BRB No. 07-0762 BLA

B. B. (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RATLIFF & CHILDERS COAL CORPORATION	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE GROUP	)	DATE ISSUED: 06/20/2008
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	
	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Michelle S. Gerdano (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (05-BLA-5756) of Administrative Law Judge Larry S. Merck on a subsequent claim[1] filed on March 15, 2004 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 credited claimant with thirty-three and one-half years of coal mine employment[2] based on the parties' stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge further determined that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and that claimant therefore established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Reviewing the entire record, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge improperly found claimant's subsequent claim to have been timely filed. Employer further asserts that the administrative law judge abused his discretion in excluding Dr. Fino's supplemental report as violative of the evidentiary limitations at 20 C.F.R. §725.414. Further, employer contends that the administrative law judge's finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) is not supported by substantial evidence, and therefore, his finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309 should be vacated. Additionally, employer argues that the administrative law judge erred in his analysis of the medical evidence when he found that claimant's total disability was due to pneumoconiosis

[1] Claimant's initial claim for benefits, filed on May 22, 1987, was finally denied on November 30, 1995, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant passed away on April 19, 2007, while the instant claim was still pending before the administrative law judge. By Order dated September 26, 2007, the Board denied his widow's motion to be substituted as the claimant, but has updated its records to reflect that claimant is deceased and the widow is pursuing his claim.

[2] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response urging affirmance of the administrative law judge's timeliness findings.[3]

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).

We initially address employer's assertion that claimant's application for benefits is barred by the time limitations set forth in 20 C.F.R. §725.308.[4] Specifically, employer argues that the opinions of Drs. Page, Myers, Clarke, and Penman, all of whom examined claimant between 1985 and 1986, constitute proof that a medical determination of total disability had been communicated to the miner more than three years before he filed the current claim. Although the administrative law judge considered this evidence and explained why each opinion was insufficient to have triggered the running of the statute of limitations pursuant to Section 725.308, employer fails to assign any specific error to the administrative law judge's evaluation of this evidence.[5]

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established thirty-three and one-half years of coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

[4] Section 725.308 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. 20 C.F.R. §725.308(a); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). The regulation also provides that there is a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). To rebut the presumption, employer bears the burden of proving that the requisite communication was made to the miner within the three-year time frame. *See Adkins v. Donaldson Mine Co.*, 19 BLR 1-34 (1993). Moreover, in defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit court has explained that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

[5] Specifically, the administrative law judge found that Dr. Page did not diagnose claimant as totally disabled; that Drs. Myers and Clarke provided no evidence of any

As we have emphasized previously, the Board's circumscribed scope of review requires that a party challenging the Decision and Order below address that Decision and Order and demonstrate why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983). Unless the party identifies errors and briefs allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-121 (1987). Because employer has not identified any specific legal or factual errors in the administrative law judge's weighing of the evidence pursuant to Section 725.308, we affirm his finding that the instant claim was timely filed.

Employer next challenges the administrative law judge's finding that Dr. Fino's report, dated June 15, 2006, exceeded the evidentiary limitations pursuant to 20 C.F.R. §725.414. The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Employer contends that, because Dr. Fino's initial, November 18, 2004 report was designated as one of employer's two affirmative reports,[6] Dr. Fino's second report[7] of June 15, 2006, in which Dr. Fino reviewed admissible evidence, constitutes a supplemental report that does not violate the evidentiary limitations. Employer's Brief at 29.

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objective testing; and, that Dr. Penman never indicated that he communicated a diagnosis of totally disabling pneumoconiosis to claimant. Decision and Order at 8.

[6] The applicable provision of 20 C.F.R. §725.414 allows employer to submit, in support of its affirmative case, no more than two medical reports. 20 C.F.R. §725.414(a)(2)(i). The regulation further specifies that "[a] medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence." 20 C.F.R. §725.414(a); *see also* 64 Fed. Reg. 54995, (October 8, 1999). Employer designated Dr. Dahhan's October 18, 2004 report as its first affirmative medical report, and Dr. Fino's November 18, 2004 and June 15, 2006 reports as its second affirmative medical report. Employer's Exhibit 5.

[7] After employer submitted Dr. Fino's initial report, claimant submitted Dr. Baker's report, dated June 7, 2005. Claimant's Exhibit 1. Dr. Fino subsequently reviewed this new evidence and issued a second report, dated June 15, 2006, stating that he considered Dr. Baker's report, but it did not alter his original opinion that claimant does not have pneumoconiosis. Employer's Exhibit 3.

In excluding Dr. Fino's June 15, 2006 report from consideration, the administrative law judge focused solely on employer's notation that Dr. Fino's June 15, 2006 report was in "rebuttal" to Dr. Baker's report. Employer's Exhibit 5. Specifically, the administrative law judge concluded that because the evidence limiting rules do not provide for the rebuttal of medical opinion evidence, employer was not permitted to submit a third report. Decision and Order at 24 n.6. The administrative law judge neglected to consider, however, that employer specifically designated Dr. Fino's November 18, 2004 report and his June 15, 2006 report as a single, affirmative medical report on its evidence summary form. Employer's Exhibit 5. Since a medical report may be submitted by a physician who has examined the miner "and/or" reviewed admissible evidence, and the evidentiary limitations do not require that a "medical report" be contained in a single document, 20 C.F.R. §725.414(a)(1), the administrative law judge erred in failing to explain why he considered Dr. Fino's June 15, 2006 report to be a separate medical report, rather than a supplement to his initial, November 18, 2004 report. *See generally Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-146-147 (2006); *C.L.H. v. Arch on the Green, Inc.*, BRB No. 07-0133 BLA, slip op. at 4 (Oct. 31, 2007)(unpub.)(deferring to the Director's position that supplemental reports based on review of admissible evidence do not exceed the two-report limitation). Because, as discussed below, we must remand this case for further consideration of the merits of claimant's entitlement, we instruct the administrative law judge, on remand, to reconsider whether Dr. Fino's June 15, 2006 report constitutes an admissible, supplemental report.

