

No. 14-3976

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

EIGHTY FOUR MINING COMPANY,

Petitioner

v.

**DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR;
CHARLES E. MORRIS,**

Respondents

**On Petition for Review of a Final Order of the Benefits Review Board,
United States Department of Labor**

BRIEF FOR THE FEDERAL RESPONDENT

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**On Petition for Review of a Final Order of the Benefits
Review Board, United States Department of Labor**

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF JURISDICTION

Eighty Four Mining Company (Eighty Four Mining or Employer) petitions this Court to review the final order of the Benefits Review Board, which affirmed a Department of Labor administrative law judge's (ALJ's) decision awarding benefits under the Black Lung Benefits Act (BLBA or Act), 30 U.S.C. §§ 901-944. This Court has subject matter jurisdiction over Eighty Four Mining's petition under

Section 21(c) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 921(c), as incorporated by section 422(a) of the BLBA, 30 U.S.C. § 932(a). Charles Morris, a former coal miner, filed a BLBA claim on January 6, 2011. Petitioner's Appendix A41. The injury contemplated by section 21(c) – Mr. Morris's exposure to coal mine dust – occurred in Pennsylvania, within the jurisdictional boundaries of this Court.

The petition also meets section 21(c)'s timeliness requirements. The administrative law judge issued his decision awarding benefits on July 9, 2013. A22. Eighty Four Mining filed a notice of appeal with the Board on August 7, 2013, within the statutorily mandated thirty-day period. A85; 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(a)). The Board issued its final order on July 25, 2014. A7. Eighty Four Mining petitioned this Court for review on September 22, 2014, within the statutorily mandated sixty-day period. A1; 30 U.S.C. § 932(a) (incorporating 33 U.S.C. § 921(c)).

STATEMENT OF THE ISSUE

The BLBA requires a miner to file a claim for benefits within three years of receiving a medical determination of total disability due to pneumoconiosis. Although Mr. Morris received a physician's report purporting to find him totally disabled due to pneumoconiosis in 2006, more than three years before he filed this instant claim, Eighty Four Mining successfully discredited the report during the

adjudication and denial of Mr. Morris's state workers' compensation claim for black lung benefits. The question presented here is:

Did the Benefits Review Board properly exercise its discretion and permissibly hold that Eighty Four Mining was judicially estopped from arguing that the 2006 medical determination triggered the BLBA's three-year statute of limitations, when it had previously successfully convinced a state court that the determination was incorrect.

STATEMENT OF THE CASE

Eighty Four challenges only the timeliness of Mr. Morris's claim; it no longer disputes the ALJ's finding that Mr. Morris is totally disabled due to pneumoconiosis. *See* Pet. Br. at 2. The timeliness issue is both legal and procedural in nature but does not involve any disputed facts. Thus, we will only summarize the relevant procedural history and holdings below.

A. Legal framework

Under the BLBA, a miner's claim for benefits must be filed within three years of receiving a medical determination of total disability due to pneumoconiosis. 30 U.S.C. § 932(f); 20 C.F.R. § 725.308(a). This time limit may be waived or tolled upon a showing of "exceptional circumstances," and there is a "rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. § 725.308(c).

The BLBA permits the filing of successive benefits claim under the theory that pneumoconiosis is a progressive disease, and the miner's condition may deteriorate over time. *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314 (3d Cir. 1995); *see* 20 C.F.R. § 725.309(c). Consequently, the final denial of a prior BLBA claim renders any earlier medical opinion of total disability due to pneumoconiosis a misdiagnosis and resets the limitations clock as to subsequent claims. *Helen Mining Co. v. Director, OWCP [Obush]*, 650 F.3d 248, 253-54 (3d Cir. 2011).

B. Procedural history

Charles Morris worked as a coal miner in Pennsylvania from 1970 until 2005, for a total of almost 35 years. A23, A41. On July 21, 2006, Mr. Morris filed a compensation claim for disability due to occupational pneumoconiosis with the Pennsylvania Bureau of Workers' Compensation Programs. A131. In support, he submitted a May, 2006 report from Dr. Robert Cohen, who found Mr. Morris totally disabled by pneumoconiosis. A140-A149.¹ Eighty Four Mining defended against the state claim by submitting a medical report from Dr. Gregory Fino, who opined that Mr. Morris did not have pneumoconiosis, and was disabled by smoking-induced emphysema, not pneumoconiosis. A137-A138. By decision

¹ At the hearing on his state claim, Mr. Morris admitted he had reviewed Dr. Cohen's report before filing the state claim. A132.

dated March 31, 2008, Pennsylvania Workers' Compensation Judge Lawton found Dr. Fino's opinion more credible and rejected Dr. Cohen's opinion as not well-explained and not supported by the underlying "physiological evidence." A139. Judge Lawton thus concluded that Mr. Morris had not proved coal workers' pneumoconiosis or any other work-related pulmonary injury, and denied Mr. Morris's claim. A139. Mr. Morris, by choosing not to appeal, accepted that determination.

Nearly three years later, Mr. Morris filed a claim for federal black lung benefits on January 6, 2011. A41-A44. He did not submit Dr. Cohen's opinion to support his claim and instead relied on medical evidence developed in 2011 or later. A25-A28. The district director issued a proposed decision awarding benefits and identified Eighty Four Mining as the responsible coal mine operator liable for the payment of those benefits. A56-A68. Eighty Four Mining rejected the proposed award and requested a hearing before an administrative law judge.²

Following a hearing, Administrative Law Judge Burke found that Mr. Morris's federal black lung claim was both timely filed and meritorious. A22-A37. Eighty Four Mining appealed, challenging both timeliness and the ALJ's

² Eighty Four Mining accepted its identification as the responsible operator liable for any benefits awarded Mr. Morris. A95.

entitlement findings. A majority of the Board affirmed the award. A7-A19.

Eighty Four Mining then petitioned this Court for review. A1-A6.

C. Decisions below

1. The ALJ award

Judge Burke first ruled that Mr. Morris's claim was timely. He found the statute of limitations issue "controlled" by *Obush*, where this Court "held that a medical determination of total disability due to pneumoconiosis predating a prior, final denial of benefits is deemed a 'misdiagnosis' and thus, cannot trigger the statute of limitations." A24. The ALJ explained that here the "decision in the state claim crediting Dr. Fino's conclusion and finding that [Mr. Morris's] pulmonary condition was not caused by coal dust exposure presupposes that Dr. Cohen's conclusion was a misdiagnosis." *Id.* As a rejected misdiagnosis, the ALJ concluded, Dr. Cohen's opinion did not trigger the running of the limitations period, and therefore, Mr. Morris was "handed a clean slate for statute of limitation purposes." *Id.* (citations omitted).

On the merits, the ALJ found that Mr. Morris worked for more than fifteen years in underground coal mining and has a totally disabling respiratory impairment. A31-A33. He accordingly invoked the fifteen-year rebuttable presumption of entitlement. 30 U.S.C. § 921(c)(4); 20 C.F.R. § 718.305. He then

determined that Eighty Four Mining had failed to rebut the presumption, and he awarded benefits. A33-A36.

2. The Benefits Review Board affirmance

In a two-to-one decision, the Board affirmed the award of benefits. In finding Mr. Morris's claim timely, the majority held that the equitable doctrine of judicial estoppel precluded Eighty Four Mining's statute of limitations defense based on Dr. Cohen's report. It explained that the doctrine is "designed to protect the integrity of the judicial process by preventing a party from asserting one position in a legal proceeding and then asserting an inconsistent position in a subsequent proceeding, simply because the party's interest has changed." A11 (citing, *inter alia*, *New Hampshire v. Maine*, 532 U.S. 742, 750-51 (2001)). After identifying the doctrine's "essential elements," it found that Eighty Four Mining had first "gained an advantage in the state claim" by successfully persuading the state compensation judge that Dr. Cohen's diagnosis was incorrect, but now was seeking additional advantage by "asserting, inconsistently, that this same report from Dr. Cohen, which [Eighty Four Mining] previously claimed, and established, was incorrect, supports a claim for work-related injury and should have been acted upon by [Mr. Morris]." A11. Furthermore, the Board ruled that applying judicial estoppel would avoid a miscarriage of justice, as Mr. Morris had established his

entitlement to benefits, and Eighty Four Mining had had a full and fair opportunity to defend its position on the merits. A11-A12.

On entitlement, the Board affirmed as unchallenged the ALJ's invocation of the fifteen-year presumption, A9 n.4, and then affirmed as supported by substantial evidence his determination of no rebuttal. A13-A15. Accordingly, the Board affirmed the award of benefits.

Judge Smith dissented, stating he would find the claim time-barred based on Dr. Cohen's 2006 report. A18. He found the ALJ's reliance on *Obush* misplaced because *Obush* involved a previously denied federal black lung claim, not a state workers' compensation claim. A17. Judge Smith also disagreed with the majority's application of judicial estoppel, believing Eighty Four Mining had not changed its position, and even if so, had not acted in bad faith. For that reason, Judge Smith would have held the claim untimely and reversed the award of benefits. A17-A18.

STANDARD OF REVIEW

Eighty Four Mining challenges the determination below that Mr. Morris's claim was timely. Whether his claim is time-barred is a question of law that the Court reviews de novo. *Labelle Processing Co.*, 72 F.3d at 313. Invocation of judicial estoppel, however, is reviewed for an abuse of discretion, with the Court asking whether the ruling below "is founded on an error of law or a misapplication

of law to the facts.” *In re Kane*, 628 F.3d 631, 636 (3d Cir. 2010) (quoting *Montrose Medical Group Participating Savings Plan v. Bulger*, 243 F.3d 773, 780 (3d Cir. 2001)).

SUMMARY OF THE ARGUMENT

The BLBA’s statute of limitations requires a miner to file a claim within three years of learning of a medical determination of totally disabling pneumoconiosis. There is no dispute that Mr. Morris received that diagnosis from Dr. Cohen in 2006, more than three years before his 2011 federal benefits claim. However, in 2008, Eighty Four Mining successfully convinced a state workers’ compensation judge (and Mr. Morris in turn) that Dr. Cohen was wrong.

The Board acted within its discretion to judicially estop Eighty Four Mining from asserting a statute of limitations defense. Eighty Four Mining’s position that Mr. Morris was required to act on Dr. Cohen’s report is wholly inconsistent with its position in the state workers’ compensation proceeding that Dr. Cohen’s opinion was incorrect. And having convinced the state judge that Dr. Cohen was wrong – and thereby gained an advantage in defeating the state claim – Eighty Four Mining must stick to its story that Dr. Cohen’s opinion was a misdiagnosis. Accordingly, the Board permissibly judicially estopped Eighty Four Mining from arguing that Dr. Cohen’s previously discredited report is correct and triggered the running of the three-year statute of limitations.

ARGUMENT

The Board did not abuse its discretion in finding Eighty Four Mining judicially estopped from arguing that Dr. Cohen’s 2006 medical opinion triggered the running of the three-year statute of limitations and rendered Mr. Morris’s 2011 federal claim untimely.

Judicial estoppel is “a fact-specific, equitable doctrine, applied at courts’ discretion” that “rests on the basic notion that, absent any good explanation, a party should not be allowed to gain an advantage by litigation on one theory, and then seek an inconsistent advantage by pursuing an incompatible theory.” *Semper v. Gomez*, 747 F.3d 229, 247 (3d Cir. 2014). “The doctrine exists to protect the integrity of the judicial process and to prohibit parties from deliberately changing positions according to the exigencies of the moment.” *New Hampshire*, 532 U.S. at 750-51. Although a party can assert alternative and even conflicting claims, it may be judicially estopped from taking “two positions that are irreconcilably inconsistent.” *Montrose Medical Group*, 243 F.3d at 779-80.

The Supreme Court has listed three factors to consider when determining whether judicial estoppel should be applied:

First, a party’s later position must be “clearly inconsistent” with its earlier position. Second, courts regularly inquire whether the party has succeeded in persuading a court to accept that party’s earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create “the perception that either the first or the second court was misled.” Absent success in a prior proceeding, a party’s later inconsistent position introduces no “risk of inconsistent court determinations,” and thus poses little threat to judicial integrity.

A third consideration is whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

New Hampshire, 532 U.S. at 750-51 (internal citations omitted). The Court made clear, however, that the listed factors are not meant as “inflexible prerequisites or an exhaustive formula for determining the applicability of judicial estoppel.

Additional considerations may inform the doctrine’s application in specific factual contexts.” *Id.*; accord *In re Kane*, 628 F.3d at 639 (same; citing *New Hampshire*).

This Court has applied similar factors in addressing issues of judicial estoppel. *See Semper*, 747 F.3d at 247 (in determining whether judicial estoppel applies, court looks to whether the party’s two positions are irreconcilably inconsistent, whether it changed its position in bad faith, whether the relief is tailored to address harm, and whether the party is provided with an opportunity to explain its actions).

Key to the Board’s determination that the factual situation warranted application of judicial estoppel was Eighty Four Mining’s irreconcilably inconsistent positions regarding the correctness of Dr. Cohen’s 2006 diagnosis. The Board noted that Eighty Four Mining initially took the position in Mr. Morris’s state claim that Dr. Cohen’s diagnosis of total disability due to pneumoconiosis was incorrect. It succeeded in persuading the state judge to accept its position, leading the state judge to reject Dr. Cohen’s opinion and to conclude that Mr. Morris was not totally disabled due to pneumoconiosis and therefore not

entitled to benefits for occupational pneumoconiosis under Pennsylvania state law. In stark contrast, in these proceedings, Eighty Four Mining asserts that Dr. Cohen's disability diagnosis is, in fact, a medical determination of total disability due to pneumoconiosis that triggered the running of the BLBA three-year statute of limitations. These two assertions – that Dr. Cohen is correct and that the same Dr. Cohen is incorrect – are facially inconsistent. The Board reasonably concluded that Eighty Four Mining could not have it both ways.

The Board properly concluded that Eighty Four Mining changed its position to suit the exigencies of the moment. Eighty Four Mining first defeated the state claim (*i.e.*, “gained an advantage”) by establishing that Dr. Cohen's opinion was “wrong;” but now, it seeks dismissal (further advantage) of the federal claim by arguing Mr. Morris failed to timely act on that report. Eighty Four has not attempted to reconcile its change in position concerning the correctness of Dr. Cohen's determination. And while zealous advocacy, not any ill-motive, may have inspired Eighty Four Mining's positions, its conflicting gambits disclose that it has been “play[ing] fast and loose with the court[s],” and that is “bad faith” in the judicial estoppel context. *In re Kane*, 628 F.3d at 638; *Krystal Cadillac-Oldsmobile GMC Truck v. Gen. Motors Corp.*, 337 F.3d 314, 319-20 (3d Cir. 2003).

In fact, Eighty Four Mining simply ignores its inconsistent positions. It contends that throughout the state and federal proceedings it has argued that Mr. Morris is not totally disabled due to pneumoconiosis. But that point is too pat. There is no dispute that, until it waived the issue on appeal to this Court, Eighty Four Mining had argued that Mr. Morris's respiratory disability is not due to pneumoconiosis. That general assertion, however, is not the position that Eighty Four Mining is judicially estopped from arguing.³ Rather, the Board's estoppel ruling is far narrower. Eighty Four Mining is estopped from relying on Dr. Cohen's report to rebut the timeliness of Mr. Morris's federal claim, a fact presumed under Section 725.308(c), because it successfully discredited that report in the prior state court proceeding.⁴ The Board thus narrowly tailored the remedy to solve the problem, and because Mr. Morris had received no other pre-application medical determinations of pneumoconiosis, his federal claim was

³ Dissenting Judge Smith likewise mischaracterized the gravamen of Eighty Four Mining's inconsistent positions. A17.

⁴ This is an important distinction. Under *Obush*, a prior federal denial renders all medical reports of total disability due to pneumoconiosis that predate the denial misdiagnoses and legally insufficient to rebut the timeliness presumption. In comparison, the Board's narrow estoppel ruling would not have prevented Eighty Four Mining from challenging this claim's timeliness if Mr. Morris had obtained *another* medical determination of total disability due to pneumoconiosis that predated his January 6, 2011, federal application by more than three years. However, there is no such evidence in this record; rather, the medical evidence of record post-dates the 2011 application date.

allowed to go forward. Mr. Morris still had to prove his entitlement, and Eighty Four Mining had a full and fair opportunity to defend itself. That Eighty Four Mining has now voluntarily given up on its merits defense does not worsen the relatively minor sanction the Board actually imposed.

This Court's *Obush* decision provides further support for finding Mr. Morris's claim timely, even if its holding does not compel that outcome. In holding that a prior denied BLBA claim renders a prior medical determination of totally disabling pneumoconiosis a misdiagnosis, the Court reasoned that under res judicata principles, the prior federal denial had to be accepted as correct. Thus, it was "required to respect the factual findings and legal conclusions in earlier adjudicated claims, [and therefore] must accept an ALJ's conclusion that a medical opinion offered in support of that claim is discredited." *Obush*, 650 F.3d at 252.

That rationale, however, does not hold true with a prior state workers' compensation denial because such denials (or awards) are not binding in a federal black lung claim. *See* 20 C.F.R. § 718.206; *Schegan v. Waste Mgmt. and Processors, Inc.*, 1994 WL 89421, 18 Black Lung Rep. 1-41, 1-46 (DOL Ben. Rev. Bd. 1994); *Miles v. Cent. Appalachian Coal Co.*, 7 Black Lung Rep. 1-744, 1-748 (DOL Ben. Rev. Bd. 1985). Nonetheless, a similar result may be appropriate through other means, such as judicial estoppel. *See Allen v. Zurich Ins. Co.*, 667 F.2d 1162, 1166-67 (4th Cir. 1982) (doctrine of judicial estoppel does not rely on

res judicata concepts). Here, characterization of Dr. Cohen's opinion as a misdiagnosis arises directly from Eighty Four Mining's own litigation decisions in Mr. Morris's state claim. And while neither the ALJ nor Board was compelled "as a matter of law" to treat Dr. Cohen's report as a misdiagnosis, *Obush*, 650 F.3d at 253, it was more than reasonable to hold Eighty Four Mining to its own characterization.

Allowing Mr. Morris's claim to be adjudicated on its merits also is consistent with this Court's desire, as expressed in *Obush*, that the BLBA's limitations provision be applied fairly and equitably. *Obush* emphasized that the BLBA's limitations provision must be construed "to include the largest number of miners as benefit recipients." 650 F.3d at 252-53 (quoting *Peabody Coal Co. v. Hill*, 123 F.3d 412, 415 (6th Cir. 1997)) And it further stressed that, because pneumoconiosis is recognized as a latent and progressive disease, the "statute of limitations [should be read] in an expansive manner to ensure that any miner who has been afflicted with the disease ... is given every opportunity to prove he is entitled to benefits." *Id.* at 253. Indeed, a more restrictive interpretation – of allowing misdiagnoses to trigger the running of the statute of limitations – "could create a substantial chilling effect discouraging miners from seeking early examinations and second opinions." *Consol. Coal Co. v. Williams*, 453 F.3d 609, 618 (4th Cir. 2006); *Arch of Ky. v. Director, OWCP*, 556 F.3d 472, 482 (6th Cir.

2009) (“ miners could become overly cautious about being screened for the disease” to avoid triggering the statute of limitations).

Applying judicial estoppel here also comports with the underlying purpose of statutes of limitations, which are designed to assure fairness to defendants by relieving them and the courts “of the burden of trying stale claims when a plaintiff has slept on his rights.” *Burnett v. New York Central Railroad Co.*, 380 U.S. 424, 428 (1965). Eighty Four Mining argues that Mr. Morris could have filed a timely BLBA claim following the state denial and still within three years of receipt of Dr. Cohen’s opinion and could have submitted Dr. Cohen’s report in support of the federal claim where it could have been credited despite the state decision to discredit it. Pet. Br. at 21. While true, Eighty Four Mining cannot claim Mr. Morris *slept* on his rights by deferring his federal claim after the state court judge informed him (based on Eighty Four Mining’s arguments) that his evidence was not credible. Nor can Eighty Four Mining point to any judicial interest in reviewing the same evidence in a different forum. Finally, Mr. Morris’s 2011 federal claim was far from stale given that it was based on evidence developed after it was filed. In light of these broad considerations, the Board acted reasonably by precluding Eighty Four Mining from relying on Dr. Cohen’s 2006 opinion to defeat Mr. Morris’s 2011 claim on timeliness grounds.

This Court has consistently stated that judicial estoppel should be applied “to avoid a miscarriage of justice.” *In re Kane*, 628 F.3d at 638. The facts here warrant its application. Mr. Morris has proven that he is totally disabled by pneumoconiosis, a fact Eighty Four Mining no longer contests, despite a full and fair opportunity to defend itself. Eighty Four Mining has not shown that the Board abused its discretion; therefore, its application of judicial estoppel and ruling that Mr. Morris’s claim is not time-barred should be affirmed.

CONCLUSION

For the foregoing reasons, the Court should affirm the award of benefits.

Respectfully submitted,

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Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B) and Third Circuit Local Rule 32.1(c), I hereby certify that this Brief for the Director, Office of Workers' Compensation Programs, was prepared using proportionally spaced, Times New Roman 14-point typeface, and contains 3,726 words, as counted by the Microsoft Office Word 2010 software used to prepare this brief.

Furthermore, I certify that the text of the brief transmitted to the Court through the CM/ECF Document Filing System as a PDF file is identical to the text of the paper copies mailed to the Court and counsel of record. In addition, I certify that the PDF file was scanned for viruses using McAfee VirusScan Enterprise 8.8. The scan indicated there are no viruses present.

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2015, the Director's brief was served electronically using the Court's CM/ECF system on, and copies mailed, postage prepaid, to the Court and the following:

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