law judge determined that the claim was timely filed, and that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Employer argues that the administrative law judge erred in finding that claimant timely filed his claim. Employer also filed a motion to hold this case in abeyance. The Director, Office of Workers' Compensation Programs, filed a limited response, urging the Board to deny employer's motion.[1] Claimant did not file a response brief in this appeal.[2]

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] Employer's motion to hold this case in abeyance pending a decision in *Lucia v. SEC*, 832 F.3d 277 (D.C. Cir. 2016), *aff'd on reh'g*, 868 F.3d 1021 (Mem.) (2017), *cert. granted*, 585 U.S. , 138 S.Ct. 736 (2018), has been rendered moot by the issuance of a decision by the United States Supreme Court on June 21, 2018. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044 (2018). We further hold that employer has forfeited the issue of whether the manner in which the Department of Labor's administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II § 2, cl. 2, because employer raised this argument for the first time in its abeyance request, filed approximately nine months after its brief in support of the petition for review, and seven months after the briefing schedule closed. *See Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (The Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal.); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 35.48 years of underground coal mine employment and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5, 17.

and in accordance with applicable law.[3] 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, 362 (1965).

Timeliness of the Claim

Employer contends that the administrative law judge erred in finding that claimant's July 29, 2013 claim was timely filed. Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing regulation, set forth at 20 C.F.R. §725.308, requires that the medical determination of total disability due to pneumoconiosis be "communicated to the miner or a person responsible for the care of the miner," and provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an oral communication of a medical determination of total disability due to pneumoconiosis is sufficient to trigger the running of the statute of limitations. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426-27, 23 BLR 2-321, 2-329-30 (4th Cir. 2006); *see also Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). Therefore, to rebut the presumption of timeliness, employer must show that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Considering whether employer satisfied its burden to rebut the presumption of timeliness at 20 C.F.R. §725.308, the administrative law judge summarized all of the medical evidence of record, together with claimant's deposition and hearing testimony. The administrative law judge also noted that from 2008 to 2012, Dr. Robinette, claimant's treating physician, repeatedly addressed the impact of claimant's pneumoconiosis on his ability to work as a miner.[4] Claimant's Exhibit 4; *see* Decision and Order at 11, 17.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] First, on October 17, 2008, Dr. Robinette stated that he had "explained to [claimant] that clearly his x-ray is abnormal and that he must cease any dust exposure whether using a respirator[] or being transferred to an alternate site in the mines." Employer's Exhibit 3; *see* Decision and Order at 9, 14. Shortly afterwards, on November 4, 2008, Dr. Robinette stated that he had "explained to [claimant] that he has evidence of

The administrative law judge determined, based on claimant's credible testimony, and the fact that he continued to work, that "[c]laimant subjectively understood that as long as he was actually working he was not totally disabled."[5] Decision and Order at 14. Thus, the administrative law judge considered whether a reasonable person would interpret Dr. Robinette's statements as being a diagnosis of total disability, as defined in the regulations. *Id*. He found that none of Dr. Robinette's communications to the miner before July 30, 2010, *i.e.* more than three years before he filed his claim on July 29, 2013, was legally sufficient to trigger the running of the statute of limitations. Decision and Order at 14-17. Consequently, the administrative law judge concluded that employer failed to rebut the

