BRB Nos. 05-0448 BLA
and 05-0448 BLA-A

JACKIE W. HUFFMAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 09/30/2005
Employer-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Denial of Claim and Denial of Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph, Jr. (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant[1] appeals, and the Director, Office of Workers' Compensation Programs (the Director), cross-appeals, the administrative law judge's Decision and Order Denial of Claim and the Denial of Motion for Reconsideration (04-BLA-5913) of Administrative Law Judge Daniel F. Solomon in a miner's subsequent claim[2] 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). In his Decision and Order, the administrative law judge, citing *Bethenergy Mines, Inc. v. Cunningham*, 104 Fed.Appx. 881, 2004 U.S. App. LEXIS 14951 (4th Cir. July 20, 2004)(unpub.) and *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), determined that employer met its burden, pursuant to 20 C.F.R. §725.308, of establishing that this claim was untimely filed and that "there were no 'extraordinary circumstances' under which the limitation period should be tolled." Decision and Order at 4. Thereafter, the Director filed a Motion for Reconsideration in which he relied on *Westmoreland Coal Co. v. Amick*, 123 Fed.Appx. 525, 2004 WL 2791653 (4th Cir. Dec. 6, 2004)(unpub.) to argue that a finding by a final adjudicator, that claimant is not totally disabled due to pneumoconiosis, repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of Section 725.308. The administrative law judge denied the Director's Motion for Reconsideration.

On appeal, claimant contends that the administrative law judge's finding that his third claim is untimely filed is irrational and not in accordance with law. Claimant's Brief at 2-9. In his cross-appeal, the Director urges the Board to apply *Amick* to the instant case and, therefore, reverse the administrative law judge's finding that claimant's third claim was untimely filed. Director's Brief at 4-8. Employer requested that the Board hold an *en banc* oral argument in this case because of the significance of the timeliness issue to the federal black lung program.[3] Employer's Motion for Oral

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[1]Claimant is Jackie W. Huffman, the miner, who filed his present claim for benefits on February 1, 2002. Director's Exhibit 4. Claimant's previous claims for benefits, filed on January 28, 1994 and January 22, 1996, were finally denied on July 12, 1994 and November 15, 2000, respectively. Director's Exhibits 1, 2.

[2]The Department of Labor has made substantive revisions to 20 C.F.R. §725.309 in the new regulations. In the revised Section 725.309, additional claims filed more than a year after the previous denial are termed subsequent claims, rather than duplicate claims.

[3]On July 20, 2005, the Board denied employer's request that the Board hold an *en banc* oral argument.

Argument at 1-2. Employer responds to claimant's appeal, and the Director's cross-appeal, by urging affirmance of the administrative law judge's denial of benefits.[4] The Director has declined to respond to claimant's appeal.

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. 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 725.308(a), in pertinent part, states:

> (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 of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later.
> . . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308(a).

At the 2004 hearing, the parties agreed that claimant testified that Dr. Jabour informed him that he was totally disabled by his black lung disease. 2004 Hearing Transcript at 23, 48. Claimant's third and present claim for benefits was filed on February 1, 2002. The record contains two reports by Dr. Jabour. In his report dated February 22, 1994, Dr. Jabour found that claimant is severely impaired due to pneumoconiosis. Director's Exhibit 1. Dr. Jabour opined that claimant is unable to

[4]In its Response Brief, employer notes its agreement with the reasoning of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Employer's Brief at 9-11.

perform his last job due (50%) to pneumoconiosis in his report dated April 9, 1996.[5] Director's Exhibit 2.

In his Decision and Order, the administrative law judge cited the unpublished decision of United States Court of Appeals for the Fourth Circuit in *Cunningham* and the Sixth Circuit's decision in *Kirk*. Decision and Order at 3-4. The administrative law judge noted that the Board held in *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) that it would not apply *Kirk* to cases arising outside of the Sixth Circuit.[6] *Id.* at 4. However, the administrative law judge further noted that *Cunningham* was issued after the Board's decision in *Dempsey* and "shows that the Fourth Circuit has not precluded application of the three year limitation."[7] *Id.* at 4. The administrative law judge determined that claimant did not set forth any facts in support of a finding of extraordinary circumstances "under which the limitation period should be tolled." *Id.* Accordingly, the administrative law judge found that employer met its burden, pursuant to Section 725.308, of establishing that claimant's third claim was untimely filed and, therefore, denied the claim. *Id.* Thereafter, the Director filed a Motion for Reconsideration in which he relied on *Amick*, and asserted that a final determination by an adjudicator, that a claimant is not totally disabled, repudiates an earlier medical determination of total disability due to pneumoconiosis, and therefore is insufficient to start the running of the statute of limitations. Employer responded to the Director's motion, contending that *Amick* is not binding on the administrative law judge because it is an unpublished case. Employer additionally asserted that the Director's position regarding Section 725.308 is not entitled to deference because the Director has taken inconsistent positions on this issue. The administrative law judge denied the Director's Motion for Reconsideration, but, apart

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[5]Employer does not contest the administrative law judge's identification of Dr. Jabour's 1996 opinion as the communication to claimant of total disability due to pneumoconiosis for the purposes of triggering the running of the statute of limitations.

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

[7]The administrative law judge stated that although the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) "did discuss the regulation, it did not meaningfully address this issue." Decision and Order at 4. Further, the administrative law judge stated that by filing his third claim more than a year after the denial of his second claim, claimant "voluntarily waived" his right to request modification pursuant to Section 725.310. *Id.*

from noting the parties' positions, the administrative law judge did not offer any reason for his denial. Denial of Motion for Reconsideration at 1.

Claimant contends that the administrative law judge should have applied the Board's holding in *Dempsey* and not applied *Kirk*[8] to this case arising outside of the jurisdiction of the Sixth Circuit, particularly in view of the unpublished decision by the Fourth Circuit, within whose jurisdiction this case arises, not to apply *Kirk*. Claimant's Brief at 8-9. The Director urges the Board to reverse the administrative law judge's finding that claimant's subsequent claim is untimely. Director's Brief at 6. The Director contends that, contrary to the Board's position in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990),[9] Section 725.308 is applicable to subsequent claims filed pursuant to Section 725.309. *Id.* But the Director maintains that the administrative law judge's "decision is incorrect because, consistent with *Brandalino* [sic] and *Amick*, a medical report such as Dr. Jabour's – which preceded the final 2000 decision denying Claimant's earlier claim – is not sufficient to start the running of the time limitation."[10] *Id.* In rendering such a conclusion, the Director refers to the language in the statute of limitations provision in the Act, that **"any"** miner's claim must be filed within the limitations period, 30 U.S.C. 932(f), and the regulation, that **"a"** miner's claim must be filed within the limitations period, 20 C.F.R. §725.308. The Director states that "[b]oth 'any' and 'a' clearly pertain to each separate claim that a miner files. Neither provision makes an exception for a

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[8]Claimant notes his disagreement with *Kirk*. Claimant's Brief at 6-8.

[9]In *Faulk v. Peabody Coal Co.*, 14 BLR 1-18, 1-21-22 (1990), the Board reasoned that limiting the statute of limitations to the initial claim "satisfies the purpose of the statute of limitations by ensuring that employer is provided with notice of the current claim and of the potential for liability for future claims, in view of the progressive nature of pneumoconiosis."

[10]In *Brandolino*, the Tenth Circuit court held that "the Act's three-year limitations period did not bar Brandolino from bringing his duplicate claim." *Brandolino*, 90 F.3d at 1507-08, 20 BLR at 2-312-13. In doing so, the court reasoned that:

> a final finding by an. . .adjudicator that the claimant is not totally disabled due to pneumoconiosis repudiates any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations.

Brandolino, 90 F.3d at 1507, 20 BLR at 2-312.

[subsequent] claim."[11] *Id.* Accordingly, the Director states that the Fourth Circuit correctly decided the issue of whether Section 725.308 applies to subsequent claims in its unpublished decision in *Amick*, and urges the Board to apply *Amick* to the instant case. *Id.* at 8.

Neither the Act nor Section 725.308 explicitly addresses the application of the statute of limitations to a subsequent claim, such as the instant case. However, the Board considered this issue in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990) and *Faulk*, and held that the statute of limitations at Section 725.308 applies only to the first claim filed. As claimant asserts, the administrative law judge erred in applying *Kirk* to this case arising outside of the Sixth Circuit. *Dempsey*, 23 BLR at 1-56. However, we decline to adopt the Director's position that although Section 725.308 is applicable to subsequent claims filed pursuant to Section 725.309, the administrative law judge's "decision is incorrect because, consistent with *Brandalino* [sic] and *Amick*,[12] a medical report such as Dr. Jabour's – which preceded the final 2000 decision denying Claimant's earlier claim – is not sufficient to start the running of the time limitation." Director's Brief at 6. Rather, we apply our holdings in *Andryka* and *Faulk* that the statute of limitations at Section 725.308 applies only to the first claim filed. Because the instant case involves a subsequent claim, we reverse the administrative law judge's Section 725.308 finding and hold that the statute of limitations does not apply to claimant's third claim. *Andryka*, 14 BLR at 1-36-37; *Faulk*, 14 BLR at 1-21-22. Consequently, we vacate the administrative law judge's denial of benefits and remand this case for consideration of the merits of this subsequent claim.

[11]The Director, Office of Workers' Compensation Programs (the Director), states that "the Board's position deprives the statute of any salutary protection for the party liable for benefits." Director's Brief at 6-7. The Director further states that he believes the Sixth Circuit's position in *Kirk* is wrong because it "would require the miner to file any and all claims for his lifetime within three years after a sufficient medical determination triggers the statute of limitations." *Id.* at 7.

[12]Because *Westmoreland Coal Co. v. Amick*, 123 Fed.Appx. 525, 2004 WL 2791653 (4th Cir. Dec. 6, 2004)(unpub.) is an unpublished decision of the Fourth Circuit, the Board is not compelled to follow it. USCS Ct. App 4th Cir., Local R 36(c).

Accordingly, the administrative law judge's Decision and Order Denial of Claim and Denial of Motion for Reconsideration are vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring:

I concur with the majority's decision to reverse the administrative law judge's holding that claimant's subsequent claim is untimely filed pursuant to 20 C.F.R. §725.308. However, my reasons for doing so differ from that of the majority. I agree with the Director, Office of Workers' Compensation Programs (the Director), that the analysis of United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP* [*Brandolino*], 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996) is correct. Accordingly, I would apply 20 C.F.R. §725.308 to subsequent claims filed pursuant to 20 C.F.R. §725.309. But I would hold, consistent with the Director's position, that the administrative law judge's decision in the instant case is incorrect because, in accordance with *Brandolino* and *Amick*,[13] a medical report such as Dr. Jabour's – which preceded the

[13]In its decision in *Westmoreland Coal Co. v. Amick*, 123 Fed.Appx. 525, 2004 WL 2791653 (4th Cir. Dec. 6, 2004)(unpub.), the Fourth Circuit court stated:

> Neither the statute nor the regulation, however, makes any distinction between initial and duplicate claims. The statute refers to "[a]ny" claim for benefits and the regulation refers to "[a] claim" for benefits.

final 2000 decision denying claimant's earlier claim – is not sufficient to trigger the running of the time limitation. Because Dr. Jabour's report was not sufficient to trigger the running of the statute of limitations, I would reverse the administrative law judge's finding that claimant's subsequent claim is untimely filed and remand the case for the administrative law judge to consider the merits of this subsequent claim. Additionally, in light of my decision, I would overrule the Board's holding in *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990) and *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) that the statute of limitations at Section 725.308 applies only to the first claim filed.

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BETTY JEAN HALL
Administrative Appeals Judge

> Based on this language, the Director, to whom we accord substantial deference in the interpretation of the regulations, *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 697, 111 S.Ct. 2524, 115 L.Ed.2d 604 (l991), advocates application of the time limitation to duplicate claims as well as initial claims, and we agree.

Amick, 123 Fed.Appx. at *528, 2004 WL 2791653 at **3.