BRB No. 01-0821 BLA

RAY CASE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
L.H. HALL COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits On Remand From The Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Inc.), Prestonsburg, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

Employer appeals the Decision and Order Awarding Benefits On Remand From The Benefits Review Board (95-BLA-1469) of Administrative Law Judge Paul H. Teitler rendered 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).[1] This case is

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All

before the Board for a third time.[2] Pursuant to the Board's most recent remand, the administrative law judge found, based primarily upon the medical opinion of Dr. Cohen, that claimant established the presence of a totally disabling respiratory impairment due to pneumoconiosis arising out of coal mine employment. Decision and Order on Remand at 2-7. Accordingly, benefits were awarded.

On appeal, employer contends that pursuant to the recent holding of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), claimant's instant duplicate claim is barred as untimely as it was filed more than three years after claimant was first informed by a physician that he was totally disabled due to pneumoconiosis. Specifically employer asserts that "Dr. Leslie's 1979 opinion started the clock running for the statute of limitations. Because Case did not file his duplicate claim until September 1986, this duplicate claim is barred by the statute of limitations," pursuant to *Kirk*. Employer's Brief at 15; *see* Director's Exhibit 42. Employer next argues, that this case must be remanded to a new administrative law judge because the administrative law judge refused to comply with the Board's remand instructions when he merely adopted his previous findings. Employer also argues, that the administrative law judge failed to determine whether the evidence submitted in support of the duplicate claim differed qualitatively from evidence submitted in the prior claim and failed to make a specific inquiry as to whether that evidence demonstrated an actual worsening of claimant's condition pursuant to *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Finally, employer contends that the administrative law judge erred in finding that the evidence established the existence of pneumoconiosis as defined by the Act and that claimant was disabled due to pneumoconiosis.

Claimant responds, urging that the award of benefits be affirmed. As to the timeliness issue, claimant argues that employer improperly relies on the holding in *Kirk*, *supra*, to stand for the proposition that the instant claim was not timely filed. Rather, claimant argues that the Sixth Circuit in *Kirk* did not set forth a change in the law regarding timeliness, but merely restated the long held view that there is a presumption that claims are filed in a timely manner pursuant to 20 C.F.R. §725.308(c) and that it is employer's burden to rebut that

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The history of this case is summarized in the Board's most recent Decision and Order. *Case v. L.H. Hall Coal Co.*, BRB No. 99-0683 BLA (Sep. 27, 2000)(unpub.) at 2.

presumption by showing that a medical determination of total disability due to pneumoconiosis was communicated to the miner more than three years before the claim was filed. Here, claimant argues not only that employer has failed to rebut the presumption of timeliness because employer has not proven that Dr. Leslie communicated to claimant that he was totally disabled, but also that employer has not preserved this issue for appeal because it never appealed the administrative law judge's finding of timeliness in the first Decision and Order awarding benefits. In reply, employer contends that because *Kirk* clarifies the application to duplicate claims of the timeliness presumption at Section 725.308(c), it provides intervening authority on the issue which employer must be allowed to challenge. Employer also reiterates its other contentions. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

We turn first to employer's argument that the Sixth Circuit's holding in *Kirk, supra*, bars the consideration of this duplicate claim as it was untimely filed. Section 725.308 provides in pertinent part that:

> (a) A claim for benefits . . . shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner . . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed.

20 C.F.R. §725.308.[3] To constitute a "medical determination" that was "communicated to the miner" so as to trigger the statutory time limit for filing a claim, a medical report or workers' compensation board finding must be adequately documented and reasoned and must clearly indicate a determination that the miner is totally disabled due to pneumoconiosis. *Adkins v. Donaldson Mine Co.*, 19 BLR 1-34 (1993).

[3] The statutory authority for 20 C.F.R. §725.308 is found at Section 422(f) of the Act, 30 U.S.C. §932(f), which was amended by the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95 (1978), to provide, *inter alia*, miners the option of a filing deadline based on the later of either three years after a medical determination of total disability due to pneumoconiosis or three years after March 1, 1981, the effective date of the Reform Act.

Subsequent to the issuance date of the Decision and Order on Remand in the instant case, the Sixth Circuit issued its decision in *Kirk* in which it held that:

> [t]he three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims , and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits.

264 F.3d at 608, 22 BLR at 2-298 (emphasis in original). The Sixth Circuit distinguished between "premature claims that are unsupported by a medical determination" which do not trigger the statute of limitations, and "[m]edically supported claims" which do trigger the statutory period. *Id.*

In the instant case, employer asserts, that the record contains a medical opinion from Dr. Leslie dated December 14, 1979, sufficient to constitute a medical determination communicated to the miner so as to trigger the statutory time limit for filing a claim. Director's Exhibit 42 at 16-18; *Adkins*, *supra*.[4] Thus, employer asserts that, under *Kirk*, Dr. Leslie's opinion "started the clock running for the statute of limitations," Employer's Brief at 15, and that because the instant duplicate claim, was not filed until September 18, 1996, it is barred by the statute of limitations as untimely. In light of the recent holding of the Sixth Circuit in *Kirk*, however, which was issued subsequent to the administrative law judge's Decision and Order on Remand, employer's assertion may have merit. *See Furgerson v. Jericol Mining, Inc.*, BLR , BRB No. 01-0728 BLA (Sep. 24, 2002).[5] Accordingly, we

[4] On an "Examination Form For Coal Worker's Pneumoconiosis," Dr. Leslie diagnosed coal workers' pneumoconiosis and stated that the miner should not return to underground coal mining because of his pneumoconiosis, and further found him disabled. Director's Exhibit 42 at 16-18.

[5] As *Kirk*, *supra*, represents a significant change in the interpretation of the law regarding Section 725.308 and was issued subsequent to the issuance of the Decision and Order on Remand in this case, we are unable to say that employer has waived its right to contest this timeliness issue because it failed to appeal the finding of timeliness by the administrative law judge in his first Decision and Order, which was issued prior to the court's decision in *Kirk*. *See* 20 C.F.R. §725.308(c) (time limits are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances); *but see Cabral v. Eastern Associated Coal Co.*, 18 BLR 1-25 (1993).

vacate the administrative law judge's Decision and Order Awarding Benefits On Remand and we remand the case to the administrative law judge for consideration of whether the instant duplicate claim was timely filed pursuant to *Kirk* and whether Dr. Leslie's opinion contained the necessary information to be sufficient to trigger the statutory time limit. *See* 20 C.F.R. §725.308(a); *Adkins*, *supra*.[6]

In order to avoid any repetition of error on remand, we also address employer's other contentions. Employer asserts that the administrative law judge failed to comply with the Board's most recent remand instructions and that this failure compels both remand and reassignment to a different administrative law judge. Specifically, employer asserts that the administrative law judge merely adopted his prior findings and erroneously relied upon the cases of *Ross*, *supra*, and *Saginaw Mining Co. v. Mazzuli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987), to stand for the "broad proposition," that an administrative law judge may reject the holdings of the Board, when he finds them to be incorrect.

When this case was previously before the Board, it held that in determining whether claimant established a material change in conditions pursuant to Section 725.309 (2000), the administrative law judge failed to determine whether the evidence submitted with the duplicate claim differed qualitatively from the evidence submitted with the previously denied claim. *See Case*, 99-0863 BLA, slip op. at 3; *see Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997). Accordingly, the Board vacated the administrative law judge's determination that the newly submitted medical opinion evidence supported a finding of a material change in conditions and remanded the claim for further consideration pursuant to the holdings in *Ross*, *supra*, and *Flynn*, *supra*. *See Case*, 99-0863 BLA, slip op. at 3.

[6] In his first Decision and Order awarding benefits in this case, the administrative law judge found that claimant's first claim for benefits which was filed on December 28, 1979 was timely filed inasmuch as it was in close proximity to the time, as reported by claimant, when Dr. Leslie advised him to quit working in the mines. The administrative law judge, however, declined to address whether Dr. Leslie's advice constituted a communication to the claimant that he was totally disabled due to pneumoconiosis. Administrative Law Judge's Decision and Order - Awarding Benefits dated September 9, 1996.

On remand, the administrative law judge concluded that "because the Board acts as an adjudicatory tribunal and does not make rules or formulate policy its interpretation of policy is not entitled to any special deference." Teitler Decision and Order Awarding Benefits On Remand from the Benefits Review Board dated May 17, 2001, at 3. The administrative law judge thus concluded that his previous findings of fact and conclusions of law were supported by substantial evidence and were thus binding on the Board. The administrative law judge then stated that, in his prior decision, he "reported in great detail and analyzed in great detail" the newly submitted medical opinion evidence in finding that such evidence supported a finding of a material change in conditions. Decision and Order Awarding Benefits on Remand at 3.

We again vacate the administrative law judge's finding that the newly submitted medical opinion evidence established a material change in conditions pursuant to Section 725.309 (2000), however. The administrative law judge has failed to comply with the instructions given in the Board's Decision and Order, specifically to consider the newly submitted evidence in a manner consistent with the duplicate claim standard established by the Sixth Circuit. *Ross, supra*; *see Flynn, supra*; *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-88 (2000). Contrary to the administrative law judge's reasoning, the Board is not formulating policy in this case, but merely implementing the Sixth Circuit's holding in *Ross, supra*. An inferior court has no power or authority to deviate from the mandate issued by an appellate court. *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993); *see Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988). A review of the entirety of the administrative law judge's Decision and Order Awarding Benefits on Remand demonstrates that the administrative law judge has failed to comply with the Board's specific remand instructions throughout and has instead merely affirmed his prior determinations without the requisite analysis.

While we do not order reassignment lightly, in the instant case, our review of the prior decisions of both the administrative law judge and the Board convinces us that reassignment on remand to a different administrative law judge is necessary to best serve the interests of the parties in the fair administration of justice. *See generally United States v. Sears, Roebuck & Co.*, 785 F.2d 777, 780 (9th Cir. 1986), *cert. denied*, 479 U.S. 988 (1986). Accordingly, in light of the administrative law judge's statements regarding the authority of this tribunal, the multiple remands of this case, and the administrative law judge's repetition of error, this case must be transferred on remand to a new administrative law judge for a "fresh look at the evidence, unprejudiced by the various outcomes of the administrative law judge and the Board's orders below," if reached. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-108 (1992); *Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568, 1-572 (1984). On remand, if reached, the newly assigned administrative law judge is to review the evidence of record and make findings consistent with the Board's

remand instructions in *Case v. L.H. Coal Co.*, BRB No. 99-0683 BLA (Sept. 22, 2000)(unpub.).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits On Remand From The Benefits Review Board is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge