U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0028 BLA

GERALD W. MABE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 12/29/2015
	)	
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 on Remand – Denial of Claim of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

C. Adam Kinser (Montgomery Kinser Law Offices, P.L.C.), Jonesville, Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles, Rice, McDavid, Graff & Love LLP), Charleston, West Virginia, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Remand – Denial of Claim (2011-BLA-05913) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on July 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. In his initial Decision and Order Awarding Benefits, issued on March 14, 2013, the administrative law judge determined that the claim was timely filed, and that claimant established entitlement to benefits pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). On appeal, the Board vacated the administrative law judge's finding that the claim was timely filed because the administrative law judge applied Board case law that was overturned by the United States Court of Appeals for the Sixth Circuit,[2] subsequent to the administrative law judge's 2013 Decision and Order. *Mabe v. Westmoreland Coal Co*., BRB No. 13-0316 BLA (Apr. 30, 2014) (unpub).[3] Independent

[1] Claimant filed a prior claim on August 14, 2009, but withdrew his claim by letter dated January 4, 2010. Director's Exhibit 1.

[2] 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 (1989) (en banc); Director's Exhibits 3, 5; Hearing Transcript at 29.

[3] In order to rebut the presumed fact that a claim is timely filed, the Act and its implementing regulations require an employer to affirmatively prove that a medical determination of total disability due to pneumoconiosis was communicated to a miner more than three years prior to filing a claim. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), (c). Citing *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (en banc), the administrative law judge concluded that there was insufficient evidence in this case to determine whether claimant received a *well-reasoned* diagnosis of total disability due to pneumoconiosis three years prior to filing his claim. Interim Order at 2. Subsequent to the administrative law judge's order, the United States Court of Appeals for the Sixth Circuit reversed *Brigance*, holding that the Board erred by requiring that a medical diagnosis be well-reasoned in order to trigger the commencement of the statute of limitations. *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). While the Sixth Circuit overturned the Board's holding that an administrative law judge must determine whether a medical opinion is well-reasoned for statute of limitations purposes, the court specifically acknowledged that the "burden falls on employer to prove that the claim was filed outside the limitations period." *Id.* It therefore remains employer's burden to affirmatively establish that, more than three years prior to filing a claim, a medical determination containing two elements

of the timeliness issue, the Board affirmed claimant's entitlement to benefits. Thus, the Board remanded the case for reconsideration of the sole issue of whether employer satisfied its burden to rebut the presumption of timeliness.

The administrative law judge denied benefits on remand, concluding that claimant did not timely file his claim within three years of receiving a medical determination of total disability due to pneumoconiosis. Claimant challenges the administrative law judge's denial of benefits pursuant to 20 C.F.R. §725.308, and the Director, Office of Workers' Compensation Programs (the Director), asks the Board to reverse the administrative law judge's finding. Employer urges affirmance of the denial of benefits.

In light of the Board's holding on the merits of the underlying claim, the timeliness issue is entirely dispositive of this matter. If the claim was timely-filed, claimant is entitled to lifetime benefits; on the other hand, if the claim is time-barred, claimant's rights are forever extinguished under the Act.[4] Because the administrative law judge has not adequately explained how employer has fulfilled its burden to establish the elements of rebuttal of the presumed fact of timeliness, and because such a finding would not be credible on our review of the record as a whole, we agree with the Director's position in this case. We therefore reverse the administrative law judge's decision.

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was communicated to the miner: 1) that the miner suffers from pneumoconiosis; and 2) that the disease is totally disabling. 20 C.F.R. §725.308(a).

[4] The regulations explicitly recognize that pneumoconiosis is a "latent and *progressive* disease . . . ." 20 C.F.R. § 718.201(c) (emphasis added). Based on this understanding of pneumoconiosis, the Fourth Circuit has acknowledged that claimants are normally not limited in the number of claims they may file, holding that "nothing bars or should bar claimants from filing claims *seriatim*, and the regulations recognize that many will." *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227 (4th Cir. 1996) (emphasis added); *see id*. ("The health of a human being is not susceptible to once-in-a-lifetime adjudication," *citing* A. Larson, The Law of Workmens' Compensation, § 79.72(f) (1989)); *Rutter*, 86 F.3d at 1364, 20 BLR at 227 ("[Pneumoconiosis] is a progressive disease, and no rational system of law or of medicine could stand on the proposition that it can or must be measured only once."). An exception, however, applies to claims previously found to be time-barred because the limitation applies to both the initial and any subsequent claims. *Sewell Coal Co. v. Director, OWCP*, 523 F.3d 257, 259 (4th Cir. 2008).

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). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

Section 422 of the Act provides that "[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). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). Therefore, to rebut the presumption of timeliness, employer must show by a preponderance of the evidence that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" specifically was communicated to the miner or his agent. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

The legislative history of the Act does not explain why a statute of limitations was included. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34, 1-38 (1993). However, "[s]tatutes of limitation generally proceed on the theory that a man forfeits his rights only when he inexcusably delays assertion of them."[5] *Ingalls Shipbuilding Div., Litton Systems, Inc. v. Hollinhead*, 571 F.2d 272, 274-275, 8 BRBS 159, 161 (5th Cir. 1978).

[5] In this regard, we note that the facts of this case are fundamentally different from those in *Brigance.* In that case, five or six years before filing his claim for federal benefits, the miner had filed a separate claim for benefits with the State of Kentucky for which he was awarded approximately eight years of state benefits. *Brigance*, 718 F.3d at 592, 25 BLR 2-282. The miner testified that, as part of his application for state benefits, he submitted a report from two physicians who opined that he was totally disabled due to black lung disease. *Id*. He also specifically admitted at his hearing that he saw the report and knew at that time that the doctors had medically determined that he was totally disabled due to pneumoconiosis. *Id.* Nevertheless, he waited approximately seven years after receiving that diagnosis to file his claim for federal benefits. *Id.* Here, by contrast, there is no indication in the record that claimant received any payments related to a state award. Further, there is no medical report in this record stating that claimant was totally disabled due to pneumoconiosis that predates the filing of the 2010 claim by more than three years; claimant continues to contest that such a diagnosis was communicated to him more than three years prior to filing his claim; and the documentation in the record

Consistent with the premise that the Act is remedial legislation that is to be liberally construed, the Board has held that the "statute of limitations must be construed in a manner that does not unduly restrict the filing and pursuit of claims." *Adkins*, 19 BLR at 1-39; *see generally Director, OWCP v. Consolidation Coal Co*. [*Petracca*], 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984).

Employer maintains that the present claim was not timely filed under 20 C.F.R. §725.308, based on inferences it asserts must be drawn from claimant's testimony. Specifically, employer argues that claimant's testimony, considered in conjunction with the medical report of Dr. Fleenor, establishes that claimant received a medical determination of total disability due to pneumoconiosis sometime between 1994 and 2002, which is more than three years prior to filing his claim in July 2010.[6] Claimant was not represented by an attorney at the hearing held on October 16, 2012,[7] at which employer's counsel elicited the following testimony during claimant's cross-examination:

> Q. Who was the first doctor who treated you for breathing problems?
> A. Best I can remember, it might have been Dr. Paranthaman in Appalachia, Big Stone.
> Q. Okay. Now, did that doctor tell you that you had black lung?
> A. No, he didn't tell me that. He said I had breathing problems.
> Q. Okay. Was there any doctor that told you that you had black lung?
> A. Oh, yeah, Dr. Fleenor, Dr. Smiddy.
> Q. Who was the first doctor to tell you that you had black lung?

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corroborates claimant's assertion that he first learned that he was totally disabled due to pneumoconiosis after suffering his stroke in 2007, which would make his claim, filed in 2010, timely.

[6] Employer relies on the following excerpt from the November 15, 2010 medical report by Dr. Fleenor, claimant's treating physician, which states:

> The first diagnosis in my record of chronic obstructive lung disease was in June 1994. [Claimant] has carried the diagnosis of Black Lung since then.

Director's Exhibit 13.

[7] Ron Carson, Lay Representative, Stone Mountain Health Services, appeared on behalf of claimant at the hearing.

A. Dr. Fleenor, I guess.
Q. Okay.
A. I've been going to Dr. Fleenor for a long time. He told me that. He said, "Your lungs are getting worse and worse."
Q. Did - - -
A. Dr. Smiddy told me I was disabled and I would never be able to go back to work.
Q. Did Dr. Fleenor tell you that you were disabled from going back to work from your black lung?
A. Yeah.
Q. And I was just looking at Dr. Fleenor's report. It looks to me like he says he's been your doctor since 1993. Is that correct?
A. Yeah. I know it was a long time. I don't know exactly how long.
Q. Okay and do you recall when it was that he told you that you had black lung and that you were totally disabled from going back to work because of your black lung?
A. I couldn't tell you the exact date, no, I couldn't.
Q. Okay. Was it back in the 1990's when you first started seeing him?
A. No, I don't think it was then. I had a stroke and my wife was up here in Virginia and come back and had a stroke. I passed out or whatever you called it and I stayed in a coma for about four days and after that, well, they said when I had the stroke, my lungs were full of carbon monoxide. That's what caused me to have the stroke and after I got out of the hospital and had therapy and stuff, I went back to Dr. Fleenor and that's when he started telling me. He said, "Your lungs are getting worse and worse," which I already knew it, but that's the first time he ever told me that I had black lung and stuff.
Q. And when did you have your stroke?
A. I don't remember to tell you the truth.
Q. Was it ten years ago?
A. Probably.
Q. Okay and ten years ago was when Dr. Fleenor told you that you had black lung?
A. It probably was.
Q. And was that also when he told you that you were totally disabled from going back to work because of your breathing?
A. Yeah.
Q. And did he tell you that your breathing problems were from your black lung?
A. Yeah.
Q. And to the best of your recollection, that was about ten years ago?

A. Yeah, something like that. I can't tell you the exact date or nothing.

Hearing Transcript at 25-27.

In his Decision and Order on Remand, the administrative law judge observed that "the weight to accord [c]laimant's testimony is crucial to the resolution of the issue of *when* claimant understood that he was totally disabled" and that "the case was remanded to determine the weight to be accorded [c]laimant's testimony and the report of Dr. Baker." Decision and Order on Remand at 4 (emphasis added). The administrative law judge noted the Director's argument that claimant's testimony is vague as to when he was told that he was totally disabled due to pneumoconiosis, but that it clearly happened after his stroke. *Id*. The administrative law judge further noted that the Director relied on a medical report from Dr. Baker to establish that the stroke occurred in 2007.[8] *Id*.

Nevertheless, the administrative law judge found that there are "no medical records" to corroborate Dr. Baker's notation that claimant had a stroke in 2007. Decision and Order on Remand at 4. The administrative law judge stated, "I accept that the [c]laimant may have had a stroke, but there is no evidence that it in any way affected his memory." *Id*. The administrative law judge then summarily concluded:

> After a review of the evidence, I find that [Director's Exhibit 13], from Dr. Fleenor, substantiates that Claimant was provided a medical determination more than three years before he filed a claim.

Id. Thus, the administrative law judge denied the claim on the grounds that it was not timely filed.

As a threshold matter, claimant argues that the administrative law judge erred in relying on Dr. Fleenor's report given the Board's prior order. We agree. The Board specifically held in the prior appeal that, although Dr. Fleenor's report states that claimant "has carried the diagnosis" of pneumoconiosis since 1994, the report did not trigger the running of the statute of limitations "because [Dr. Fleenor] did not state that claimant was totally disabled [since 1994]."[9] *Mabe*, BRB No. 13-0316 BLA, slip. op. at

[8] Dr. Baker, who examined claimant on behalf of the Department of Labor on August 13, 2010, noted that claimant had a "stroke 2007." Director's Exhibit 9.

[9] Although Dr. Fleenor states that claimant has had pneumoconiosis since 1994, he does not indicate when, if at all, such diagnosis was communicated to claimant. Nor does he indicate when claimant may have first become disabled. Director's Exhibit 13.

6. Additionally, the administrative law judge failed to properly address the Board's remand instruction to determine if employer elicited credible testimony from claimant to satisfy its burden of proof. Contrary to the administrative law judge's analysis, the significance of claimant's stroke is not whether it affected claimant's memory, but whether it establishes a timeline demonstrating the timeliness of the claim in light of claimant's testimony that he received his diagnosis of total disability due to pneumoconiosis *after* his stroke.

In light of the administrative law judge's errors and his failure to adequately explain his conclusion, our dissenting colleague would remand the case to the administrative law judge for further consideration. Taking into consideration the Director's arguments for reversal, however, we are compelled to examine whether a second remand is appropriate and to consider whether claimant's testimony constitutes sufficient evidence by which employer could rebut the presumption of timeliness. After a thorough review of the record as a whole, we conclude that it does not.[10]

At the outset, we note that employer, who bears the burden of rebutting the presumption of timeliness, has identified no definitive evidence in the record to establish the year, much less the date, that claimant may have received a "medical determination of total disability due to pneumoconiosis" from which we could calculate the running of the statute of limitations. 20 C.F.R. §725.308. Employer pins its entire case on claimant's testimony. In order to satisfy employer's burden, however, claimant's testimony must establish that he was diagnosed with total disability due to pneumoconiosis, and establish when that diagnosis was communicated to him. On its face, the testimony fails on both counts.[11]

[10] Notwithstanding the administrative law judge's error, the facts of this case do not mandate a second remand. While factual determinations are the province of the administrative law judge, in this case "no factual issues remain to be determined" and "[n]o further factual development is necessary." *See generally Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014) (denial reversed with directions to award benefits without further administrative proceedings). Deciding cases in this manner, where appropriate, fosters judicial economy by obviating the need for remands where the outcome is clear. *Id.* Missing from our respected colleague's dissent, in our view, is any explanation of how employer could fulfill its burden under the governing law and the facts established in this case.

[11] The Fourth Circuit has held that an employer may establish rebuttal of the presumption of timeliness at 20 C.F.R. §725.308, based on a medical determination of total disability due to pneumoconiosis that is orally communicated to the miner. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 426-27, 23 BLR 2-321, 2-329-30 (4th Cir.

Claimant indicated that Dr. Fleenor diagnosed him with "black lung" but testified repeatedly that he could not remember the exact date when he may have been told by Dr. Fleenor, or any physician, that he had *disabling* black lung disease. Claimant clearly stated that he first received a diagnosis of black lung from Dr. Fleenor after his stroke, but he could not remember the exact date of his stroke. It was only after further questioning by employer's counsel as to whether the stroke was "ten years ago," that claimant responded "[p]robably." Hearing Transcript at 27. Based on employer's counsel's suggestion that his stroke occurred at least ten years prior to the hearing date of October 16, 2012, claimant again responded "probably" when asked whether it was ten years ago that he was diagnosed with pneumoconiosis. *Id*. But, when asked whether that was the same timeframe that Dr. Fleenor told him that his breathing problems were "from" his pneumoconiosis, claimant responded, "Yeah, something like that. I can't tell you the exact date or nothing." *Id.* As the Director points out:

> Given that *the only time* the miner gave clear, unhesitant testimony concerning the time of Dr. Fleenor's discussion was when the miner stated it occurred after his stroke, and given that the record shows the miner's stroke occurred in 2007 and [employer] developed no evidence to the contrary . . . as a matter of law, [employer] failed to rebut the presumption that the miner's claim was timely filed.

Director's Brief at 5, emphasis in the original.

Indeed, the only rational inference to be drawn from claimant's testimony, in consideration with the medical record, is that his stroke occurred in 2007. Specifically, Dr. Baker completed a CM Form-988 in conjunction with his Department of Labor examination of claimant on August 13, 2010. Director's Exhibit 9. In that report, under "Patient History" – "Hospitalizations," Dr. Baker wrote "stroke 2007." *Id.* Contrary to the administrative law judge's finding that there are no medical records to corroborate Dr. Baker's reference to claimant's 2007 stroke, Dr. Hippensteel's January 20, 2011 report states that "[claimant] said he had a stroke about four years ago." Employer's Exhibit 5 at 3. Medical records from the Stone Mountain Health Services/Pennington Family Health Center dated June 16, 2010 further corroborate Dr. Baker's notation. Claimant's

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2006). But the court did not address, specifically, the quality of the testimony that will suffice to rebut the presumption of timeliness. In deciding this case, we recognize that there may be instances when a miner's testimony, standing alone, is sufficient to trigger the commencement of the statute of limitations. This, however, is not one of them.

Exhibit 9. Those records indicate that claimant was seen by Dr. Almatari, who wrote that claimant was:

> status post CVA [cerebral vascular incident] in 2007. At that time, [claimant] was in a coma for [four] days at Johnson City Medical Center and [two] weeks after that he had rehabilitation.

Id. Dr. Almatari's report lends support to claimant's description of receiving physical therapy after his stroke. Hearing Transcript at 29. Claimant also testified that he was put on oxygen *before* he had his stroke, which is consistent with Dr. Almatari's notation that claimant's shortness of breath "worsened and required him to start using oxygen in 2006." Claimant's Exhibit 9; Hearing Transcript at 27-28. Consequently, the medical evidence does not aid employer in establishing rebuttal, and supports only a conclusion that claimant's stroke occurred in 2007.

Beyond claimant's highly equivocal and uncertain testimony, employer has not identified any evidence that contains both elements required to trigger the statute of limitations, nor has it proffered any documentation to dispute claimant's contention that he suffered a stroke in 2007. Employer had ample opportunity to develop evidence and establish a more definitive evidentiary record regarding the timeliness of the claim. It failed to do so. *See* 20 C.F.R. §725.414(a)(3)(i)(A) (permitting employer to obtain treatment records); 20 C.F.R. §725.414(c) (permitting physician depositions).

We thus hold that claimant's testimony does not satisfy employer's burden of proof as a matter of law, as it fails to *affirmatively* establish the date, or year, when claimant may have received a medical determination of total disability due to pneumoconiosis for triggering the statute of limitations, and we reverse the administrative law judge's finding pursuant to 20 C.F.R. §725.308. We also, therefore, reverse the denial of benefits.[12] *See Universal Camera*, 340 U.S. at 477.

[12] Our holding is consistent with prior cases in which the Board has concluded that employer failed to satisfy its burden to establish that a miner's claim was not timely filed. *See, e.g., Stewart v. Cliffco Enterprises*, BRB No. 14-0118 BLA (Nov. 25, 2014) (unpub.) (a medical determination that met the regulatory definition of legal pneumoconiosis not sufficient to trigger the statute of limitations because it did not explicitly diagnose pneumoconiosis); *Blevins v. Triple Elkhorn Mining Co.*, BRB No. 13-0459 BLA (June 19, 2014) (unpub.) (recognizing that the case was distinguishable from *Brigance* because the claimant did not "sit on his rights" while awaiting a result on his state law claim); *Williams v. Peabody Coal Co.*, BRB No. 12-0664 BLA (Sept. 26, 2013)

With regard to the appropriate date for commencement of benefits, the administrative law judge found in his March 14, 2013 Decision and Order Awarding Benefits, that benefits were payable beginning in July 2010, the month in which claimant filed his claim. As employer did not challenge the administrative law judge's determination regarding the date for commencement of benefits in the prior appeal, we reinstate the administrative law judge's finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Mabe v. Westmoreland Coal Co.*, OALJ Case No. 2011-BLA-05913, slip op. at 5 (Mar. 14, 2013).

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Claim is reversed, and this case is remanded to the district director for entry of an appropriate order reflecting July 2010 as the date from which benefits commence.

SO ORDERED.

(unpub.) (holding that the presumption of timeliness was not rebutted where the record contained no evidence to establish when the diagnosis was communicated to claimant and where "several portions" of a doctor's report had "to be read together in order to understand its meaning"); *Morris v. Benco Mining, Inc.*, BRB No. 11-0147 BLA (Oct. 27, 2011) (unpub.) (holding that a miner's testimony at hearing in a claim filed in 2006, that he was informed "as early as 1999" by a physician that he suffered from the effects of "black lung disease" and should "get out of the mines" and "file a claim for black lung benefits," not sufficient to trigger commencement of statute of limitations).

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

JONATHAN ROLFE
Administrative Appeals Judge

GILLIGAN, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to reverse the administrative law judge's finding that employer rebutted the presumption of timeliness pursuant to 20 C.F.R. §725.308. Although I agree with the majority that the administrative law judge's determination that claimant's claim was untimely filed is not affirmable, I cannot agree with the majority's approach, an extensive evaluation of the evidence which reverses the administrative law judge's finding. Instead, I would vacate the administrative law judge's finding, and remand the case for the administrative law judge to make the necessary findings and credibility determinations.

The regulations state that the Board "is not empowered to engage in a *de novo* proceeding or unrestricted review of a case" and is only authorized to review the administrative law judge's findings of fact and conclusions of law. 20 C.F.R. §802.301. When, as in this case, an administrative law judge fails to make important and necessary factual findings, appellate review is impossible. The proper course for the Board is to remand the case to the administrative law judge, rather than attempting to fill the gaps in the administrative law judge's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Moreover, determining the credibility of a witness and the reliability of the evidence is within the sound discretion of the administrative law judge. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-

67, 1-68 (1986). The determination as to whether the evidence establishes that Dr. Fleenor communicated a diagnosis of total disability due to pneumoconiosis to claimant more than three years before he filed his claim is a credibility matter. As such, it is for the fact-finder to decide. The Board has no authority to make any factual findings.[13] Thus, I would remand this case for the administrative law judge to determine the weight to be accorded claimant's testimony, as well as the other relevant evidence of record. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 658, 19 BLR 2-181, 2-190 (4th Cir. 1995).

In remanding the case, I would instruct the administrative law judge to fully explain the bases for his factual findings and legal conclusions in compliance with 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). After affording claimant the mandated regulatory presumption that his claim was timely filed, pursuant to 20 C.F.R. §725.308, the administrative law judge should then address whether employer has rebutted the presumption. The administrative law judge should determine whether there is evidence of a medical determination of total disability due to pneumoconiosis made by a physician of sufficient qualifications to render such diagnosis. *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 593-94, 25 BLR 2-273, 2-279 (6th Cir. 2013). The administrative law judge should also determine whether the evidence establishes a communication of such diagnosis to the claimant sufficient to trigger the running of the statute of limitations. *See Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006) (holding that there is no requirement of a written communication to trigger the running of the statute of limitations). Finally, the administrative law judge should weigh the evidence as a whole to determine whether it is sufficient to rebut the presumption that this claim was timely filed.

Therefore, I would remand this case for the administrative law judge to weigh the evidence, with the burden on employer to rebut the presumption of timeliness, render findings, and explain the bases for those findings in compliance with the APA. *See Wojtowicz*, 12 BLR at 1-165.

[13] Although the majority has painstakingly explained how the evidence in this case might be examined and evaluated, the majority fails to consider that an administrative law judge might make different factual findings and legal conclusions. Notwithstanding the interest in "judicial economy," the Board is not empowered to supplant the administrative law judge's role as fact-finder. As such, I decline the majority's invitation to explain how I might evaluate the credibility of claimant's testimony and other relevant evidence.

RYAN GILLIGAN
Administrative Appeals Judge