

BRB No. 09-0247 BLA

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| F.R. |) | |
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| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| UNITED FUELS CORPORATION |) | |
| |) | DATE ISSUED: 09/28/2009 |
| Employer-Respondent |) | |
| |) | |
| DIRECTOR, OFFICE OF WORKERS' |) | |
| COMPENSATION PROGRAMS, UNITED |) | |
| STATES DEPARTMENT OF LABOR |) | |
| |) | |
| Party-in-Interest |) | DECISION and ORDER |

Appeal of the Decision and Order on Remand - Denial of Claim and the Denial of Motion to Reconsider of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Incorporated), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Ann Marie Scarpino (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denial of Claim and the Denial of Motion to Reconsider (06-BLA-5003) of Administrative Law Judge Daniel F. Solomon 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). This case involving a subsequent claim filed on June 21, 2004, is before the Board for the second time.¹ On January 18, 2007, the administrative law judge issued a Decision and Order awarding benefits. The administrative law judge found that the claim was timely filed, credited claimant with twenty-two years of coal mine employment,² and accepted employer's stipulation that claimant is totally disabled. Based on employer's stipulation to total disability, the administrative law judge found that claimant established a change in an applicable condition of entitlement since the denial of his prior claim on April 18, 2003. *See* 20 C.F.R. §725.309(d). Considering the merits of the claim, the administrative law judge found that the evidence established that claimant is totally disabled due to pneumoconiosis arising out of coal mine employment. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge erred in finding that the claim was timely filed because he failed to consider the 1991 medical reports of Drs. Clarke and Myers that were entered into evidence in claimant's first claim, which he filed in 1991.³ *F.R. v. United Fuels, Inc.*, BRB No. 07-0424 BLA,

¹ Claimant filed a claim for benefits on May 30, 1991, which was denied by Administrative Law Judge Edward J. Murty, Jr., on September 21, 1993, because the evidence did establish the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1-29. Claimant timely requested modification, which Judge Murty denied on March 24, 1995. Director's Exhibit 1-2. There is no indication that claimant took any further action in regard to his 1991 claim.

Claimant filed a second claim on June 11, 1996, which was denied by the district director on October 8, 1996 because claimant did not establish the existence of pneumoconiosis or that he was totally disabled due to pneumoconiosis. Director's Exhibit 2-25, 121. Claimant did not pursue that claim. Claimant filed a third claim on September 6, 2001, which the district director denied on April 18, 2003, for the same reasons. Director's Exhibit 3-5, 3-118. On June 21, 2004, claimant filed his fourth and current claim for benefits, the subject of the instant appeal. Director's Exhibit 5.

² The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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*).

³ Dr. Clarke's report, dated April 15, 1991, diagnosed claimant with coal workers' pneumoconiosis and stated that he was totally and permanently disabled for all work in a dusty environment. Director's Exhibit 1-234. Dr Myers' report, dated April 30, 1991, diagnosed claimant with coal workers' pneumoconiosis and chronic obstructive

slip op. at 4 (Feb. 29, 2008)(unpub.); *see* n.1, *supra*. Consequently, the Board vacated the administrative law judge's timeliness finding and remanded the case for him to determine whether, under the standard of *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), either medical report constituted a reasoned diagnosis of total disability due to pneumoconiosis that was communicated to claimant, so as to trigger the statute of limitations for filing a claim. *Id.* Next, the Board rejected employer's argument that the administrative law judge misidentified the element of entitlement that was previously adjudicated against claimant, for purposes of 20 C.F.R. §725.309(d). The Board held that, since the district director, in denying claimant's September 6, 2001 claim, found that the medical evidence did not establish total disability, the administrative law judge correctly identified that as an element of entitlement which had been previously adjudicated against claimant. *Id.* at 4-5. Since employer stipulated to total disability in this claim and the administrative law judge found that the new medical evidence supported the stipulation, he permissibly found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). *Id.* at 5. With respect to the merits of entitlement, the Board vacated the administrative law judge's finding that the weight of the medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and instructed him to discuss and weigh all of the medical opinion evidence on remand, and to reconsider his determination that the opinions of Drs. Fino and Westerfield are hostile to the Act. *Id.* at 5-7. Because the administrative law judge had to reconsider whether the evidence established the existence of pneumoconiosis, the Board vacated his finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and instructed him to reconsider that issue. *Id.* at 7.

On remand, applying *Kirk*, the administrative law judge found that Dr. Clarke's 1991 opinion constituted a reasoned medical determination of total disability due to pneumoconiosis that was communicated to claimant more than three years before he filed his current claim.⁴ Accordingly, the administrative law judge found that claimant's 2004 claim was untimely filed, and denied benefits on that basis. Subsequently, in an order dated November 14, 2008, the administrative law judge denied claimant's motion for reconsideration and reaffirmed his decision that the current claim was untimely filed.

On appeal, claimant argues that the administrative law judge erred in finding that his current claim was untimely. The Director, Office of Workers' Compensation

pulmonary disease, and stated that, from a respiratory standpoint, claimant was unable to perform his usual coal mine employment. Director's Exhibit 1-317.

⁴ The administrative law judge did not rely on the 1991 medical report of Dr. Myers in his analysis of whether the claim was timely.

Programs (the Director), responds, asserting that the administrative law judge erred in finding that the claim was untimely, because Dr. Clarke's 1991 report predates the denial of claimant's 1991 claim and is therefore insufficient as a matter of law to trigger the statute of limitations. Director's Brief at 4, *citing Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, --- BLR --- (6th Cir. 2009). Employer responds, agreeing with the Director that under *Hatfield*, the current claim is timely. Employer states that this case must be remanded for consideration of whether claimant is entitled to benefits. Additionally, employer renews its argument from the last appeal challenging the administrative law judge's threshold finding that claimant satisfied the requirements of 20 C.F.R. §725.309(d); employer contends that total disability is not the applicable condition of entitlement that claimant must establish to obtain review of the merits of this claim. Employer argues that the administrative law judge, on remand, must reconsider the Section 725.309(d) issue and determine whether new evidence establishes that claimant's total disability is due to pneumoconiosis.

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).

Claimant contends that the administrative law judge erred in finding that his 2004 claim was not timely filed. Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . 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." 30 U.S.C. §932(f). Miners' claims for black lung benefits are presumed to have been filed timely. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show 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). The three-year statute of limitations is applicable to the filing of both the initial claim by a miner and any subsequent claims. *Kirk*, 264 F.3d at 607, 22 BLR at 2-297; *J.O. v. Helen Mining Co.*, --- BLR ---, BRB No. 08-0671 BLA (June 24, 2009).

The administrative law judge determined that Dr. Clarke's April 15, 1991 medical report, submitted in connection with claimant's 1991 claim, constituted a medical determination of total disability due to pneumoconiosis that was communicated to claimant, and which commenced the running of the statute of limitations. The administrative law judge found that, because claimant's 2004 subsequent claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to claimant, his 2004 claim was untimely filed. Decision and Order on Remand at 4-5; 20 C.F.R. §725.308(a).

After the administrative law judge's decision, the United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is legally insufficient to 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. *Hatfield*, 556 F.3d at 483, --- BLR at ---; *accord J.O.*, --- BLR --- BRB No. 08-0671 BLA, slip op. at 4.

In this case, the final determination of Administrative Law Judge Edward J. Murty, Jr., that claimant was not totally disabled due to pneumoconiosis as of March 24, 1995, necessarily repudiated the 1991 opinion of Dr. Clarke that claimant was totally disabled due to pneumoconiosis.⁵ Director's Exhibit 3. Consequently, the 1991 medical report of Dr. Clarke could not trigger the running of the three-year time limit for filing claimant's 2004 claim. *Hatfield*, 556 F.3d at 483, --- BLR at ---; *J.O.*, --- BLR at ---, BRB No. 08-0671 BLA, slip op. at 5. Employer has not alleged that there is any other medical evidence that could trigger the three-year statute of limitations, and employer concedes that this claim is timely, in view of *Hatfield*. Therefore, we reverse the administrative law judge's finding that claimant's 2004 claim was not timely filed, 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), and remand the case to the administrative law judge for his consideration of the merits of entitlement of this claim, pursuant to the instructions provided in our prior decision. *F.R.*, slip op. at 5-7.

Employer contends that the Board erred previously in affirming the administrative law judge's finding of a change in an applicable element of entitlement. Employer notes that it stipulated to total disability at the 1993 hearing held on claimant's 1991 claim, and asserts that, since total disability was not an issue resolved against claimant by Judge Murty in denying claimant's 1991 claim, total disability cannot be the basis of a finding of a change in an applicable condition of entitlement pursuant to Section 725.309 in this claim.

In our prior decision, we rejected the same argument and held that, based on the district director's specific findings in the 2003 final denial of claimant's third claim, the administrative law judge correctly identified total disability as an applicable condition of entitlement that claimant could establish in his fourth and current claim. *F.R.*, slip op. at 4-5. This holding constitutes the law of the case with regard to this issue. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Employer has not shown a basis for an exception to this doctrine, *see Williams*, 22 BRBS at 237, and therefore, we decline to revisit the issue.

⁵ Judge Murty's March 24, 1995, final denial of benefits necessarily repudiated Dr. Myers' 1991 opinion, as well.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Claim and the Denial of Motion to Reconsider are reversed, and this case is remanded to the administrative law judge for consideration of the merits of the claim consistent with the instructions provided in our February 29, 2008 decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge