BRB No. 03-0386 BLA

WILLIAM L. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/26/2004
	)	
ROBERTS & SCHAEFER COMPANY	)	
	)	
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 Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-0366) of Administrative Law Judge Rudolf L. Jansen granting modification and awarding benefits 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] The administrative law judge found that the instant claim, as well as the modification request, were timely filed pursuant to 20 C.F.R. §§725.308 and 725.310 (2000), that employer's due process rights were not violated by any delay in its notification of the filing of this claim, and that employer was properly designated as the responsible operator.[2] The administrative law judge further found that claimant, a construction worker, was a miner under the Act in this capacity with employer and established thirteen and one-quarter years of qualifying coal mine employment. The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718 and, in considering the merits of entitlement based on claimant's request for modification pursuant to 20 C.F.R. §725.310 (2000),[3] found that the newly submitted evidence of record, in conjunction with the evidence associated with the denied claim, established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii) and (iv) and that such disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge thus concluded that claimant established a mistake in a determination of fact previously adjudicated against him and granted modification pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were awarded as of November, 1998.

On appeal, employer argues that the instant claim is time-barred. Alternatively, employer contends that the delay between claimant's filing of the claim and subsequent

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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 (the Black Lung Act). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726. All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant filed his claim for benefits on November 24, 1998, which was denied by the district director on June 1, 1999, as claimant failed to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. Director's Exhibits 1, 2, 6, 16. Claimant took no further action thereafter until filing the instant modification request on May 31, 2000, which the district director denied on November 7, 2000. Director's Exhibits 19, 30.

[3] The amendments to the regulation at 20 C.F.R. §725.310 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

request for modification and employer's receiving notice of the instant claim was unreasonable, deprived employer of its due process rights and was prejudicial to employer. Thus, employer contends that it should not be liable for benefits. Next, employer challenges the administrative law judge's findings regarding the length of coal mine employment, that it is the responsible operator, that claimant was a "miner" under the Act and that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging that the administrative law judge's Decision and Order awarding benefits be affirmed.

The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in response to employer's appeal, urging the Board to affirm the administrative law judge's finding that the claim was timely filed and arguing that the administrative law judge properly found that claimant's employment with employer constituted covered coal mine employment, that employer is the putative responsible operator and that the administrative law judge correctly found that employer failed to rebut the presumption set forth in 20 C.F.R. §725.202(a) . The Director also urges the Board to reject employer's contention that, in light of the delay between claimant's filing of his claim and employer receiving notice of the claim, it should be excused from liability. Employer has filed a reply to claimant's response brief as well as to the Director's response, reiterating its contentions.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein.

Employer contends that the instant claim is time-barred. Employer argues that the instant claim, filed in 1999, does not meet the three-year statute of limitations for filing a claim under Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308, because it was not filed within three years of medical evidence, from 1992,

indicating that claimant had severe chronic obstructive pulmonary disease due to emphysema which prevented him from performing any type of gainful employment in or around the coal mining industry. Employer seeks a denial of the claim on this basis. Claimant disagrees with employer's contention and asserts that there were no physicians' reports diagnosing claimant as totally disabled due to pneumoconiosis until Dr. Carandang made this determination in 1999, after claimant filed his claim.

Employer's contention lacks merit. Section 422(f) of the Act, 30 U.S.C. §932(f), provides, in pertinent part, that any claim for benefits by a miner under this section shall be filed within three years after a medical determination of total disability due to pneumoconiosis. Section 422 of the Act, 30 U.S.C. §932(f). The implementing regulation at 20 C.F.R. §725.308 provides, in pertinent part, that a claim for black lung benefits must be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner, or to a person responsible for the care of the miner. *See* 20 C.F.R. §725.308. In *Faulk v. Peabody Coal Co.,* 14 BLR 1-18 (1990), the Board held that the statute of limitations at Section 725.308 applies only to initial claims and does not apply in duplicate claims. *Contra Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001); *Peabody Coal Co. v. Ferguson*, 140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998)(Ryan, C.J., concurring). The Board noted that the restriction of Section 725.308 to initial claims ensures that employer is provided notice of the claim and of potential liability for future claims, in view of the progressive nature of pneumoconiosis. *See Faulk*, 14 BLR 1-18. With regard to the time limitation of 20 C.F.R. §725.308, the Board has held that Section 725.308(a) requires a written medical report, found to be probative, reasoned and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware, or, in the exercise of reasonable diligence, should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. *Id.* Additionally, the Board stated that the determination of whether the evidence is sufficient to rebut the timeliness presumption is fact-specific and depends on the administrative law judge's credibility assessments of the documentary and testimonial evidence. *Adkins v. Donaldson Coal Co.,* 19 BLR 1-34 (1993); *Andryka v. Rochester & Pittsburgh Coal Co.,* 14 BLR 1-34 (1990).

In this case, the administrative law judge found that even though the record contained medical evidence dating from 1992 which indicates claimant was diagnosed with chronic obstructive pulmonary disease, this evidence did not also indicate a medical determination of total disability due to pneumoconiosis. Decision and Order at 4. The administrative law judge thus concluded that since the record does not contain evidence that claimant received the required notice more than three years prior to filing his initial claim for benefits, his claim was timely filed. As the 1992 medical evidence did not specifically diagnose total disability due to pneumoconiosis, these opinions are not sufficient to commence the running of the three-year statute of limitations contained in Section 725.308. *See Adkins,* 19 BLR 1-34; *Daugherty v. Johns Creek Elkhorn Coal*

Corp., 18 BLR 1-95 (1993). We affirm the administrative law judge's determination that the instant claim is not time-barred and we reject employer's arguments to the contrary.

Alternatively, employer contends that claimant's unreasonable delay in filing this claim until 1998, in light of the cessation of claimant's coal mine employment in 1984, and the Department of Labor's negligent, two-year delay in notifying employer of the claim deprived employer of its due process rights. Thus, employer contends that it should be dismissed from the claim pursuant to the doctrine of laches because both claimant and the Department of Labor were responsible for the inexcusable delay. The administrative law judge rejected these contentions because employer had access to the medical evidence and developed its own medical evidence and therefore was not prejudiced by delay, but was able to defend the claim. Decision and Order at 4.

In addition, inasmuch as the Department of Labor is not required to notify an employer of a claim until after the initial determination of eligibility, the United States Court of Appeals for the Seventh Circuit has rejected as inappropriate the contention that delays in notification due to the administrative adjudication of a claim violate an employer's due process rights so that liability for payment of benefits should transfer from the employer to the Trust Fund, *see Midland Coal Co. v. Director, OWCP* [*Kelly*], 120 F.3d 64, 21 BLR 2-161 (7th Cir. 1997); *see also Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *U.S. Pipe & Foundry Co. v. Webb*, 595 F.2d 264, 2 BLR 2-7 (5th Cir. 1979); *see also* 20 C.F.R. §725.420. In the instant case, there was never an initial determination of eligibility prior to the case being referred to the Office of Administrative Law Judges for a hearing upon claimant's request after the denial of modification. Moreover, as the administrative law judge rationally found that employer was not prejudiced by any delay in the filing of the claim or in the responsible operator designation, we affirm the administrative law judge's rejection of employer's contentions as supported by substantial evidence. 20 C.F.R. §725.407(d); Decision and Order at 5; *see Miller v. Alabama By-Products Corp.*, 11 BLR 1-42 (1988).

Employer next contends that the administrative law judge erred in his decision on the merits: in finding that employer was an "operator" under the Act; in finding that claimant's duties as a construction worker satisfied the definition of a miner under the Act; and erred in his determination of the length of claimant's coal mine employment. These contentions lack merit. The "responsible operator" is the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year. 20 C.F.R. §725.493(a). The regulation at 20 C.F.R. §725.202(a)(1) (2000) provides that coal transportation or coal mine construction workers have a rebuttable presumption of coal mine dust exposure during all periods of employment in or around a coal mine or coal preparation facility. The presumption may be rebutted by evidence showing that the individual was not regularly exposed to coal mine dust during his or her employment in or around a coal mine or coal preparation facility, or the individual was not regularly employed in or around a coal mine or coal preparation facility. Thus, employer must establish that claimant was not regularly

exposed to coal mine dust. 20 C.F.R. §725.202(a)(1)(i) (2000); *Ray v. Williamson Shaft Contracting Co.*, 14 BLR 1-105 (1990)(*en banc*); *Tressler v. Allen & Garcia Co.*, 8 BLR 1-365 (1985).

The administrative law judge discussed claimant's testimony that his work as a construction worker for employer from 1974 to 1984 involved construction and repair of tipples and other structures around coal mine sites, and that the majority of his work took place at operating coal mines. Decision and Order at 6; Hearing Transcript at 25. The administrative law judge relied on claimant's testimony that he was exposed to coal dust during this work. Decision and Order at 6; Hearing Transcript at 41. The administrative law judge found that claimant was a "miner" under the Act inasmuch as claimant's duties with employer as a construction worker involved exposure to coal dust and thus satisfied the requisites of qualifying coal mine employment. Decision and Order at 6. The administrative law judge further found that employer did not establish that claimant was not regularly exposed to coal mine dust. 20 C.F.R. §725.202(a)(1)(i); *Ray*, 14 BLR 1-105; *Tressler*, 8 BLR 1-365; Decision and Order at 7. Based on all of the documentary evidence and testimony, the administrative law judge found that when claimant worked as a construction worker for employer, he performed the work of a miner when he repaired tipples. Consequently, the administrative law judge correctly found that employer fit the definition of an "operator" under the Act because it was an independent contractor performing services at a mine. 20 C.F.R. §§725.491(a)(1), 725.492(a), 725.493(a); Decision and Order at 5-7. Accordingly, we affirm the administrative law judge's findings that employer was an "operator" under the Act, that claimant was a "miner" under the Act for more than ten years and that employer was the properly designated responsible operator.

Employer further contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis pursuant to Sections 718.202(a)(4) and 718.204(c). Generally, employer asserts that the administrative law judge erroneously accorded greater weight to the opinion of Dr. Cohen, who concluded that claimant suffered from pneumoconiosis and that his total disability was due to a combination of coal dust exposure and smoking; and improperly discounted the opinion of Dr. Selby, who concluded that the claimant did not suffer from pneumoconiosis and had an impairment due to smoking and asthma.[4] Claimant's Exhibit 1; Director's Exhibit 31. Specifically, employer asserts that the administrative law judge's reliance on Dr. Cohen, a non-examining physician, over Dr. Selby, who examined claimant, renders his finding flawed.

[4] Employer does not allege error with respect to the administrative law judge's weighing of the medical opinions of Drs. Carandang and Marder, both of whom diagnosed total disability due to chronic obstructive pulmonary disease resulting from coal dust exposure and smoking. Decision and Order at 12-13, 16-17, 21-22; Director's Exhibits 11, 19, 26.

Contrary to employer's assertion, the administrative law judge, within his discretion as fact-finder, reasonably determined that Dr. Cohen's opinion, which was consistent with the opinions of Drs. Carandang and Marder, was entitled to great weight, in spite of his status as a non-examining physician, in light of the doctor's "substantial expertise" and upon finding the opinion well-reasoned and well-documented. *See Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); Decision and Order at 16. Although employer asserts otherwise, the administrative law judge reasonably determined that Dr. Cohen based his diagnosis on detailed work, smoking and medical histories, claimant's symptoms, and a review of objective medical data, *i.e.*, pulmonary function studies and arterial blood gas studies. Decision and Order at 12, 16; Claimant's Exhibit 1. Moreover, the administrative law judge rationally credited Dr. Cohen's opinion in light of his qualifications of board-certification in internal medicine, as well as the sub-specialties of pulmonary disease and critical care, in addition to his extensive training, experience and academic appointments.[5] *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); Decision and Order at 12; Claimant's Exhibits 1, 13. Consequently, the administrative law judge acted within his discretion in finding that the opinions of Dr. Cohen, in conjunction with the opinions of Drs. Carandang and Marder, were more persuasive than the opinion of Dr. Selby. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). Thus, we reject employer's assertion that the administrative law judge erred in finding Dr. Cohen's opinion more persuasive that the opinion of Dr. Selby and we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Likewise, we also reject employer's contention that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). The administrative law judge considered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was due, at least in part, to pneumoconiosis. In weighing the medical opinions of record, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Cohen, Carandang and Marder regarding the contribution of the claimant's coal mine employment to his pulmonary disease and rationally found this evidence sufficient to establish total disability due to pneumoconiosis. *Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990) *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990); Decision and Order at 21-22. This finding is affirmed as it is supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that the evidence was sufficient to establish a mistake of fact in the prior denial pursuant to Section 725.310 and

[5] Dr. Selby's credentials were not admitted into the record.

affirm the administrative law judge's finding of entitlement to benefits pursuant to 20 C.F.R. Part 718. *See generally Trent*, 11 BLR 1-26.

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER R. GABAUER, Jr.
Administrative Appeals Judge