

BRB No. 11-0157 BLA

BENNETT MULLINS)
)
 Claimant-Respondent)
)
 v.)
)
 TOPPER COAL COMPANY,)
 INCORPORATED)
)
 and)
)
 LIBERTY MUTUAL INSURANCE GROUP) DATE ISSUED: 09/27/2011
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the [2010] Decision and Order on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, P.S.C., Pikeville, Kentucky, for claimant.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the [2010] Decision and Order on Remand – Award of Benefits (04-BLA-6482) of Administrative Law Judge Larry S. Merck awarding benefits on a miner’s claim¹ filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §901-944 (2006) *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l) (the Act)).² This case is before the Board for the third time.³ In the last appeal, the Board affirmed the administrative law judge’s finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The Board also affirmed the administrative law judge’s finding that Dr. Anderson’s 1993 medical report did not constitute a reasoned medical determination of total disability due to pneumoconiosis, but vacated his finding that the claim was timely filed pursuant to 20 C.F.R. §725.308,⁴ and remanded the case for the administrative law judge to reconsider whether Dr. Baker’s 1993 report was a reasoned medical determination of total disability due to pneumoconiosis sufficient to rebut the

¹ Claimant, Bennett Mullins, is the miner who filed his application for benefits on October 28, 2002. Director’s Exhibit 2.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director’s Exhibit 2.

³ The earlier procedural history of this case is set forth in the Board’s last decision. *Mullins v. Topper Coal Co.*, BRB No. 09-0549 BLA (Mar. 24, 2010) (unpub.).

⁴ Section 725.308 provides in relevant 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 or a person responsible for the care of the miner

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, . . . 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.

presumption that this claim was timely filed in accordance with 20 C.F.R §725.308. If, on remand, the administrative law judge found Dr. Baker's opinion to be reasoned, the Board instructed the administrative law judge to determine whether claimant understood that he was totally disabled due to pneumoconiosis in 1993 for purposes of the Act. *Mullins v. Topper Coal Co.*, BRB No. 09-0549 BLA (Mar. 24, 2010) (unpub.).

Pursuant to the Board's remand instructions, the administrative law judge reassessed Dr. Baker's 1993 report, and found that it did not constitute a reasoned medical determination of total disability due to pneumoconiosis that was communicated to claimant. Consequently, the administrative law judge concluded that employer had not established rebuttal of the presumption that the claim was timely filed pursuant to Section 725.308. Accordingly, benefits were reinstated.

On appeal, employer challenges the administrative law judge's finding that the claim was timely filed pursuant to Section 725.308, and asserts that the administrative law judge erroneously shifted the burden of proof to employer. Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the administrative law judge's award of benefits.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we reject employer's argument that the administrative law judge impermissibly shifted the burden of proof from claimant to employer in this case. Employer's Brief at 10. The applicable regulation provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c); *W.C. [Cornett] v. Whitaker Coal Corp.*, 24 BLR 1-21, 1-25 (2008). In *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises,⁵ held that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the miner]" more than three years prior to the filing of his claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296 [emphasis added]; see also *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009).

⁵ Because claimant's coal mine employment occurred in Kentucky, 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*); Director's Exhibit 3.

Employer also maintains that Dr. Baker's 1993 report constitutes a reasoned medical determination of total disability due to pneumoconiosis that was communicated to, and understood by, claimant. Employer notes that Dr. Baker checked "no" in response to a form question as to whether claimant was physically able, from a pulmonary standpoint, to perform his usual coal mine employment or comparable work in a dust-free environment; he explained that claimant "should have no further exposure to coal dust, rock dust, or similar noxious agents due to his coal workers' pneumoconiosis, moderate obstructive airway disease and chronic bronchitis," and that claimant "would have difficulty doing sustained manual labor, on an 8 hour basis, even in a dust-free environment, due to these conditions." Director's Exhibit 6; Employer's Brief at 7-8. Employer argues that claimant received the report; knew the contents of the report; pursued a state black lung claim based on the report; and left coal mining in 1993, never to return, in reliance upon the report. Thus, employer asserts that claimant understood that he was disabled due to pneumoconiosis and could no longer work in the coal mines, based on Dr. Baker's 1993 report. Employer's Brief at 11-14. Employer's arguments lack merit.

Assuming, *arguendo*, that Dr. Baker's report was a reasoned determination of total disability due to pneumoconiosis, the administrative law judge accurately summarized claimant's testimony regarding the report. [2010] Decision and Order on Remand at 7. While claimant testified that he was advised to leave the dusty conditions of the mines, Hearing Transcript at 15-16; that he did so in 1993 as a result of his "back and lungs," Hearing Transcript at 15-17; that Dr. Baker "put it on his report that I needed to get out of the mines," Hearing Transcript at 17; and that he filed the report with his State black lung claim and turned it over to the "Federal office" when he filed his current claim under the Act, Hearing Transcript at 18, the administrative law judge acted within his discretion in concluding that this testimony established only that claimant was advised to leave the mines, and did not reflect a communication to claimant that he was totally disabled due to pneumoconiosis, or that he had a viable claim for benefits under the Act. *Id.*; see generally *Zimmerman v. Director, OWCP*, 871 F.2d 564, 567, 12 BLR 2-254, 2-258 (6th Cir. 1989)(a recommendation against further coal dust exposure is not tantamount to a finding of total disability due to pneumoconiosis); see also *Cornett*, 24 BLR at 1-30. As substantial evidence supports the administrative law judge's findings, we affirm his determination that employer failed to establish rebuttal of the Section 725.308 presumption that claimant's claim was timely filed under the Act.

Accordingly, the administrative law judge's [2010] Decision and Order on Remand – Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge