**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0274 BLA

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| JOHN A. CONRAD<br><br>Claimant-Respondent<br><br>v.<br><br>ISLAND CREEK KENTUCKY MINING COMPANY<br><br>and<br><br>ISLAND CREEK COAL COMPANY<br><br>Employer/Carrier-Petitioners<br><br>DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR<br><br>Party-in-Interest | ) | DATE ISSUED: 03/30/2018<br><br>DECISION and ORDER |

Appeal of the Decision and Order Awarding Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Yonts, Sherman & Driskill, PSC), Greenville, Kentucky, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Lexington, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: BOGGS, BUZZARD, and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2014-BLA-05597) of Administrative Law Judge Colleen A. Geraghty rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The relevant procedural history is as follows.

Claimant filed his initial claim for benefits on August 1, 1991, which was finally denied by the district director on January 3, 1992, because he did not establish any element of entitlement. Director's Exhibit 1. Claimant filed this subsequent claim on February 2, 2012. Director's Exhibit 4. The district director awarded benefits and employer requested a hearing, which the administrative law judge held on April 26, 2016.

At the hearing, claimant confirmed that Dr. Chavda, who performed the Department of Labor-sponsored medical examination in connection with this subsequent claim, told him that he was totally disabled due to pneumoconiosis. Hearing Tr. at 29. Claimant further testified, however, that, "many years ago," a Dr. Anderson in Louisville, Kentucky, told him he was totally disabled due to pneumoconiosis.[1] *Id.* at 30. Claimant could not remember exactly when his communications with Dr. Anderson took place.[2]

[1] Claimant first stated that he had previously been told by physicians that he was "disabled by lung disease." Hearing Tr. at 30. When asked whether any of them had told him the cause of the lung disability, he stated "No, they said that I had this stage so and so of Black Lung. Dr. Anderson up there in Louisville." *Id.* Claimant then responded "Yeah," however, when asked whether Dr. Anderson told him that he was "totally disabled by Black Lung disease." *Id.*

[2] Claimant testified that he is "certain" that he saw Dr. Anderson more than fifteen years ago, but was "not sure on the dates." Hearing Tr. at 30, 32. When asked about specific time periods, he testified that he "couldn't say" and did not know whether he saw Dr. Anderson "after 1989," "after 1992," "after 1995," or "around 2000." *Id.* at 30, 33,

*Id.* at 30, 33-34. Because the date of Dr. Anderson's communication to claimant could impact whether claimant's subsequent claim was timely filed, employer's counsel moved that claimant's counsel be ordered to find and provide employer with a copy of Dr. Anderson's medical report. *Id.* at 35. In response, the administrative law judge instructed claimant's counsel to make a good faith effort to obtain any medical report prepared by Dr. Anderson, and to provide a status report in thirty days.[3] *Id.* at 36-37. Claimant's counsel agreed. *Id.*

Employer's counsel then moved to call claimant's wife as a witness to see if she remembered anything about claimant having seen Dr. Anderson. Hearing Tr. at 37. Claimant's counsel objected because employer had not identified claimant's wife as a witness prior to the hearing and, thus, she had not been prepared. *Id.* The administrative law judge denied employer's request at that time, stating that she would first see what documentary evidence could be obtained by claimant's counsel. *Id.* Neither party provided any further information regarding claimant having seen Dr. Anderson.

In her January 27, 2017 Decision and Order, the administrative law judge noted that claimant's counsel did not file the requested status report regarding his attempts to obtain any records from Dr. Anderson. Based on the evidentiary record before her, however, she found that this claim was timely filed pursuant to 20 C.F.R. §725.308. The administrative law judge then credited claimant with at least fifteen years of underground coal mine employment, and accepted employer's concession that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c), and

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34. Claimant further testified that he "couldn't put a date on it" and stated, "You could say [1986] and I wouldn't know." *Id*. at 33, 34. He further stated that his previous lawyer, whose name he could not remember, had sent him to see Dr. Anderson in connection with his first federal Black Lung claim "that [he] lost," but subsequently testified that he was not sure whether it was for a federal or state claim, just that it was "for Black Lung." *Id*. at 30, 32, 34. He also could not recall ever having filed a state claim. *Id*. at 34.

[3] Following claimant's testimony, the administrative law judge asked the parties whether "anybody know[s] who Dr. Anderson is[.]" Hearing Tr. at 36. Claimant's counsel speculated that "he's a deceased doctor in Louisville, maybe," while employer's counsel "assum[ed] it's Dr. William Anderson" who is deceased and had done "numerous evaluations" in both federal and state Black Lung claims. *Id.*

invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[4] She further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer initially contends that the administrative law judge erred in finding that this subsequent claim was timely filed. Employer argues that the administrative law judge erred in adjudicating this claim despite claimant's counsel's failure to respond to her order that he provide a status report regarding his attempts to obtain information regarding claimant's prior examination or examinations by Dr. Anderson. Employer also contends that the administrative law judge abused her discretion in denying employer's motion to call claimant's wife as a witness at the hearing. Alternatively, employer asserts that the administrative law judge erred in finding, based on the record as compiled, that this subsequent claim is not barred by the statute of limitations. Finally, employer asserts that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.

Claimant responds, urging affirmance of the administrative law judge's findings that this claim was timely filed and that claimant established entitlement to benefits. The Director, Office of Workers Compensation Programs, filed a limited response urging the Board to affirm the administrative law judge's finding that this claim was timely filed.

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.[5] 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).

Employer initially contends that the administrative law judge erred in finding that claimant's claim was timely filed. Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing

[4] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §718.305.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c).

To rebut the presumption of timeliness, employer must show, by a preponderance of the evidence, 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); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013). A medical determination of total disability due to pneumoconiosis predating a final denial 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. *See Brigance*, 718 F.3d at 595-96, 25 BLR at 2-283 (explaining that "if it is determined that a claimant does not meet the criteria for an award of benefits under the [Black Lung Benefits Act], then the claimant is handed a clean slate for purpose[s] of the . . . statute of limitations"); *Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-153-54 (6th Cir. 2009).

In finding the claim timely, the administrative law judge considered employer's argument that Dr. Anderson told claimant he was totally disabled due to pneumoconiosis more than three years before he filed the current claim. Employer relied on the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Company v. Kirk*, 264 F.3d 602, 22 BLR 2-291 (6th Cir. 2001), that "[t]he 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," even if the physician's opinion was considered in the denial of a prior claim. *Kirk*, 244 F.3d at 608, 22 BLR at 2-298. The administrative law judge rejected employer's argument noting that pursuant to *Hatfield*, which issued subsequent to *Kirk*, the proper inquiry is whether Dr. Anderson's communication to claimant occurred after the initial claim was denied and more than three years before the current claim was filed. Decision and Order at 7, *citing Hatfield*, 556 F.3d at 483, 24 BLR at 2-151-152. The administrative law judge further found that there is no evidence in the record that affirmatively establishes that a diagnosis of total disability due to pneumoconiosis was communicated to claimant by Dr. Anderson during that time period. Decision and Order at 7. Therefore, she found that employer did not meet its burden to rebut the presumption that the instant claim was timely filed. *Id.*

Employer asserts that the administrative law judge erred in rendering her decision without addressing claimant's counsel's failure to respond to her order that he attempt to

obtain records regarding claimant's purported evaluation by Dr. Anderson, and provide a status report as to the results of his efforts.[6] Employer's Brief at 10-13. We agree.

While it is not claimant's burden to provide evidence establishing timeliness, here claimant's counsel agreed to attempt to obtain information regarding claimant having seen Dr. Anderson, and to provide the requested status report within thirty days of the April 26, 2016 hearing, but did not do so.[7] Requiring the administrative law judge to

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[6] The Director, Office of Workers' Compensation Programs, asserts that "it is far from clear" that the administrative law judge issued an order to claimant's counsel, rather than simply requesting claimant's counsel to make a good faith effort to locate any written report prepared by Dr. Anderson. Director's Brief at 4, *referencing* Hearing Tr. at 38. The administrative law judge's instructions to claimant's counsel, however, were precise:

> Mr. Yonts, I'm going to ask you to do your best to see if you can get any records from Dr. Anderson, where he evaluated [claimant]. . . . I'm going to give you thirty days to do that. And at the end of that period of time I'd like for you to detail in a letter to me, sort of a response to the motion that's been made on the record, as to what efforts you have undertaken, when you have undertaken them, and the results.

Hearing Tr. at 37. Thus, although claimant's counsel was asked to "do [his] best" to locate claimant's records, he was specifically instructed, in response to employer's motion, to detail the efforts undertaken and the results of those efforts. *See* Decision and Order at 6 ("Claimant was given [thirty] days to . . . provide the court with a letter detailing the timing, nature, and results of his efforts to obtain [Dr. Anderson's] records."). Moreover, prior to the administrative law judge's issuance of the order, claimant's counsel stated, "I will see what I can find, if you order it . . . ." Hearing Tr. at 36. After its issuance, claimant agreed to provide the requested information within the specified time frame. *Id*. at 37.

[7] We note that the information in question related to claimant's having seen Dr. Anderson for an examination he said was arranged by prior counsel, possibly in connection with either a prior federal or a state claim. Claimant could not recall the name of his prior counsel, and there is no evidence in the record of any prior claim, federal or state, involving a Dr. Anderson. Under the circumstances, the identification of the correct Dr. Anderson, and his location (at least as of the time of the examination), are matters particularly within the knowledge of claimant. Moreover, claimant's consent would be required for disclosure of any pertinent records. Consequently, it was

address the outstanding order is consistent with the Board's holding in *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc) regarding the prompt resolution of procedural matters.[8] Furthermore, her denial of employer's motion to question claimant's wife about claimant having seen Dr. Anderson was predicated on first reviewing the results of claimant's counsel's attempts to obtain any records from Dr. Anderson, creating an expectation that she would readdress employer's motion after such information was provided.[9] *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-200 (1986), *aff'd on reconsideration*, 9 BLR 1-236 (1987) (en banc) ("While an administrative law judge is generally afforded broad discretion in dealing with procedural matters, [she] is obliged to [e]nsure a full and fair hearing on all the issues presented."); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989 ) (en banc). Because the administrative law judge has not addressed the outstanding procedural orders issued at the hearing, this case is not ripe for adjudication.

For the foregoing reasons, we must vacate the Decision and Order Awarding Benefits and remand the case for the administrative law judge to address and resolve any outstanding matters that arose at the hearing, including her outstanding order to claimant's counsel. *See generally Harlan Bell Coal Co. v. Lamar*, 904 F.2d 1042, 1047-50, 14 BLR 2-1, 2-7-11 (6th Cir. 1990); *Tackett v. Benefits Review Board*, 806 F.2d 640, 642, 10 BLR 2-93, 2-95 (6th Cir. 1986). Only after doing so should the administrative law judge issue her decision on the claim.

In light of our determination that this case is not ripe for adjudication, we decline to address employer's allegations of error regarding the administrative law judge's

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appropriate for the administrative law judge to order claimant's counsel to attempt to obtain the information. *See* 20 C.F.R. §725.351(b); 29 C.F.R. §18.12(b).

[8] In *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc), a case involving application of the evidentiary limitations, the Board held that in accordance with the principles of fairness and administrative efficiency, the administrative law judge should render her evidentiary rulings before issuing the Decision and Order.

[9] In denying employer's counsel's request to call claimant's wife as a witness, the administrative law judge stated: "Let's see what we get from th[e] evidence [claimant's counsel obtains]. I'm not going to call her today. . . . We'll see what we can do in terms of the documents." Hearing Tr. at 38.

finding that, based on the evidence developed to date, the subsequent claim was timely filed or her finding that employer failed to rebut the Section 411(c)(4) presumption.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded to the administrative law judge for further consideration of the claim consistent with this opinion.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge