BRB No. 03-0440 BLA

ARTHUR BOOTH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 03/23/2004
	)	
ZIEGLER COAL HOLDING COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 – Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Slayton, Inez, Kentucky, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, 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 the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (98-BLA-0766) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) issued on a duplicate 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 is before the Board for the third time. Most recently, the Board, in *Booth v. Wolf Creek Collieries* [*Booth*], BRB No. 01-0956 BLA (Sept. 26, 2002)(unpublished), vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to consider whether the instant claim, filed on August 1, 1997, Director's Exhibit 1, was timely filed pursuant to the holding of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[2] The Board also instructed the administrative law judge that, for purposes of determining on remand whether Dr. Fritzhand's October 19, 1988 opinion is one that triggers the statute of limitations at 20 C.F.R. §725.308, the administrative law judge must determine whether the physician's opinion constitutes a well reasoned opinion of total disability due to pneumoconiosis. The Board also instructed the administrative law judge to determine whether the opinion was communicated to the miner as required in 20 C.F.R. §725.308(a). *Booth*, slip op. at 5. On the merits of the claim, the Board affirmed its prior holding, in *Booth v. Wolf Creek Collieries*, BRB No. 99-1166 BLA (Aug. 21, 2000)(unpublished), that the newly submitted evidence established the existence of pneumoconiosis in the instant case. The Board also held that the administrative law judge permissibly concluded that the x-ray

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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] In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit held that the three-year limitations clock imposed by 20 C.F.R. §725.308 on the filing of a claim, begins to tick the first time that a miner is told by a physician that he is totally disabled due to pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), the clock may only be turned back if the miner returns to the mines after a denial of benefits.

and CT scan evidence supported a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a). The Board indicated that, in the event the administrative law judge on remand reached the merits of the claim, he should award benefits as the Board affirmed the administrative law judge's finding that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis provided at 20 C.F.R. §718.304. Accordingly, the Board remanded the case.

Administrative Law Judge's Decision and Order on Remand

On remand, the administrative law judge found that the instant duplicate claim is not time barred. Specifically, the administrative law judge discussed the holding of *Kirk* and then addressed the majority opinion in the unpublished case of *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002). The administrative law judge applied the holding in *Dukes* to the instant case. Specifically, the administrative law judge applied that part of the *Dukes* decision wherein the majority held that *Kirk* indicated in *dicta,* rather than in its holding, that where a medically supported claim is denied, three years after such a denial, 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*, 264 F.3d at 608, 22 BLR at 298-299. The administrative law judge noted that rather, the majority in *Dukes* had 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).[3] The administrative law judge thus determined the timeliness of the instant duplicate claim pursuant to the majority opinion in *Dukes*, which held:

> We agree with the reasoning of the Tenth Circuit and likewise expressly hold that a misdiagnosis does not equate to a "medical determination" under the statute. That is, if a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any

[3] 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), held that when a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination. The Tenth Circuit also held, however, that a final finding by an Office of Workers' Compensation Programs adjudicator that the claimant 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.

> prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes. If he later contracts the disease, he is able to obtain a medical opinion to that effect, which then re-triggers the statute of limitations. In other words, this statute of repose does not commence until a *proper* medical determination.

Dukes, slip op. at 5 (emphasis in original). Applying the majority decision in *Dukes* to the facts in the instant case, the administrative law judge referred to the fact that claimant's prior October 3, 1988 claim was denied by the district director on March 29, 1989, based on claimant's failure to establish the existence of pneumoconiosis or total disability due to pneumoconiosis (or any element of entitlement). Director's Exhibit 41-8. The administrative law judge, quoting *Dukes,* stated:

> As such, the Sixth Circuit has expressly held that "this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes." *Id.*
>
> In sum, the 1988 opinion of Dr. Fritzhand does not constitute a "medical determination" because Claimant's claim was subsequently denied based on a finding that the (sic) he did not suffer from pneumoconiosis or total disability arising therefrom (sic). He ultimately received a "medical determination" in 1997 when he was properly diagnosed with the disease. Since he filed his claim that same year, the statute of limitations is not at issue here. As my finding that the Claimant has established the existence of complicated pneumoconiosis entitling him to the irrebuttable presumption of [20 C.F.R.] §718.304 was affirmed by the Board, I adopt it herein.

Decision and Order on Remand at 5-6. The administrative law judge thus determined that the instant claim was not time-barred and awarded benefits.

Employer's Appeal

Employer contends that the administrative law judge erred in relying on *Dukes* to determine the timeliness issue, because *Dukes* is unpublished and because it conflicts with *Kirk*. Employer argues that the unpublished *Dukes* decision has no precedential value where *Kirk* constitutes reported controlling authority. Claimant responds, and argues that, notwithstanding the Board's previous ruling to the contrary, employer failed

to preserve, and has waived, the timeliness issue by failing to assert it in the prior appeal.[4] Claimant further argues that Dr. Fritzhand's 1988 opinion is not reasoned or documented and, even if the opinion were determined reasoned and documented, there is no evidence that the opinion was ever communicated to claimant. The Director, Office of Workers' Compensation Programs (the Director), responds, and argues in support of an affirmance of the decision below. The Director contends that the administrative law judge correctly determined that *Dukes* is controlling. The Director argues that although *Dukes* is unreported, it is controlling authority. Employer has filed a reply brief, restating its arguments in favor of a remand of the case to the administrative law judge for application of *Kirk* to determine the timeliness of the instant duplicate claim.

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).

Propriety of the Administrative Law Judge's Application of *Dukes* on Remand

Employer contends that the administrative law judge committed reversible error by applying the majority opinion in *Dukes*, an unpublished case, to determine whether the instant duplicate claim is time barred, where the Sixth Circuit's published decision in *Kirk* remains controlling precedent. We agree. The Board in *Booth* vacated the award of benefits and remanded this case for the administrative law judge to determine the timeliness issue pursuant to *Kirk*. *Booth*, slip op. at 5. The administrative law judge erred on remand by failing to apply *Kirk* where *Kirk* constitutes controlling authority, and

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[4] In *Booth v. Wolf Creek Collieries*, BRB No. 01-0956 BLA (Sept. 26, 2002) (unpublished), the Board held:

> As *Kirk, supra,* represents a significant change in the interpretation of the law regarding Section 725.308 and was issued subsequent to the issuance of the Decision and Order on Remand – Award of Benefits in this case, we are unable to say that employer has waived its right to contest this timeliness issue. *See* 20 C.F.R. §725.308(c)(time limits in (sic) are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances); *but see Cabral v. Eastern Associated Coal Co.,* 18 BLR 1-25 (1993).

Booth, slip op. at 5 n.6.

by applying *Dukes* where *Dukes* is an unpublished case and, as such, has no precedential value. 6 Cir.R. 206(c); *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). Rule 206(c) of 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.

6 Cir.R. 206(c).[5]

Based on the foregoing, we vacate the administrative law judge's findings on remand that the instant claim is not time-barred and that Dr. Forehand's October 19, 1988 opinion does not constitute a "medical determination" within the meaning of 20 C.F.R. §725.308(a). We further vacate the administrative law judge's award of benefits and remand the case. On remand, the administrative law judge is instructed to follow the Board's previous remand order to determine the timeliness issue pursuant to controlling authority, namely *Kirk*. The administrative law judge is also instructed to follow the Board's previous orders in *Booth* to determine, pursuant to 20 C.F.R. §725.308(a), whether the October 19, 1988 opinion of Dr. Fritzhand, Director's Exhibit 41, constitutes a well reasoned "medical determination of total disability due to pneumoconiosis which has been communicated to the miner…" 20 C.F.R. §725.308(a); *Booth*, slip op. at 5.

[5] Employer notes that the United States Court of Appeals for the Sixth Circuit denied the motion filed by the Director, Office of Workers' Compensation Programs, to publish the decision in *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated and the case is remanded for further findings 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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BETTY JEAN HALL
Administrative Appeals Judge