BRB No. 13-0518 BLA

CHARLES E. MORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY FOUR MINING COMPANY	)	
	)	DATE ISSUED: 07/25/2014
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Margaret M. Scully (Thompson Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

HALL, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (2012-BLA-5118) of Administrative Law Judge Thomas M. Burke awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on January 6, 2011.

The administrative law judge initially found that the claim was timely filed. Next, applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[1] the administrative law judge credited claimant with 34.75 years of coal mine employment, of which at least nineteen years were performed underground.[2] The administrative law judge further found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Moreover, the administrative law judge determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant's 2011 claim was timely filed. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited

[1] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[2] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 3, 4, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

response addressing the issue of the timeliness of the claim.[3] Employer replied to the Director's response.[4]

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 Claim

Employer initially contends that claimant's claim was not timely filed. The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

The administrative law judge found that the record contains a May 24, 2006 report from Dr. Cohen, who diagnosed claimant as totally disabled due to pneumoconiosis in connection with claimant's state workers' compensation claim for occupational pneumoconiosis.[5] The administrative law judge further found that, at the hearing on his

[3] The Director, Office of Workers' Compensations Programs, did not initially file a brief in this appeal. However, by Order dated May 20, 2014, the Board requested that the Director address whether the administrative law judge's determination that the claim was timely filed was correct. The Director filed a response, to which employer replied. Claimant did not file a reply to the Director's brief.

[4] Because they are unchallenged on appeal, we affirm the administrative law judge's findings that (1) claimant has 34.75 years of coal mine employment, of which at least nineteen years were performed underground; (2) the evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b); and (3) claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Claimant filed a Pennsylvania workers' compensation claim for occupational pneumoconiosis in 2006. Employer was the defendant in that claim. In support of his claim, claimant submitted a 2006 medical report from Dr. Cohen, diagnosing claimant as

federal claim, claimant acknowledged that he was aware of Dr. Cohen's opinion in 2006, more than three years before he filed his claim on January 6, 2011. Decision and Order at 3; Hearing Tr. at 25; Employer's Exhibits 11, 12. The administrative law judge determined, however, that Dr. Cohen's 2006 report, and claimant's knowledge of it, were not sufficient to trigger the running of the three-year limitation period, because Dr. Cohen's report was prepared in support of claimant's state workers' compensation claim, which was ultimately denied. Decision and Order at 3. Specifically, the administrative law judge noted that the United States Court of Appeals for the Third Circuit has held that a medical determination of total disability due to pneumoconiosis predating a prior denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 253-54, 24 BLR 2-369, 2-378 (3d Cir. 2011). Applying the reasoning of *Obush*, the administrative law judge found that the denial of claimant's state claim rendered Dr. Cohen's 2006 opinion a misdiagnosis, and thus legally insufficient to trigger the running of the three-year time limit for filing a claim. Therefore, the administrative law judge held that employer failed to establish that a medical determination of total disability due to pneumoconiosis was communicated to claimant three years prior to the filing of his 2011 claim.

Employer contends that the administrative law judge's reliance on *Obush* was misplaced, as the decision in *Obush* involved the timeliness of a subsequent claim for federal black lung benefits, and is not applicable to the instant case, involving an initial federal claim, following a prior state claim denial. Thus, employer contends, Dr. Cohen's 2006 report, and its communication to claimant, are sufficient to trigger the running of the statute of limitations.

The Director contends that the Board may affirm on alternative grounds the administrative law judge's finding that the claim was timely. Specifically, the Director asserts that we need not address employer's arguments because, in this case, the doctrine of judicial estoppel precludes employer from arguing that claimant's federal claim is time-barred even though it was filed more than three years after claimant was informed of Dr. Cohen's May 24, 2006 determination of total disability due to pneumoconiosis. Director's Brief at 3. The Director avers that, because employer asserted in claimant's state claim that Dr. Cohen's diagnosis of total disability due to pneumoconiosis was

---

totally disabled due to pneumoconiosis. Employer submitted a 2006 report from Dr. Fino, opining that claimant's respiratory impairment was due entirely to smoking, in defense of the claim. In a decision dated March 31, 2008, a Pennsylvania state workers' compensation judge rejected Dr. Cohen's opinion, in favor of Dr. Fino's report, and denied the claim. Employer's Exhibit 11.

wrong, employer cannot now contend that Dr. Cohen's 2006 opinion triggered the running of the statute of limitations in claimant's federal black lung claim. Director's Brief at 4. Employer replies, asserting that, contrary to the Director's contention, its position has consistently been that claimant's disabling respiratory impairment is not due to coal mine dust exposure. Employer's Reply Brief at 4.

Judicial estoppel is a common-law, equitable doctrine invoked at a court's discretion; it is designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a subsequent proceeding, simply because the party's interest has changed. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001); *MD Mall Assocs., LLC v. CSX Transp., Inc.*, 715 F.3d 479, 486 (3d Cir. 2013); *Krystal Cadillac-Oldsmobile GMC Truck v. Gen. Motors Corp.*, 337 F.3d 314, 319-20 (3d Cir. 2003); *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996); *Sparks v. Serv. Emps. Int'l, Inc.*, 44 BRBS 11, 13-14, *aff'd on recon.*, 44 BRBS 77 (2010). The essential elements for the application of judicial estoppel are: (1) a party's later position must be clearly inconsistent with its earlier position; (2) the party against whom this doctrine is invoked successfully persuaded the court to accept its earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) the party seeking to assert the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *New Hampshire v. Maine*, 532 U.S. at 750-51. In addition, the Third Circuit has held that: (1) estoppel must address the harm, so that no lesser sanction is appropriate, *Krystal Cadillac*, 337 F.3d at 319-20; (2) estoppel should only be applied to avoid a miscarriage of justice, *MD Mall*, 715 F.3d at 486; *Krystal Cadillac*, 337 F.3d at 319-20; *Ryan Operations*, 81 F.3d at 358; and (3) equity requires that the party being estopped be given a meaningful opportunity to provide an explanation for its changed position. *MD Mall*, 715 F.3d at 486; *Krystal Cadillac*, 337 F.3d at 319-20.

We agree with the Director that, on the facts of this case, the doctrine of judicial estoppel precludes employer from asserting that claimant's 2011 federal black lung claim is untimely. As the Director contends, employer gained an advantage in the state claim by persuading the state claim judge that Dr. Cohen's 2006 diagnosis of totally disabling pneumoconiosis was wrong, and that Dr. Fino's contrary opinion was correct. Employer now seeks an advantage by asserting, inconsistently, that this same report from Dr. Cohen, which employer previously claimed, and established, was incorrect, supports a claim for work-related injury and should have been acted upon by claimant. *See New Hampshire v. Maine*, 532 U.S. at 750-51; *MD Mall*, 715 F.3d at 486. Moreover, as the Director asserts, to hold that employer is judicially estopped from asserting that claimant's claim is untimely would avoid a miscarriage of justice, as contemplated by the Third Circuit, in that claimant has established his entitlement to benefits before the

administrative law judge, and employer has had a full opportunity to defend its position on the merits. *See Krystal Cadillac*, 337 F.3d at 319-20. For the foregoing reasons, we reject employer's allegations of error, and affirm the administrative law judge's finding that claimant's 2011 claim was timely filed.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[6] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer did not establish rebuttal by either method.

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis, based on the x-ray and medical opinion evidence. Decision and Order at 12-13. In determining whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Fino and Renn, who opined that claimant does not have pneumoconiosis, but suffers from disabling obstructive lung disease that is due solely to smoking.[7] Employer's Exhibits 1, 2, 13, 14.

The administrative law judge discounted the opinions of Drs. Fino and Renn as "poorly reasoned," because he found that the physicians "d[id] not adequately explain their rejection of coal dust exposure as a substantial cause of [c]laimant['s] pulmonary impairment . . . ." Decision and Order at 14. The administrative law judge found that Dr. Fino's reasoning for eliminating coal mine dust exposure as a source of claimant's impairment was at odds with both the medical science accepted by the Department of

[6] "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[7] The administrative law judge also considered the medical opinions of Drs. Begley, Holt, and Schaaf, who diagnosed claimant with disabling obstructive pulmonary disease due to both smoking and coal mine dust exposure. Director's Exhibit 16; Claimant's Exhibits 1, 2, 4, 5.

Labor (DOL) in the preamble to the 2001 regulatory revisions, and with the regulations. Decision and Order at 13-14. Further, the administrative law judge found that Dr. Renn focused on whether the pattern of claimant's impairment was consistent with one caused by smoking, without adequately addressing whether claimant's years of coal mine dust exposure also contributed to the impairment. Decision and Order at 14. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis.

Employer contends that the administrative law judge failed to provide valid reasons for finding that the opinions of Drs. Fino and Renn did not disprove the existence of legal pneumoconiosis. Employer's Brief at 18-23. We disagree.

The administrative law judge accurately noted that, in concluding that any contribution caused by coal mine dust is not clinically significant and did not play a role in claimant's pulmonary impairment, Dr. Fino relied, in part, on medical studies that concluded that the average loss of lung function related to coal mine dust exposure is very small. Decision and Order at 13-14; Employer's Exhibits 1 at 11; 14 at 13-15, 23-24. Based on those medical studies, Dr. Fino concluded that claimant's loss of lung function due to his nineteen years of underground coal mine dust exposure would be insignificant. Employer's Exhibits 1 at 11; 14 at 13-15, 23-24. The administrative law judge discounted Dr. Fino's reasoning, finding that it was "illogical" for Dr. Fino "to project the loss of pulmonary capacity of a hypothetical miner onto [c]laimant's exposure." Decision and Order at 14. Contrary to employer's contention, the administrative law judge permissibly discounted this aspect of Dr. Fino's reasoning, because he found that it was inconsistent with the findings of DOL, as set forth in the preamble to the 2001 revised regulations, that such statistical averaging can hide the effect of coal mine dust exposure in individual miners. *See Obush*, 650 F.3d at 257, 24 BLR at 2-383; *see also Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 14, *citing* 65 Fed. Reg. 79,920, 79,941 (Dec. 20, 2000).

The administrative law judge also discounted Dr. Fino's opinion, that claimant's emphysema is due to smoking, because it was based on his view that the amount of emphysema present is related to the amount of coal mine-induced disease seen pathologically or seen on a chest x-ray. Decision and Order at 13-14; Employer's Exhibits 1 at 11-12; 14 at 14-15, 17. The administrative law judge also cited Dr. Fino's statement that he attributed the emphysema to claimant's smoking history because claimant's chest x-rays show that he does not have enough coal dust in his lungs to be of clinical significance. Decision and Order at 13-14; Employer's Exhibits 1 at 12; 14 at 23-24. Finding that Dr. Fino's reasoning was inconsistent with both the definition of legal pneumoconiosis and the provision that pneumoconiosis may be diagnosed

"notwithstanding a negative X-ray," 20 C.F.R. §718.202(a)(4), the administrative law judge permissibly discounted Dr. Fino's opinion. *See* 20 C.F.R. §§718.201, 718.202(a)(4); *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383.

In assessing the credibility of Dr. Renn's opinion, the administrative law judge accurately noted that the physician eliminated coal mine dust exposure as a source of claimant's impairment, in part, based on his opinion that claimant's severely reduced diffusion capacity, taken together with his negative chest x-rays, is a combination that is consistent with cigarette smoking, not coal mine dust exposure. Decision and Order at 14; Employer's Exhibits 2 at 5-6; 13 at 20-22, 30-31. The administrative law judge found that "the fact that some symptoms are consistent with cigarette smoking does not preclude coal mine dust exposure as also having a significant causative effect." Decision and Order at 14. Thus, contrary to employer's argument, the administrative law judge acted within his discretion in finding that Dr. Renn did not adequately explain why claimant's thirty-four years of coal mine dust exposure could not have significantly contributed, along with claimant's smoking history, to his disabling respiratory impairment. *See Balsavage v. Director, OWCP*, 295 F.3d 390, 396-97, 22 BLR 2-386, 2-396 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. Fino and Renn, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.[8] The failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

The administrative law judge next addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). Having discounted the medical opinions of Drs. Fino and Renn, that claimant's impairment is unrelated to coal mine dust exposure, the administrative law

[8] Thus, we need not address employer's argument that the administrative law judge erred in failing to make specific determinations regarding the credibility of the opinions of claimant's physicians, Drs. Begley, Holt, and Schaaf. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Employer's Brief at 22.

judge stated that "a separate determination of the etiology of [c]laimant's disease is unnecessary as the legal pneumoconiosis inquiry necessarily subsumes that inquiry." Decision and Order at 15. Employer has not challenged the administrative law judge's finding that employer failed to establish that claimant's totally disabling impairment did not arise out of, or in connection with his coal mine employment pursuant to Section 411(c)(4). That finding is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Thus, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption, and further affirm the award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

_____

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

_____

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that claimant's 2011 federal black lung claim was timely filed. Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . 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). Miners' claims for black lung benefits are presumptively timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Claimant filed this claim, his first, on January 6, 2011. Thus, to rebut the timeliness presumption in this case, employer had to show that "a medical determination

of total disability due to pneumoconiosis" was communicated to claimant before January 6, 2008. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

There is no dispute that the statutory and regulatory requirements for rebuttal of the timeliness presumption have been met. As the administrative law judge found, the record contains both the May 24, 2006 report from Dr. Cohen, diagnosing totally disabling pneumoconiosis, and claimant's acknowledgement that, in 2006, his attorney reviewed Dr. Cohen's report with him, in connection with his state workers' compensation claim.[9] Decision and Order at 3; Hearing Tr. at 25; Employer's Exhibits 11, 12. Thus, construing the language of the statute and the implementing regulation, as written, under the facts of this case, a medical determination of total disability due to pneumoconiosis, sufficient to trigger the running of the limitations period, was communicated to claimant in 2006, more than three years before he filed his claim for federal black lung benefits. No more is required. *See, e.g.*, *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594, 25 BLR 2-273, 2-280 (6th Cir. 2013) (holding that a medical determination of total disability due to pneumoconiosis is not required to be reasoned and documented); *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006) (holding that a medical determination

[9] Moreover, the record contains the transcript of the hearing conducted in connection with claimant's Pennsylvania workers' compensation claim, at which claimant acknowledged that he was aware of Dr. Cohen's diagnosis in 2006:

> Q. Now, as Claimant's Exhibit One I put in a report of Dr. Robert Cohen; and did you and I go over Dr. Cohen's report?
>
> A. Yes, ma'am, sometime in June.
>
> Q. I received that report on June 21st, 2006, so would it have been shortly after that?
>
> A. Yes, ma'am.
>
> Q. Is that the first time that you became aware of the fact that a doctor had diagnosed you as disabled from pneumoconiosis?
>
> A. Yes.

Employer's Exhibit 11, Sept. 26, 2006 Pennsylvania Bureau of Workers' Compensation Hearing Tr. at 11-12.

of total disability due to pneumoconiosis is not required to be in writing to begin the running of the three-year statute of limitations period).

Additionally, I would hold that the administrative law judge's reliance on *Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 253-54, 24 BLR 2-369, 2-378 (3d Cir. 2011), to find that Dr. Cohen's opinion is legally insufficient to trigger the running of the three-year time limit, is misplaced. The court's holding, that a previously denied federal black lung claim renders a medical opinion that is otherwise capable of invoking the statute of limitations, a misdiagnosis, is based on the theory that a prior federal denial must be accepted as accurate under res judicata principles. Specifically, the court held that it was "required to respect the factual findings and legal conclusions in earlier adjudicated claims, [and therefore] must accept an [administrative law judge's] conclusion that a medical opinion offered in support of that claim is discredited." *Obush*, 650 F.3d at 252, 24 BLR at 2-375. The same rationale is not applicable to the instant case, involving an initial federal claim, following a prior state claim denial. There is no requirement that the Board accept the finding of an earlier adjudicated state claim as accurate. The Board has long held that determinations by state occupational pneumoconiosis boards and other agencies, while relevant, are not binding. *Schegan v. Waste Mgmt. & Processors, Inc.*, 18 BLR 1-41, 1-46 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc); *Wenanski v. Director, OWCP*, 8 BLR 1-487 (1986); *Miles v. Cent. Appalachian Coal Co.*, 7 BLR 1-744, 1-748 n.5 (1985). Thus, the holding in *Obush* does not compel us to conclude that claimant's claim is timely. Director's Brief at 5.

Moreover, I respectfully disagree with my colleagues' decision that the doctrine of judicial estoppel precludes employer from arguing that claimant's federal claim is time-barred. I would conclude that, under the facts of this case, the application of judicial estoppel would be inappropriate, as several factors that typically inform the decision of whether to apply the doctrine are absent. First, a party's later position must be "clearly inconsistent" with its earlier position. *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001). However, there is no indication in the factual record before us that employer made any assertion before the administrative law judge that is clearly inconsistent with its earlier position before the state workers' compensation board. Moreover, employer's contention that its position is now, and has always been, that "[c]laimant's respiratory impairment is not related to coal mine dust exposure," is evidenced by the medical opinions it submitted in both the state and federal claims. Employer's Brief at 4. Additionally, even assuming my colleagues are correct in their assertion that employer's current and prior litigation positions are somehow inconsistent, judicial estoppel is not intended to eliminate all inconsistencies. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 358 (3d Cir. 1996). Rather, an inconsistent argument sufficient to invoke judicial estoppel must be attributable to intentional wrongdoing, "'tantamount to a knowing misrepresentation to or even fraud on the court.'" *Krystal Cadillac-*

Oldsmobile GMC Truck v. Gen. Motors Corp., 337 F.3d 314, 324 (3d Cir. 2003), *quoting Total Petroleum Inc., v. Davis*, 822 F.2d 734-38 (8th Cir. 1987); *see Ryan*, 81 F.3d at 362. As there is no evidence that employer acted in bad faith, I would hold that the application of judicial estoppel is not appropriate under the facts of this case.

Based on the administrative law judge's finding that Dr. Cohen's diagnosis of totally disabling pneumoconiosis was communicated to claimant in 2006, more than three years before he filed his 2011 federal black lung claim, I would hold that claimant's claim was untimely. Therefore, I would reverse the award of benefits.

_____

ROY P. SMITH
Administrative Appeals Judge