BRB No. 09-0151 BLA

WILLIAM O. DEMPSEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEWELL COAL COMPANY	)	
	)	DATE ISSUED: 11/25/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington and Lee University School of Law, Legal Practice Clinic), Lexington, Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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: SMITH, HALL and BOGGS, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Second Decision and Order on Remand – Awarding Benefits (02-BLA-5357) of Administrative Law Judge Daniel L. Leland, rendered 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.* (the Act). This case is before the Board for a third time and we incorporate herein the procedural history of the case as contained in the Board's prior decisions. *Dempsey v. Sewell Coal Co.*, BRB No. 05-0614 BLA, slip op. at 2-5 (Mar. 31, 2006) (unpub.) (Boggs, J., concurring in part and dissenting in part); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-54-55 (2004) (*en banc*). The Board most recently affirmed the administrative law judge's award of benefits based on his findings that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204. *Dempsey*, BRB No. 05-0614 BLA, slip op. at 10. Employer appealed and the United States Court of Appeals for the Fourth Circuit vacated the Board's March 31, 2006 Decision and Order, holding that the administrative law judge erred in concluding that the statute of limitations contained at 20 C.F.R. §725.308 was not applicable to subsequent claims and, thus, that claimant's subsequent claim, filed on February 8, 2001, was timely.[1] *Sewell Coal Co. v. Director, OWCP* [*Dempsey*], 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008). The Fourth Circuit vacated the award of benefits and remanded the case to the administrative law judge for further consideration pursuant to Section 725.308. *Dempsey*, 523 F.3d at 260, 24 BLR at 2-134; *see also Dempsey v. Sewell Coal Co.*, BRB No. 05-0614 BLA (unpub. Order) (June 30, 2008).

In his Second Decision and Order on Remand issued on October 23, 2008, the administrative law judge determined, pursuant to Section 725.308, that claimant was entitled to a presumption that his subsequent claim was timely filed, and further determined that employer failed to rebut that presumption. Accordingly, the administrative law judge awarded benefits commencing February 1, 2001.

Employer appeals, asserting that the administrative law judge erred in failing to find that employer had rebutted the Section 725.308 presumption of timeliness. Employer also raises multiple errors with respect to the administrative law judge's prior findings on the merits. Employer asserts that the administrative law judge erred in his treatment of Dr. Renn's opinion, in finding that claimant is totally disabled due to pneumoconiosis, in issuing his evidentiary rulings and in "arbitrarily setting the onset date as the month in which the claim was filed." Employer's Brief in Support of Petition for Review at 7. Claimant responds, urging affirmance of the administrative law judge's Second Decision and Order on Remand. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter on appeal, urging the Board to affirm the administrative law judge's finding that claimant's subsequent claim was timely filed

[1] The Board had affirmed the administrative law judge's findings pursuant to 20 C.F.R. §725.308 in its initial decision. *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-56 (2004) (*en banc*).

pursuant to Section 725.308. Employer has filed a reply brief, reiterating its argument that the evidence is sufficient to establish rebuttal of the Section 725.308 presumption.

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).

A. Timeliness of the Subsequent Claim

The regulations set forth a statute of limitations for the filing of claims. Section 725.308(a) states that "[a] claim for benefits filed under this part by, or on behalf of, a miner shall 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 also 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 that the requisite communication was made to the miner within three years of the filing of his claim. *See Adkins v. Donaldson Mine Co.*, 19 BLR 1-34 (1993).

In this case, employer asserts that the administrative law judge erred in failing to find that a medical determination of total disability due to pneumoconiosis was communicated to claimant in 1989, more than three years before he filed his subsequent claim. Specifically, employer asserts that two letters submitted by Dr. Brown to the West Virginia State Board of Rehabilitation (WV Board), read in conjunction with one another, establish rebuttal of the Section 725.308 presumption of timeliness. We disagree.

In the first letter, dated July 19, 1989, Dr. Brown stated that he had advised claimant in February 1989 to "stop working in coal mines due to his diagnosis of [chronic obstructive pulmonary disease (COPD)] due to pneumoconiosis." Claimant's Exhibit 1. Dr. Brown diagnosed multiple respiratory and non-respiratory impairments,[3] including acute tonsillitis, upper respiratory infection and acute bronchitis, possible appendicitis, a

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] The regulations require that a miner be totally disabled by a respiratory condition alone. See 20 C.F.R. §718.204(b)(1); *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994).

femoral hernia, influenza, right otitis media, acute URI and wax plug, BPH with secondary acute prostatitis, and intercostal neuritis and radiculitis. *Id*. He wrote that, "[i]t is the feeling of this examiner that [claimant] is totally and permanently disabled from any type of gainful employment due to his diagnoses stated above." *Id*.

In the second letter, dated October 17, 1989, Dr. Brown stated:

> On August 29, 1989, I did inform the patient that I felt that I had nothing more I could add to his treatment. I told him that I felt he was totally and permanently disabled.
>
> It is my feeling that this man is totally and permanently disabled from any type of gainful employment due to his diagnoses of severe shortness of breath and COPD.

Claimant's Exhibit 1.

In weighing this evidence, the administrative law judge permissibly found that none of Dr. Brown's statements established that Dr. Brown specifically communicated to claimant that he was totally disabled due pneumoconiosis. With respect to the first letter, the administrative law judge permissibly found that Dr. Brown's advice to claimant that he stop working in the mines was not the equivalent of a diagnosis of total disability. *Zimmerman v. Director, OWCP*, 871 F.2d 564, 12 BLR 2-254 (6th Cir. 1989). Moreover, as noted by the administrative law judge, even if Dr. Brown's July letter were construed to be a diagnosis of total disability, the fact that the letter predated the denial of claimant's first claim by the district director, precludes that letter from triggering the statute of limitations.[4] *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006) ("a medical determination later deemed to be a misdiagnosis . . . by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims"). Thus, we affirm the administrative law judge's finding that the July 18, 1989 letter does not establish rebuttal of the Section 725.308 presumption.

The administrative law judge also acted within his discretion in finding that the October 17, 1989 letter did not trigger the statute of limitations. As noted by the administrative law judge, although Dr. Brown wrote, in the first part of his October 1989 letter, that he had informed claimant that he was totally disabled, the doctor "did not indicate the cause of the disability was due to pneumoconiosis." Second Decision and Order on Remand at 3. Moreover, the administrative law judge reasonably found it was unclear from Dr. Brown's second statement in the October 1989 letter whether he had

[4] Claimant's prior claim for benefits, filed on April 27, 1989, was finally denied by the district director on August 15, 1989. Director's Exhibit 1.

communicated to claimant, his "feeling" that claimant was totally disabled as a result of severe shortness of breath and COPD. *Id., quoting* Claimant's Exhibit 1. Thus, contrary to employer's contention, because the administrative law judge has discretion to assess the credibility of the evidence of record, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), we affirm the administrative law judge's findings that Dr. Brown's "vague and premature statements" fail to rebut the presumption that the miner's claimant was timely filed." Second Decision and Order on Remand at 3. Thus, we reject employer's assertions of error and affirm the administrative law judge's findings pursuant to Section 725.308.

In the remainder of its brief, employer resurrects arguments with respect to the administrative law judge's evidentiary rulings and his findings on the merits, which have already been addressed by the Board in the prior appeals in this case.[5] Under the law of the case doctrine, the Board will adhere to a prior holding in the same case unless: 1) there has been a change in the underlying fact situation; 2) intervening controlling authority demonstrates that the initial decision was erroneous; or 3) it is shown that the Board's prior holding was either clearly erroneous or that it results in manifest injustice. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000) (en banc) (Hall, J. and Nelson, J., concurring and dissenting). Because the Board's previous disposition constitutes the law of the case, and an exception to it has not been demonstrated, we decline to address employer's arguments with respect to 20 C.F.R. §§718.202(a)(1), (4), 718.204(c), 725.414. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

B. Onset of Disability

Employer generally asserts in this appeal that the administrative law judge erred in awarding benefits beginning with the month in which claimant filed his subsequent

[5] Employer's arguments pursuant to 20 C.F.R. §725.414 were addressed by the Board in the first appeal. *Dempsey*, 23 BLR at 1-59-64; *see* Employer's Brief in Support of Petition for Review at 41-54. The Board has also specifically rejected, in the prior appeal, employer's arguments that the administrative law judge selectively analyzed the medical opinion evidence, that he improperly discounted Dr. Renn's opinion because he found that Dr. Renn's opinion was based primarily on inadmissible evidence, and erred in finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). *Dempsey v. Sewell Coal Co.*, BRB No. 05-0614 BLA, slip op. at 6-10 (Mar. 31, 2006) (unpub.) (Boggs, J., concurring in part and dissenting in part); *see* Employer's Brief in Support of Petition for Review at 14-21; 28-41.

claim. As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503. If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

Employer argues that the "default onset date" set forth at Section 725.503(b) "improperly allocates the burden of proof by creating a burden shifting presumption." Employer's Brief in Support of Petition for Review at 56. Employer asserts that, because Section 725.503(b) places the burden of persuasion on the party opposing the benefits award, it contravenes Section 7(c) of Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that, "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. § 556(d). Citing *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), employer contends that claimant has the burden to establish the onset date of his total disability without the aid of a presumption.[6]

Contrary to employer's contention, however, the United Court of Appeals for the Seventh Circuit has specifically explained why 20 C.F.R. §725.503(b) does not conflict with the APA. In *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002), the Seventh Circuit, citing the reasoning of the Fourth Circuit as to other rebuttable presumptions, held that because Section 725.503(b) shifts the burden of production, and not the burden of proof, it is permitted by *Ondecko* and Section 7(c) of the APA. Additionally, the Seventh Circuit referenced the notation by the United States Supreme Court in *Ondecko* that:

> T]he [Act] incorporates the APA, "but it does so 'except as otherwise provided . . . by regulation of the Secretary.' 30 U.S.C. §932(a)." Section 725.503 is a regulation by the Secretary. Therefore, under the express language of the Act, the APA does not trump the regulation.

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[6] In *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), the United States Supreme Court held that the application of the true doubt rule violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), as it relieves claimants of their burden of proof in establishing entitlement to benefits.

Amax, 312 F.3d at 893, 22 BLR at 2-532. Thus, based on the rationale employed by the Fourth and Seventh Circuits, we reject employer's argument and conclude that Section 7(c) of the APA has not been contravened in this case.

Additionally, employer contends that the administrative law judge "erred by failing to make some attempt to determine whether the evidence establishes a date of onset of total disability in this claim," citing the administrative law judge's 2003 Decision and Order. Contrary to employer's assertion of error, the administrative law judge specifically determined that the medical evidence did not establish when claimant first became totally disabled and, thus, he found that benefits must commence as of February 1, 2001. 2005 Decision and Order on Remand at 8. The administrative law judge reinstated his onset determination in his Second Decision and Order on Remand. Because employer has not raised a specific error with regard to the administrative law judge's 2005 finding that the medical evidence of record is insufficient to establish the date of onset, we affirm the administrative law judge's decision to award benefits commencing as of February 1, 2001. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Second Decision and Order on Remand – Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur with my colleagues' decision to affirm the administrative law judge's finding that claimant timely filed his subsequent claim pursuant to 20 C.F.R. §725.308. In all other respects, I concur and dissent as previously stated in *Dempsey v. Sewell Coal Co.*, BRB No. 05-0614 BLA (Mar. 31, 2006) (unpub.) (Boggs, J., concurring in part and dissenting in part).

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JUDITH S. BOGGS
Administrative Appeals Judge