BRB No. 07-0697 BLA

A.L.H. (On Behalf of C.H., deceased miner)	)	
Claimant-Respondent	)	
v.	)	
SCOTTS BRANCH COAL COMPANY	)	DATE ISSUED: 05/28/2008
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 of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonburg, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 (2005-BLA-05870) of Administrative Law Judge Janice K. Bullard on a subsequent 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*.[1] The miner filed his subsequent claim on March 17, 2004.[2] Director's Exhibit 3. Based on the parties' stipulation, the administrative law judge credited the miner with twenty-one years of coal mine employment. The administrative law judge determined that the claim was timely filed pursuant to 20 C.F.R. §725.308, based upon her understanding that the statute of limitations is not applicable to subsequent claims. The administrative law judge determined that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4) and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, and that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in concluding that the miner's subsequent claim was timely filed. Employer also challenges the administrative law judge's finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Sections 718.202(a)(1), (4), and disability causation at Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to employer's appeal, agreeing that the administrative law judge did not properly apply Section 725.308, but maintaining that the error is harmless, as the medical reports identified by employer "are legally insufficient to commence the three-year limitations period." Director's Brief at 2. However, the Director also states that "if

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[1] On August 24, 2007, counsel filed a Notice and Motion to Substitute, advising the Board that because the miner, C.H., had died on March 27, 2007, the caption of the case should be amended to reflect that the miner's widow, A.L.H., was pursuing the claim on behalf of her husband's estate. The Board granted the motion and has amended the caption accordingly. [*A.L.H.*] *v. Scotts Branch Coal Co.*, BRB No. 07-0697 BLA (Sept. 14, 2007) (Order) (unpub.).

[2] The miner filed an initial claim for benefits on April 27, 1988, which was denied by Administrative Law Judge Daniel L. Stewart on March 11, 1992 because the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 1. The miner appealed and the Board affirmed the denial of benefits. [*C.H.*] *v. Scotts Branch Coal Co.*, BRB No. 92-1292 BLA (May 27, 1993) (unpub.); Director's Exhibits 1. The miner took no further action on that claim until he filed his subsequent claim on March 17, 2004. Director's Exhibit 3.

the Board disagrees with our position, then it should remand the case for the [administrative law judge] to reconsider whether the opinions were communicated to the miner more than three years prior to the filing of his 2004 [subsequent] claim." Director's Brief at 3.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965).

After reviewing the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we vacate the award of benefits because we conclude that the administrative law judge failed to properly consider whether the miner's subsequent claim was timely filed pursuant to Section 725.308.

Timeliness of the Subsequent Claim

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at Section 725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. 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, within whose jurisdiction this cases arises, stated 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 . . . ." *Kirk*, 244 F.3d at 608, 22 BLR at 2-298.[4]

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

[4] The Director, Office of Workers' Compensation Programs, takes the position that the language in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), indicating that the denial of a prior claim does not reset the limitations period for subsequent claims, is dicta. Director's Brief at 3. The Board, however, has rejected the Director's position, and applies *Kirk* in all cases arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *Furgerson v. Jericol Mining*, 22 BLR 1-216, 1-222 (2002) (*en banc*).

The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The Sixth Circuit stated in *Kirk* that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the miner]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

Furthermore, in defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. Applying this standard, the Board has held that, under the language set forth in *Kirk*, a miner's mere statement that he was told by a physician that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations. *See Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006) (*en banc*); *Furgerson v. Jericol Mining Co.*, 22 BLR 1-216 (2002) (*en banc*).

In this case, employer argued before the administrative law judge that "[the miner] long ago was diagnosed and information communicated to him that he had the disease and that a claim should have been filed." Employer's Brief (Post-Hearing) at 4. Employer relied on the miner's testimony at the hearing that he recalled being examined by Drs. Fritzhand, Penman, and Clarke in 1989 or 1990, in conjunction with his prior claim for benefits, and that they told him that was totally disabled by black lung. *Id*.; Director's Exhibit 1; Hearing Transcript at 36-37. In finding that employer failed to rebut the presumption of timeliness, the administrative law judge stated:

> [The miner's] first claim was filed timely, and those communications [reports of Drs. Fritzhand, Penman, and Clarke] were associated with [the] initial claim, which was denied. ***I find that the communications made by these physicians do not apply to the instant claim***, as that initial claim was denied. *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 [BLR] 1-34 (1990) (statute of limitations applies only to the first claim filed).

Decision and Order at 5 (emphasis added).[5]

[5] After the administrative law judge found the opinions of Drs. Fritzhand, Clark and Penman to be irrelevant to the timeliness issue, she evaluated the miner's testimony. Decision and Order at 5. The administrative law judge noted that the miner "consistently asserted that his back injury is the reason he stopped working" and, therefore, found that "[w]hatever [the miner] was told by any physician of record regarding the nature of his disability, it is not clear that he understood it to mean that he has a total pulmonary disability due to pneumoconiosis." *Id*.

We hold that the administrative law judge erred in refusing to consider the "communications" of Drs. Fritzhand, Penman and Clarke relevant to whether the miner's subsequent claim was timely filed. The Sixth Circuit made clear in *Kirk* that:

> The 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. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination...and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, 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 2-298 (emphasis in original), citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Thus, contrary to the administrative law judge's finding, under *Kirk*, a credible medical determination of total disability due to pneumoconiosis, which was communicated to the miner, may be sufficient to trigger the statute of limitations at Section 725.308 regardless of the outcome of the prior claim. We, therefore, vacate the administrative law judge's finding at Section 725.308 and remand this case for further consideration as to whether the miner's subsequent claim was timely filed. On remand, the administrative law judge should consider whether the reports of Drs. Fritzhand, Penman, and Clarke constitute reasoned medical opinions of total disability due to pneumoconiosis and determine whether such an opinion was communicated to the miner more than three years prior to filing his subsequent claim.

Merits of Entitlement

Although we are remanding this case to the administrative law judge for further consideration at Section 725.308, in the interest of judicial economy we will address employer's arguments on the merits. Employer specifically contends that the administrative law judge erred in finding that the miner had legal pneumoconiosis and that he was totally disabled due to pneumoconiosis. We disagree.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, a miner must prove the existence of pneumoconiosis, arising out of coal mine employment, and total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. If a miner files a claim for benefits more than one year after

the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2).

In this case, the miner's prior claim was denied for failure to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, the newly submitted medical evidence had to show that the miner had pneumoconiosis, in order for the administrative law judge to proceed to consider the merits of his subsequent claim. 20 C.F.R. §725.309(d)(2), (3). Because the administrative law judge determined that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4), she found a change in an applicable condition of entitlement under Section 725.309. Based on her review of all of the record evidence,[6] the administrative law judge also found that the miner was totally disabled due pneumoconiosis, and awarded benefits.

We reject employer's contention that the administrative law judge erred in finding that the miner established the existence of legal pneumoconiosis.[7] Under Section

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[6] The administrative law judge noted that because pneumoconiosis is a progressive and irreversible disease, she accorded greater weight to the more recent evidence that established that the miner was totally disabled due to pneumoconiosis. Decision and Order at 20.

[7] Dr. Forehand conducted the Department of Labor examination on April 26, 2004 and opined that the miner suffered from clinical pneumoconiosis, by x-ray, and chronic obstructive pulmonary disease (COPD) due to cigarette smoking and coal mine employment. Claimant's Exhibits 4, 5. Dr. Forehand opined that the miner was totally disabled due to pneumoconiosis and coal dust exposure. *Id.* Dr. Dahhan examined the miner on October 25, 2004 and opined that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. Director's Exhibit 36; Employer's Exhibit 4. He diagnosed advanced chronic bronchitis and emphysema due to cigarette smoking and stated that the miner was unable to return to his previous coal mining work. Dr. Fino prepared a report on August 17, 2005, based on his review of the medical record. Dr. Fino opined that the miner had no radiographic evidence of clinical pneumoconiosis, but he diagnosed emphysema due to smoking, asthma, and chronic obstructive bronchitis due, in part, to coal dust exposure. Employer's Exhibit 1. Although

718.202(a)(4), the administrative law judge noted that Drs. Forehand and Fino were in agreement that the miner suffered from a chronic obstructive respiratory condition due, in part, to coal dust exposure, which diagnoses were consistent with the definition of legal pneumoconiosis at 20 C.F.R. §718.201(a)(2). Decision and Order at 14. The administrative law judge permissibly determined that the opinions of Drs. Forehand and Fino were better reasoned than the contrary opinion of Dr. Dahhan, that the miner did not suffer from a respiratory condition attributable to his coal mine employment. *Id.* The administrative law judge specifically determined that Dr. Dahhan's reasoning that the miner did not have legal pneumoconiosis because his objective studies were more consistent with asthma was not sufficiently explained in light the objective evidence.[8] *Id*.

Employer asserts that Dr. Forehand is biased and that his opinion is tainted by his belief that all coal miners will develop coal workers' pneumoconiosis. Employer's Brief at 7, citing Claimant's Exhibit 5 at 24. We disagree. The administrative law judge specifically noted the portion of Dr. Forehand's testimony which employer contends is indicative of bias. The administrative law judge noted that Dr. Forehand diagnosed clinical pneumoconiosis based in part on a positive x-ray and that "when asked whether his opinion would change if the x-ray evidence were negative, Dr. Forehand stated that '[y]ou can … be certain or be confident that a miner has coal workers' pneumoconiosis, a negative x-ray notwithstanding.'" Decision and Order at 11, citing Claimant's Exhibit 5 at 24. The administrative law judge ultimately found, within her discretion, that Dr. Forehand based his diagnosis of legal pneumoconiosis on accurate smoking and work histories, and a review of claimant's abnormal arterial blood gas study and pulmonary

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Dr. Fino opined that the miner was totally disabled from a respiratory standpoint, he attributed the miner's respiratory disability entirely to smoking. Employer's Exhibit 3.

[8] The administrative law judge rejected Dr. Dahhan opinion that the miner did not have legal pneumoconiosis because he had a reversible respiratory impairment attributable to asthma. Decision and Order at 14. The administrative law judge noted that Dr. Dahhan's reasoning was flawed for two reasons. First, the administrative law judge noted that it was based on an erroneous assumption that asthma cannot be related to coal dust exposure. *Id*. Second, Dr. Dahhan's opinion that the miner's respiratory condition is unrelated to coal dust exposure because he showed a "significant response" after the administration of a bronchodilator on pulmonary function testing, was flawed since "as Dr. Forehand points out…[the miner's] improved post-bronchodilator results still showed lung abnormalities and reduced lung function." *Id.*

function study results.[9] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); Decision and Order at 11, 14.

More importantly, however, even if we were to conclude that the administrative law judge failed to adequately address the reliability of Dr. Forehand's opinion, any error committed by the administrative law judge with respect to Dr. Forehand's opinion at Section 718.202(a)(4) would be harmless, as it does not affect the administrative law judge's decision to credit Dr. Fino's diagnosis of legal pneumoconiosis over Dr. Dahhan's contrary opinion. Because employer assigns no specific error to the weight accorded Dr. Dahhan's opinion at Section 718.202(a)(4), and since employer does not even attempt to argue that the administrative law judge erred in crediting Dr. Fino's diagnosis of chronic bronchitis due, in part, to coal dust exposure, we affirm her finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[10] *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).[11]

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[9] Employer contends that the administrative law judge erred in giving Dr. Forehand's opinion some additional credibility because he treated claimant on June 22, 2006, when "the truth of the matter is in reviewing his report of that time it is more of a supplemental evaluation than it is a course of treatment." Employer's Brief at 6. However, as the administrative law judge specifically determined that Dr. Forehand's opinion diagnosing legal pneumoconiosis was reasoned and documented, any error made by the administrative law judge in referencing Dr. Forehand as a treating physician is harmless. *See Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[10] Because we affirm the administrative law judge's finding that the miner had legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), it is not necessary that we address employer's argument that the administrative law judge erred in finding that the miner also had clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-216 (2002) (*en banc*),

[11] We affirm, as unchallenged on appeal, the administrative law judge's finding that miner had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Turning to the issue of disability causation, we reject employer's contention that the administrative law judge erred in assigning greater weight to Dr. Forehand's opinion, that the miner's disability was due, in part, to coal dust exposure, and less weight to the opinions of Drs. Fino and Dahhan, that the miner's disability was due to smoking alone. The administrative law judge found Dr. Fino's causation opinion to be unpersuasive since Dr. Fino did not describe the role of the miner's coal dust related chronic bronchitis in his disabling respiratory impairment. The administrative law judge explained:

> In his report, Dr. Fino described how various studies have found that the amount of clinical pneumoconiosis present in a given miner's lungs is relevant to the degree of emphysema, which in turn is relevant to determining impact on FEV_1. Ostensibly, reviewing the impact on FEV_1 would permit one to distinguish the effects of smoking from the effects of coal mine dust exposure in a given miner's total disability. In the instant case, Dr. Fino's conclusion hinges on his finding that [the miner's] emphysema was not severe enough to have caused a significant reduction in his FEV_1. In his second report, Dr. Fino opined that a portion of [the miner's] obstructive abnormality was related to emphysema. However, Dr. Fino did not address how [the miner's] diagnosed chronic bronchitis arising from coal mine dust exposure would factor into [the miner's] pulmonary disability, regardless of chest X-ray evidence. I find that Dr. Fino's opinion is poorly reasoned on the issue of causation of total disability.

Decision and Order at 20. Further, the administrative law judge rejected Dr. Dahhan's opinion regarding the etiology of the miner's impairment since Dr. Dahhan was not of the opinion that the miner had legal pneumoconiosis, contrary to the administrative law judge's finding.[12] *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidation Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995). In contrast to the opinions of Drs. Fino and Dahhan, Dr. Forehand's opinion, that the miner's disabling respiratory impairment was due to a combination of smoking and coal dust exposure, was credited by the administrative law judge because

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[12] We reject employer's contention that because Drs. Fino and Dahhan are Board-certified in pulmonary medicine, while Dr. Forehand is not, the administrative law judge erred in failing to accord greater weight to their opinions. The administrative law judge is under no obligation to credit a doctor's opinion solely based on his qualifications, particularly when the administrative law judge finds that the doctor's medical conclusions are not sufficiently explained. *See Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995).

she found his diagnosis to be supported by the objective evidence and by the miner's work and smoking histories and, therefore, reasoned. *Clark*, 12 BLR at 151.

Resolving conflicts in the evidence is committed to the discretion of the administrative law judge and the administrative law judge's credibility determinations are given deference by the Sixth Circuit. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 103 (6th Cir. 1983). In deciding the issue of disability causation, the administrative law judge examined each medical opinion "in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based," *Rowe*, 710 F.2d at 255, 5 BLR at 2-103, and explained her rationale for crediting the opinion of Dr. Forehand over those of employer's doctors. Decision and Order at 20. Consequently, we affirm her finding that claimant established total disability due to pneumoconiosis at Section 718.204(c). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005); *Griffith v. Director, OWCP*, 49 F.3d 184, 186-187, 19 BLR 2-111, 2-117 (6th Cir. 1995); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

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 consider whether this subsequent claim was timely filed pursuant to Section 725.308. If the claim is determined to be untimely, the administrative law judge must deny benefits. However, if the administrative law judge finds that claim was timely filed, she 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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REGINA C. McGRANERY
Administrative Appeals Judge