BRB No. 06-0233 BLA

SAMUEL CURTIS WOOTEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DON WOOTEN MINING COMPANY	)	DATE ISSUED: 11/30/2006
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.) Hyden, Kentucky, for claimant.

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

Barry H. Joyner (Howard M. Radzely, 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: SMITH, MCGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (03-BLA-6677) of Administrative Law Judge Rudolf L. Jansen 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). Claimant filed a subsequent claim on January 15, 2002.[1] Director's Exhibit 3. The district director issued a Proposed Decision and Order denying benefits on June 9, 2003. Director's Exhibit 36. Claimant requested a hearing, which was held on September 5, 2003. In its post-hearing brief, employer argued that claimant's subsequent claim was time barred under 20 C.F.R. §725.308. In his Decision and Order - Denying Benefits, the administrative law judge recognized that claimant was entitled to a presumption that his claim was timely filed under Section 725.308, however, the administrative law judge determined that employer had rebutted that presumption. The administrative law judge specifically found that the presence of medical reports in the record, along with claimant's hearing testimony, established that claimant had been informed that he was totally disabled by pneumoconiosis more than three years prior to filing his subsequent claim, and thus, that his subsequent claim was time barred under Section 725.308. Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging that administrative law judge's finding that his subsequent claim was not timely filed. Claimant asserts that the administrative law judge erred in relying on his hearing testimony to establish rebuttal of the Section 725.308 presumption. Claimant asserts that employer failed to satisfy its burden of proof to show that claimant received a specific diagnosis that he was disabled as a result of coal dust exposure more than three years prior to the filing of his subsequent claim. Claimant

[1] Claimant first filed a claim for benefits on May 7, 1975, which was denied by the district director on August 29, 1980 because claimant failed to establish the existence of pneumoconiosis, causal relationship, and that he was totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant filed a duplicate claim for benefits on July 2, 1985, which was denied by Administrative Law Judge Daniel L. Stewart on July 25, 1990. Director's Exhibit 2. That decision was affirmed by the Board. *See Wooten v. Don Wooten Mining Co.*, BRB No. 90-1903 BLA (Jun. 16, 1992) (unpub.); Director's Exhibit 2. Claimant subsequently filed a request for modification on January 12, 1993, which the district director denied on the grounds that that claimant failed to establish a mistake in fact or a change in conditions pursuant to 20 C.F.R. §725.310. Claimant requested a hearing, which was held before Administrative Law Judge Donald W. Mosser. Director's Exhibit 2. In his Decision and Order Denying Benefits dated April 20, 1995, Judge Mosser determined that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment, and therefore, he found that claimant failed to establish a mistake in fact or a change in conditions pursuant to Section 725.310. *Id*. The Board also affirmed Judge Mosser's decision on appeal. *Wooten v. Dan Wooten Mining Company*, 95-1480 BLA (Feb. 27, 1996) (unpub.). Director's Exhibit 2.

argues that, while there are pulmonary evaluation reports of record, employer failed to show that the contents of the reports had been communicated to him. Claimant's Brief at 3.

The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, urging the Board to reverse the administrative law judge's finding at Section 725.308. The Director contends that the administrative law judge erred in his determination that claimant received a reasoned medical determination of total disability due to pneumoconiosis more than three years prior to filing his subsequent claim. The Director specifically argues that, contrary to the administrative law judge's finding, neither Drs. Baker, Bushey or Rader offered an opinion that claimant was totally disabled for work due to a respiratory impairment arising out of coal mine employment. The Director further argues that "even if the opinions of Drs. Baker, Bushey and Rader were deemed to have diagnosed total disability due to pneumoconiosis, they still would not suffice to trigger the running of the limitations period, as employer failed to prove that they were communicated to claimant." Director's Brief at 3.

Employer has filed a brief in response to claimant's appeal, and a brief in reply to the Director's brief. Employer urges the Board to affirm the administrative law judge's determination that claimant's subsequent claim is time barred under Section 725.308. Employer maintains that the Board is without the authority to reweigh the evidence and conclude that Dr. Baker's report was not a definitive diagnosis of total pulmonary disability, contrary to the administrative law judge's finding. Employer's Reply Brief at 5, *citing* the Director's Brief at 3, n.4. Although employer contends that the administrative law judge properly exercised his discretion in finding that the Section 725.308 presumption had been rebutted by the record evidence and claimant's testimony, employer alternatively argues that, if the Board is unable to affirm the administrative law judge's finding at Section 725.308, the Board should remand the case to the administrative law judge for further consideration of the timeliness issue.[2]

[2] The Director, Office of Workers' Compensation Programs, (the Director) notes that the record contains a February 1988 report from Dr. Clarke, who specifically diagnosed that claimant was totally disabled due to pneumoconiosis. Director's Brief at 3, n.7; Director's Exhibit 2. However, because employer did not cite Dr. Clarke's opinion in its post-hearing brief as evidence to support rebuttal of the presumption, the Director contends that "employer has waived any argument that Dr. Clarke's opinion was sufficient to trigger the running of the statute of limitations period." *Id*. In its reply brief, employer argues that, if the Board is unable to affirm the administrative law judge's finding at Section 725.308, the proper course for the Board is to remand the case to the administrative law judge for consideration of Dr. Clarke's opinion relevant to rebuttal of the presumption. Employer's Brief at 7-8.

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.[3] 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).

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 which has been communicated to the miner or a person responsible for the care of the miner . . . ." 20 C.F.R. §725.308(a). This regulation also provides that there is a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this claim arises, has held in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 298 (6th Cir. 2001) that "it is employer's burden to rebut the presumption of timeliness by showing that a medical determination [i.e., a "reasoned" opinion by a medical professional] satisfying the statutory definition [of total disability due to pneumoconiosis, i.e., a totally disabling respiratory or pulmonary impairment substantially caused by coal dust exposure] was communicated" to the miner more than three years prior to the filing of his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296.

In support of his finding that claimant's 2002 subsequent claim was time barred, the administrative law judge found that "the evidence contains two reasoned medical reports by Dr. Baker, and other supporting medical reports, by Drs. Becknell, Rader, and Bushey concluding that [claimant] was totally disabled by pneumoconiosis in 1993, at the latest, and in the mid-1980's at the earliest." Decision and Order at 8. He also found that these reports were communicated to claimant, and specifically stated:

> Claimant's testimony establishes that he received these reports and was aware of their existence in the previous record. His testimony that he knew Dr. Baker and other physicians had generated these reports based on his full

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

Claimant cites to the Sixth Circuit court's unpublished decision in *Peabody Coal Co. v. Director, OWCP* [*Dukes*], 48 Fed. Appx. 140, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) (Batchelder, J., dissenting). We note, however, that *Dukes* is an unpublished case. *See* 6th Cir. R. 206(c); *Lopez v. Wilson*, 355 F.3d 931 (6th Cir. 2004); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996).

> pulmonary examinations. Notwithstanding [c]laimant's testimony that he was uncertain of the doctors' wording, [c]laimant understood that Dr. Baker, as well as his treating physician and other doctors, had informed him, based on their examinations, that he should no longer work in the mines because of his pulmonary disease and damage to his lungs and that he was unable to work in mining because of this condition.

Decision and Order at 8-9.

Both claimant and the Director argue that opinions cited by the administrative law judge do not constitute a medical determination of total respiratory disability due to pneumoconiosis sufficient to trigger the tolling of the statute of limitations. We agree. The record reveals that Dr. Baker examined claimant on January 20, 1993 and again on September 8, 1993, and that after each examination, Dr. Baker completed a Form 108 issued by the Kentucky Workers' Compensation Board entitled "Standard Form Medical Report for Occupational Disease." Director's Exhibit 2. On both forms, Dr. Baker diagnosed that claimant had coal workers' pneumoconiosis based upon a positive x-ray reading and chronic bronchitis by history. *Id*. In response to the question of whether the miner was physically able from a pulmonary standpoint to perform his usual coal mine work or comparable and gainful work in a dust free environment, Dr. Baker wrote. "Patient should have no further exposure to coal dust, rock dust or similar noxious agents due to his coal workers' pneumoconiosis and chronic bronchitis. He may have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to [these] conditions." Director's Exhibit 2.

The Director correctly asserts that Dr. Baker's opinion is insufficient to constitute a reasoned medical determination of total disability. Medical opinions which advise against further coal dust exposure, and fail to address claimant's physical capacity to do his usual coal mine employment, do not establish total disability. *See Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989); *Taylor v. Evans & Gambrel Co., Inc.*, 12 BLR 1-83 (1988); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Moreover, Dr. Baker qualified his opinion that claimant should work in a dust-free environment by speculating that claimant "may" have difficulty performing manual labor. Director's Exhibit 2. This equivocal statement does not constitute a "reasoned" opinion by a medical professional that claimant is totally disabled due to pneumoconiosis, and therefore Dr. Baker's opinion is legally insufficient to trigger the tolling of the statute of limitations at 20 C.F.R. §725.308. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-298 (6th Cir. 2001); *Justice v. Island Creek Coal Co*., 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987).

The administrative law judge also erred in relying on Dr. Bushey's opinion to support his timeliness ruling. Dr. Bushey examined claimant on November 8, 1993. In a

report dated November 12, 1993, he recorded claimant's history of coal dust exposure, history of smoking and asbestos exposure, and complaints of chronic back pain and weakness. Director's Exhibit 2. He noted that claimant broke his back in 1992, which required him to undergo fusion surgery and have temporary rods placed in his back. *Id*. Dr. Bushey diagnosed chronic lung disease with pulmonary fibrosis, compatible with coalworker[s'] pneumoconiosis 2/2, q/p." Director's Exhibit 2. Underneath this diagnosis, he also wrote, "This man is totally disabled." *Id*.

Contrary to the administrative law judge's finding, Dr. Bushey's opinion is not a medical determination of total respiratory disability due to pneumoconiosis because the doctor did not make clear in his report whether claimant was disabled for work due to pneumoconiosis, his back problem, or a combination of these conditions. As noted by the Director, Dr. Bushey's failure to specify whether claimant's pulmonary condition alone would preclude coal mine employment, renders his opinion insufficient to constitute a diagnosis of total disability due to pneumoconiosis as contemplated by the regulations, which make clear that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis." 20 C.F.R. §718.204(c); *see* Director's Brief at 3.

Similarly, although the administrative law judge references Dr. Rader's opinion as supporting evidence for his timeliness ruling, Dr. Rader also did not distinguish whether claimant was totally disabled in accordance with the regulatory standard.[1] Dr. Rader examined claimant on March 20, 1986. Director's Exhibit 2. He stated, at that time, that "claimant was totally and permanently disabled for manual labor, such as work in the mines, on the basis of his lungs as well as that of his motor vehicle accident." *Id*. Because Dr. Rader's opinion fails to specifically address claimant's disability from a respiratory standpoint alone, his opinion fails to satisfy the regulatory definition of a medical determination of total respiratory or pulmonary disability, and thus, it is insufficient to trigger the statute of limitations.

Additionally, the administrative law judge's reliance on Dr. Becknell's opinion is misplaced. Dr. Becknell examined claimant on May 30, 1980 and completed a standard Department of Labor examination form, wherein he diagnosed minimal pneumoconiosis and stated that he found no limitations in claimant's ability to walk, climb, lift or carry due to his pulmonary disease. Because Dr. Becknell did not diagnose that claimant was totally disabled by a respiratory or pulmonary impairment, his opinion is insufficient to

trigger the tolling of the statute of limitations, and the administrative law judge erred in his finding that Dr. Becknell's opinion supports rebuttal of the presumption.[4]

Notwithstanding, if we were to assume arguendo that the opinions cited by the administrative law judge were sufficient to constitute a medical determination of total respiratory disability due to pneumoconiosis, we still conclude that the administrative law judge erred in finding that employer met its burden of proof to rebut the presumption of timeliness at Section 725.308 by showing that any of the medical opinions was actually communicated to claimant.[5] Contrary to the administrative law judge's finding, the mere existence, in the record, of a medical report discussing the results of a pulmonary evaluation of claimant, or his pulmonary status, does not, in and of itself, establish that claimant had knowledge of the contents of those reports or the diagnoses contained therein. Thus, even if the record contained a medical report stating that claimant was totally disabled due to pneumoconiosis, employer still bore the burden of showing that the report had been communicated to claimant in order to rebut the presumption.[6] Such

[4] The administrative law judge acknowledged that "Dr. Becknell's written report offered no opinion on [c]laimant's ability to return to work and listed his impairment in 1980 as 'mild'." Decision and Order at 9, n. 2.

[5] We note that the United States Court of Appeals for the Fourth Circuit held in *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006), that the language of 30 U.S.C. §932(f) and the language of 20 C.F.R. §725.308(a) plainly do not contain the written notice requirement adopted by the Board in *Adkins v. Donaldson Mine Co.*, 19 BLR 1-36 (1993). *See Henline*, 456 F.3d 421, 23 BLR 2-321. Thus, under *Henline* it would be sufficient for an employer to establish rebuttal of the presumption of timeliness at 20 C.F.R. §725.308 based on a medical determination of total disability due to pneumoconiosis that is orally communicated to the miner. In this case, however, employer has failed to demonstrate that such a medical determination of total disability was communicated to claimant by any of the record physicians.

[6] We note that claimant did not offer any testimony with respect to Dr. Clarke's opinion of total disability due to pneumoconiosis. As there is no evidence that Dr. Clarke's opinion was ever communicated to claimant, and the record establishes only that his report was sent to claimant's attorney, we agree with the Director that Dr. Clarke's report could not, as a matter of law, start the running of the statute of limitations. *See* Director's Brief at 3, n. 7. Because we conclude that Dr. Clarke's opinion was not communicated to claimant, any error committed by the administrative law judge in failing to discuss Dr. Clarke's opinion was harmless, s*ee Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), and it is unnecessary for us to remand the case to the administrative law judge for further consideration of Dr. Clarke's opinion.

requisite communication has not been demonstrated in this case. At best, the record shows only that the reports were sent to claimant's attorney and not directly to claimant, thereby failing to satisfy the communication element required for rebuttal of the presumption. S*ee Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-96, 1-99 (1993) (medical opinion addressed to legal counsel is insufficient to trigger the limitations period).

Furthermore, the administrative law judge has misconstrued claimant's hearing testimony. Contrary to the administrative law judge's finding, claimant never mentioned Drs. Bushey and Rader during his hearing testimony, there is no evidence that they orally communicated their diagnoses to him. Claimant did testify that Dr. Becknell, his treating physician, "told me in the '70's I needed to get out of the mines, it was damaging my lungs and [I] needed to find something else to do." Hearing Transcript at 24. However, contrary to the administrative law judge's suggestion, this testimony does not establish that claimant received a diagnosis of total disability due to pneumoconiosis. Based on the wording of claimant's testimony, the only reasonable interpretation of Dr. Becknell's diagnosis was that claimant should avoid further coal dust exposure, which is not a diagnosis of total disability.

We also agree with the Director that the administrative law judge erroneously construed Dr. Baker's opinion as a diagnosis of total disability. Although claimant initially answered yes to a leading question posed by employer's counsel on cross-examination as to whether Dr. Baker had ever told him that he was "disabled due to your lungs," Hearing Transcript at 25, claimant later clarified his response on redirect examination, stating that "he just said that I need to find another occupation. You know to work at because of my lungs." Hearing Transcript at 29. Claimant's statements at the hearing establish, at best, that he was told that he should avoid further coal dust exposure, not that he was totally disabled for work due to a respiratory or pulmonary impairment arising out of coal dust exposure. We, therefore, conclude that the administrative law judge erred in finding both that Dr. Baker communicated a diagnosis of total disability due to pneumoconiosis to claimant more than three years prior to the date he filed his subsequent, and that Dr. Baker's opinion was sufficient to trigger the tolling of the statue of limitations.

Consequently, as the administrative law judge has erred in finding that a reasoned medical opinion satisfying the regulatory definition of total respiratory or pulmonary disability due to pneumoconiosis was communicated to claimant based on the opinions of Drs. Baker, Bushey, Rader or Becknell, we reverse his determination that employer established rebuttal of the presumption of timeliness at Section 725.308. We, therefore, remand this case for consideration of claimant's entitlement to benefits.

Accordingly, the Decision and Order – Denying Benefits of the Administrative Law Judge is reversed and the case is remanded for consideration on the merits of entitlement.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge