BRB No. 06-0911 BLA

F.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	DATE ISSUED: 06/27/2007
	)	
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 Finding the Claim Timely and Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Finding the Claim Timely and Awarding Benefits (05-BLA-0002) of Administrative Law Judge Thomas F. Phalen, Jr., 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).[1] This case has been before the Board previously.[2] In the most recent decision, the Board affirmed the administrative law judge's determination that employer failed to establish good cause for its untimely controversion pursuant to 20 C.F.R. §725.413 (2000).[3] *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 02-0510 BLA (Mar. 31, 2003)(unpub.). The Board also considered employer's additional argument, that the instant claim is barred by 20 C.F.R. §725.308,[4] in light of the decision by the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[5] The Board initially rejected the assertions by the Director, Office of Workers' Compensation Programs (the Director), that employer was precluded from raising the issue of timeliness of the claim. Therefore, the Board vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge solely for further consideration, pursuant to *Kirk*, of the issue of the timeliness of the application for benefits. *See* 20 C.F.R. §§725.413(b)(3) (2000), 725.463; *Kirk*, 264 F.3d at 602, 22 BLR at 2-288; *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). The Board emphasized that, on remand, employer was not permitted to contest any other issue.

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The procedural history of this case has been previously set forth in detail in the Board's prior decisions in *Hatfield v. Arch of Kentucky, Inc.*, BRB Nos. 99-0615 BLA and 96-1141 BLA (Sept. 26, 2000)(unpub.), and *Hatfield v. Arch of Kentucky, Inc.*, BRB No. 02-0510 BLA (Mar. 31, 2003)(unpub.), and is incorporated herein by reference.

[3] The regulation at 20 C.F.R. §725.413 (2000) has been substantially revised. The Department of Labor deleted this section from the regulations and incorporated it into 20 C.F.R. §725.412. *See* 20 C.F.R. §§725.412, 725.413. This revision does not impact the instant claim, as this amendment does not apply to claims that were pending on January 19, 2001. *See* 20 C.F.R. §725.2(c).

[4] The amended regulations did not alter 20 C.F.R. §725.308.

[5] This case 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 Exhibit 2.

On remand, the administrative law judge determined that the instant claim was timely filed. Accordingly, in light of the Board's prior affirmance of the finding that employer failed to establish good cause for its untimely controversion of the claim, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge's timeliness finding was in error. Employer further asserts that in light of recent case law, and in order to prevent a manifest injustice to employer, the Board should reconsider whether the administrative law judge properly found that employer failed to establish good cause for its untimely controversion. Claimant responds, urging affirmance of the award of benefits. The Director responds, asserting that substantial evidence supports the administrative law judge's timeliness determination. Employer has filed a reply brief to claimant's response.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark*, 12 BLR at 1-153.

Employer initially asserts that the administrative law judge's finding that claimant's duplicate claim was timely cannot be affirmed because the administrative law judge erred in finding that the unpublished case of *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), not *Kirk*, controls the outcome of this case.[6] Employer's Brief at 14. Employer further contests the administrative law judge's alternative finding that the claim is also timely under the

[6] In *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), the United States Court of Appeals for the Sixth Circuit agreed with the holding of the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), that when a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of the time he became aware or should have become aware of the determination. The Sixth Circuit court also agreed with the holding that a final finding by an Office of Workers' Compensation Programs adjudicator that the claimant is not totally disabled due to pneumoconiosis, repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations. *Dukes*, slip op. at 5.

standard set forth in *Kirk*. Employer's Brief at 12, 16-21. First, we agree with employer that *Kirk* constitutes the controlling authority on the issue of timeliness, and that, therefore, the administrative law judge erred in applying *Dukes*, which is an unpublished case and has no precedential value. 6th Cir. R. 206(c);[7] *Lopez v. Wilson*, 355 F.3d 931 (6th Cir. 2004); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-217 (2002)(*en banc*)*; Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). We reject, however, employer's contention that the administrative law judge erred in finding that this claim is also timely under the standard set forth in *Kirk*.

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). As noted in our prior decision, with respect to the time limitation of 20 C.F.R. §725.308, the Sixth Circuit held in *Kirk* that "[t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. . . ." *Kirk*, 244 F.3d at 608, 22 BLR at 2-298.

As noted above, following his determination that the claim was timely under *Dukes*, the administrative law judge went on to find that the duplicate claim is also timely under the standard set forth in *Kirk*. Decision and Order at 7. The administrative law judge acknowledged employer's contention that the record contains the 1987 and 1988 reports of Drs. Myers, Baker, and Wright, diagnosing total disability due to pneumoconiosis, but found that the facts of this case do not establish that these diagnoses were communicated to claimant. Decision and Order at 7. Thus, the administrative law judge found that employer failed to rebut the presumption of timeliness set forth at 20 C.F.R. §725.308(c).

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[7] Rule 206(c) of the United States Court of Appeals for the Sixth Circuit regarding Publication of Decisions indicates:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

6th Cir. R. 206(c). Of particular note is the fact that the Sixth Circuit denied the motion filed by the Director to publish the decision in *Dukes*.

Employer contends that in alternatively applying the principles set forth in *Kirk*, the administrative law judge erred as a matter of law in failing to apply the plain language of the statute, which does not require that the medical determination be communicated to the miner. Section 422(f) of the Act, 30 U.S.C. §932(f); Employer's Brief at 16-17; Employer's Reply Brief at 6. Employer contends that to the extent the regulation at 20 C.F.R. §725.308 is inconsistent with the statute, the regulation is invalid. Employer's Brief at 17; Employer's Reply Brief at 6. Thus, employer asserts, in order to "save the regulation from invalidity," the communication requirement should be read simply as a question of "notice" to the claimant. Employer's Brief at 17 n.8. The Director responds, asserting that the regulation at 20 C.F.R. §725.308 "is not inconsistent with the statute; rather, the regulation is a reasonable construction of the statute by the administering agency."[8] Director's Brief at 2.

Employer's contention is without merit. The Board has long recognized that the statute's implementing regulation, 20 C.F.R. §725.308, contains additional language not found in the statute, including the requirement that the medical determination of total disability due to pneumoconiosis be communicated to the miner. 20 C.F.R. §725.308(a); *Adkins*, 19 BLR at 1-39. In addition, neither the Board, nor any of the United States Courts of Appeals, has found the communication requirement to be inconsistent with the Act, and employer cites no authority in support of its argument that 20 C.F.R. §725.308 is invalid because it includes a communication requirement. Moreover, both the United States Court of Appeals for the Sixth Circuit, and the Board, have specifically upheld the application of the communication requirement set forth at 20 C.F.R. §725.308, and have further held that the mere fact that a claimant filed a state claim, or otherwise indicated that he had notice of his condition, does not, by itself, fulfill the requirement that a medical determination of total disability be communicated to the miner. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-296; *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-174-175 (2006)(*en banc*); *see also Adkins*, 19 BLR at 1-41-42. Moreover, the Director's reasonable interpretation of the Act and its implementing regulations is entitled to deference. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). For all of these reasons, we reject employer's assertion that the administrative law judge erred in applying the regulation at 20 C.F.R. §725.308 to determine whether claimant's duplicate claim was timely.

[8] The Director explains that there is a "significant policy reason" for requiring communication to the miner to trigger the statute of limitations: "[A] physician's diagnosis of disabling pneumoconiosis must be communicated to the miner himself because the miner is the person who must file the claim, and therefore is the person who must learn that he has limited time in which to file his claim." Director's Brief at 2.

Employer next contends that in finding the claim to be timely, the administrative law judge failed to properly analyze the documentary evidence of record that, employer contends, establishes not only that medical determinations of total disability due to pneumoconiosis were communicated to claimant's attorney, but that claimant himself had actual knowledge of these medical determinations. Employer's Brief at 18-21. Specifically, employer asserts that the record contains a request for attorney fees, signed by claimant's attorney, indicating that the 1987 and 1988 reports of Drs. Baker and Myers had been received and reviewed. Employer's Brief at 18-19; Director's Exhibit 78-72, 78-82, 78-100. In addition, employer asserts that these reports are referenced in, and attached to, a January 20, 1988 application for state workers' compensation benefits, signed by claimant, which the administrative law judge failed to adequately address. Employer's Brief at 19-21; Director's Exhibit 78-123. We disagree.

Contrary to employer's arguments, the administrative law judge fully discussed all of employer's contentions, including employer's assertions that the reports of Drs. Baker and Myers were attached to a state claim form signed by claimant, and that the record contains no evidence or testimony to rebut claimant's signed statements. Decision and Order at 7. As the Director asserts, the administrative law judge properly found that it is employer's burden to rebut the presumption of timeliness set forth at 20 C.F.R. §725.308(c), and that mere access to a report contained in the record or in possession of an attorney does not equate to communication by a physician to claimant.[9] *Daugherty*, 18 BLR at 1-99; Decision and Order at 7. In addition, as the Director points out, the administrative law judge acted within his discretion in concluding that, because employer had an opportunity to cross-examine claimant, but did not ask claimant whether he had ever been told by a physician that he was totally disabled due to pneumoconiosis, the facts of this case do not support employer's contention that the claim is untimely. Decision and Order at 7. Therefore, as the administrative law judge properly analyzed the evidence of record pursuant to the standard enunciated in 20 C.F.R §725.308, and according to the principle set forth in *Kirk*, and explained the reasons for his conclusion that the miner's duplicate claim was timely, we affirm this determination as within his discretion. *See Clark*, 12 BLR at 1-153.

We next address employer's contention that recent case law requires that we revisit our prior holding that the administrative law judge properly found that employer failed to establish good cause for its untimely controversion pursuant to 20 C.F.R.

[9] As the Director notes, employer does not assert that claimant's attorney was responsible for claimant's care.

§725.413 (2000).[10] Employer contends that in *Couch v. Shamrock Coal Co.*, 05-BLA-5693, Administrative Law Judge Joseph E. Kane found that a claimant's assertion that he had misplaced his notice of hearing, and, as a result, the date of the hearing had slipped his mind, constituted good cause for counsel's failure to appear at the hearing. Employer contends that if such a clerical mistake constitutes good cause on behalf of a claimant, the similar clerical error by employer's former counsel, in failing to timely controvert this claim, should also constitute good cause for employer's oversight. We disagree. Judge Kane's ruling in *Couch* was set forth in an unpublished Order, and represented Judge Kane's reasonable exercise of his discretion under the facts and circumstances of the case before him. *See Clark*, 12 BLR at 1-153. It is not binding precedent in the instant case, where the administrative law judge had to make an independent judgment based on the record developed herein. Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Hall v. Director, OWCP*, 12 BLR 1-80 (1988).

We also reject employer's contention that the Board is required to remand the case in light of the decision of the United States Court of Appeals for the Third Circuit in *George Harms Construction Co v. Chao*, 371 F.3d 156 (3d Cir. 2004), in which the Third Circuit court held that an administrative law judge erred in failing to properly apply the factors set forth in *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993) in determining if good cause, *i.e.*, excusable neglect, was established.[11] In our prior decision, we rejected employer's contention that, in finding that employer did not establish good cause for its untimely controversion, the administrative law judge erred in failing to apply the factors set forth in *Pioneer*, and we held that Administrative Law Judge Pamela Lakes Wood's determination was within her discretion and consistent with *Pioneer*. [2003] *Hatfield*, slip op. at 6-7. The issue is therefore settled for purposes of this appeal. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

Finally, employer urges the Board to revisit its prior determination in order to prevent a manifest injustice to employer. Specifically, employer contends that the APA

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[10] Contrary to employer's contention, the regulation at 20 C.F.R. §725.413 (2000), not the revised regulation at 20 C.F.R. §725.412, governs the current claim that was filed before January 19, 2001. *See* 20 C.F.R. §725.2(c).

[11] In determining if "excusable neglect" is established, the United States Supreme Court held that in evaluating such claims, the courts must consider the danger of prejudice [to a party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the party seeking to excuse the delay, and whether that party acted in good faith. *Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership*, 507 U.S. 380 (1993).

mandates that employer receive a full and fair hearing on the merits of entitlement, and that employer's small clerical error in failing to controvert claimant's claim should not work to deprive employer of its due process rights. Employer's Brief at 22-23. Employer's contention lacks merit. As claimant correctly points out, employer received a full hearing on the merits of entitlement before Judge Wood on March 24, 1998, and, as noted by Judge Wood in her Order dated September 24, 2001, specifically declined the opportunity for a second hearing solely on the issue of good cause, on the grounds that an oral hearing would not be of any further benefit to employer. Order dated September 24, 2001, Director's Exhibit 78 at 326. Thus there is no basis for employer's contention that it was deprived of its due process rights. As the Board's prior holding, that the administrative law judge acted within her discretion in finding that employer failed to show good cause for its untimely controversion, constitutes the law of the case, and employer demonstrates no exception to that doctrine, we decline to further revisit this issue.[12] *See Brinkley*, 14 BLR at 1-151.

[12] We again decline to address employer's contention, raised here for the third time, that the Notice of Initial Finding was not properly served on employer. Employer's Brief at 23 n.11. This matter was fully addressed by Administrative Law Judge Pamela Lakes Wood in her decision and Order on Remand dated March 26, 2002, which was previously affirmed by the Board. *See Hatfield v. Arch of Kentucky, Inc.*, BRB No. 02-0510 BLA (Mar. 31, 2003)(unpub.).

Accordingly, the administrative law judge's Decision and Order Finding the Claim Timely and Awarding Benefits is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge