BRB No. 13-0395 BLA

ESTIL HELTON, SR. (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANALAPAN MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
ARROWPOINT CAPITAL/CONNECTICUT INDEMNITY COMPANY	)	DATE ISSUED: 03/31/2014
	)	
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 of Stephen R. Henley, Administrative Law Judge, United States Department of Labor.

John C. Morton (Morton Law LLC), Henderson, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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/carrier (employer) appeals the Decision and Order (2011-BLA-6295) of Administrative Law Judge Stephen R. Henley awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on January 25, 2010.[1]

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant[3] with at least twenty-three years of qualifying coal mine employment.[4] The administrative law judge further found that the new evidence established that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[5] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4).

[1] Claimant's initial claim, filed on March 26, 1986, was finally denied because the evidence did not establish that claimant suffered from a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] Claimant died on February 20, 2012. Hearing Transcript at 11.

[4] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Because the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in the applicable condition of entitlement. 20 C.F.R. §725.309.

Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant's 2010 subsequent claim was timely filed. Employer also challenges the applicability and constitutionality of amended Section 411(c)(4). Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging the Board to reject employer's contention that claimant's 2010 subsequent claim was not timely filed. Employer has filed a reply brief reiterating its previous contentions.[6]

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).

Timeliness of Claim

Employer initially challenges the administrative law judge's determination that claimant's 2010 subsequent claim was timely filed. Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after whichever of the following occurs later -- (1) a medical determination of total disability due to pneumoconiosis; or (2) March 1, 1978." 30 U.S.C. §932(f). Miners' claims for black lung benefits are presumptively timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Moreover, the United States Court of Appeals for the Sixth Circuit has held that a medical determination of total disability due to pneumoconiosis predating a prior denial

[6] Because they are unchallenged on appeal, we affirm the administrative law judge's findings that (1) claimant had at least twenty-three years of qualifying coal mine employment; (2) the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b); (3) claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; and (4) claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009). Administrative Law Judge Donald W. Mosser denied claimant's prior claim on July 15, 1988. Thus, to rebut the timeliness presumption in this case, employer had to show that "a medical determination of total disability due to pneumoconiosis" was communicated to claimant between July 15, 1988 and January 25, 2007. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Employer argues that claimant received a diagnosis of total disability due to pneumoconiosis more than three years before he filed his claim on January 25, 2010, thus rendering his claim untimely. Employer relies upon claimant's December 15, 2011 deposition testimony. During the deposition, claimant testified as follows:

> Q. And between 1990 and today, has any doctor told you that you had pneumoconiosis or black lung disease?
>
> A. Yeah.
>
> Q. What doctor?
>
> A. Several of them, Dr. Penn, Dr. Miller, Dr. Jones.
>
> ***
>
> Q. In 1991, and this was after you'd already quit working for the mines, at that point, did you understand that you had pneumoconiosis and that you were totally disabled from pneumoconiosis?
>
> A. Yeah. Dr. Miller told me so.

Employer's Exhibit 6 at 28, 32.

Employer argued that claimant's testimony established that Dr. Miller told him that he was totally disabled due to pneumoconiosis in 1991, more than three years before he filed his claim on January 25, 2010, thus rendering his claim untimely. The administrative law judge found that claimant's 1991 testimony was insufficient to trigger the running of the three-year limitation period, because there was no evidence to support a finding that claimant received "written notice" from Dr. Miller that he was totally disabled due to pneumoconiosis. Decision and Order at 7. The administrative law judge further found that "the actual medical opinions referred to by [claimant] in his deposition

testimony, to include what Dr. Miller said, are not in the record." *Id.* The administrative law judge also found that, even though Dr. Miller may have informed claimant that he was totally disabled due pneumoconiosis, there was no evidence that the doctor told claimant that "he specifically attributed [claimant's] disability to pneumoconiosis *arising out of coal mine employment*."[7] *Id.* The administrative law judge, therefore, found that employer failed to establish that a "reasoned" medical determination of total disability due to pneumoconiosis was communicated to the claimant three years prior to the filing of his 2010 subsequent claim.

Employer argues that the administrative law judge provided invalid reasons for finding that claimant's testimony was insufficient to trigger the running of the limitations period. We agree. Subsequent to the issuance of the administrative law judge's Decision and Order, the Sixth Circuit clarified when a "medical determination" sufficient to trigger the running of the limitations period has been made:

> Construing the text of the statute as written, we hold that when a diagnosis of total disability due to pneumoconiosis by a physician trained in internal and pulmonary medicine is communicated to the miner, a "medical determination" sufficient to trigger the running of the limitations period has been made. No more is required. Additional findings regarding whether the medical determination is well-reasoned and well-documented are unnecessary.

Peabody Coal Co. v. Director, OWCP [*Brigance*], 718 F.3d 590, 594 (6th Cir. 2013).

In light of the Sixth Circuit's decision in *Brigance*, the administrative law judge's reasons for finding claimant's testimony insufficient to trigger the running of the limitations period cannot stand. Dr. Miller's determination of total disability due to pneumoconiosis need not be well-reasoned to trigger the running of the limitations period. *Brigance*, 718 F.3d at 594. Moreover, a medical determination of total disability due to pneumoconiosis need not be in communicated in writing, or evidenced by a written report in the record. *Id.*; *see also Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006) (holding that written notice of a medical determination of total disability due to pneumoconiosis is not required to begin the running of the three-year statute of limitations period). Further, neither the Act nor the

[7] The administrative law judge also considered whether information contained in claimant's treatment notes could trigger the running of the limitations period. However, because there is nothing in the record to indicate that this information was ever communicated to claimant, the administrative law judge determined that the treatment notes could not trigger the limitations period. Decision and Order at 7.

regulations require a physician to attribute his or her diagnosis of pneumoconiosis to coal mine employment for the limitations period to begin. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Consequently, we cannot affirm the administrative law judge's reasons for finding that claimant's testimony could not assist employer in establishing that claimant's 2010 subsequent claim was untimely filed.

Employer and the Director argue, for different reasons, that a remand to the administrative law judge for reconsideration of the timeliness issue is not necessary. Urging the Board to affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness, the Director argues that "there is simply no clear evidence that [claimant] was told he was totally disabled due to pneumoconiosis after the denial of his first claim and more than three years before filing the current claim." Director's Brief at 7-8. Specifically, the Director contends that Dr. Miller diagnosed claimant as totally disabled due to pneumoconiosis in 1985 and 1987, before claimant's initial claim for benefits was finally denied, and argues that Dr. Miller's earlier diagnoses, therefore, cannot trigger the statute of limitations for the subsequent claim. *Id.* at 6-7. The Director further asserts that "the miner's testimony cannot be construed as indicating that Dr. Miller provided a second opinion after the denial of the first claim." [8] *Id.* at 7.

Employer, however, contends that claimant's testimony, that he knew in 1991 that he was totally disabled due to pneumoconiosis, "is most logically understood to mean that Dr. Miller provided a second opinion after the denial of claimant's first claim."[9] Employer's Reply Brief at 3. Employer asserts that claimant's testimony "confirm[s] that Dr. Miller told him in 1991 that he was totally disabled due to pneumoconiosis." *Id.*

[8] The Director, Office of Workers' Compensation Programs, argues that Dr. Miller's medical determination cannot trigger the limitations period because his qualifications are not found in the record. We disagree. While the Sixth Circuit has held that a "medical determination," as used in 30 U.S.C. §932(f), requires a diagnosis from a medical professional trained in internal and pulmonary medicine, the court has recognized that this includes "a physician with expertise in diagnosing pneumoconiosis." *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 593-94 (6th Cir. 2013). Dr. Miller's 1985 medical report and treatment notes demonstrate that the doctor was treating claimant for pneumoconiosis, thereby rendering him qualified to make a medical diagnosis sufficient to trigger the limitations period. Director's Exhibit 1; Employer's Exhibit 2.

[9] The record contains Dr. Miller's treatment notes from January 24, 1989, and June 10, 1992, documenting that the doctor continued to treat claimant after the denial of claimant's prior claim in 1988. Employer's Exhibit 2.

In this case, the administrative law judge found that claimant's testimony supports a finding that Dr. Miller communicated to claimant a medical determination of total disability due to pneumoconiosis. However, the administrative law judge has not specifically addressed *when* this communication occurred; *i.e*, whether claimant's testimony establishes that Dr. Miller communicated this determination to claimant after the denial of his first claim, but more than three years prior to the filing of his 2010 subsequent claim. This factual dispute is properly resolved by the administrative law judge, not the Board. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc).

Because the administrative law judge's determination was not in accordance with applicable law, we vacate his finding that employer failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308, and remand this case for further consideration. On remand, the administrative law judge should reconsider, in accordance with *Brigance*, whether the evidence establishes that a diagnosis of total disability due to pneumoconiosis was communicated to claimant after the denial of his previous claim, but more than three years prior to his filing of this subsequent claim. If the administrative law judge determines that employer has rebutted the presumption that claimant's subsequent claim was timely, entitlement to benefits is precluded.

Merits of Entitlement

In the interest of judicial economy, we will address employer's arguments on the merits of claimant's entitlement to benefits. Employer initially asserts that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. The Sixth Circuit has rejected these arguments. *Vision Processing, LLC v. Groves*, 705 F.3d 551, 25 BLR 2-231 (6th Cir. 2013). For the reasons set forth in *Groves*, we reject employer's arguments. Employer also contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision.[10] We also reject employer's contention that the Section 411(c)(4) presumption does not apply to subsequent claims. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1

[10] Moreover, the Department of Labor recently promulgated regulations implementing amended Section 411(c)(4). Those regulations make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013).

(6th Cir. 2011); *see also Union Carbide Corp. v. Richards*, 721 F.3d 307, 314-17 (4th Cir. 2013).

Employer next argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. The Department of Labor's (DOL's) regulations provide that if claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

The administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis,[11] a finding that precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; Decision and Order at 13-15. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In evaluating whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, the administrative law judge considered Dr. Rosenberg's opinion. Dr. Rosenberg attributed claimant's disabling obstructive pulmonary impairment to smoking. Employer's Exhibit 5.

The administrative law judge found that Dr. Rosenberg's opinion was insufficient to establish rebuttal because the doctor failed to effectively rule out coal mine employment as a cause of claimant's total disability. Decision and Order at 16-17. The administrative law judge further discounted Dr. Rosenberg's opinion because he found that it was premised on an assumption that was contrary to the scientific views endorsed by the DOL in the preamble to the regulatory revisions made in 2001. *Id.* at 16. The administrative law judge also found that Dr. Rosenberg's opinion, regarding the cause of claimant's pulmonary impairment, was entitled to less weight because it was inconsistent with the recognition that pneumoconiosis is a latent and progressive disease. *Id.* The administrative law judge, therefore, found that employer failed to prove that claimant's pulmonary impairment "did not arise out of, or in connection with," coal mine employment. *Id.* at 16-17.

[11] Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Employer argues that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. We disagree. The Sixth Circuit has held that in order to meet its rebuttal burden, employer must "rule out" coal mine employment as a cause of the miner's disability.[12] *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1071 (6th Cir. 2013) (holding that there is no meaningful difference between the "play[ed] no part" standard and the "rule-out" standard). In this case, the administrative law judge properly found that Dr. Rosenberg's opinion, that claimant's pneumoconiosis was not a substantially contributing cause of his respiratory impairment, was insufficient to satisfy employer's burden. Decision and Order at 16-17. The administrative law judge further determined that Dr. Rosenberg's opinion, that claimant's disabling obstructive impairment was unrelated to coal mine dust exposure, is inconsistent with scientific studies approved by the DOL in the preamble to the amended regulations. Dr. Rosenberg eliminated coal dust exposure as a source of claimant's obstructive pulmonary impairment, in part, because he found a disproportionate decrease in claimant's FEV1 compared to his FVC, which in his view is characteristic of a cigarette smoke-induced lung disease, but not one caused by coal mine dust. Employer's Exhibit 5. The administrative law judge accorded less weight Dr. Rosenberg's opinion, because he found that this view was contrary to the regulations. Decision and Order at 16; *see* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000). Consequently, the administrative law judge permissibly discounted Dr. Rosenberg's opinion, as to the cause of claimant's disabling obstructive pulmonary impairment, because he relied on an assumption that is contrary to the medical science credited by the DOL. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012). As the administrative law judge's bases for discrediting Dr. Rosenberg's opinion are rational and supported by substantial evidence, they are affirmed.[13] Because Dr. Rosenberg's opinion is the only opinion supportive of a finding that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption.

[12] Similarly, the implementing regulation that was promulgated after the administrative law judge's decision was issued requires the party opposing entitlement in a miner's claim to establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii).

[13] Because the administrative law judge provided valid bases for according less weight to Dr. Rosenberg's opinion, we need not address employer's remaining arguments regarding the weight the administrative law judge accorded to Dr. Rosenberg's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

In summary, we affirm the administrative law judge's findings on the merits of entitlement, but remand the case for the administrative law judge to reconsider whether this subsequent claim was timely filed pursuant to Section 725.308. If the administrative law judge determines that the claim is untimely, he must deny benefits. If he finds that the claim was timely filed, however, he should reinstate the award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and 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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BETTY JEAN HALL
Administrative Appeals Judge