BRB No. 07-0454 BLA

E.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 03/20/2008
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, P.S.C.), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (Gregory F. Jacob, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2005-BLA-05145) of Administrative Law Judge Daniel F. Solomon on a subsequent claim[1] filed on December 24, 2003, 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 accepted the parties' stipulations that claimant worked nineteen years in coal mine employment; suffered from a totally disabling respiratory impairment; and, therefore, established a change in an applicable condition of entitlement upon which claimant's prior claim had been denied pursuant to 20 C.F.R. §725.309. As a threshold issue, the administrative law judge found that claimant's subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. On the merits, he found that claimant established the existence of legal pneumoconiosis, as defined at 20 C.F.R. §718.201(a)(2), pursuant to 20 C.F.R. §718.202(a)(4), and disability causation pursuant to 20 C.F.R. §718.204(c). 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; and, even if the claim is not time-barred, employer asserts that the administrative law judge's decision on the merits rests on impermissible reasons to resolve conflicts in evidence under 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the administrative law judge's timeliness findings.

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.[2] 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).

[1] Claimant filed his initial application for benefits on June 9, 1992. Director's Exhibit 1-131. The claim was denied by the Department of Labor on July 6, 1993, as claimant failed to establish any element of entitlement. Director's Exhibit 1-10.

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

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.[3] Employer maintains that nothing in the statute, regulations, or case law requires that a medical opinion be reasoned or credible in order to start the running of the statute of limitations. Employer, therefore, further asserts that the administrative law judge erred in finding that claimant's testimony, that he was diagnosed prior to 1992 as totally disabled due to pneumoconiosis, was insufficient to trigger the running of the statute of limitations pursuant to Section 725.308. Employer's argument lacks merit.

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 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 stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.2d at 607, 22 BLR at 2-296. Thus, under the language set forth in *Kirk*, the administrative law judge properly found claimant's testimony alone was insufficient to start the running of the statute of limitations. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006). As substantial evidence supports the administrative law judge's determination that claimant's testimony does not identify the doctor who told him he was totally disabled by pneumoconiosis; employer did not identify any doctor's report stating that claimant was totally disabled due to pneumoconiosis; claimant was not compensated for total disability due to pneumoconiosis at the state level; and, claimant could not recall the diagnosis of his treating physician, Dr. O'Brien, *see* Decision and Order at 6; 2006 Hearing Transcript at 31-32, we affirm the administrative law judge's finding that

[3] Section 725.308 provides in relevant part that:

> (a) A claim for benefits. . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner . . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

claimant's 2003 subsequent claim was timely filed pursuant to 30 U.S.C. §932(f); 20 C.F.R. §725.308. *See Kirk*, 264 F.2d at 607, 22 BLR at 2-298; *Brigance*, 23 BLR at 1-175.

Turning to the decision on the merits, employer challenges the administrative law judge's assignment of weight and credibility to each of the four medical opinions of record pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Initially, employer argues that the administrative law judge provided invalid reasons for discounting the opinions of Drs. Repsher and Fino. Citing *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003), employer specifically asserts that it was improper for the administrative law judge to reject Dr. Repsher's opinion on the ground that the physician did not "significantly explain how he was able to eliminate coal dust exposure as a factor in [the miner's] case." Employer's Brief at 14. Citing *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004), employer also asserts that the administrative law judge improperly discounted the opinion of Dr. Fino based on his status as a non-examining physician. *Id*. at 15-16. Employer's arguments are without merit.

In evaluating the medical opinions of Drs. Repsher and Fino, the administrative law judge accurately determined that Dr. Repsher attributed claimant's disabling respiratory impairment entirely to smoking and ruled out coal dust exposure as a contributing factor based on the lack of positive x-ray and computerized tomography scans and the results of claimant's July 12, 2004 pulmonary function study, arterial blood gas study, electrocardiogram, and comprehensive metabolic panel findings. However, as the administrative law judge found that Dr. Simpao persuasively testified that claimant's respiratory dysfunction resulted from both smoking and coal dust exposure, and that it was not possible to differentiate between the effects of these two contributing causes, the administrative law judge permissibly gave less weight to Dr. Repsher's opinion because the physician failed to explain how his test results allowed him to do so. Decision and Order at 11-12; *see Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (*en banc*); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Moreover, the administrative law judge determined that Dr. Repsher did not address whether coal dust exposure could aggravate claimant's diagnosed respiratory condition, and the administrative law judge additionally found that none of the learned articles offered in support of Dr. Fino's conclusions established that it was possible to disitinguish legal pneumoconiosis from smoking as a cause of a miner's pulmonary impairment. *Id*. As Dr. Fino did not examine claimant, but relied largely on Dr. Repsher's conclusions, the administrative law judge acted within his discretion in finding that both opinions were poorly reasoned and entitled to less weight. *Id*.

Employer also challenges the administrative law judge's assignment of greater weight and credibility to the opinions of Drs. Baker and Simpao, that claimant's legal pneumoconiosis was a contributing cause of his total disability. Specifically, employer

asserts that Drs. Baker and Simpao relied on discredited or questionable positive x-ray interpretations, and that their opinions were insufficiently explained and lacked an objective basis for a diagnosis of legal pneumoconiosis. Employer's Brief at 16-21. Employer also asserts that the administrative law judge erred in failing to consider Dr. Simpao's opinion in conjunction with Dr. Fino's invalidation of Dr. Simpao's pulmonary function study. *Id*. at 18. Employer's arguments are without merit, and essentially amount to a request to reweigh the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

A review of the record indicates that neither Dr. Baker nor Dr. Simpao based his diagnosis of legal pneumoconiosis on positive x-ray findings, nor did the administrative law judge credit their diagnoses of clinical pneumoconiosis. Decision and Order at 7, 11; Director's Exhibit 11; Claimant's Exhibits 2, 3. Further, contrary to employer's assertions, Dr. Baker notes in his report that he based his diagnosis of chronic obstructive pulmonary disease on the results of the miner's September 11, 2004, qualifying pulmonary function study. Claimant's Exhibit 2 at 3, 12. Additionally, although Dr. Simpao's diagnosis of total disability was based on the January 23, 2004, pulmonary function study, Claimant's Exhibit 3 at 12, employer fails to state how Dr. Fino's invalidation of the study undermines the probative value of Dr. Simpao's opinion where employer has stipulated to the existence of a totally disabling respiratory impairment. Moreover, while neither Dr. Baker nor Dr. Simpao eliminated smoking as a causal factor, both doctors unequivocally opined that coal dust exposure was a contributing cause of claimant's disabling respiratory impairment. Director's Exhibit 11; Claimant's Exhibits 2, 3. Consequently, the administrative law judge permissibly found that both opinions were well reasoned, and properly relied on the opinions to support his finding of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). *See Cornett*, 227 F.3d at 576, 22 BLR at 2-121; *Peabody Coal Co. v. Hill*, 123 F.2d 412, 21 BLR 2-192 (6th Cir. 1997); *Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996).

As substantial evidence supports the administrative law judge's weighing of the medical opinion evidence of record, we affirm his findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), and the award of benefits.

Accordingly, the administrative law judge's Decision and Order Award of 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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BETTY JEAN HALL
Administrative Appeals Judge