BRB No. 07-0424 BLA

F.R.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED FUELS, INCORPORATED	)	DATE ISSUED: 02/29/2008
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd LLP), Washington, D.C., for employer.

Rita A. Roppolo (Gregory F. Jacob, Solicitor of Labor; Allen H. Feldman, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2006-BLA-5003) of Administrative Law Judge Daniel F. Solomon awarding benefits on a subsequent claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with twenty-two years of qualifying coal mine employment, as stipulated by the parties and supported by the record, and adjudicated this claim, filed on June 21, 2004, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge accepted employer's stipulation that claimant was totally disabled, and therefore, found that an applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). After finding that the present claim was timely filed pursuant to 20 C.F.R. §725.308, the administrative law judge determined that the evidence was sufficient to establish that claimant was totally disabled from pneumoconiosis arising out of coal mine employment. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the current claim timely filed, and in finding that a "material change" in condition occurred pursuant to 20 C.F.R. §725.309. Employer also argues that the administrative law judge erred in weighing the x-ray and medical opinion evidence of record in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202, and in finding disability causation established pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response asserting that the miner's claim was timely filed, and urging the Board to reject employer's arguments pursuant to 20 C.F.R. §725.309(d).

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.[1] 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).

Employer challenges the administrative law judge's finding that claimant's June 21, 2004 claim was timely filed. Employer initially asserted, at the hearing before the administrative law judge, that claimant's testimony, regarding statements from his treating physician, was sufficient to rebut the presumption of timeliness. The administrative law judge rejected employer's argument, and permissibly determined that claimant's testimony alone was insufficient to establish that a well-reasoned medical opinion had been communicated to the miner as required by 20 C.F.R. §725.308 and the

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). Decision and Order at 4. Employer now additionally asserts that the timeliness finding was in error because the administrative law judge failed to consider the 1991 medical reports of Drs. Clarke and Myers[2] that were entered into evidence in a prior claim. Employer's Brief at 19. Employer's argument has merit.

The Black Lung Benefits Act requires that a living miner's claim for benefits be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner or a party responsible for the care of the miner. 30 U.S.C. §932(f);[3] 20 C.F.R. §725.308(a);[4] *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). In order to trigger the

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[2] Dr. Clarke's report is dated April 8, 1991, and diagnoses coal workers [sic] pneumoconiosis and that claimant was totally and permanently disabled for all work in a dusty environment. Director's Exhibit 1-324. Dr. Myers's report is dated April 30, 1991, and diagnoses coal workers' pneumoconiosis, chronic obstructive pulmonary disease, and that claimant was not able, from a pulmonary standpoint, to do his usual coal mine employment. Director's Exhibit 1-317.

[3] 30 U.S.C. §932(f) provides:

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

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

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

running of the three-year statute of limitations, the medical determination must be a reasoned opinion of a medical professional. *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006)(*en banc*). Additionally, the regulation provides a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to 20 C.F.R. §725.308(a), (c) involves factual findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In the present case, the administrative law judge did not consider the 1991 medical reports of Drs. Clarke and Myers under Section 725.308(c). Consequently, we vacate the administrative law judge's finding that this subsequent claim was timely filed, and remand the case for the administrative law judge to determine if these medical reports are sufficient to constitute a reasoned diagnosis of total disability due to pneumoconiosis, and if so, whether the diagnosis was communicated to claimant sufficiently to trigger the statutory time limit for filing a claim, consistent with *Kirk*. While employer additionally asserts that the 1991 reports were communicated to the miner by virtue of the fact that he acted *pro se* during the 1994 modification proceedings, or alternatively, that knowledge was imputed to the miner through his attorney, the Director correctly notes that acting *pro se* does not automatically establish that the miner was aware of all the evidence of record. Such a determination is within the administrative law judge's discretion. S*ee Grundy Mining Co. v. Flynn*, 353 F.3d 467, 23 BLR 2-44 (6th Cir. 2003); Employer's Brief at 19-20. Furthermore, knowledge by claimant's attorney may not be imputed where, as here, personal knowledge is required. *See Daugherty v. Johns Creek Elkorn Coal Corp.*, 18 BLR 1-95 (1993).

Employer next argues that the administrative law judge erred by failing to make a qualitative analysis of the old and new evidence before finding a "material change" in conditions established pursuant to Section 725.309. Employer's Brief at 24. Employer additionally states that the administrative law judge misidentified the element of entitlement previously adjudicated against claimant. Employer asserts that to establish a "material change," claimant had to demonstrate that he is totally disabled *due to pneumoconiosis*. Employer's Brief at 22-23. We disagree. Initially, we note that pursuant to 20 C.F.R. §725.309(d), as amended, the administrative law judge is required only to make a determination that a change in an applicable condition of entitlement has been established since the date upon which the order denying the prior claim became final. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47 (2004)(*en banc*); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); *compare* 20 C.F.R. §725.309 (1999); *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). The district director's April 18, 2003 denial letter specifically found that "such disease has not caused a breathing impairment of sufficient degree to establish total disability within the meaning of the Act and the Regulations." Director's Exhibit 3-5. The entitlement analysis portion of the

letter informed claimant that, "the medical opinions also fail to show that the claimant is totally disabled." Director's Exhibit 3-8. Thus, the administrative law judge correctly inquired whether the new evidence established this element of entitlement. 20 C.F.R. §725.309(d)(2). The administrative law judge permissibly found, based upon employer's stipulation to claimant's total disability and the medical evidence, that a change in an applicable condition of entitlement had been established pursuant to 20 C.F.R. §725.309(d)(2). Decision and Order at 3. Accordingly, we affirm the administrative law judge's finding pursuant to Section 725.309, as supported by substantial evidence.

Employer next argues that the administrative law judge failed to properly weigh the x-ray evidence of record under Section 718.202(a)(1). Specifically, employer argues that the administrative law judge should have weighed all the "old" x-ray interpretations from the prior claims with the "new" x-ray evidence in the current claim. Employer's Brief at 28. Because the administrative law judge found that claimant did not meet his burden of proof to establish pneumoconiosis by x-ray evidence, however, any error in his weighing of this evidence would be harmless. Decision and Order at 12; *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Accordingly, we affirm the administrative law judge's finding that pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1).

Employer next contends that the administrative law judge erred in finding legal pneumoconiosis established at Section 718.202(a)(4) because he failed to consider all the prior medical opinions of record, many of which ruled out legal pneumoconiosis and attributed claimant's impairment to cigarettes or asthma, thereby buttressing the reports of Drs. Fino and Westerfield. Employer's Brief at 29. Additionally, employer contends that the administrative law judge did not provide valid reasons for crediting the opinion of Dr. Rasmussen over the opinions of Drs. Fino and Westerfield. Employer's Brief at 30, 33-43.

Employer is correct that once a change in an applicable condition of entitlement has been established, an administrative law judge must consider whether all of the record evidence, including that submitted with the previous claims, supports a finding of entitlement to benefits. *See Ross*, 42 F.3d 993, 19 BLR 2-12. Accordingly, we vacate the administrative law judge's evaluation of the medical opinion evidence at Section 718.202(a)(4), and instruct the administrative law judge to discuss and weigh all the medical opinion evidence of record on remand.

Employer also argues that the administrative law judge erred in finding that the opinions of Drs. Fino and Westerfield were hostile to the Act. We agree. The administrative law judge accorded less weight to the opinions of Drs. Fino and Westerfield because they testified that "even if simple pneumoconiosis, Category 1 profusion on x-ray were established, …the amount would be insufficient to be associated

with significant lung tissue destruction as a result of coal mine dust exposure." Decision and Order at 15. The administrative law judge found that this proposition "denies the existence of legal pneumoconiosis." *Id.* The administrative law judge also discounted the opinion of Dr. Westerfield as being contrary to the Act because "he implies that a restrictive, rather than obstructive impairment, is necessary to prove pneumoconiosis." Decision and Order at 15.

An administrative law judge may discount a medical opinion predicated on a tenet that is inimical to the Act, *e.g.*, that simple pneumoconiosis is never disabling; that pneumoconiosis does not progress after cessation of a miner's coal mine employment; or that obstructive disorders cannot be caused by coal mine employment, because such an opinion is hostile to the Act, and therefore, is not entitled to much, if any, weight. *See Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69 (6th Cir. 1987); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). However, in this case, neither Dr. Fino[5] nor Dr. Westerfield[6] denied the existence of legal pneumoconiosis, and Dr. Westerfield[7] opined that coal mine dust exposure can cause a disabling obstructive impairment. *Id.*; Director's Exhibits 21, 25; Employer's Exhibits 1, 2.

On remand, the administrative law judge should reconsider his determination that the doctors' opinions are hostile to the Act. Decision and Order at 15; *see Adams v. Peabody Coal Co.*, 816 F.2d 1116, 10 BLR 2-69, 2-72 (6th Cir. 1987). We note, however, in addressing employer's additional arguments, that an administrative law judge may permissibly accord greater weight to a medical opinion of a physician he determines has greater expertise in the study of coal workers' pneumoconiosis and provides a more rational and reasoned explanation for his opinion. *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113

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[5] Dr. Fino opined, "Even if I were to assume that this man has coal workers' pneumoconiosis, it has not contributed to his disability. He would be as disabled had he never stepped foot in the mines." Director's Exhibit 21; Employer's Exhibit 2.

[6] Dr. Westerfield opined, "If we assumed that Mr. Ratliff did have coal workers' pneumoconiosis which would be simple pneumoconiosis at a Category I level based on other x-ray interpretation, it would remain my opinion that his disability is not due to coal workers' pneumoconiosis or inhalation of coal dust." Director's Exhibit 25.

[7] Dr. Westerfield specifically opined: Q- In your opinion, to find a respiratory impairment due to lung disease caused by coal mine dust inhalation, is it necessary to have a restrictive impairment? A- No, sir. Q- Can coal mine dust exposure cause a disabling obstructive impairment? A- Yes, sir. Employer's Exhibit 1 at 20.

(1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In addition, we reject employer's argument that the administrative law judge has mischaracterized the evidence and has been selective in his analysis of the medical opinion evidence. Employer has not provided any support for that assertion, nor does a review of the evidence and the administrative law judge's Decision and Order reveal selective analysis of the evidence.

Because the administrative law judge must reevaluate whether the medical opinion evidence establishes the existence of pneumoconiosis, an analysis that could affect his weighing of the evidence on the issue of disability causation, we also vacate the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remand for a reassessment of all relevant evidence thereunder.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge