BRB Nos. 06-0449 BLA
and 06-0449 BLA-A

KENNETH CALDWELL	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SHAMROCK COAL COMPANY, INCORPORATED, c/o ACORDIA EMPLOYERS SERVICE	)	DATE ISSUED: 01/31/2007
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

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

Rita Roppolo (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:

Claimant appeals, and employer cross-appeals, the Decision and Order – On Remand (03-BLA-5590) of Administrative Law Judge Joseph E. Kane on a subsequent claim[1] 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). In its prior Decision and Order, the Board affirmed the denial of benefits but vacated the administrative law judge's finding that the instant claim was timely filed and remanded the case for a redetermination of the timeliness issue. *Caldwell v. Shamrock Coal Co.,* BRB Nos. 04-0970 BLA and 04-0970 BLA-A (Aug 31, 2005)(unpub.). The Board specifically affirmed the administrative law judge's finding that the newly submitted evidence failed to establish either the existence of pneumoconiosis or total respiratory or pulmonary disability pursuant to 20 C.F.R. §§718.202(a), 718.204(b)(2) and, thus, that claimant failed to demonstrate a change in an applicable condition of entitlement since the prior denial pursuant to 20 C.F.R. 725.309(d). *Id.* The Board remanded the case solely for the administrative law judge to address the issue of timeliness and instructed the administrative law judge to determine whether the record contains "a medical determination of total disability due to pneumoconiosis that has been communicated to the miner" in accordance with the regulations at 20 C.F.R. §725.308 and the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[2] *Id.* On remand, the administrative law judge found that the claim was timely filed and, therefore, he reinstated his decision denying benefits.

On appeal, claimant contends that the administrative law judge erred in his prior decision in finding that the evidence did not establish the existence of pneumoconiosis and total disability at 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.204(b)(2) and that the Director, Office of Workers' Compensation Programs (the Director), failed to provide

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[1] The subsequent claim was filed on April 4, 2001. The remainder of the procedural history is set forth in *Caldwell v. Shamrock Coal Co.,* BRB Nos. 04-0970 BLA and 04-0970 BLA-A (Aug 31, 2005) (unpub.), slip op. at 2.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment occurred in Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

him with a complete and credible pulmonary evaluation. Employer responds, and urges affirmance of the decision below, arguing that the Board rejected claimant's arguments in its prior decision. The Director responds, and asserts that claimant's argument regarding the Director's obligation, under Section 413(b) of the Black Lung Benefits Act, 30 U.S.C. §923(b), to provide claimant with a complete pulmonary evaluation was rejected by the Board in its prior decision and that the Board's holding must stand in view of claimant's failure to establish an exception to the law of the case doctrine.

Employer has filed a cross-appeal, contending that the administrative law judge erred in finding that the subsequent claim was timely filed. The Director has filed a letter in response to employer's cross-appeal in which he argues that the administrative law judge properly concluded that the evidence of record fails to rebut the presumption, set forth in Section 725.308, that the claim was timely filed.

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).

In his brief on appeal, claimant raises precisely the same contentions that he advanced in his previous appeal regarding the administrative law judge's findings under Sections 718.202(a)(1), (a)(4), and 718.204(b)(2)(iv) and whether the Director provided him with a complete and credible pulmonary evaluation. Those contentions were addressed and rejected by the Board in its prior Decision and Order. *Caldwell,* BRB Nos. 04-0970 BLA and 04-0970 BLA-A, slip op. at 4-7. Because claimant has advanced no argument in support of altering our prior holdings, they constitute the law of the case and will not be disturbed. S*ee Stewart v. Wampler Bros. Coal Co.*, 22 BLR 1-80, 1-89 (2000); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). We reaffirm, therefore, the administrative law judge's denial of benefits.

We will now address the administrative law judge's findings regarding the issue of whether claimant's subsequent claim was timely filed. Section 422(f) of the Act, 30 U.S.C. §932(f), provides in relevant part that:

> 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.

30 U.S.C. §932(f). The implementing regulation, 20 C.F.R. §725.308, provides that:

> (a) A claim for benefits . . . 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 a miner...
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308. In this case, the administrative law judge determined that the 1993 opinion of Dr. Clarke, that claimant was totally disabled due to pneumoconiosis, was never communicated to claimant as required under the Act and regulations. The administrative law judge found, therefore, that employer failed to rebut the presumption that the subsequent claim was timely filed.

Employer alleges the administrative law judge's finding is contrary to Section 422(f), 30 U.S.C. §932(f) because: Dr. Clarke's 1993 report provided claimant with the requisite communication of a "medical determination of total disability due to pneumoconiosis;" this report was obtained by claimant and it "could be assumed that claimant's own physician's opinion would be 'communicated' to the claimant;" and that claimant was on notice because he "should have inquired about his own doctor's conclusions." Employer's Brief at 12. In support of its arguments, employer states that in 1996, Dr. Clarke's report was included in a joint stipulation of the evidence of record, thereby providing claimant with notice of Dr. Clarke's diagnosis of total disability due to pneumoconiosis. Employer's Brief at 14. Employer also asserts that Dr. Clarke's report was relied upon and quoted by claimant's attorney in the "original litigation before the administrative law judge" and that the administrative law judge allegedly ignored the "normal rules of agency" in finding that Dr. Clarke's report was not communicated to claimant. Employer's Brief at 15.

Employer's contentions are without merit. In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the Board held that "communication to the miner" requires that the medical determination "is actually received by the miner." *Adkins*, 19 BLR at 1-43. The Board reiterated this principle in *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994), in which it held that receipt of a medical determination of total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner. In this case, the administrative law judge acted within his discretion in determining that the mere presence of Dr. Clarke's report in the record or in the possession of claimant's attorney did not constitute communication of the findings to claimant pursuant to Section 725.308. *Daugherty*, 18 BLR at 1-101. The administrative

law judge also rationally found that claimant's hearing testimony regarding his medical history did not establish that Dr. Clarke's diagnosis was communicated to him, because he did not mention the physician. *Id;* February 9, 1996 Hearing Transcript at 9-24; September 23, 2003 Hearing Transcript at 12-23. Finally, the Director notes correctly that the January 1996 joint stipulation that referred to Dr. Clarke's opinion provided that Dr. Clarke read an x-ray as 2/1 and diagnosed total disability, but did not indicate whether claimant's total disability was respiratory in nature or due to pneumoconiosis. Administrative Law Judge's Exhibit 1. The administrative law judge reasonably determined, therefore, that Dr. Clarke's diagnosis of total disability due to pneumoconiosis was never communicated to claimant and, thus, that this claim was timely filed in accordance with Section 725.308.[3] *Kirk*, 264 F.3d at 607, 22 BLR at 2-296; *Daugherty*, 18 BLR at 1-101.

[3] The administrative law judge also found that Dr. Clarke's diagnosis of total disability due to pneumoconiosis did not trigger the running of the three year limitations period, as it was not well reasoned. We need not address this aspect of the administrative law judge's findings under 20 C.F.R. §725.308, in light of our affirmance of his determination that Dr. Clarke's diagnosis was not communicated to claimant. 20 C.F.R. §725.308(a); *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – On Remand 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