We now turn to employer's arguments on the merits of entitlement. To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Relevant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered five new medical opinions.[8] The administrative law judge discounted the opinions of Drs. Dahhan, Fino, and Stamper as insufficiently reasoned, and credited the opinions of Drs. Forehand and Baker, that claimant has legal pneumoconiosis, as well documented and reasoned. The administrative law judge credited the opinions of Drs. Forehand and Baker, because he found that their opinions were consistent with their physical examinations, objective testing, and with claimant's smoking and work histories. Decision and Order at 16-18.

Employer asserts that the administrative law judge did not correctly resolve claimant's smoking history, and therefore, failed to adequately analyze whether the opinions of Drs. Forehand and Baker were well-reasoned as to the existence of legal pneumoconiosis.[9] Employer's Brief at 18. Employer further asserts that, in assessing the physicians' opinions, the administrative law judge erred in failing to address whether their opinions regarding the etiology of claimant's chronic bronchitis and chronic obstructive pulmonary disease were sufficiently reasoned to satisfy claimant's burden of proof. Employer's Brief at 13, 16. Employer's assertions of error have merit.

The administrative law judge found that claimant had a fifteen to twenty pack-year smoking history.[10] In so finding, however, the administrative law judge failed to explain

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[8] The record contains the opinions of Drs. Stamper, Forehand, Baker, Dahhan, and Fino. Director's Exhibits 13, 15, 17, 28; Claimant's Exhibit 1; Employer's Exhibits 1, 3. Drs. Stamper, Forehand, and Baker opined that claimant's chronic lung disease was caused by both smoking and coal dust exposure, while Drs. Fino and Dahhan opined that claimant's lung disease was caused entirely by smoking. *Id*.

[9] Employer argues that claimant's smoking history may be as high as forty-one pack-years, which was the smoking history recorded by Dr. Fino, Employer's Exhibit 1, whereas Drs. Baker and Forehand based their diagnoses on a significantly lesser smoking history. Specifically, Dr. Forehand recorded that claimant smoked a half a pack of cigarettes a day for thirty years, while Dr. Baker noted that claimant smoked a half a pack to a pack of cigarettes a day, off and on, for fifteen to twenty years. Director's Exhibit 15; Claimant's Exhibit 1.

[10] Specifically, the administrative law judge stated:

> Claimant testified that he started smoking cigarettes when he was a teenager and that he quit smoking in the early 1980's, before he quit his job as a coal miner. . . . Claimant stated that he sometimes smoked as much as half a pack of cigarettes a day. Dr. Forehand recorded that [c]laimant smoked a half a pack of cigarettes a day from 1944 to 1974. Dr. Baker

how he resolved the inconsistencies in claimant's smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88 (1993); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Because the administrative law judge did not adequately explain his credibility determination, we vacate his finding of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and his attendant finding that a change in an applicable condition of entitlement was established under 20 C.F.R. §725.309(d).

On remand, the administrative law judge must explain his assignment of weight and credibility to the conflicting smoking history evidence. *See Trumbo*, 17 BLR at 1-88; *Stark*, 9 BLR at 1-37. The administrative law judge must additionally consider the opinions of Drs. Forehand and Baker in light of the smoking history, with the burden of proof on claimant to establish the existence of legal pneumoconiosis. *See Anderson*, 12 BLR at 1-112. In addressing the validity of these opinions on remand, the administrative law judge must adequately explain how claimant's smoking and work histories, and the objective studies and physical examinations conducted by Drs. Forehand and Baker, support their respective conclusions that "a substantial portion of [claimant's chronic bronchitis] is due to coal mine dust exposure," and that claimant's "COPD with a severe obstructive defect, chronic bronchitis, and hypoxemia have all been significantly contributed to and substantially aggravated by dust exposure in his coal mine employment." Director's Exhibit 15; Claimant's Exhibit 1; *see Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983).

> noted in his medical report that [c]laimant smoked a half a pack to a pack of cigarettes a day, off and on for fifteen to twenty years, beginning in the 1960's and quitting in the 1980's. Dr. Stamper, [c]laimant's treating physician since 1978, did not record [c]laimant's smoking history on the questionnaire that he filled out, which [c]laimant submitted as evidence. Dr. Dahhan reported that [c]laimant smoked a half a pack to a pack of cigarettes a day, beginning at age sixteen and quitting at age fifty. Dr. Fino, reported that [c]laimant smoked one pack of cigarettes a day for forty-one years, from 1943 to 1984. In his medical report, in which he reviewed all of the medical evidence in the record, Dr. Fino also recorded that [c]laimant reported smoking one pack of cigarettes a day for twelve years, quitting twenty years earlier. I find that the preponderance of the evidence establishes that [c]laimant has a fifteen to twenty pack-year smoking history.

Decision and Order at 3-4 (internal citations omitted).

Further, as the administrative law judge's reconsideration of the medical opinion evidence on the issue of the existence of pneumoconiosis could affect his weighing of the medical opinions on the issue of whether claimant's total disability is due to pneumoconiosis, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c). If reached on remand, the administrative law judge must reconsider disability causation under 20 C.F.R. §718.204(c) in accordance with the proper legal standard in the Sixth Circuit, and explain his credibility determinations. *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 1-185-186 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989); *see also Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

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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JUDITH S. BOGGS
Administrative Appeals Judge