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severe pulmonary disease with interstitial pulmonary fibrosis related to an occupational pneumoconiosis," that "[he] is obviously disabled from working on the basis of his pulmonary disease alone" and that he should "cease any and all further dust exposure." Employer's Exhibit 2; *see* Decision and Order at 9-10, 14. From November 14, 2008 through April 19, 2010, Dr. Robinette's notes continued in a similar vein, stating: "Clearly, [claimant] is disabled from working on the basis of his pulmonary disease. He has diffuse pneumoconiosis with evidence of a restrictive ventilatory defect and a reduction in his diffusion capacity;" "I felt that he was disabled from working as an underground miner based on his pulmonary disease;" "I did discuss with him the fact that he is disabled from working on the basis of his pulmonary disease;" "I reviewed . . . the [x-ray showing a Category B mass] with the patient and compared [it] to his prior CT scan. [Claimant] is disabled from working on the basis of his lung disease. He needs to stop working in the mining industry and apply for black lung disability;" "[c]early the patient has evidence of complicated pneumoconiosis with progressive massive fibrosis. I have encouraged him to stop working in the mining industry because of his radiographic findings and his severe functional impairment;" and "[c]learly, he has evidence of occupational pneumoconiosis and should avoid any and all dust exposure." Employer's Exhibit 6; see Decision and Order at 10-11, 15-16. On November 2, 2010, Dr. Robinette stated that he "again reinforced the importance of [claimant] stopping dust exposure because of his marked radiographic abnormalities; on May 4, 2011, Dr. Robinette noted that he had "had multiple discussions with [claimant] in the past concerning his capacity to continue to work as an underground miner, particularly breathing respirable dust." Claimant's Exhibit 4; *see* Decision and Order at 11. On June 5, 2012, Dr. Robinette stated that he had advised claimant that he was "no longer able to work at any vocation." Claimant's Exhibit 4; *see* Decision and Order at 11-12; 17.

[5] Claimant continued to work until May 2012. He testified that the reason he continued to work was because he didn't think his condition was that bad and he was not in a position to quit. Decision and Order at 14; Hearing Tr. at 18-19; Employer's Exhibit 1 at 25.

presumption that claimant's July 29, 2013 claim was timely filed. Decision and Order at 17.

Employer asserts that in finding the claim timely, the administrative law judge erred in relying exclusively on Dr. Robinette's treatment records without adequately considering claimant's deposition and hearing testimony which, employer contends, establish that claimant was aware that Dr. Robinette told him he was disabled in 2008 and 2009. Employer's Brief at 13. We disagree. The administrative law judge considered both claimant's deposition and hearing testimony and determined that while claimant was a "generally credible witness in terms of candor and honesty," he was attempting to recall multiple conversations with Dr. Robinette that took place many years ago. Decision and Order at 13. He found that the contemporaneous treatment notes of Dr. Robinette were more reliable as to what was discussed at each visit. *Id.* Thus, contrary to employer's argument, the administrative law judge permissibly accorded greater weight to Dr. Robinette's treatment notes as the "more reliable" evidence regarding his conversations with claimant. *See Miller v. Director, OWCP*, 7 BLR 1-693, 1-694 (1985) (An administrative law judge is charged with determining the credibility of all witnesses and may reject testimony found to be not credible.); Decision and Order at 13; Employer's Brief at 9, 13.

Employer next argues that in determining whether Dr. Robinette's treatment notes established total disability the administrative law judge analyzed the evidence under an erroneous legal framework. Employer's Brief at 8. Employer asserts that the administrative law judge erred in comparing Dr. Robinette's statements to the regulatory definition of total disability. Employer's argument has merit, in part. The administrative law judge noted that a miner shall be considered totally disabled under the regulations if he has a pulmonary or respiratory impairment which, standing alone, prevents or prevented him:

(i) From performing his or her usual coal mine work; and
(ii) From engaging in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time.

20 C.F.R. §718.204(b)(1). Applying this standard, the administrative law judge noted that in his initial treatment note dated October 17, 2008, Dr. Robinette stated:

> I explained to [claimant] that clearly his x-ray is abnormal and that he must cease any dust exposure whether using a respiratory [sic] or being transferred to an alternate site in the mines.

Employer's Exhibit 2. The administrative law judge reasoned:

> Even if this communication satisfies the (i) prong of total disability, which is questionable [ceasing dust exposure does not satisfy total disability], it does not satisfy the other necessary prong, (ii). Dr. Robinette does not address whether claimant would be able to perform the same level of work he was performing, away from dust exposure. Absent a medical opinion that he could not engaging [sic] in gainful employment in the immediate area of his or her residence requiring the skills or abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity over a substantial period of time, this communication is insufficient to trigger the statute of limitations.

Decision and Order at 14; Employer's Exhibit 3. In his November 8, 2008 treatment note, Dr. Robinette stated:

> I have explained to [claimant] that he has evidence of severe pulmonary disease with interstitial pulmonary fibrosis related to an occupational pneumoconiosis. . . I explained to [claimant] that [he] is obviously disabled from working on the basis of his pulmonary disease alone. He could [sic] cease any and all dust exposure and I gave him a work excuse for a minimum of two weeks pending a follow-up evaluation in our office to ascertain if there is any reversible component to his problems that I have described.

Employer's Exhibit 2. The administrative law judge reasoned:

> Though this explanation could be taken to suggest that he thinks claimant is totally disabled, his previous and future statements of being disabled from working in the coal mines make it equally as likely that he was saying, '[h]e is disabled from working [in his current position or in the coal mines].' Additionally, inadvisability of returning to coal mine employment because of pneumoconiosis does not constitute a finding of total disability. Therefore, this statement is equivocal as to timeliness and does not help employer overcome its burden.

Decision and Order at 15; Employer's Exhibit 2. Applying a similar analysis to each entry, the administrative law judge found that none of Dr. Robinette's treatment notes dated prior to July 30, 2010 constitutes a diagnosis of total disability under the regulations and,

therefore none was sufficient to trigger the running of the statute of limitations.[6] Decision and Order at 15-17. Rather, he found that the first communication to claimant that clearly satisfied the regulatory definition of total disability was Dr. Robinette's June 5, 2012 statement that he had advised claimant that he was no longer able to work at any vocation.[7] *Id.* at 17.

Contrary to employer's argument, in determining whether Dr. Robinette communicated a diagnosis of total disability to claimant more than three years before he filed his claim, the administrative law judge properly considered what it means to be totally disabled under the Black Lung regulations. Employer's Brief at 4. While Section 422(f) of the Act and its implementing regulation at 20 C.F.R. §725.308 require that any claim for benefits by a miner be filed within three years after a diagnosis of "total disability due to pneumoconiosis" has been communicated to him, neither specifically addressed what it means to be "totally disabled" for the purpose of establishing timeliness. Further, none of the Circuit Courts of Appeals, including the Fourth Circuit, has provided a separate definition of total disability in addressing whether a diagnosis of total disability due to pneumoconiosis has been communicated to the miner pursuant to 20 C.F.R. §725.308. Rather, the Circuit Courts simply reference the statutory and regulatory language requiring "a medical determination of total disability." *See e.g.*, *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 668, BLR (4th Cir. 2017); *Brigance*, 718 F.3d at 593, 25 BLR at 2-279; *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 251, 24 BLR 2-369, 2-374 (3d Cir. 2011); *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1221, 24 BLR 2-155, 2-171 (10th Cir. 2009); *Henline*, 456 F.3d at 423, 23 BLR at 2-325; *Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 997, 23 BLR 2-302, 2-314 (7th Cir. 2005). Thus, the administrative law judge rationally determined that the definition of total disability used to determine timeliness is the same as that used to establish entitlement under the regulations, *i.e.*, that a miner is totally disabled if a respiratory or pulmonary impairment prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); Decision and Order at 14.

[6] The administrative law judge also properly considered whether each treatment note was communicated to claimant.

[7] On June 5, 2012 Dr. Robinette stated: "I have given [claimant] an excuse stating his lung function has deteriorated to the point that he is no longer able to work at any specific vocation. I have advised him to apply for black lung benefits immediately and continue his medications as outlined." Claimant's Exhibit 4.

The administrative law judge began his analysis of Dr. Robinette's treatment notes by correctly acknowledging that a medical conclusion that a miner should not return to underground coal mining because of his pneumoconiosis is not sufficient to establish that a miner is totally disabled under the regulations. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989) (holding that a doctor's recommendation against further coal dust exposure is insufficient to establish a totally disabling respiratory impairment); Decision and Order at 14-16. Thus, he properly considered whether Dr. Robinette's statements, taken together, establish that he was recommending that claimant avoid further exposure at the coal mine, or opining that claimant cannot do the work there. *See Stallard*, 876 F.3d at 669; Decision and Order at 14-17.

The administrative law judge erred, however, in further examining whether Dr. Robinette's statements establish that claimant cannot perform comparable gainful work outside of the mines, pursuant to 20 C.F.R. §718.204(b)(1)(ii). Decision and Order at 14-17. Contrary to the administrative law judge's analysis, it is not "necessary" for claimant to prove that he is totally disabled for *all* work in order to establish that he is totally disabled under the regulations. Decision and Order at 14, 15, 17. Rather, once a claimant has established that he is unable to perform his usual coal mine work, a *prima facie* case for total disability exists and the party opposing entitlement bears the burden to prove that claimant is capable of performing comparable and gainful employment pursuant to 20 C.F.R. §718.204(b)(2).[8] *Taylor v. Evans & Gambrel Co.*, 12 BLR 1-83, 1-86-87 (1988)

[8] In *Taylor*, a case that arose in the Sixth Circuit, the Board held that if 20 C.F.R. §718.204(b) is interpreted as requiring claimant to prove not only an inability to perform his usual coal mine work, but also an inability to perform comparable gainful work, it would impose upon the claimant a burden of proof that various Courts of Appeals, including the Sixth Circuit, have not imposed upon claimants under Section 223(d) of the Social Security Act. *E.g. O'Banner v. Secretary of Health, Education & Welfare*, 587 F.2d 321 (6th Cir. 1978); *Myers v. Weinberger*, 514 F.2d 293 (6th Cir. 1975); *Noe v. Weinberger*, 512 F.2d 588 (6th Cir. 1975); *see also Brinker v. Weinberger*, 522 F.2d 13 (8th Cir. 1975); *Taylor v. Weinberger*, 512 F.2d 664 (4th Cir. 1975). Because the Black Lung Benefits Act prohibits the Secretary of Labor from defining total disability with more restrictive criteria than that imposed under Section 223(d) of the Social Security Act, *see* 30 U.S.C. §902(f), the Board declined to interpret 20 C.F.R. §718.204(b) in such a manner. Thus, the Board held that, under 20 C.F.R. Part 718, once a claimant has established an inability to perform his usual coal mine employment, a *prima facie* case for total disability exists. Thereafter, the party opposing entitlement bears the burden of going forward with evidence to prove that claimant is able to perform comparable and gainful employment as defined in 20 C.F.R. §718.204(b)(2). *Taylor v. Evans and Gambrel Co., Inc.*, 12 BLR 1-83, 1-87 (1988).

(declining to interpret 20 C.F.R. §718.204(b) as requiring more restrictive criteria than the criteria under the Social Security Act, as mandated pursuant to Section 402(f)(1) of the Act, 30 U.S.C. §902(f)(1)).

It is unclear in this case whether the incorrect portion of the administrative law judge's analysis pursuant to 20 C.F.R. §718.204(b)(1)(ii) impacted his determination that Dr. Robinette's statements are not sufficient to establish that a diagnosis of total disability due to pneumoconiosis was communicated to claimant prior to July 30, 2010. We, therefore, must vacate his finding that employer did not rebut the presumption that this claim was timely filed. Consequently, we also vacate the award of benefits, and remand this case for the administrative law judge to reconsider the timeliness issue using the correct standard for total disability.

On remand, the administrative law judge must determine whether Dr. Robinette's treatment notes, taken together, establish that: claimant was totally disabled from a respiratory standpoint from performing the exertional requirements of his usual coal mine work; that the total disability was due to pneumoconiosis; and that his medical determination was communicated to claimant more than three years before he filed his claim. 20 C.F.R. §725.308(a); *see Stallard*, 876 F.3d at 669; *Henline*, 456 F.3d at 426-27, 23 BLR at 2-329-30. In so doing, the administrative law judge must consider the entirety of each treatment note so that Dr. Robinette's communications to claimant are taken in context. *See Wright v. Director, OWCP*, 7 BLR 1-475, 1-477 (1984) (An administrative law judge must not selectively analyze the evidence.). The administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the Administrative Procedure Act.[9] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge determines that Dr. Robinette's notes satisfy the terms of 20 C.F.R. §725.308(a) and, therefore, that employer has rebutted the presumption that this claim was timely filed, the administrative law judge must then determine whether claimant has shown that "extraordinary circumstances" exist to toll the time limit. *See* 20 C.F.R. §725.308(c). If employer rebuts the presumption of timely filing and claimant does not show extraordinary circumstances, entitlement to benefits is precluded. *See Brigance*, 718 F.3d at 594-95, 25 BLR at 2-282.

[9] The Administrative Procedure Act, 5 U.S.C. §§500-596, as incorporated into the Act by 30 U.S.C. §932(a), provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to vacate the administrative law judge's award of benefits and to remand the case to the administrative law judge for further consideration of the issue of timeliness pursuant to 20 C.F.R. §725.308. To rebut the presumption that a miner's claim was timely filed, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), (c). Claimant filed this claim, his first, on July 29, 2013. Thus, to rebut the timeliness presumption in this case, employer had to show that "a medical determination of total disability due to pneumoconiosis" was communicated to claimant before July 30, 2010. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). There is no dispute that under the facts of this case, the statutory and regulatory requirements for rebuttal of the timeliness presumption have been met.

As explained by the United States Court of Appeals for the Sixth Circuit, "when a diagnosis of total disability due to pneumoconiosis by a physician trained in internal and pulmonary medicine is communicated to the miner, a 'medical determination' sufficient to trigger the running of the limitations period has been made. No more is required." *See, e.g., Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594, 25 BLR 2-273, 2-280 (6th Cir. 2013) (holding that a medical determination of total disability due to

pneumoconiosis is not required to be reasoned and documented); *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006) (holding that a medical determination of total disability due to pneumoconiosis is not required to be in writing to begin the running of the three-year statute of limitations period).

Here, the record contains treatment records by Dr. Robinette beginning in 2008, which the administrative law judge credited as the most reliable evidence as to what medical diagnoses have been communicated to claimant. Decision and Order at 10. In his preliminary examination dated October 17, 2008, Dr. Robinette explained to claimant that his x-ray was clearly abnormal and that he must cease any dust exposure. To clarify claimant's condition, Dr. Robinette requested full pulmonary function studies and a CT scan. Employer's Exhibit 3; *see* Decision and Order at 9. In claimant's follow-up assessment on November 4, 2008, Dr. Robinette noted that his CT scan was consistent with silicosis and pneumoconiosis and that his pulmonary function testing "confirmed a severe restrictive defect" and "severely impaired" diffusion capacity. Employer's Exhibit 2; *see* Decision and Order at 9. Based on these test results, Dr. Robinette "explained to [claimant] that he has evidence of severe pulmonary disease with interstitial pulmonary fibrosis related to an occupational pneumoconiosis," and that "[he] is obviously disabled from working on the basis of his pulmonary disease alone." Employer's Exhibit 2; *see* Decision and Order at 9-10, 14. Moreover, Dr. Robinette saw claimant on at least ten more occasions and he never retracted his diagnosis of disability due to pneumoconiosis. Claimant's Exhibit 4; Employer's Exhibit 6. Rather, he repeatedly referred to claimant as "disabled" due to his pulmonary disease, which he explained was occupational pneumoconiosis. Thus Dr. Robinette's treatment notes taken separately, and together, establish that claimant was "legally notified that he was totally disabled due to black lung disease." *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 668, BLR (4th Cir. 2017) (noting the importance of one physician communicating the diagnosis of total disability due to pneumoconiosis to claimant); Claimant's Exhibit 4; Employer's Exhibit 6.

Based on Dr. Robinette's diagnosis of totally disabling pneumoconiosis, which was communicated to claimant on November 4, 2008, more than three years before he filed this claim, I would hold that claimant's claim was untimely. Therefore, I would reverse the award of benefits.

RYAN GILLIGAN
Administrative Appeals Judge