BRB No. 11-0182 BLA

CHARLES W. LOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	
	)	
and	)	
	)	
TRANSCO ENERGY COMPANY	)	DATE ISSUED: 11/18/2011
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Edmond Collett, Hyden, Kentucky, for claimant.

James M. Kennedy (Baird & Baird, P.S.C.), Pikeville, Kentucky, for employer/carrier.

Helen H. Cox (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-5150) of Administrative Law Judge Larry S. Merck (the administrative law judge) denying claimant's request for modification of the denial of a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case, involving a subsequent claim filed on September 27, 2002,[2] is before the Board for the second time.

Initially, in a Decision and Order issued on June 29, 2006, Administrative Law Judge Alan L. Bergstrom determined that this claim was not timely filed pursuant to 20 C.F.R. §725.308(a).[3] Judge Bergstrom found that the claim was untimely, because it was filed more than three years after Dr. Clarke's 1994 medical opinion, which diagnosed total disability due to pneumoconiosis, was communicated to claimant. 2006 Decision and Order at 12-18; Director's Exhibit 55. In making that finding, Judge Bergstrom relied on language in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), stating that the three-year statute of limitations period begins to run when a physician first tells a miner that he is totally disabled due to pneumoconiosis, and is not tolled by denial of the miner's claim, but continues to run, unless the miner returns to coal mine employment after the denial. 2006 Decision and Order at 12-13. Accordingly, Judge Bergstrom denied benefits.

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[1] Claimant's first claim, filed with the Social Security Administration (SSA) on July 20, 1973, was denied by SSA on December 5, 1973, and by the Department of Labor on April 21, 1980, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant's second claim, filed on February 2, 1995, was denied by Administrative Law Judge Donald W. Mosser on July 15, 1998, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Love v. Leeco, Inc.*, BRB No. 98-1394 BLA (Nov. 22, 1999)(unpub.); Director's Exhibit 1. Claimant filed this claim on September 27, 2002. Director's Exhibit 3.

[2] Because claimant filed his subsequent claim before January 1, 2005, this case is not affected by a recent amendment to the Act that was enacted by Public Law No. 111-148. *See* Pub. L. No. 111-148, §1556(a),(c), 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

[3] Section 725.308 provides, in pertinent part, 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. . . ." 20 C.F.R. §725.308(a). Under Section 725.308, there is "a rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c).

Pursuant to claimant's appeal, the Board held that Judge Bergstrom permissibly found Dr. Clarke's 1994 medical opinion to be well-reasoned, and that it was communicated to claimant more than three years before he filed this subsequent claim. Therefore, the Board affirmed Judge Bergstrom's finding that the claim was not timely filed, and affirmed the denial of benefits. *Love v. Leeco, Inc.*, BRB No. 06-0807 BLA (July 24, 2007)(unpub.); Director's Exhibit 67.

Claimant timely requested modification of the denial of benefits. Director's Exhibit 70; *see* 20 C.F.R. §725.310. Since claimant submitted no new evidence, the district director construed his request as an assertion that there was a mistake in a determination of fact in the prior decision, and referred the modification request to the Office of Administrative Law Judges (OALJ) for a hearing. Director's Exhibit 74.

While claimant's modification request was pending before the OALJ, the United States Court of Appeals for the Sixth Circuit issued its opinion in *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009), holding that a miner's subsequent claim was timely filed. In *Hatfield*, the court first held that the pertinent language in *Kirk*, the same language relied upon by Judge Bergstrom in this case, was not necessary to the outcome of *Kirk*, and therefore, was *dicta*. *Hatfield*, 556 F.3d at 481, 24 BLR at 2-150-51. In holding that the miner's subsequent claim was timely, the court applied its "rule resetting the limitations period" from *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994), to hold that the final denial of benefits "necessarily refute[d]" any medical opinion of total disability due to pneumoconiosis submitted with Mr. Hatfield's prior claim, and "reset the clock on any subsequent claim" filed by him. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-153-54.

Nine months later, the administrative law judge held a hearing on claimant's modification request, and on October 20, 2010, he issued his Decision and Order denying modification. The administrative law judge noted the standard for evaluating requests for modification, reviewed the procedural history of this case, and considered Judge Bergstrom's Decision and Order. The administrative law judge found that *res judicata* barred any reconsideration on modification of whether claimant's subsequent claim was timely filed:

> The doctrine of *res judicata* seeks to bar re-litigation of the same claim. This is exactly what Claimant seeks to do here. While this is usually permissible in the area of Black Lung because of its progressive nature – it is not permissible to re-litigate a determination of fact which I find is supported by the evidence of record. Claimant has not submitted any additional evidence on the issue of timeliness. Claimant and Employer were both parties in the previous claim with the same claim/issues in that

> case as the one before the undersigned today. A final determination was made on the issue of timeliness before a court of competent jurisdiction.

Decision and Order at 15 (footnote omitted).

The administrative law judge acknowledged *Hatfield*'s holding "that a medical determination of total disability due to pneumoconiosis, which is outweighed by contrary evidence, is insufficient to begin the statute of limitations period." Decision and Order at 15 n.2. He explained, however, that he was "not deciding if Claimant files a new claim whether or not Claimant is time barred,"[4] but was "only deciding if . . . *res judicata* bars the current claim under consideration." *Id.* The administrative law judge therefore found that, "as was determined in the June 2006 Decision and Order, Claimant failed to timely file" his claim. Decision and Order at 15. Accordingly, the administrative law judge denied benefits.

On appeal, claimant asserts that the administrative law judge erred in finding that the claim was not timely filed. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has submitted a letter urging the Board to reverse the administrative law judge's finding that this claim was untimely 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).

Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, which is incorporated into the Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.310, authorizes the modification of an award or denial of benefits based, in pertinent part, upon a mistake in a determination of fact. Mistakes of fact may be demonstrated by wholly new evidence, cumulative evidence, or merely further reflection

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[4] The administrative law judge apparently meant that claimant could wait one year, then file another claim against employer. *But see Stolitza v. Barnes & Tucker Co.*, 23 BLR 1-94 (2005)(holding that where a previous claim was finally denied as untimely, that decision is *res judicata*, and bars the filing of a subsequent claim).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See* Director's Exhibit 4; Hearing Transcript at 13; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

on the evidence initially submitted. *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

Section 22 "was implemented by Congress to displace traditional notions of *res judicata* and collateral estoppel." *Branham v. BethEnergy Mines, Inc.*, 20 BLR 1-27, 1-32 (1996). Therefore, the administrative law judge erred in finding that *res judicata* barred consideration of whether there was a mistake in a determination of fact in the prior decision. *See Jonida Coal Co. v. Hunt*, 124 F.3d 739, 21 BLR 2-203 (6th Cir. 1997); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65 (2008).

Further, we agree with the Director that, as a matter of law, there was a mistake in the prior determination that claimant's subsequent claim was untimely filed. *See* 20 C.F.R. §725.310. As noted, the language from *Kirk* that Judge Bergstrom relied upon to find this claim to be untimely was *dicta*.[6] *Hatfield*, 556 F.3d at 481, 24 BLR at 2-150-51. Under the law that must be applied to this claim, a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year statute of limitations for filing a subsequent claim, if it was discredited or found outweighed by other evidence in the prior denied claim. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-154. Therefore, Dr. Clarke's 1994 medical opinion, diagnosing claimant as totally disabled due to pneumoconiosis, must be deemed a misdiagnosis, in view of the 1998 decision finally denying claimant's 1995 claim. Additionally, that denial "reset the clock" for filing this subsequent claim. *Hatfield*, 556 F.3d at 483, 24 BLR at 2-154. Because employer points to no other evidence that claimant's 2002 subsequent claim was untimely, nor does a review of the record reveal any evidence that would have triggered the statute of limitations, we hold, as a matter of law, that employer did not rebut the presumption that the 2002 claim was timely filed. *See* 20 C.F.R. §725.308. Therefore, we reverse the administrative law judge's finding that this claim was not timely filed.

Consequently, we remand this case for the administrative law judge to consider whether the medical evidence developed since the final denial of claimant's last claim establishes a change in an applicable condition of entitlement pursuant to 20 C.F.R.

[6] Employer argues that modification may not be granted based on a change in law. Employer's Brief at 7. Employer's argument is misplaced, because the pertinent language in *Kirk* was *dicta*, and thus, was not the law. *See Arch of Ky., Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 481, 24 BLR 2-135, 2-150-51 (6th Cir. 2009). Further, whether the evidence is sufficient to rebut the presumption of timely filing under Section 725.308 is a factual issue that is subject to modification. *See V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-70-71 (2008).

§725.309(d). If so, the administrative law judge must consider whether all of the evidence establishes that claimant is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order is reversed, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

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