BRB Nos. 14-0113 BLA
and 14-0113 BLA-A

MILDRED GARRETT (o/b/o CHARLES GARRETT)	)	
Claimant-Petitioner Cross-Respondent	)	
v.	)	
KARST ROBBINS COAL COMPANY, INCORPORATED	)	DATE ISSUED: 10/28/2014
and	)	
BITUMINOUS CASUALTY CORPORATION	)	
Employer/Carrier- Respondents Cross-Petitioners	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Mildred Garrett, Ben Hur, Virginia, *pro se*.

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

Ann Marie Scarpino (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals, without the assistance of counsel,[2] and carrier cross-appeals, the Decision and Order Denying Benefits (2011-BLA-6086) of Administrative Law Judge Linda S. Chapman rendered on a request for modification of the denial of a subsequent claim[3] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case, involving a miner's claim filed on July 14, 2003, is before the Board for the second time.

[1] Claimant is the widow of the miner, who died on November 11, 2010. Director's Exhibit 148. Claimant is pursuing the miner's claim on his behalf.

[2] Robin Napier, a benefits counselor with Stone Mountain Health Services, has requested, on behalf of claimant, that the Board review the administrative law judge's decision in its entirety, but is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] The miner's initial claim, filed on February 20, 1987, was denied by the district director as an abandoned claim. Director's Exhibit 1. The miner's second claim, filed on February 13, 1990, was denied by Administrative Law Judge Frank J. Marcellino on December 19, 1991. On July 20, 1994, the Board affirmed, in part, and vacated, in part, Judge Marcellino's decision and order, and remanded the case for further consideration. *Garrett v. Karst Robbins Coal Co*., BRB No. 92-0872 BLA (July 20, 1994)(unpub.). On remand, Administrative Law Judge Fletcher E. Campbell, Jr. determined that the miner failed to establish pneumoconiosis or disability due to pneumoconiosis, and the Board affirmed the denial of benefits. *Garrett v. Karst Robbins Coal Co*., BRB No. 95-1799 BLA (June 26, 1996)(unpub.). Director's Exhibit 2. The miner's third claim, filed on January 2, 1998, was denied by Administrative Law Judge Daniel A. Sarno, Jr. on February 29, 2000, because the miner failed to establish pneumoconiosis. On April 19, 2001, the Board affirmed the denial of benefits. *Garrett v. Karst Robbins Coal Co*., BRB No. 00-0664 BLA (Apr. 19, 2001)(unpub.). On October 1, 2001, the miner requested modification, which was denied by the district director on May 7, 2002. Director's Exhibit 3. The miner took no further action until the filing of the present claim on July 14, 2003. Director's Exhibit 5.

In the initial decision dated February 15, 2007, Administrative Law Judge Pamela Lakes Wood found that the current claim was timely filed. She further denied carrier's motion to be dismissed as the responsible carrier and to rescind its insurance policy with Karst Robbins Coal Company. Judge Wood credited the miner with seventeen years of coal mine employment and found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Consequently, Judge Wood found that the miner demonstrated a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d) (2013).[4] Reviewing the entire record, Judge Wood found that the miner established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total respiratory disability pursuant to 20 C.F.R. §718.204(b), but failed to establish that pneumoconiosis was a substantially contributing cause of his disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

After the miner appealed the administrative law judge's decision without the assistance of counsel, the Board vacated Judge Wood's denial of benefits, and remanded the case for Judge Wood to analyze the evidence of record to determine whether carrier met its burden to rebut the presumption that the claim was timely filed. Judge Wood was instructed to reevaluate Dr. Smiddy's medical reports and letter to the miner to determine if they contain an opinion of a medical professional sufficient to trigger the running of the statute of limitations. If Judge Wood found the claim to be timely filed, she was instructed to remand the case to the district director for a complete pulmonary evaluation, in light of the concession by the Director, Office of Workers' Compensation Programs (the Director), that Dr. Paranthaman failed to adequately address the issues of the existence of legal pneumoconiosis[5] and the cause of disability. Director's Exhibit 121; *Garrett v. Karst Robbins Coal Co.*, BRB Nos. 07-0534 BLA and 07-0534 BLA-A (Apr. 29, 2008)(unpub.).

On remand, Judge Wood determined that employer failed to rebut the presumption of timeliness, and remanded the claim to the district director for a complete pulmonary evaluation.[6] Director's Exhibit 126. On November 23, 2009, the district director denied

[4] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth in 20 C.F.R. §725.309(d)(2013) is now set forth in Section 725.309(c)(2014).

[5] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[6] Dr. Baker performed the new pulmonary evaluation for the Department of Labor on February 27, 2009. Director's Exhibit 127.

benefits, Director's Exhibit 140, and the miner requested modification, which was denied on April 27, 2011 by the district director, who found no change in conditions or mistake of fact. Director's Exhibit 150. The case was transferred to the Office of Administrative Law Judges, and on March 22, 2012, Administrative Law Judge Richard T. Stansell-Gamm denied carrier's request for dismissal. A formal hearing was subsequently held before Administrative Law Judge Linda S. Chapman (the administrative law judge) on May 9, 2013.

In her Decision and Order dated November 19, 2013, the administrative law judge credited the miner with 11.23 years of coal mine employment,[7] and found that the claim was timely filed and that employer was the properly designated responsible operator. The administrative law judge further found that while the evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), it was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or disability causation pursuant to 20 C.F.R. §718.204(c). Finding that claimant failed establish a change in conditions and that no mistake in a determination of fact was made in the prior denial of this subsequent claim, the administrative law judge denied modification pursuant to 20 C.F.R. §725.310, and denied benefits.

On appeal, claimant generally challenges the denial of benefits. Carrier responds in support of the denial of benefits. Carrier also cross-appeals, contending that the administrative law judge erred in failing to dismiss it as the responsible carrier herein, and in finding that this subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. Employer has not filed a brief in this appeal. The Director has filed a brief in response to carrier's argument raised on cross-appeal, asserting that carrier is liable for the payment of any benefits awarded in connection with this claim. Carrier replies in support of its position.[8]

[7] Noting that the miner was previously credited with seventeen years of coal mine employment, the administrative law judge determined that this finding was not supported by the miner's Social Security Administration records. She also correctly noted that even if the miner established more than fifteen years of coal mine employment, the amendments to the Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Decision and Order at 23, n.14.

[8] Carrier also raises a jurisdictional question, noting that the Board's Order dated April 25, 2014 found that it was in the interest of justice to accept claimant's appeal, which was mistakenly filed with the Office of the District Director, but that the Order did not specifically address whether the appeal was timely. Carrier's Brief at 2; *see* 20 C.F.R. §802.207(a)(2). As carrier points to no evidence to show that claimant's letter of appeal dated December 19, 2013 was not mailed on that date, and as such mailing date was within thirty days of the issuance of the administrative law judge's Decision and

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[9] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address carrier's contention that the administrative law judge erred in finding that this subsequent claim was timely filed. The Act requires that a miner's claim for benefits 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. 30 U.S.C. §932(f);[10] 20 C.F.R. §725.308(a).[11] Additionally, the

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Order, we hold that claimant's appeal was timely filed and that we have jurisdiction over this appeal. *See* 20 C.F.R. §802.207(b).

[9] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 6.

[10] 30 U.S.C. §932(f) provides:

> Any claim for benefits by a miner under this section shall be filed within three years after whichever of the following occurs later-
> (1) a medical determination of total disability due to pneumoconiosis; or
> (2) March 1, 1978.

[11] 20 C.F.R. §725.308 was promulgated to implement 30 U.S.C. §932(f). It provides in relevant part:

> (a) 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 which has been communicated to the miner or a person responsible for the care of the miner, or within three years after the date

regulation provides a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c).

In determining that this claim for benefits was timely filed, the administrative law judge adopted "the thorough and considered conclusions of Judge Stansell-Gamm" in his 2012 decision, that none of Dr. Smiddy's letters or reports constituted a reasoned opinion of a medical professional that the miner was totally disabled due to pneumoconiosis sufficient to trigger the statute of limitations. Judge Stansell-Gamm determined that Dr. Smiddy's 1987 and 1991 reports lacked a specific conclusion that the miner was totally disabled due to pneumoconiosis; that Dr. Smiddy's 1997 report found that the miner was totally disabled by a combination of conditions, but did not specify that he was disabled by pneumoconiosis standing alone; and that Dr. Smiddy's 1999 letter constituted a diagnosis of total disability due to pneumoconiosis, but was not well-reasoned. Relying on Judge Stansell-Gamm's findings, the administrative law judge concluded that this claim was timely filed. Decision and Order at 5.

Citing *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 25 BLR 2-273 (6th Cir. 2013), carrier argues that the miner received a medical determination of total disability due to pneumoconiosis from Dr. Smiddy that was sufficient to trigger the statute of limitations pursuant to 30 U.S.C. §923(f). Specifically, carrier maintains that the medical determination need not be well-reasoned, and asserts that the reports from Dr. Smiddy in 1987, 1991, 1997, and 1999 are sufficient to trigger the statute of limitations.[12] Carrier's Brief at 21-23. Carrier thus contends that the administrative law judge erred in finding that this claim was timely filed. We disagree.

While carrier correctly asserts that *Brigance*, issued subsequent to Judge Stansell-Gamms's decision, held that a medical determination need not be well-reasoned or well-documented in order to trigger the statute of limitations, the United States Court of Appeals for the Sixth Circuit has also approved resetting the limitations period after the denial of a claim, where a purported diagnosis of pneumoconiosis was discredited or

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> of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

[12] Carrier also argues that the miner's November 25, 2003 deposition testimony, that doctors told him he was totally disabled by black lung before 1990, is sufficient to trigger the statute of limitations. Carrier's Brief at 22. In her Order of Remand dated November 6, 2008, however, Judge Wood found that the miner's deposition testimony was "ambiguous at best" regarding whether and/or when the miner was informed that he was totally disabled due to pneumoconiosis.

found to be outweighed by contrary evidence. *See Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009). The court in *Brigance* also recognized that a misdiagnosis of pneumoconiosis does not constitute a "medical determination" within the meaning of the statute, but cautioned that the misdiagnosis rule applies only if a miner's claim is ultimately rejected on the basis that he does not have the disease. *Brigance*, 718 F.3d at 594, 25 BLR at 2-279, *citing Peabody Coal Co. v. Director, OWCP* [*Dukes*], 48 F. App'x 140, 146 (6th Cir. 2002) ("[I]f a miner's claim is ultimately rejected on the basis that he does not have the disease, this finding necessarily renders any prior medical opinion to the contrary invalid, and the miner is handed a clean slate for statute of limitation purposes"). In the present case, the miner's 1990 claim was filed within three years of Dr. Smiddy's 1987 report, and the claim was ultimately denied for failure to establish the existence of pneumoconiosis after Dr. Smiddy's 1987 and 1991 reports were discredited. *See* Director's Exhibit 2. The miner's 1998 claim was denied for failure to establish the existence of pneumoconiosis after Dr. Smiddy's 1997 and 1999 reports were discredited. *See* Director's Exhibit 3. Thus, Dr. Smiddy's medical determinations are considered misdiagnoses as a matter of law, and are insufficient to trigger the statute of limitations with regard to the current claim. *See Hatfield*, 556 F.3d at 483, 24 BLR 2-154; *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-121-22 (2009). Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that carrier failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308.

Turning to the merits, in order to establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In this case, having found that claimant established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(b), the administrative law judge concluded that there was no credible evidence showing that the miner's disability was due to pneumoconiosis pursuant to Section 718.204(c). In so finding, the administrative law judge considered the opinions of Drs. Baker, Fino, Rosenberg, Dahhan, and Jarboe.[13] Dr. Baker, the only physician to attribute the miner's disabling

[13] The administrative law judge also reviewed the opinion of Dr. Paranthaman, who diagnosed chronic bronchitis and emphysema, "probably related to the combined effect of 20 years of cigarette smoking and 20 years of coal mine employment, if documented," and early changes of coal workers' pneumoconiosis. . . due to coal dust exposure." However, the administrative law judge correctly determined that, because Dr. Paranthaman "did not indicate that [the miner's] pneumoconiosis or exposure to coal

respiratory impairment, in part, to pneumoconiosis, diagnosed coal workers' pneumoconiosis (CWP), chronic obstructive pulmonary disease (COPD), and chronic bronchitis that "can be caused by coal dust exposure." Director's Exhibit 127. Dr. Baker concluded that a significant portion of the miner's disability was due to smoking, but that his CWP, 1/0, COPD with a moderate obstructive defect, mild resting arterial hypoxemia and chronic bronchitis had "an adverse effect on his respiratory system" and significantly contributed to his disability. *Id*. Dr. Baker noted that the length of the miner's coal dust exposure was "close to" that of the miner's smoking history, and stated "it is felt that one-pack year of smoking is equivalent to one year of coal dust exposure in terms of decline of the FEV_1." *Id.* The administrative law judge acted within her discretion in according little weight to Dr. Baker's opinion, finding it "speculative" because the physician "did not support it with any studies or other literature" and "did not point to any findings specific to the miner or otherwise explain why in this particular case, [the miner's] history of coal mine dust exposure was a significant contributor to his respiratory impairment." Decision and Order at 19; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 835-36, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

The administrative law judge did not credit the remaining opinions, but properly determined that the opinions of Drs. Fino, Rosenberg, Dahhan and Jarboe[14] do not aid claimant in establishing that the miner's disabling respiratory impairment was due to pneumoconiosis, as the doctors attributed the disability to emphysema due to smoking and ruled out pneumoconiosis as a contributing cause of disability. Decision and Order at 20-22; Director's Exhibits 78, 88, 139; Employer's Exhibits 1, 3, 5, 7. Finding "no reliable medical opinion evidence" to establish that pneumoconiosis was a substantially contributing cause of the miner's disabling respiratory impairment, the administrative law judge permissibly concluded that claimant failed to establish disability causation pursuant to Section 718.204(c). Decision and Order at 19-22; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985).

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mine dust were a factor in his totally disabling respiratory impairment, or provide any discussion of this issue," his opinion could not establish disability causation. Decision and Order at 22; Director's Exhibit 17.

[14] The administrative law judge erred in considering Dr. Jarboe's opinion, as it was never admitted into the record. Hearing Transcript at 10. Any error is harmless, however, as the administrative law judge did not credit the doctor's opinion, and his conclusion, that the miner's disabling respiratory impairment was due solely to smoking, could not help claimant establish disability causation. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 20.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 282, 24 BLR 2-269, 2-279 (4th Cir. 2010); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c), an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112. Consequently, we need not address carrier's argument on cross-appeal that it should be dismissed as the responsible carrier in this case.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge