U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0061 BLA-A

EARL EVANS Claimant-Petitioner v. DIXIE PINE COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY, INCORPORATED Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/21/2016 DECISION and ORDER

Appeal of the Decision and Order Denial of Claim Due to Violation of the Statute of Limitations of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky for claimant.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Maia Fisher, 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: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denial of Claim Due to Violation of the Statute of Limitations (2012-BLA-06228) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed on October 5, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Considering whether the claim was timely filed, the administrative law judge determined that Dr. Hudson's February 19, 1993 medical report, which was submitted in conjunction with claimant's 1992 claim for benefits, triggered the running of the three-year statute of limitations set forth in Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308. Because claimant filed the present subsequent claim more than three years after he received Dr. Hudson's medical report, the administrative law judge denied it as untimely.

Claimant argues on appeal that the administrative law judge erred in finding that he did not timely file the current subsequent claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and agrees with claimant that the administrative law judge erred in determining that claimant's most recent subsequent claim is untimely.[2]

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,

[1] Claimant filed four claims for benefits prior to the current subsequent claim. Director's Exhibit 1. The administrative law judge has provided a recitation of the procedural history of this case in the Decision and Order issued on September 30, 2015, which is the subject of the present appeal. 2015 Decision and Order at 1-4. We will refer to claimant's prior claims only to the extent that they are relevant.

[2] The Director, Office of Workers' Compensation Programs (the Director), initially filed an appeal in this case on October 29, 2015, which was assigned BRB No. 16-0061 BLA. The Director subsequently requested that his appeal be withdrawn, and the Board granted his request. *Evans v. Dixie Pine Coal Co.*, BRB Nos. 16-0061 BLA and 16-0061 BLA-A (Jan. 12, 2016) (unpub. Order).

and in accordance with applicable 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 (1965).

Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing regulation, set forth at 20 C.F.R. §725.308, requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the presumption of timeliness, employer must show by a preponderance of the evidence that the claim was filed more than three years after a medical determination of total disability due to pneumoconiosis was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013).

In this case, the administrative law judge found that Dr. Hudson's February 19, 1993 report diagnosing totally disabling obstructive bronchitis caused by smoking and coal dust exposure was sufficient to trigger the running of the statute of limitations. 2015 Decision and Order at 1-3; Director's Exhibit 1 (Director's Exhibit 32-6). Dr. Hudson examined claimant at the request of the Department of Labor in conjunction with claimant's second claim, filed on October 26, 1992, which was denied on April 28, 1994. Director's Exhibit 1 (Director's Exhibits 32-1, 32-6, 32-18). The administrative law judge observed that, pursuant to the decision of the United States Court of Appeals for the Sixth Circuit in *Brigance*, a physician's medical determination need constitute only "a diagnosis of total disability due to pneumoconiosis," rather than a "well-reasoned" diagnosis of such disability.[4] *Id*. at 4-5, *citing Brigance*, 718 F.3d at 594, 25 BLR at 2-282. The administrative law judge further found that the statute of limitations was not

[3] The record reflects that claimant's coal mine employment was in Tennessee. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] The administrative law judge also acknowledged that he had previously ruled on the timeliness issue when he considered claimant's fourth claim, filed on May 17, 1999, and reached a different conclusion. In his Decision and Order on Remand dated August 25, 2005, the administrative law judge found that Dr. Hudson's opinion did not constitute a communication to claimant of a medical determination of total disability due to pneumoconiosis and, therefore, did not trigger the statute of limitations at 20 C.F.R. 725.308(a). 2005 Decision and Order on Remand at 13-14.

tolled by the denial of the 1992 claim "because [c]laimant did not perform coal mine employment after Dr. Hudson's examination in 1993." *Id.* Based on these findings, the administrative law judge concluded that the present subsequent claim was untimely pursuant to 20 C.F.R. §725.308(a) and he denied it accordingly. *Id.*

Claimant contends that the administrative law judge's disposition of the timeliness issue is based on a misunderstanding of the relevant case law. Claimant further alleges that the statute of limitations should not apply because Dr. Hudson did not actually opine that claimant's disability is due to pneumoconiosis; it is not clear whether Dr. Hudson's opinion was communicated to claimant; the law of the case doctrine requires that the previous determinations of timeliness be respected; and extraordinary circumstances warrant tolling the three-year limitations period. Claimant also maintains that the administrative law judge erred in determining that claimant had to return to work to prevent the triggering of the statute of limitations. The Director agrees with claimant that, pursuant to precedent established by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, Dr. Hudson's 1993 medical report contained a misdiagnosis and, therefore, did not trigger the statute of limitations at 20 C.F.R. §725.308(a). In contrast, employer argues that the Sixth Circuit's holding in *Arch of Kentucky, Inc. v. Director, OWCP* [*Hatfield*], 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009), that a medical determination of total disability due to pneumoconiosis becomes a misdiagnosis upon the denial of the claim, "cannot be reconciled with the Sixth Circuit's decisions cautioning against confusing the merits of a claim with the statute of limitations." Employer's Brief at 15, *citing Brigance*, 718 F.3d at 596, 25 BLR at 2-283. Accordingly, employer urges the Board to affirm the administrative law judge's denial of benefits.

The contentions made by claimant and the Director have merit. Although the administrative law judge is correct that, in *Brigance*, the Sixth Circuit rejected the requirement that a physician's medical determination of total disability due to pneumoconiosis be well-reasoned in order to trigger the statute of limitations, he did not accurately characterize the court's analysis of the effect of a denial of benefits on the sufficiency of the medical determination. *See Brigance*, 718 F.3d at 594, 25 BLR at 2-282; 2015 Decision and Order at 5. Relying on the reasoning in *Peabody Coal Co. v. Director, OWCP* [*Dukes*], 48 F. App'x. 140, 144 (6th Cir. 2002), the Sixth Circuit held that a medical determination that predates a denial of benefits cannot trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Brigance*, 718 F.3d at 595, 25 BLR at 2-282; *see Hatfield*, 556 F.3d at 483**,** 24 BLR at 2-153-54. As the court stated, "[i]f it is determined that a claimant does not meet the criteria for an award of benefits under the [Act], then the claimant is handed a clean slate for purpose of the [Act's] statute of limitations." *Brigance*, 718 F.3d at 594, 25

BLR at 2-282. Thus, the administrative law judge's finding that Dr. Hudson's 1993 medical record triggered the statute of limitations was erroneous.

Finally, we reject employer's assertion that there is an irreconcilable conflict between the Sixth Circuit's holding in *Hatfield* and its holding in *Brigance*. Employer is correct that the *Brigance* court rejected a requirement that the medical determination of total disability due to pneumoconiosis be well-reasoned in order to trigger the statute of limitations. The court stated, "[t]o hold otherwise would improperly conflate the statute of limitations with the merits of the claim. Statutes of limitation are intended to stave off stale claims, not weak claims." *Brigance*, 718 F.3d at 594, 25 BLR at 2-282. However, the court also explained that treating a medical determination in a denied claim as a misdiagnosis, consistent with *Hatfield*, "makes sense" because a miner with a weak claim "did not sit on his rights under the [Act] but instead acted upon them prematurely, for which he should not be penalized." *Brigance*, 718 F.3d at 594-95, 25 BLR at 2-282. Based on this language, it is apparent that the Sixth Circuit views the holdings in *Hatfield* and *Brigance* as complementary, rather than contradictory, and employer has not convinced us otherwise.

Because Dr. Hudson's February 19, 1993 medical report was considered in conjunction with a claim that was finally denied in 1994, we reverse the administrative law judge's findings that this report triggered the running of the three-year statute of limitations at 20 C.F.R. §725.308(a) and that the present subsequent claim, filed on October 5, 2011, is untimely.[5] *See Brigance*, 718 F.3d at 594-95, 25 BLR at 2-282; *Hatfield*, 556 F.3d at 483, 24 BLR at 2-153-54. We remand this case to the administrative law judge for consideration of whether claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and entitlement to benefits on the merits under 20 C.F.R. Part 718.

[5] In light of our reversal of the administrative law judge's finding that the current subsequent claim is untimely, we need not address claimant's additional arguments on this issue.

Accordingly, the administrative law judge's Decision and Order Denial of Claim Due to Violation of the Statute of Limitations is reversed and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge