BRB No. 06-0314 BLA

JOAN WALLACE (on behalf of the estate of ETHEL EVERSOLE)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/31/2007
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Third Remand – Awarding Living Miner Benefits and Survivor Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joan Wallace, Beaver Dam, Kentucky, *pro se*.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Helen H. Cox (Jonathan L. Snare, Acting 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 Third Remand – Awarding Living Miner Benefits and Survivor Benefits (2002-BLA-0086) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on claims 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). This case is before the Board for a fourth time. This case involves a miner's duplicate claim and a survivor's claim, which were consolidated for hearing. Both the miner and his widow died while the claims were pending. The miner's daughter (claimant) is pursuing the claims on behalf of her parents.[1] The relevant procedural history of the case was set forth in the Board's prior decision and is incorporated by reference herein.[2] *Wallace (on behalf of the estate of Ethel Eversole) v. Peabody Coal Co.* [*Wallace*], BRB No. 04-0323 BLA (Dec. 28, 2004) (unpub.). Most recently, the Board reversed the administrative law judge's order to dismiss claimant as a party to the proceeding. The Board vacated the administrative law judge's award of benefits in the miner's claim, and instructed the administrative law judge to consider whether the miner's duplicate claim was time-barred. *Wallace*, slip op. at 10. The Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(4) and 718.204(c) because he failed to weigh the opinions of Drs. Branscomb and Caffrey, relevant to whether the miner's chronic obstructive disease was due to smoking or coal dust exposure. *See Wallace*, slip op. at 11. Because the administrative law judge's finding on remand, as to the existence of legal pneumoconiosis, would impact his consideration of whether the miner's death was hastened by pneumoconiosis, the Board also vacated the

[1] Employer notes its continued objection to the Board's holding in *Wallace (on behalf of the estate of Ethel Eversole) v. Peabody Coal Co. [Wallace]*, BRB No. 04-0323 BLA (Dec. 28, 2004) (unpub.), that claimant is a proper party to the claims because she was properly substituted for her deceased parents pursuant to 20 C.F.R. §725.360(b). Employer "preserves its objection for any future proceedings[,] but it does not contest [the Board's] holding in the appeal now pending." Employer's Brief in Support of Petition for Review at 5, n. 2.

[2] The Board previously affirmed, as unchallenged by the parties, the administrative law judge's conclusion that the miner was totally disabled from a respiratory standpoint, and thus, the Board found, as a matter of law, that a material change in conditions had been established pursuant to 20 C.F.R. §725.309(d). *Eversole v. Peabody Coal Co*., BRB No. 00-0284 BLA (Dec. 18, 2000) (unpub.), slip op. at 4; *Eversole v. Peabody Coal Co*., BRB No. 98-0548 BLA (Jul. 22, 1999)(unpub.), slip op. at 3. The Board also has affirmed the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), or (3). *Eversole*, BRB No. 98-0548 BLA, slip op. at 2, n.2.

award of survivor's benefits, and remanded the case for further consideration of both claims.

In his Decision and Order Third Remand dated December 8, 2005, the administrative law judge first addressed the timeliness issue. The administrative law judge determined that, while Dr. Simpao's 1986 opinion constituted a reasoned medical opinion of total disability due to pneumoconiosis, because there was no evidence from which to conclude that Dr. Simpao's opinion had been properly "communicated" to the miner, the doctor's diagnosis was insufficient to trigger the running of the statute of limitations pursuant to 20 C.F.R. §725.308. The administrative law judge specifically rejected employer's assertion, that insofar as Dr. Simpao's report was provided to claimant's attorney, knowledge of the contents of the report should impute to claimant, regardless of whether claimant's attorney actually sent a copy of the report to his client, or verbally informed him of the contents of the report. The administrative law judge thus found that employer was unable to rebut the presumption that the miner's claim was timely filed pursuant to Section 725.308. On the merits, the administrative law judge found that the weight of the evidence established that the miner had legal pneumoconiosis in the form of chronic obstructive pulmonary disease due, in part, to coal dust exposure, and that the miner was totally disabled due to his pneumoconiosis. The administrative law judge further found, with respect to the survivor's claim, that pneumoconiosis hastened the miner's death due to cancer pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits in the miner's claim and the survivor's claim.

Employer appeals, challenging the administrative law judge's finding at Section 725.308 that the miner's claim was timely filed, alleging, in part, that the administrative law judge's ruling amounts to a denial of due process. Employer also challenges the weight that the administrative law judge accorded the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), and 718.205(c). Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to affirm the administrative law judge's finding that the miner's claim was timely filed. The Director further asserts that the Board may affirm the administrative law judge's credibility determinations relevant to the issues of the existence of legal pneumoconiosis, total disability due to pneumoconiosis, and whether the miner's death was hastened by pneumoconiosis. Employer had filed a reply brief, reiterating its position that Dr. Norsworthy's opinion is insufficient to satisfy claimant's burden of proof on the requisite elements of entitlement.

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).

Timeliness of the Miner's Claim:

Employer contends that the administrative law judge erred when he found that employer failed to rebut the presumption at 20 C.F.R. §725.308 that the miner's duplicate claim was timely filed. Employer further contends that due process requires that liability for benefits transfer to the Black Lung Disability Trust Fund since the miner is deceased and employer is unable to obtain testimony to satisfy its burden of proof under Section 725.308.

After our consideration of the administrative law judge's decision, the arguments on appeal, and the evidence of record, we reject employer's assertion that the administrative law judge's timeliness ruling was in error. The regulation at Section 725.308(a) governs the time limits for filing claims and provides that "[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*...(emphasis added)." 20 C.F.R. §725.308(a). This regulation further provides that there is a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction these claims arise,[3] held in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 291 (6th Cir. 2001) that "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 claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

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

In *Kirk*, the Sixth Circuit held that the three-year statute of limitations "clock" imposed by Section 725.308 on the filing of a claim, "begins to tick the first time that a miner is told by a physician that he is totally disabled due to pneumoconiosis[,]" and that "[t]his clock is not stopped by the resolution of the miner's claim or claims…the clock may only be turned back if the miner returns to the mines after a denial of benefits." *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 BLR 291, 298 (6th Cir. 2001).

In this case, in order to establish rebuttal of the Section 725.308 presumption, employer had to show that the miner received a communication of total disability due to pneumoconiosis more than three years prior to the date he filed his duplicate claim on January 22, 1993. The record contains a Department of Labor (DOL) form prepared in conjunction with an examination performed by Dr. Simpao on September 30, 1986, which included a diagnosis that the miner was totally disabled due to pneumoconiosis. Director's Exhibits 1, 27. Employer argues before the Board, as it did before the administrative law judge, that the miner's duplicate claim was untimely filed since it was not filed within three years of Dr. Simpao's diagnosis. Employer asserts that, because a copy of Dr. Simpao's report was included in the copy of the administrative file compiled by the DOL in conjunction with the miner's first claim, and that file was provided to the miner's attorney, knowledge of the content of the report, and Dr. Simpao's diagnosis of total disability due to pneumoconiosis, must impute to the miner for purposes of satisfying the communication requirement of Section 725.308. Employer further asserts that, if possession of Dr. Simpao's report by the miner's attorney is not sufficient to constitute communication under the regulation, liability for benefits should transfer to the Black Lung Disability Trust Fund. Employer contends that due process requires transfer of liability insofar as the miner is deceased and employer is unable to obtain testimony as to whether the miner had knowledge of the contents of Dr. Simpao's report.

On remand, the administrative law judge considered the arguments and case law presented by employer with respect to whether the miner's duplicate claim was timely filed. Contrary to employer's assertion, the administrative law judge permissibly declined to impute knowledge of the contents of Dr. Simpao's report to the miner simply because the report was in the possession of the miner's attorney. *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-96, 1-99 (1993)(medical opinion addressed to attorney insufficient to trigger limitations period). Furthermore, although employer relies on *Daniel v. Cantrell*, 375 F.3d 377, 385-86 (6th Cir. 2004) for the proposition that notice to an attorney should be considered to be notice to the client, *see* Employer's Brief in Support of Petition for Review at 12, we agree with the administrative law judge that *Cantrell* is not instructive:

> The statute of limitations in *Cantrell* related to a federal privacy issue under 18 U.S.C. §2710(c)(3), and not an administrative claim for benefits under the Act. In addition, 18 U.S.C. §2710 does not include a presumption similar to that found in [Section] 725.308(c). It is clear to the undersigned that by including [Section] 725.308(c)'s rebuttable presumption, that Congress intended a more exacting requirement than that found in *Cantrell*, and that a reasoned diagnosis of total disability due to pneumoconiosis must be communicated directly to a miner, and not through his agent. As a result, I am not inclined to assume that simply because a medical report was

> in the record or in the possession of the [m]iner's attorney, that the findings were 'communicated' to [the miner].

Decision and Order Third Remand at 4-5.

We also reject employer's assertion that there has been a denial of due process. In order to establish a denial of due process in an administrative hearing there must be a showing of substantial prejudice, *see Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972).

Contrary to employer's contention, the administrative law judge acted within his discretion in concluding that the change in the law, which has now prompted employer to dispute the timeliness of the miner's duplicate claim, does not justify transferring liability to the Black Lung Disability Trust Fund at such a late date in the litigation process, simply because the miner is no longer available to testify. The administrative law judge permissibly found that employer has not been substantially prejudiced in this case, noting that employer "has had the opportunity to defend against both claims for benefits at each stage of the [litigation] process[,]" and "even though *Kirk* changed how the statue of limitations under [Section] 725.308 was applied, this does not negate the fact that [Section] 725.308 proceeded *Kirk*, and futile or not, was open to challenge by [e]mployer." Decision and Order Third Remand at 5.

An administrative law judge is afforded discretion in dealing with matters of fairness and judicial efficiency. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986); *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984). The Board has recognized that since an adjudication officer is empowered to conduct formal hearings and render decisions under the Act, he or she is granted broad discretion in resolving procedural issues, particularly in situations where the requirements of a regulation are not clearly defined. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *citing Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002); *Freeman United Coal Mining Co. v. Benefits Review Board* [*Whited*], 909 F.2d 193, 14 BLR 2-32 (7th Cir. 1990). We decline to vacate the administrative law judge's timeliness ruling in this matter as we see no abuse of discretion presented in the record. Consequently, we affirm the administrative law judge's finding at Section 725.308, that employer failed to rebut the presumption that the miner's duplicate claim was timely filed. We also affirm the administrative law judge's rejection of employer's due process argument.

Merits of Entitlement/Miner's Claim:

Turning our attention to the merits of the entitlement in the miner's claim, we reject employer's assertion that the administrative law judge failed to explain the weight he accorded the medical opinions relevant to the issue of legal pneumoconiosis or that he improperly shifted the burden of proof to employer at 20 C.F.R. §718.202(a)(4). On remand, the administrative law judge properly noted that the Board previously affirmed his finding that the opinions of Drs. O'Bryan, Norsworthy, Penman, and Mercer are reasoned and documented, and that these opinions are supportive of a finding of legal pneumoconiosis. Decision and Order Third Remand at 3; *see Eversole*, BRB No. 00-0284 BLA, slip op. at 5-8. The administrative law judge complied with the Board's instruction that he reweigh the opinions of Dr. Branscomb and Dr. Caffrey relevant to the issue of whether the miner's respiratory impairment or disability was due to coal dust exposure.[4] Decision and Order Third Remand at 9. The administrative law judge permissibly found that the opinions of Drs. Caffrey and Branscomb were less persuasive regarding the etiology of the miner's chronic obstructive pulmonary disease since neither physician adequately explained the basis for his conclusion that the miner's respiratory impairment was due entirely to smoking, s*ee Clark*, 12 BLR 1-149; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987), and since they appeared to base their opinions on the general statements contained in the medical literature they cited, as opposed to focusing their opinions on the specifics of the miner's respiratory condition, *see Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). Decision and Order Third Remand at 9.

The administrative law judge has discretion to resolve the conflicting evidence and he is given deference by the Sixth Circuit with regard to his credibility determinations. S*ee Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 103 (6th Cir. 1983). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the miner had legal pneumoconiosis pursuant to Section 718.202(a)(4).

[4] The Board previously held that the administrative law judge erred in rejecting the opinions of Drs. Branscomb and Caffrey on the grounds that they did not personally examine the miner prior to his death. *Eversole*, BRB No. 00-0284 BLA, slip op. at 9. The Board, however, affirmed the administrative law judge's determination that the opinions of Drs. O'Bryan, Mercer, Penman, and Norsworthy constituted documented and reasoned opinions, and that their diagnoses of a chronic lung disease due, in part, to coal dust exposure, supported a finding of legal pneumoconiosis at 20 C.F.R. Section 718.202(a)(4). *Eversol*e, BRB No. 00-0284 BLA, slip op. at 5-9.

Furthermore, we reject employer's contention that there is no evidence to support the administrative law judge's finding that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). Employer's Brief in Support of Petition for Review at 18. In support of his finding, the administrative law judge specifically referred to Dr. O'Bryan's credible opinion in 1993 that the miner was disabled, that he suffered from moderate respiratory impairment, of which fifty percent was attributable to chronic obstructive pulmonary disease arising, in part, from coal dust exposure. *Id*. The administrative law judge further found that Dr. Norsworthy's treatment notes, letters, and deposition testimony collectively demonstrated that Dr. Norsworthy was of the opinion that the miner was totally disabled due, in part, to coal workers' pneumoconiosis arising out of coal mine employment. *Id*.

As to employer's experts, the administrative law judge permissibly rejected the opinions of Drs. Branscomb and Caffrey relevant to the issue of disability causation, since neither physician opined that the miner had legal pneumoconiosis.[5] We therefore affirm, as supported by substantial evidence, the administrative law judge's finding at Section 718.204(c) that claimant satisfied her burden of proof to establish that the miner was totally disabled due to pneumoconiosis prior to his death. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-296; 20 C.F.R. §718.204(c)(1). Consequently, we affirm the administrative law judge's award of benefits in the miner's claim.

Merits of Entitlement/Survivor's Claim:

Employer challenges the administrative law judge's finding that the miner's death was hastened by pneumoconiosis. Employer's Brief in Support of Petition for Review at 20-22. Employer asserts that the administrative law judge erred in relying on Dr. Norsworthy's opinion to award survivor benefits and asserts that the administrative law judge's finding that the miner's death was hastened by pneumoconiosis is not supported by substantial evidence.

We disagree. The administrative law judge properly found that Dr. Norsworthy attended to the miner in the final days of his life and that Dr. Norsworthy completed the death certificate identifying chronic obstructive pulmonary disease and coal workers'

[5] The administrative law judge noted that "[w]hile both Dr. Branscomb and Dr. Caffrey assumed the existence of [coal workers' pneumoconiosis] for the purpose of addressing the etiology of [the miner's] total disability, it is clear from the context in which they discuss [coal workers' pneumoconiosis] that they were speaking only of clinical pneumoconiosis[,]" and that neither physician ever considered whether the miner was totally disabled as a result of chronic obstructive pulmonary disease arising, in part, from coal dust exposure. Decision and Order Third Remand at 15-16, n.6.

pneumoconiosis as underlying causes of death. Decision and Order Third Remand at 17. The administrative law judge permissibly found that Dr. Norsworthy "possessed the requisite qualifications and personal knowledge of [the miner's] medical condition from which to assess the cause of death."[6] Decision and Order Third Remand at 17; *see generally* 20 C.F.R §718.104(d). The administrative law judge also permissibly found that Dr. Norsworthy provided credible and reasoned testimony, how the miner "was not ever offered the option of surgery to resect the [lung] cancer because of his overall lung condition from the combination of the [miner's] pneumoconiosis and underlying [chronic obstructive pulmonary disease]." Decision and Order Third Remand at 19. Because the administrative law judge has determined that the miner's chronic obstructive pulmonary disease due, in part, to coal dust exposure constitutes legal pneumoconiosis, he properly found that Dr. Norsworthy's opinion, that the miner's chronic obstructive pulmonary disease hastened the miner's death due to lung cancer, is sufficient to satisfy claimant's burden of proof at Section 725.205(c).

Furthermore, the administrative law judge permissibly found the contrary opinions of employer's experts, Drs. Caffrey and Branscomb, that the miner's death was unrelated to coal dust exposure, to be less probative because they did not believe that the miner suffered from legal pneumoconiosis. Decision and Order Third Remand at 15-16, n. 6; s*ee Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). We decline to vacate the administrative law judge's credibility determinations under Section 718.204(c) as they were within his discretion as the trier-of-fact. *See Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because Dr. Norsworthy's opinion constitutes substantial evidence in support of the administrative law judge's finding at Section 718.205(c), we affirm his conclusion that the miner's death was hastened by pneumoconiosis. We therefore affirm the administrative law judge's award of benefits in the survivor's claim.

[6] The administrative law judge found that Dr. Norsworthy had attended to the miner during the final weeks of his life, and that over a nine month period leading to the miner's death, the doctor was kept informed of the miner's condition by being sent copies of all the miner's medical records from those physicians who treated the miner's lung cancer. The administrative law judge also found that Dr. Norsworthy had specifically discussed the miner's pulmonary status with Dr. O'Bryan, who performed the miner's lung biopsy. Decision and Order Third Remand at 17; see Director's Exhibits 10, 29.

Accordingly, the Decision and Order Third Remand – Awarding Living Miner Benefits and Survivor Benefits of the administrative law judge is affirmed.

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