BRB No. 02-0510 BLA

FRED HATFIELD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
ARCH OF KENTUCKY, INC.	)	
	)	
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 on Remand of Pamela Lakes Wood, 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.

Jennifer U. Toth (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for 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 on Remand (97-BLA-1670) of Administrative Law Judge Pamela Lakes Wood finding employer's controversion untimely and awarding benefits 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, after noting that this case involves a modification petition in which the only issue was whether employer established good cause for its untimely controversion pursuant to 20 C.F.R. §725.413 (2000), the Board rejected employer's contention that a request for modification of the good cause finding was sufficient to reopen the claim for consideration of the merits. The Board reasoned that to permit reopening of the claim without a finding of good cause for the late controversion would defeat the regulatory scheme and procedures regarding the initial adjudication of claims by the district director and the time periods for response to notices and render Section 725.413(b) (2000) meaningless. The Board remanded the case, noting that it would not address any contentions with respect to the merits, including the timeliness of the claim, as the only issue that was properly before the administrative law judge was whether good cause had been shown for the late controversion. Therefore, the Board instructed the administrative law judge to determine if a mistake of fact was established with respect to the good cause finding. *Hatfield v. Arch of Kentucky, Inc.*, BRB Nos. 99-0615 BLA and 96-1141 BLA (May 16, 2001)(*En Banc* Decision and Order on recon.)(unpublished).

On remand, the administrative law judge determined that employer failed to establish good cause for the untimely controversion. Decision and Order on Remand at 9-17.

[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 previously been set forth in detail in the Board's prior decision in *Hatfield v. Arch of Kentucky, Inc.*, BRB Nos. 99-0615 BLA and 96-1141 BLA (September 26, 2000)(unpublished), which is incorporated herein by reference.

Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge's good cause finding was in error. Employer further asserts that benefits should be denied in light of the recent 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).[3] Claimant responds, urging affirmance of the award of benefits as it is supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), responds asserting that substantial evidence supports the administrative law judge's good cause determination.

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).

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

Initially, employer's assertion that the administrative law judge failed to determine if the untimely controversion should be accepted as it is in the "interest of justice" lacks merit. Employer's Brief at 21. The language that employer refers to is contained in Section 725.413(a) (2000) in which it is provided that the district director may extend the thirty day period for filing the controversion for good cause shown or in the interest of justice.[4] *See* 20 C.F.R. §725.413(a) (2000). In the instant case, employer never requested an extension to file the controversion but rather requested that the district director find good cause for the late filing. Director's Exhibits 15, 20. Consequently, the relevant part of the regulation, which is concerned with the filing of a controversion that is already untimely, is contained in 20 C.F.R. §725.413(b)(3) (2000), which specifically requires a finding of good cause for the untimely filing. *See* 20 C.F.R. §725.413(b)(3) (2000). We therefore reject employer's contention that the administrative law judge should have considered whether the untimely filing was in the interest of justice.[5]

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[4]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 Section 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 which were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

[5]Employer's contention that by contesting the merits of the original 1988 claim, it evidenced an intent to contest the instant duplicate claim was addressed by the Board in its prior Decision and Order and thus we decline to further review this contention as our holding constitutes the law of the case. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); *Hatfield v. Arch of Kentucky, Inc.*, BRB Nos. 99-0615 BLA and 96-1141 BLA

(September 26, 2000)(unpublished), slip op. at 6, n. 5. Moreover, inasmuch as claimant's original claim was finally denied, claimant's duplicate claim is a separate claim subject to the applicable filing provisions of the regulations. *See* 20 C.F.R. §725.309(d) (2000).

Employer also argues that in finding that it did not establish good cause for its untimely controversion, the administrative law judge erred in failing to 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 and therefore remand is required.[6] We disagree. We review the administrative law judge's procedural rulings for abuse of the broad discretion granted to her in addressing procedural matters. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). In this case, the administrative law judge acted within her discretion in declining to accept employer's controversion, as employer failed to show good cause for the untimely filing. *Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992); *Clark, supra*; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987); *Itell v. Ritchey Trucking Co.*, 8 BLR 1-356 (1985).

In rendering this appropriate finding, the administrative law judge applied a three prong test developed by the United States Court of Appeals for the Sixth Circuit in *Waifersong, Ltd. Inc. v. Classic Music Vending*, 976 F.2d 290 (6th Cir. 1992), which requires consideration of whether the non-moving party will suffer any prejudice, whether the moving party can assert a meritorious defense, and the extent of the moving party's culpable conduct. The administrative law judge found that claimant would not suffer any prejudice and that employer could assert a meritorious defense. Decision and Order on Remand at 14-15. The administrative law judge further found, however, that employer failed to develop evidence after receiving notice of the claim and provided nothing more than a vague and unsupported reason for the untimely controversion. The administrative law judge concluded, therefore, that good cause was not established. Decision and Order on Remand at 17. Although the administrative law judge did not specifically consider the factors set forth in *Pioneer*, error, if any, is harmless. The administrative law judge's finding, that employer did not develop its case or offer any further explanation of what happened to cause the untimely controversion

[6]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).

other than a vague excuse that the need to respond was not placed on its docket calendar, corresponds to the third and fourth prongs of the test set forth in *Pioneer*. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Decision and Order on Remand at 16-17. Under the circumstances of this case, therefore, we discern no abuse of discretion in the administrative law judge's finding that good cause was not established and affirm this determination. *See Krizner, supra*; *Clark, supra*; *Shedlock, supra*; *Itell, supra*.

Employer further contends that based on the recent decision by the United States Court of Appeals for the Sixth Circuit in *Kirk*, this claim was untimely filed. Employer asserts that the instant claim is barred by 20 C.F.R. §725.308,[7] since it was not filed within three years after the communication to claimant of a medical determination that he is totally disabled due to pneumoconiosis. Employer's Brief at 7-12; Employer's Reply Brief at 1-2. The Director responds asserting that Section 725.413(b)(3) (2000) bars employer from contesting the claim in "any further proceeding conducted with respect to the claim," and thus employer can not raise issues "inconsistent" with the initial finding of entitlement such as the statute of limitations. Director's Brief at 14-15.

We initially reject the Director's assertion that Section 725.413(b)(3) (2000) absolutely precludes employer's statute of limitations assertion based upon the circumstances of the instant case and the plain meaning of the regulations. Section 725.413(b)(3) (2000) states that if employer files an untimely controversion in which good cause is not found to exist for the untimeliness, employer shall be deemed to have accepted the initial findings of the district director when made and "shall not, **except as provided in §725.463**, be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings in any further proceeding conducted with respect to the claim."[8] 20 C.F.R. §725.413(b)(3) (2000) (emphasis added). The regulation specifically references 20 C.F.R. § 725.463 which

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

[8]Contrary to employer's assertion, however, the filing of a petition for modification pursuant to 20 C.F.R. §725.310 (2000) does not entitle employer to a modification of the entire claim. The Board has previously considered this argument and our holding in the prior decision constitutes the law of the case. *See Gillen, supra*; *Brinkley, supra*; *Bridges, supra*; *Hatfield v. Arch of Kentucky, Inc.*, BRB Nos. 99-0615 BLA and 96-1141 BLA (May 16, 2001)(*En Banc* Decision and Order on recon.)(unpublished), slip op. at 3-5; *Hatfield v. Arch of Kentucky, Inc.*, BRB Nos. 99-0615 BLA and 96-1141 BLA (September 26, 2000)(unpublished), slip op. at 6-9. An employer who fails to timely file a controversion shall not be permitted to raise issues or present evidence with respect to issues inconsistent with the initial findings "in any further proceeding conducted with respect to the claim" pursuant to 20 C.F.R. §725.413(b)(3) (2000).

states, in relevant part, that an administrative law judge may consider a new issue only if such issue was not "reasonably ascertainable" by the parties at the time that the case was before the district director. 20 C.F.R. §725.463(b). Thus, the regulations do not absolutely preclude employer from raising issues inconsistent with the initial finding of entitlement but rather sets forth a very specific and narrow avenue by which employer may pursue an issue that was not raised before the district director. 20 C.F.R. §§725.413(b)(3) (2000), 725.463(b).

We also reject the Director's contention that employer has waived its right to raise the issue of timeliness of the claim in this instance. The Director specifically contends that the issue of timeliness was not raised as an affirmative defense in the original proceedings in this case, and as a result, employer has waived reliance on the issue of timeliness under Section 725.308. *See* Director's Brief at 14; *Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993). While an appellate court generally will not address an issue which was not presented below, an exception is made when raising the issue would have been futile. *See Youakim v. Miller*, 425 U.S. 231 (1976); *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995); *The Youghiogheny and Ohio Coal Co. v. Warren*, 841 F.2d 134, 11 BLR 2-73 (6th Cir. 1987); *Kyle v. Director, OWCP*, 819 F.2d 139, 10 BLR 2-112 (6th Cir. 1987), *cert. denied*, 488 U.S. 997 (1988). Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by Section 725.308, requires that a claim be filed within three years of a medical determination of total disability due to pneumoconiosis that is communicated to the miner or claimant. The Board has held that this time limitation does not bar the filing of a duplicate claim, as Section 725.308 applies only to the filing of claimant's initial Part C claim and that the filing of any subsequent claims need not comply with the statute of limitations. *See Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990); *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). At the time that the instant case was filed, the Board adhered to this position and, thus, it would have been futile for employer to raise this issue before the district director or the administrative law judge. *See Youakim, supra*; *Greer, supra*; *Warren, supra*; *Kyle, supra*. Consequently, we hold that the issue of timeliness was not waived by employer and thus, we will consider employer's arguments thereunder. *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-217 (2002)*; Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002).

Employer asserts that because claimant has submitted evidence indicating a diagnosis of total disability due to pneumoconiosis in his initial claim filed on January 5, 1988, the present claim, which was filed more than three years after that date, is untimely filed in accordance with the recent decision by the Sixth Circuit in *Kirk*. Employer therefore alleges that claimant's June 1993 claim is barred by the terms of Section 725.308. Employer's Brief at 9-11; Employer's Reply Brief at 1-2. Subsequent to the administrative law judge's Decision and Order in the instant case, the Sixth Circuit issued *Kirk, supra*, and with respect to the time limitation of Section 725.308 held:

> The 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. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination...and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course he may continue to pursue pending claims.

Kirk, 244 F.3d 608.

Employer contends that the medical evidence submitted in the original claim rebuts the presumption of timeliness in Section 725.308 in light of *Kirk*, as employer need only show that a medical determination of total disability due to pneumoconiosis was communicated to the claimant more than three years prior to the duplicate claim filing. Employer's Brief at 10-11. Employer asserts that as the opinions satisfy the statutory requirements for a diagnosis of total disability due to pneumoconiosis, that was communicated to claimant, since it was part of the prior administrative record, under Section 725.308 and the Sixth Circuit's decision in *Kirk*, claimant is untimely in filing this duplicate claim on June 17, 1993. Employer's Brief at 9-11. Employer further maintains that rebuttal of the presumption of timeliness is accomplished despite the fact that the prior evidence favorable to claimant was not credited. Employer contends that under Section 725.308, the clock begins to run the first time that a miner is told that he is totally disabled by pneumoconiosis, even if the diagnosis is found not to be supported by the weight of the medical evidence. Employer's Brief at 11.

Section 725.308 includes a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(c). Whether the evidence in a particular case is sufficient to establish rebuttal of this presumption involves substantial **factual** findings which are appropriately made by the administrative law judge. *Clark*, *supra* (emphasis added). Moreover, the Sixth Circuit has held that "[w]hen the administrative law judge fails to make important and necessary factual findings, the proper course for the Board is to remand the case. . . ." *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-233 (6th Cir. 1995); *Harlan Bell Coal Co. v.*

Lemar, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990). As it would have been futile for employer to challenge the timeliness of the instant claim prior to the decision by the Sixth Circuit in *Kirk, supra*, and it is the administrative law judge's duty to make factual determinations, we must vacate the administrative law judge's award of benefits and remand this case to the administrative law judge solely for further consideration of the issue of the timeliness of the application for benefits, as employer is not permitted to raise any other issue inconsistent with the initial findings. *See* 20 C.F.R. §§725.413(b)(3) (2000), 725.463; *Kirk, supra*; *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1994); *Clark, supra*. If, on remand, the administrative law judge finds the evidence of record sufficient to establish rebuttal of the presumption that this claim was timely filed, then he must give claimant the opportunity to show if any extraordinary circumstances exist that may avoid the dismissal of the claim. 20 C.F.R. §725.308(c).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further findings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge