

BRB No. 04-0590 BLA

CECIL E. NEWCOM )  
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 Claimant-Respondent )  
 )  
 v. )  
 )  
 KENELLIS ENERGIES, INCORPORATED )  
 )  
 and )  
 )  
 CONNECTICUT INDEMNITY COMPANY )  
 ) DATE ISSUED: 03/14/2005  
 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-Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Samuel J. Bach and Allison B. Rust (Bach Hamilton LLP), Henderson, Kentucky, for employer.

Helen H. Cox (Howard 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (03-BLA-0092) 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). This case involves a duplicate claim filed on April 4, 2000.<sup>1</sup> Director's Exhibit 1. After crediting claimant with forty-four years of coal mine employment, the administrative law judge determined that claimant's duplicate claim was timely filed and that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 718.204. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed pursuant to 20 C.F.R. §725.308. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's determination that claimant's duplicate claim was timely filed.<sup>2</sup>

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

After considering the administrative law judge's Decision and Order-Awarding Benefits, the issues on appeal, and the evidence of record, we conclude that substantial

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<sup>1</sup> Claimant filed a claim for benefits on December 4, 1992. Director's Exhibit 29. The Office of Workers' Compensation Programs denied the claim on May 21, 1993, and claimant took no further action on the claim.

<sup>2</sup> On appeal, employer challenges only whether the claim was timely, not the administrative law judge's weighing of the evidence on the issues of entitlement. Accordingly, the administrative law judge's finding that claimant has forty-four years of coal mine employment, and his findings pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204, and 725.309(d) (2000), are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

evidence supports the administrative law judge's finding that this claim was timely filed. The administrative law judge applied the Board's holding that the three-year statute of limitations at Section 422(f) of the Act, as implemented by 20 C.F.R. §725.308, applies only to the first claim filed. Decision and Order-Awarding Benefits at 4; *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990); *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990). Moreover, the administrative law judge found that, in any event, claimant testified credibly that Dr. Houser was the first physician to tell him that he had black lung. Decision and Order at 4; Hearing Tr. at 41. Because claimant could not remember when Dr. Houser told him that he had black lung, the administrative law judge reasonably found that May 22, 2000, the day claimant began seeing Dr. Houser, was the earliest that the communication occurred. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that there was "no evidence that claimant received the requisite notice more than three years prior to filing his claim for benefits . . . ." Decision and Order at 4; see 20 C.F.R. §725.308(a),(c); *Adkins v. Donaldson Mine Co.* 19 BLR 1-34, 1-41-43 (1993). Based on the foregoing, we affirm the administrative law judge's determination that claimant's duplicate claim was timely filed.

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

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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REGINA C. McGRANERY  
Administrative Appeals Judge