BRB No. 08-0354 BLA

Estate of L.M.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JONES BRANCH COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/27/2009
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL	)	
	)	
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 of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (06-BLA-5874) of Administrative Law Judge Larry S. Merck awarding benefits on a miner's 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).[1] The administrative law judge credited the miner with twenty-three and one-half years of qualifying coal mine employment, and determined that this subsequent claim, filed on July 30, 2004, was subject to the regulatory provisions at 20 C.F.R. §725.309(d).[2] The administrative law judge determined that the claim was timely filed pursuant to 20 C.F.R. §725.308, and that the newly submitted evidence was sufficient to establish both total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found the weight of the evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that this subsequent claim was timely filed, and his findings that the evidence was sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), as well as the existence of legal pneumoconiosis at Section 718.202(a)(4), total respiratory disability at Section 718.204(b)(2), and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The

[1] Claimant herein is the Estate of L.M., the miner, who died on September 27, 2005. The miner's widow, B.M., originally pursued the miner's claim on his behalf, and filed a survivor's claim on October 18, 2005. The administrative law judge denied benefits on the survivor's claim, and no appeal thereof has been filed.

[2] The miner's first claim for benefits was filed on May 22, 1978 and finally denied on February 19, 1985. Decision and Order at 2; Director's Exhibit 1. A second claim for benefits, filed on September 16, 1988, was denied on April 6, 1989. Director's Exhibit 1. A third claim for benefits, filed on August 24, 1989, was considered to be a request for modification of the second claim, and was finally denied on November 20, 1992. *Id.* A fourth application for benefits, filed on May 18, 1994, Director's Exhibit 2, was denied by the district director on November 1, 1994 for failure to establish total disability due to pneumoconiosis. No further action was taken until the filing of the current claim on July 30, 2004.

Director, Office of Workers' Compensation Programs (the Director), has filed a limited response addressing only the timeliness issue. Employer has filed a reply brief.[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 rational, supported by substantial evidence, and in accordance with applicable law.[4] 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. Turning first to the timeliness issue, Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). It is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition [of total disability due to pneumoconiosis] was communicated to [the miner]" more than three years prior to the filing of his/her claim. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001);[5] *see Sharondale Corp. v. Ross*, 42 F.3d 993, 997-98, 19 BLR 2-10, 2-18 (6th Cir. 1994); *Adkins v. Donaldson Mine Co*., 19 BLR 1-34 (1993). Moreover, the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.2d at 607, 22 BLR at 2-296. Thereafter, the three-year statute of limitations clock "may only be turned back if the miner returns to the mines after a

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that the weight of the pulmonary function study and blood gas study evidence of record, old and new, was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, because the miner's last coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 1.

[5] Inasmuch as the Director agrees that this claim was timely filed based on the administrative law judge's analysis, we do not reach the Director's argument regarding the proper construction of *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

denial of benefits." *Kirk*, 264 F.3d at 608, 22 BLR at 2-298. Since the current claim for benefits was filed on July 30, 2004, employer must establish that a medical determination satisfying the statutory definition was communicated to the miner prior to July 30, 2001. The miner's testimony alone is insufficient to start the running of the statute of limitations. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006).

In the present case, the administrative law judge rationally concluded that the record was "devoid of any compelling evidence that the Miner was ever actually informed by a physician that he was totally disabled due to pneumoconiosis." Decision and Order at 7. While employer asserts that the miner testified that he was told in the 1970's that "he was totally disabled due to black lung disease by both Dr. Ruben[6] and Dr. Martin," Employer's Brief at 15, the administrative law judge acted within his discretion in finding that the miner's belief that he was totally disabled due to pneumoconiosis at some time in the 1970's was insufficient to support employer's burden on rebuttal.[7]

[6] While employer references "Dr. Ruben," the record indicates that the physician's name is Dr. Rubin Singayao. *See* Director's Response at 18; Director's Exhibit 23 at 7.

[7] At his 2004 deposition, the miner testified that Dr. Baker told him "last month" that he had black lung. Director's Exhibit 23 at 7. The pertinent remaining testimony of the miner is as follows:

> Q. Has any other doctor ever told you that?
>
> R. No. I don't know of another one that's told me. I've had different doctors tell me that I have bad lungs.
>
> Q. Has any doctor ever told you that you're totally disabled because of black lung?
>
> R. Yes.
>
> Q. Could you tell me who told you that?
>
> R. Dr. Rubin was one, and a – [there] used to be another doctor at McDowell. He was a surgeon. My right lung collapsed back years ago and he's the one that told me to get out of the coal mine. He told me that, that I wouldn't live long if I didn't get out of the coal mine, that my lungs were in bad shape back then. And he's the reason that I signed up on silicosis.

Director's Exhibit 23 at 7-8.

Decision and Order at 6-7; *see Brigance*, 23 BLR 1-170. Moreover, the miner's return to coal mine employment in the 1980's following the denial of his federal claim for benefits restarted the statute of limitations for filing a new claim. *See Kirk*, 264 F.2d at 608, 22 BLR at 2-298; Decision and Order at 4, 6-7; Director's Exhibits 2 at 72, 23 at 7-9. Contrary to employer's argument, the mailing of Dr. Mettu's medical report, appended to a denial of a claim, is also insufficient to constitute "communication" for purposes of rebutting the presumption of timeliness. *See generally W.C. v. Benham Coal Co.*, 24 BLR 1-50 (2008); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993). While employer asserts that a written diagnosis is not required, *see Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006), substantial evidence supports the administrative law judge's finding that the record contains no evidence "that a well-reasoned and well-documented diagnosis of total disability due to pneumoconiosis was communicated to the Miner." Decision and Order at 8. Consequently, we affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness pursuant to Section 725.308(c). *Kirk*, 264 F.3d at 607, 22 BLR at 2-298.

Employer next contends that the administrative law judge erred in finding that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2), and a change in an applicable condition of entitlement pursuant to Section 725.309(d).[8] Specifically, employer maintains that this case must be remanded for the administrative law judge to provide an analysis of whether the physicians whose opinions he relied upon to find total disability established had knowledge of the exertional requirements of the miner's usual coal mine employment. Employer's Brief at 20. We disagree. After finding that the weight of the newly submitted pulmonary function study and blood gas study evidence of record was sufficient to establish total disability at Section 718.204(b)(2)(i), (ii), the administrative law judge accurately determined that every physician who provided an opinion on the issue concluded that the miner was totally disabled by his pulmonary condition pursuant to Section 718.204(b)(2)(iv). Decision and Order at 12. Because the administrative law judge found that the newly submitted objective evidence was independently sufficient to establish total disability pursuant to Section 718.204(b)(2), without contradiction by any physician, we affirm the administrative law judge's finding of total disability thereunder

[8] We find no merit in employer's assertion that the notification form used by the district director to deny the miner's prior claim "lumped disability and disability causation together so it is not possible to determine whether . . . [the claim was denied] for failure to establish disability or failure to establish disability causation," Employer's Brief at 19, as the attachment to the denial notice listed the non-qualifying values obtained on the miner's pulmonary function and blood gas studies. Director's Exhibit 2 at 20-22. Thus, the administrative law judge properly determined that the issue of total disability constituted an applicable condition of entitlement herein.

and his finding of a change in an applicable condition of entitlement at Section 725.309(d). As employer has not challenged the administrative law judge's finding that the newly submitted evidence was entitled to greater weight than the earlier evidence, we also affirm his finding that the weight of the evidence of record was sufficient to establish total disability at Section 718.204(b)(2)(i)-(iv). *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, employer contends that the administrative law judge failed to provide valid reasons for crediting the opinions of Drs. Baker and Potter, that the miner had legal pneumoconiosis, over the contrary opinions of Drs. Dahhan and Fino at Section 718.202(a)(4). Employer's arguments are without merit. The administrative law judge accurately summarized the conflicting medical opinions of record, noting their underlying documentation and the physicians' explanations for their respective conclusions. Decision and Order at 17-28, 31-32. The administrative law judge acted within his discretion in finding that Dr. Baker's diagnosis of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, significantly related to and aggravated by coal dust exposure, was well-reasoned and supported by the objective evidence of record. Decision and Order at 17-20; Director's Exhibits 17, 66; *see Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). In evaluating the opinion of Dr. Potter, the miner's treating physician, the administrative law judge properly considered the factors at 20 C.F.R. §718.104(d), and determined that Dr. Potter's diagnosis of legal pneumoconiosis, based on his own objective testing as well as the miner's medical records and Dr. Baker's addendum report, was well-reasoned and entitled to "special consideration." Decision and Order at 31-33; Director's Exhibit 70; Claimant's Exhibit 1. In light of the other relevant evidence and the record as a whole, the administrative law judge permissibly accorded the opinion significant weight. Decision and Order at 33; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002). The administrative law judge rationally accorded little weight to Dr. Dahhan's opinion, that the miner's COPD was caused entirely by smoking, as he was not persuaded by the physician's explanation that the miner's airway obstruction was "severe and disabling in nature, a finding that is not seen secondary to the inhalation of coal dust, *per se*. . . ."[9] Director's Exhibits 45, 72. Further, the administrative law judge found that Dr. Dahhan failed to adequately explain

[9] Contrary to employer's argument, the administrative law judge did not find that Dr. Dahhan's opinion was hostile to the Act. Rather, the administrative law judge determined that Dr. Dahhan's view was not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature underlying the applicable regulations. Decision and Order at 23-24; *cf. Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-266 (7th Cir. 2001).

why coal dust exposure did not exacerbate the miner's condition. Decision and Order at 22-23; *see Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1998). While the administrative law judge found that Dr. Fino rendered a well-reasoned opinion that the miner had no condition that was significantly contributed to or aggravated by coal dust exposure, the administrative law judge acted within his discretion in finding that the opinion was outweighed by the reasoned opinions of Drs. Baker and Potter. Decision and Order at 24-28, 35; *see Rowe*, 710 F.2d 251, 5 BLR 2-99. As substantial evidence supports the administrative law judge's finding that the weight of the evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), it is affirmed.

Lastly, employer maintains that it is not clear that the administrative law judge applied the proper standard in finding that Dr. Baker's opinion was sufficient to establish disability causation at Section 718.204(c). We disagree. Based on his weighing of the conflicting medical opinions on the issue of legal pneumoconiosis, the administrative law judge properly determined that Dr. Baker's well-reasoned opinion was entitled to determinative weight on the issue of disability causation. Decision and Order at 37. Although Dr. Baker conceded that both smoking and coal dust exposure had a material adverse effect on the miner's respiratory condition and contributed substantially to his total disability, the physician was not required to apportion the relative contribution of each contributing cause of disability. *See Cornett*, 227 F.3d 569, 22 BLR 2-107. Consequently, we affirm the administrative law judge's finding that the weight of the evidence established disability causation at Section 718.204(c), as supported by substantial evidence, and we affirm his award of benefits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits on the miner's subsequent claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge