BRB No. 05-0899 BLA

LEE A. MARSILI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNITED STATES STEEL CORPORATION	)	
	)	DATE ISSUED: 07/28/2006
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 Granting Summary Decision for Employer of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices), Harlan, Kentucky, for claimant.

H. Kent Hendrickson (Rice, Hendrickson & Williams), Harlan, Kentucky, for employer.

Michelle S. Gerdano (Howard M. Radzely, 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: SMITH, McGRANERY, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision for Employer (04-BLA-6407) of Administrative Law Judge William S. Colwell 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). The administrative law judge found that the record contains a reasoned medical opinion of totally disabling pneumoconiosis, provided by Dr. Clarke in 1979. The administrative law judge found that the instant claim is untimely under Section 422 of the Act, 30 U.S.C., §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), because it was filed more than three years after Dr. Clarke's 1979 diagnosis was communicated to claimant. Therefore, the administrative law judge granted the employer's motion for summary judgment and dismissed the claim.

On appeal, claimant and the Director, Office of Workers' Compensation Programs (the Director), assert that the administrative law judge erred in finding the instant claim barred by the statute of limitations pursuant to 20 C.F.R. §725.308(a). Employer responds, urging affirmance of the administrative law judge's dismissal of the instant claim based on his finding that it is barred by the statute of limitations.[2]

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).

Claimant, and the Director, urge the Board to reverse the administrative law judge's dismissal of the claim as untimely filed. Citing the unpublished decision of the United States Court of Appeals for the Sixth Circuit in *Peabody Coal Co. v. Director, OWCP*, [*Dukes*], 48 Fed.Appx. 140, No. 01-3043 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(Batchelder, J., dissenting),[3] claimant argues that only an initial claim must be filed

[1] Claimant filed his first claim for benefits on July 5, 1978, which was denied on May 12, 1979. Director's Exhibit 1. On January 9, 1981, claimant filed a second claim, which was ultimately denied by Decision and Order dated December 18, 1984. Director's Exhibit 1. Claimant filed his current claim on October 11, 2002. Director's Exhibit 3.

[2] The administrative law judge's finding that Dr. Clarke provided a well-reasoned and documented opinion that claimant is totally disabled due to pneumoconiosis is affirmed as it is unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The instant claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 1, 2.

within three years of when the miner is aware that he has totally disabling pneumoconiosis. Claimant contends that requiring that every subsequent claim be filed within three years of the previous one is a "perversion of the statute." Claimant's Brief at 3-4. The Director acknowledges the Board's holding in *Furgerson v. Jericol Mining*, 22 BLR 1-216 (2002)(*en banc*), that *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) is binding precedent in cases arising within the Sixth Circuit, but argues that the *Kirk* court's suggestion that a medical opinion rejected in a prior claim may nevertheless commence the limitations period constitutes *dicta*. Director's Response dated Dec. 12, 2005. The Director also argues that the administrative law judge erred in finding that a communication of a medical determination of totally disabling pneumoconiosis to claimant's attorney, and not to claimant personally, is sufficient to start the statute of limitations period.

Initially, we reject claimant's argument on the applicability of the Sixth Circuit court's unpublished decision in *Dukes* over the court's published decision in *Kirk*. Because *Kirk* is a published case, it constitutes binding precedent on the timeliness issue, whereas *Dukes* is unpublished and, as such, has no precedential value. *See* 6th Cir. R.206(c); *Lopez v. Wilson*, 355 F.3d 931 (6th Cir. 2004).

Section 422(f) of the Act, 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.

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

> (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.

The administrative law judge found that Dr. Clarke provided a well-reasoned and documented opinion that claimant was totally disabled due to pneumoconiosis. Decision and Order at 5. The administrative law judge then determined that claimant's attorney arranged for claimant's evaluation by Dr. Clarke and that Dr. Clarke's July 2, 1979 report was mailed to claimant's attorney, who then submitted the report to the district director, who entered the exhibit as Director's Exhibit 11 in claimant's prior claim. *Id*. The administrative law judge concluded that "by Dr. Clarke providing notice of his diagnosis to Claimant's attorney for the Claimant's claim, . . . Dr. Clarke provided notice to the Claimant." *Id*. The administrative law judge therefore stated that because a credible medical determination of total disability due to pneumoconiosis was communicated to the miner more than three years before he filed this claim, this claim is untimely in accordance with Section 725.308.

We find merit in the Director's contention that the administrative law judge erred in finding that communication of a diagnosis of totally disabling pneumoconiosis to claimant's attorney is equivalent to communicating the diagnosis to claimant. Contrary to the administrative law judge's finding, a medical report, addressed to an attorney, is not sufficient evidence that there was "communicat[ion] to the miner" pursuant to Section 725.308. *See Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-96, 1-99 (1993). The administrative law judge found that Dr. Clarke's report was addressed to claimant's attorney, but did not find that claimant received a copy of Dr. Clarke's medical opinion. Additionally, there was no finding that claimant's attorney was "responsible for the care of [the] miner" pursuant to Section 725.308. Based on the foregoing, we hold that the administrative law judge erred in finding that the claimant's attorney's receipt of a medical determination of totally disabling pneumoconiosis constitutes a communication to the miner of such diagnosis sufficient to trigger the three-year limitations period pursuant to Section 725.308(a). *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. We therefore reverse the administrative law judge's Decision and Order Granting Summary Decision for Employer finding that employer met its burden to rebut the presumption of timeless and we remand this case to the administrative law judge for consideration of the claim.

Accordingly, the Decision and Order Granting Summary Decision for Employer is reversed and the case is remanded to the administrative law judge for further consideration of the claim.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge