BRB No. 01-0288 BLA

WILLIAM T. KILLMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
SAHARA COAL COMPANY	)	
	)	
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--Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Erik A. Schramm (Hanlon, Duff, Paleudis & Estadt Co., LPA), St. Clairsville, Ohio, for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order--Denial of Benefits (1999-BLA-0760) of Administrative Law Judge Robert L. Hillyard rendered 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] Claimant's initial application for benefits filed on February 20, 1985 was ultimately denied on December 21, 1993 by an administrative law judge who found that claimant established the existence of pneumoconiosis arising out of coal mine employment, but did not establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibits 1, 29, 31, 36. Upon consideration of claimant's appeal, the Board affirmed the denial of benefits on June 23, 1994. Director's Exhibit 37.

On July 26, 1994, claimant, by counsel, moved for reconsideration of the Board's decision. The Board denied claimant's motion as untimely on January 6, 1995. Director's Exhibit 38. On January 13, 1995, claimant, by counsel, timely moved for reconsideration of the Board's January 6, 1995 order, arguing that his July 26, 1994 motion for reconsideration was timely. On May 11, 1995, the Board granted reconsideration of its January 6, 1995 order, but again concluded that claimant's July 26, 1994 motion for reconsideration was untimely, and denied relief. Director's Exhibit 39.

On January 23, 1996, claimant, then acting without counsel, filed a request for modification with the District Director of the Office of Workers' Compensation Programs. Director's Exhibit 40. The District Director initially found the request for modification to be timely, Director's Exhibit 41, but later reversed himself after employer was notified and responded that the Board's June 23, 1994 decision had become final and that claimant's modification request was filed more than one year after June 23, 1994. Director's Exhibits 45, 47; *see* 20 C.F.R. §725.310(a)(2000)(authorizing modification within "one year after the denial of a claim"). In a July 11, 1996 order denying the modification request as untimely, the District Director notified claimant that if he filed a claim form within six months of the

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[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

District Director's order, the new claim would be deemed filed as of the date of claimant's untimely modification request. Director's Exhibit 47; *see* 20 C.F.R. §725.305(b)(a "written statement indicating an intention to claim benefits" must be perfected by filing a claim form within six months of notice from the District Director).

Claimant instead requested a hearing, and his case was referred to the Office of Administrative Law Judges and scheduled for a hearing before Administrative Law Judge Edward J. Murty. Prior to the scheduled hearing, claimant, who had by then retained counsel, moved for remand to the District Director so that claimant could file a new application for benefits. In claimant's motion, he stated that he now understood "that his modification request was untimely," and "that there [was] no current application for black lung benefits on file." Motion for Remand to District Director, Oct. 6, 1997, at 2.

On October 20, 1997, claimant filed a new application for benefits with the District Director. Director's Exhibit 55. Approximately three weeks later, Judge Murty issued an order granting claimant's motion to remand the case. In the order, Judge Murty also ruled that claimant's January 12, 1996 letter requesting modification "must . . . be considered a new claim filed as of that date," because the "letter of January 12, 1996 is certainly a writing from which an inference may be drawn that a claim for compensation is being made." Director's Exhibit 54 at 2. Judge Murty made no mention of either 20 C.F.R. §725.305 or the District Director's July 11, 1996 notice informing claimant of the need to timely file a claim form.

While claimant's application for benefits was being processed, claimant asserted that Judge Murty's ruling required that his new claim be considered filed on January 12, 1996. Director's Exhibit 72. Both the District Director and employer disagreed with claimant's position and contested this issue. Director's Exhibits 63, 70, 71, 84A, 93. At the hearing, claimant argued further that recently issued decisions supported his earlier contention that his motions for reconsideration filed with the Board tolled the time limit for requesting modification. Tr. at 24. Consequently, claimant returned to his previous position that his January 12, 1996 letter to the District Director constituted a timely request for modification. *Id*.; *see also* Claimant's Post-Hearing Brief, June 5, 2000, at 8-14.

In the Decision and Order--Denial of Benefits at issue in the instant case, Administrative Law Judge Robert L. Hillyard credited claimant with twenty-three years of coal mine employment pursuant to the parties' stipulation, and found that

the claim was a new claim for benefits filed on October 15, 1997[2] and not a request for modification. Because the new claim was filed more than one year after the previous denial, the administrative law judge considered whether the new evidence demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). The administrative law judge found that the evidence developed since the previous denial did not establish that claimant is totally disabled by a respiratory or pulmonary impairment. Consequently, the administrative law judge found that a material change in conditions was not established, and denied benefits.

On appeal, claimant contends that the administrative law judge erred in treating this claim as a new claim rather than a request for modification. Claimant further asserts that the administrative law judge erred in finding that claimant's new claim could not be considered filed as of January 12, 1996. Additionally, claimant alleges that substantial evidence does not support the finding that he is not totally disabled because the administrative law judge erred in his analysis of the medical opinion evidence. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), responds only to urge affirmance of the finding that this claim is a new claim filed in October 1997.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Claimant contends that his January 12, 1996 request for modification of the denial of benefits was timely because it was filed within one year of the Board's May 11, 1995 order denying his second motion for reconsideration. Claimant asserts that because the Board reviewed and ruled on both of his motions for reconsideration, the one-year period for requesting modification was tolled during the pendency of those motions. In support of this assertion, claimant cites *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997), a case in which the court noted

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[2] October 15, 1997 was the date claimant signed the claim form. Director's Exhibit 55. Claims are not considered filed until received by the Office of Workers' Compensation Programs. *See* 20 C.F.R. §725.303(a). The Office of Workers' Compensation Programs stamped the form as received on October 20, 1997. Director's Exhibit 55 at 1. Hence, the administrative law judge did not correctly determine the precise date of filing, but his error is harmless. *See Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has twenty-three years of coal mine employment and that total disability was not established by the pulmonary function and blood gas studies. *See* 20 C.F.R. §718.204(b)(2)(i), (ii); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

the Board's jurisdiction to review successive motions for reconsideration. Claimant also relies on *Youghiogheny & Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999), a case in which the court held that a court of appeals's decision does not become final for the purpose of starting the one-year modification period until the court's mandate issues. Claimant argues that under *Milliken*, the Board's June 23, 1994 decision did not become final until the Board ruled on claimant's second motion for reconsideration. Claimant's arguments lack merit.

A request for modification may be filed "at any time prior to one year after the rejection of a claim . . . ." 33 U.S.C. §922; *see also* 20 C.F.R. §725.310(a). A claim is rejected when the denial becomes "final." *See* 33 U.S.C. §921(c); *Milliken*, 200 F.3d at 951, 22 BLR at 2-60; *see also Stanley v. Betty B Coal Co*., 13 BLR 1-72, 1-76 (1990)(a party has "one year from a final decision" to request modification). A Board decision "become[s] final 60 days after the issuance of such decision unless a written petition for review . . . is filed in the appropriate U.S. court of appeals prior to the expiration of the 60-day period . . . or . . . a timely request for reconsideration by the Board has been filed . . . ." 20 C.F.R. §802.406. To be timely, a motion for reconsideration must be filed within thirty days from the filing of the Board's decision. 20 C.F.R. §802.407(a).

The Board's decision was filed on June 23, 1994. Director's Exhibit 37. Claimant's first motion for reconsideration was filed more than thirty days after that date. Director's Exhibit 38. Thus, the first motion was untimely. Claimant's second motion for reconsideration was filed within thirty days of the Board's order denying the first motion, but the second motion was a timely request for reconsideration of the January 6, 1995 order, not of the Board's June 23, 1994 decision. Upon reconsideration, the Board adhered to its ruling that the first motion for reconsideration was untimely. Director's Exhibit 39. Because claimant did not file a timely motion for reconsideration or timely appeal the Board's decision, the Board's decision became final. Claimant's January 12, 1996 request for modification was filed more than one year after the Board's decision became final and thus, more than one year after the "rejection" of his claim. 33 U.S.C. §922. Consequently, claimant's modification request was untimely.

The cases claimant cites do not advance his case. Although the Board has jurisdiction to review successive motions for reconsideration, *see* 20 C.F.R. §802.409; *Abner, supra*; *Midland Coal Co. v. Director, OWCP* [Luman], 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998), it does not follow that the Board's review of successive motions to reconsider, where the first motion was untimely, tolls the time for requesting modification of the original decision denying benefits. "Otherwise, the regulation's tolling for '*timely* requests to reconsider' would be superfluous." *Luman*, 149 F.3d at 564, 21 BLR at 2-461 (emphasis in original, citing 20 C.F.R. §802.406). Additionally, claimant's reliance on *Milliken* is misplaced. The court in

Milliken had to determine when its decision became final for purposes of starting the one-year modification period precisely because "[n]either the statute nor the regulations . . . elucidate[d] when a court of appeals's decision . . . becomes 'final'. . . ." *Milliken*, 200 F.3d at 951, 22 BLR at 2-61. Here, by contrast, the regulations expressly define when an order of the Board becomes final. *See* 20 C.F.R. §802.406.

Claimant next contends that even if the modification request was untimely so that claimant was limited to filing a new claim, the administrative law judge erred in finding that the new claim was not filed on January 12, 1996.[4] Claimant alleges that in applying Section 725.305 as written, the administrative law judge penalized claimant for choosing to appeal the district director's July 11, 1996 order instead of filing a claim form within six months. Section 725.305 contains no tolling provision. Without exception, any claim based on a written statement indicating an intention to claim benefits must be perfected by filing a claim form within six months of notice by the district director. *See* 20 C.F.R. §725.305(b). Any claim not perfected by timely filing a claim form "shall not be processed." 20 C.F.R. §725.305(d); *see Stacy v. Cheyenne Coal Co*., 21 BLR 1-111, 1-115 (1999). Because claimant did not file a claim form until October 1997, more than six months after the district director's July 11, 1996 order, the administrative law judge properly found that the filing date of claimant's new claim was October 1997.

Claimant's argument that the administrative law judge was bound by the law of the case to follow Judge Murty's ruling setting January 12, 1996 as the filing date lacks merit. First, as noted above, the filing date was made a contested issue for the hearing. Second, once a case is appealed "the question is not whether the second judge should have deferred to the ruling of the first judge, but whether that ruling was correct." *Williams v. Commissioner of Internal Revenue*, 1 F.3d 502, 503 (7th Cir. 1993). As is clear from the preceding analysis, Judge Murty's ruling was incorrect.[5] Consequently, claimant's reliance on the doctrine of law of the case is misplaced. Therefore, we affirm the administrative law judge's finding that this claim is a new claim filed as of October 15, 1997.

To be entitled to benefits under the Act, claimant must demonstrate by a

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[4] The earlier filing date sought by claimant could determine the commencement date of any benefits awarded, if the medical evidence does not establish that date. *See* 20 C.F.R. §725.503(b).

[5] Review of Judge Murty's order reveals that he based his ruling on cases arising under the Longshore and Harbor Workers' Compensation Act (the Longshore Act). Under the Longshore Act, no particular form is needed to assert a claim for compensation. *Peterson v. Columbia Marine Lines*, 21 BRBS 299, 301 (1988). By contrast, an official claim form must be filed to claim black lung benefits. 20 C.F.R. §§725.304(a); 725.305(b).

preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, and the subsequent claim is filed prior to January 20, 2001, 20 C.F.R. §725.2(c), the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d), a miner "must show that something capable of making a difference has changed since the record closed on the first application." *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09, 21 BLR 2-113, 2-127 (7th Cir. 1997)(*en banc*). Specifically, "a material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." *Sahara Coal Co. v. OWCP, [McNew]*, 946 F.2d 554, 556, 15 BLR 2-227, 2-229 (7th Cir. 1991).

Claimant's first claim was denied because the record did not establish a totally disabling respiratory or pulmonary impairment. Therefore, the administrative law judge properly considered whether the evidence developed since the prior denial established that claimant has become totally disabled.

Claimant contends that the administrative law judge did not properly weigh the medical opinion evidence in finding that claimant is not totally disabled by a respiratory or pulmonary impairment. Claimant's contention has merit.

A miner is considered totally disabled when "a pulmonary or respiratory impairment . . . prevents or prevented the miner: . . . [f]rom performing his or her usual coal mine work." 20 C.F.R. §718.204(b)(1)(i). Review of the record indicates that claimant's usual coal mine work as a foreman or "face boss" required him to walk constantly while bent over in low coal and carrying approximately thirty pounds of equipment. Tr. at 28-30. Claimant testified that he inspected eight faces every twenty minutes, repeatedly walking a distance of 960 feet, some of which was uphill. Tr. 30, 41. After each eight-hour shift, claimant lifted barrels of oil, rock dusted, and helped a mechanic with tasks such as changing a buggy tire. Tr. at 42. The record contains documentary evidence setting forth the lifting and carrying requirements of claimant's job. Director's Exhibit 5.

The physicians of record agreed that claimant has an obstructive pulmonary

impairment reflected by his new pulmonary function studies. Based on these tests, Dr. Robert Cohen rated claimant's impairment as mild to moderate and opined that it prevents claimant from performing his job as a foreman. Director's Exhibits 60, 89; Claimant's Exhibit 1. Dr. Glen Baker stated that although claimant's pulmonary function study values were non-qualifying, those values revealed a mild obstructive impairment which would permit claimant to engage in "mild to moderate exertion at most." Director's Exhibit 44. Drs. Peter Tuteur, Joseph Renn, and A. Dahhan diagnosed a mild obstructive impairment and stated that claimant retains the respiratory capacity to work as a foreman. Director's Exhibit 71A; Employer's Exhibits 1, 2, 11, 13, 15. All of these physicians are Board-certified in Internal Medicine and Pulmonary Disease.

The administrative law judge gave greater weight to the opinions of Drs. Tuteur, Renn, and Dahhan because these physicians were highly qualified and because their opinions that claimant is not disabled were found better reasoned in that all of claimant's pulmonary function and blood gas studies were non-qualifying.[6] Decision and Order at 31-33. However, as claimant contends, in weighing the medical opinions the administrative law judge did not address the contention below that Drs. Renn, Dahhan, and Tuteur did not understand the exertional requirements of claimant's job as accurately as Dr. Cohen did when they considered whether claimant's obstructive pulmonary impairment prevents him from performing that work. Claimant's Post-Hearing Brief, June 5, 2000, at 33, 34, 37; *see* 20 C.F.R. §718.204(b)(1). Review of the record indicates that Dr. Cohen concluded that claimant's job duties as a foreman required significant exertion. Director's Exhibits 60, 89; Claimant's Exhibit 1. Dr. Renn's impression was that claimant's job duties constituted light to moderate work. Employer's Exhibit 15 at 33-34. Dr. Dahhan did not discuss claimant's job duties. Employer's Exhibit 11. Although Dr. Tuteur's initial report did not discuss claimant's job duties as a foreman, Director's Exhibit 71A, Dr. Tuteur discussed some specific job requirements at his deposition. Employer's Exhibit 13 at 16, 51-53. The administrative law judge's Decision and Order contains no finding as to the nature of claimant's work as a foreman. In this factual context, where the physicians diagnosed a respiratory impairment based on objective tests and addressed claimant's ability to perform his usual coal mine work with that impairment, we hold that the administrative law judge should not have assessed the physicians' reasoning based solely on the non-qualifying nature of claimant's objective tests. *See Poole v. Freeman United Coal Mining Co*., 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990)("To infer disability, the ALJ must first determine the nature of claimant's usual coal mine work and then compare evidence of the exertional requirements of the work with medical opinions as to the claimant's

[6] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B, C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i),(ii).

work capability").

Therefore, we must vacate the administrative law judge's finding and remand this case for him to consider the evidence regarding the exertional requirements of claimant's usual coal mine work as a foreman, to make a finding as to the nature of that work, and then to reweigh the new medical opinion evidence to determine whether claimant's respiratory impairment prevents him from performing that work.[7] *See Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*). If the administrative law judge finds that total disability and a material change in conditions are established, then in addressing the merits of entitlement the administrative law judge should address claimant's objection to the consideration of exhibits which were excluded by the previous administrative law judge. Claimant's Post-Hearing Brief, June 5, 2000, at 3, A-1, A-5. Additionally, as claimant contends, the administrative law judge's decision does not explain how he arrived at a smoking history of thirty years, in view of claimant's testimony and the various smoking histories recorded by physicians. Decision and Order at 5. Therefore, if the merits are reached, the administrative law judge should clearly explain his analysis of the evidence in determining claimant's smoking history.

[7] Even if the administrative law judge finds that the record does not reflect whether Drs. Dahhan, Renn, and Tuteur had a full understanding of the exertional requirements of claimant's coal mine employment, so that he cannot rely on their opinions that claimant is not totally disabled, he can still determine whether a mild or mild to moderate impairment would render claimant totally disabled. *See Poole, supra*; *McMath v. Director, OWCP*, 12 BLR 1-6, 1-9 (1988)(the administrative law judge may compare claimant's ability with his coal mine employment duties).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge