

BRB No. 07-0583 BLA

A.N., JR.)
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 Claimant-Petitioner)
)
 v.)
)
 CONSOLIDATION COAL COMPANY C/O) DATE ISSUED: 01/29/2008
 ACORDIA EMPLOYERS SERVICE)
)
 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 Denying Benefits of Robert D. Kaplan,
Administrative Law Judge, United States Department of Labor.

A.N., Jr., Wallens, Kentucky, *pro se*.

Allison B. Moreman (Jackson Kelly P.L.L.C.), Lexington, Kentucky, for
employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant, without the assistance of counsel,¹ appeals the March 22, 2007 Decision
and Order Denying Benefits (2006-BLA-05671) of Administrative Law Judge Robert D.
Kaplan 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). The

¹ Jerry Murphee, a benefits counselor with Stone Mountain Health Services of St.
Charles, Virginia, filed an appeal on behalf of claimant, but is not representing him on
appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

administrative law judge found that claimant’s “uncontradicted testimony” and the written report of Dr. Clarke evidenced that claimant had been informed of a medical determination of total disability on February 17, 1993, and that, therefore, employer had rebutted the presumption that claimant’s May 13, 2005 claim was timely filed pursuant to 30 U.S.C. §932(f), 20 C.F.R. §725.308(a). Accordingly benefits were denied.

On appeal, claimant generally challenges the denial of benefits and argues that “the evidence in the file will prove the miner was not told he was disabled from a breathing perspective and that his testimony was a misunderstanding on what medical evidence doctors [relied upon who] were determining his [degree of] disability on his state of Kentucky claim.” Employer has responded, urging affirmance, and the Director, Office of Workers’ Compensation Programs, has declined to participate in this appeal.

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).

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);² 20 C.F.R. §725.308(a);³ see *Tennessee Consolidated*

² 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.

³ 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

Coal Co. v. Kirk, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).⁴ In order to trigger the 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 Section 725.308(a) 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*).

Claimant contends that the testimony he gave at his January 18, 2007 hearing⁵ pertained only to his Kentucky state workers' compensation claim, and was misunderstood by the administrative law judge to mean that the claimant had been notified by a medical professional that he was totally disabled under the Black Lung Benefits Act.⁶ Additionally, claimant contends that the objective medical evidence contained in the report the administrative law judge relied on was based on Kentucky state law standards. Employer contends, however, that claimant's hearing testimony, together with the medical report of Dr. Clarke, are sufficient to rebut the presumption at Section 725.308(c). We agree.

The administrative law judge found that Dr. Clarke's opinion, that claimant was totally and permanently disabled due to coal workers' pneumoconiosis, was a valid and

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 minor.

⁴ The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2-7.

⁵ Claimant testified that by the time he settled his state black lung claim, six out of seven different doctors had told him that he was totally disabled due to black lung, and that, therefore, by 1990 he knew he was totally disabled due to black lung. Hearing Transcript at 31.

⁶ Although claimant contends that his testimony referenced medical opinions stating that he was totally disabled due to pneumoconiosis only for purposes of his state workers' compensation claim, which is based on standards different from a federal claim, the administrative law judge properly determined that Dr. Clarke's opinion satisfied the federal statutory standards. Decision and Order at 4.

reasoned medical determination made by a medical professional that qualified to trigger the statute of limitations under *Kirk*, 264 F.3d at 607, 22 BLR at 2-297.⁷ The administrative law judge noted that Dr. Clarke relied on “[c]laimant’s symptoms, physical examination, coal mine employment history, and objective medical testing in reaching his conclusion.” Decision and Order at 5. Additionally the administrative law judge found that, while claimant’s testimony alone was insufficient to trigger the statute of limitations, when considered in conjunction with Dr. Clarke’s report, it was clear that the three year limitation period had expired before claimant filed for benefits. *Id.*; Decision and Order at 5.

Dr. Clarke conducted his examination of claimant in conjunction with a Kentucky state workers’ compensation claim. The pulmonary function test values obtained within his examination, although qualifying under Kentucky law, do not qualify the claimant as totally disabled under the federal regulations. However, Dr. Clarke indicated that he based his finding of total disability due to pneumoconiosis on an extensive employment history, his familiarity with the exertional requirements of coal mining, and asserted that his assessment did not “depend on any one test, any one x-ray, any one history, any one spirometry, any one blood gas study; but, by a process of colligation of all the evidences.” Claimant’s Exhibit 4. Thus, Dr. Clarke’s opinion qualifies as a reasoned medical opinion diagnosing total disability due to pneumoconiosis which supports a finding of total disability under the federal regulations, regardless of the results of his pulmonary function tests.⁸ *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987);

⁷ Dr. Clarke’s February 7, 1993 report notes claimant’s complaints of shortness of breath, rattling and rhonchi in his chest which keep him up at night, “signs and symptoms of advanced upper respiratory disease,” and disabling dyspnea. A detailed review of claimant’s employment history noted 18 years of underground coal mining consisting of running a cutting machine and roof bolter, as well as 12 years of surface work hauling coal. In addition to noting this history, Dr. Clarke stated that he was “intimately cognizant of [coal miners’] duties” after 47 years of working with coal miners and conducting pulmonary disability examinations. A chest x-ray revealed an ILO rating of 2/1, positive for coal workers’ pneumoconiosis, and pulmonary function testing revealed an FEV₁/FVC ratio of 74% and a FEV₁ of 60%, which Dr. Clarke stated was “in keeping with severe restrictive pulmonary disease and severe chronic obstructive airways disease.” On the basis of his examination, Dr. Clarke concluded that claimant was totally and permanently disabled: unable to perform coal mining or comparable work based on his coal workers’ pneumoconiosis. Claimant’s Exhibit 4.

⁸ In *Cornett v. Benham Coal Co.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000), the Sixth Circuit held that a reasoned opinion of total disability may be based, in part, on non-qualifying pulmonary study results.

Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985).

The administrative law judge acted within his discretion in finding that Dr. Clarke's opinion was communicated to the miner. The administrative law judge found that Dr. Clarke's opinion, that was attached to claimant's Kentucky state settlement agreement signed by the claimant on July 5, 1993, when considered in conjunction with claimant's testimony that he had been diagnosed as totally disabled due to pneumoconiosis by six out of seven doctors before his state claim was settled,⁹ established that Dr. Clarke's diagnosis of total disability due to pneumoconiosis was communicated to claimant in 1993. *Kirk*, 264 F.3d at 607, 22 BLR at 2-297; Claimant's Exhibit 4; Hearing Transcript at 31. Hence, the administrative law judge concluded that the instant claim, filed in 2005, was untimely.

As substantial evidence supports the administrative law judge's determination that the presumption of timeliness of claimant's May 13, 2005 claim was rebutted by evidence of a reasoned medical report diagnosing total disability due to pneumoconiosis, which was communicated to claimant no later than May 25, 1994, we affirm the administrative law judge's Decision and Order Denying Benefits. 30 U.S.C. §932(f); Section 725.308(c). *Clark*, 12 BLR at 1-152.

⁹ Claimant's state claim was settled on May 25, 1994. Claimant's testimony establishes that he was informed of Dr. Clarke's opinion by May 25, 1994; his testimony does not prove, as the administrative law judge found, that the opinion was communicated to claimant on the date it was issued, February 17, 1993. Decision and Order at 5. In any event, claimant's testimony supports the administrative law judge's ultimate finding that the claim was untimely.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge