## PART I

## INTRODUCTION

### F. STATUTE OF LIMITATIONS, SUMMARY OF PRIOR LAW AND REFORM ACT CHANGES

Prior to enactment of the Reform Act, Sections 422(f)(1) and (f)(2) of the Act, 30 U.S.C. §§932(f)(1),(2), imposed certain time bar provisions on all Part C claims and, through the operation of Section 415(a)(5) of the Act, on Part B "transition period" claims as to the potentially responsible operator. Section 422(f)(1) provided that any claim filed under Part C must be filed within three years of the discovery of total disability due to pneumoconiosis. A survivor's claim had to be filed within three years of the miner's death. Section 422(f)(2) provided that a claim by a living miner filed on the basis of Section 411(c)(4) of the Act must be filed within three years of the date of last exposed employment in a coal mine. Survivors' claims based on Section 411(c)(4) had to be filed within fifteen years of the date of last exposed employment in a coal mine.

Section 422(f), as amended, now provides as follows:

> Any claim for benefits by a miner under this section 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

Thus, all claims that were filed before March 1, 1981 were timely filed.

Since the enactment of the Reform Act, the Board is seldom faced with the issue of statutes of limitations. The issues presented in claims filed after March 1, 1981 have begun to be addressed. The following is a brief listing of pre-Reform Act cases intended to give some historical reference for research purposes and current cases are digested to identify pertinent issues as they arise in claims filed after March 1, 1981.

### CASE LISTING

[Standards for when discovery of total disability occured] ***Close v. National Mines***

***Corp.***, 7 BRBS 455 (1978); ***Warner v. The Youghiogheny & Ohio Coal Co.***, 1 BLR 1-365 (1978); ***Pritt v. Gilmer Fuel Co.***, 1 BLR 1-213 (1977); ***Shafer v. The Youghiogheny & Ohio Coal Co.***, 1 BLR 1-175 (1977).

[Current employment in usual coal mine employment] ***Christensen v. United States Steel Corp.***, 1 BLR 1-940 (1978).

[Rebuttal standard = clear evidence to contrary] ***Close v. National Mines Corp.***, 7 BRBS 455 (1978).

[Discovery rule; survivors' claims statute of limitations] ***Harvey v. Director, OWCP***, 1 BLR 1-137 (1977).

[Survivors' claims statute of limitations under Section 411(c)(4) of the Act] ***Phillips v. Director, OWCP***, 1 BLR 1-77 (1977); ***Maffiolo v. Director, OWCP***, 1 BLR 1-15 (1976); ***Garred v. Jones & Laughlin Steel Corp.***, 1 BLR 1-2 (1976); ***Voiles v. Director, OWCP***, 4 BRBS 409 (1976).

[Tolling based on senility, illiteracy, ill health] ***Setser v. Director, OWCP***, 4 BRBS 47, 50 (1976); ***Jones v. Bethlehem Mines Corp.***, 4 BRBS 373 (1976).

[Tolling where widow remarries] ***Ellenburg v. Director, OWCP***, 4 BRBS 457, 459 (1976).

## DIGESTS

The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to 20 C.F.R. §725.308(a) involves factual findings which are appropriately made by the administrative law judge. ***Clark v. Karst-Robbins Coal Co.***, 12 BLR 1-149 (1989)(*en banc*).

Where claimant initially filed a Part C claim and later filed a duplicate claim, the Board held that the statute of limitations provided by Section 422(f) of the Act, 30 U.S.C. §932(f), and implemented by 20 C.F.R. §725.308, applies to only the filing of claimant's initial Part C claim, therefore, the filing of any subsequent claim need not comply with the statute of limitations. The Board noted that its holding satisfied the purpose of the statute of limitations by ensuring that employer is provided notice of the current claim and of potential liability for future claims, in view of the progressive nature of pneumoconiosis. ***Faulk v. Peabody Coal Co.***, 14 BLR 1-18 (1990).

The statute of limitations at 20 C.F.R. §725.308(a) applies only to the first claim filed. ***Andryka v. Rochester & Pittsburgh Coal Co.***, 14 BLR 1-34 (1990).

The Board discussed the legislative history of Section 422(f) and the implementing regulation, 20 C.F.R. §725.308, and stated that the Act's statute of limitations must be construed in a manner that does not unduly restrict the filing and pursuit of claims under the Act. In view of the remedial purpose of the Act, the Board held that Section 725.308(a) requires a written medical report, found to be probative, reasoned, and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware, or, in the exercise of reasonable diligence, should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment. The Board stated that "communication to the miner" is to be construed as to require that a medical opinion "is actually received by the miner;" thus, mere knowledge of the contents of a medical report is insufficient. Additionally, the Board stated that the determination of whether the evidence is sufficient to rebut the timeliness presumption is fact-specific and depends on the administrative law judge's credibility assessments of the documentary and testimonial evidence. The Board outlined the type of inquiry the administrative law judge should engage in when making the determination of whether a medical opinion is sufficient to start the running of the statute of limitations. ***Adkins v. Donaldson Coal Co.***, 19 BLR 1-34 (1993).

The Board construed the timeliness provision at Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented at Section 725.308, as providing a statute of limitations provision, rather than a jurisdictional requirement, which must therefore be raised by the opposing party as an affirmative defense or be considered waived. Inasmuch as employer had withdrawn the issue of timeliness of the claim at the hearing before the administrative law judge, the Board held that employer had waived reliance on that affirmative defense. In construing the timeliness provision, the Board relied on the principle that statute of limitations provisions are generally held to provide affirmative defenses, on the purpose of timeliness provisions in the context of workers' compensation law, on the lack of reference to "jurisdiction" in the text of Section 422(f), as contrasted with Section 21(c) of the Longshore Act, on the legislative history of Section 422(f), which repeatedly refers to the provision as a statute of limitations, and on the history of Section 725.308 and its antecedent provisions; the Board also noted that its construction of Section 422(f) as an affirmative defense rather than a jurisdictional requirement that could not be waived and could be raised at any time, was consistent with the doctrine of exhaustion of remedies. ***Cabral v. Eastern Associated Coal Co.***, 18 BLR 1-25 (1993).

The Board applied the holding in ***Adkins v. Donaldson Coal Co.***, 19 BLR 1-34 (1993) to remand this case. Based on Section 422(f) of the Act and the implementing regulation, 20 C.F.R. §725.308, the Board noted that the Act's statute of limitations must be construed in a manner that does not unduly restrict the filing and pursuit of claims under the Act. In remanding, the administrative law judge, who found that claimant "first learned" of his total disability when "informed by his physician" was instructed to determine whether the medical evidence of record, written reports that are "probative,

reasoned and documented...indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware or in the exercise of reasonable diligence should have been aware" of this disability, constitute medical determinations of total disability due to pneumoconiosis. The final determination that must be made on remand was whether claimant had "actual physical receipt" of such opinions or merely knowledge of their contents. ***Adkins***, at 1-43. This strict construction of Section 725.308 presumes that all claims are timely filed, places the burden for rebutting this presumption on the opposing party and allows for a finding of "extraordinary circumstances" to toll the time limit should rebuttal be established. ***Daugherty v. Johns Creek Elkhorn Coal Corp.***, 18 BLR 1-95 (1994).

The Sixth Circuit held that under 30 U.S.C. §932(f), 20 C.F.R. §725.308, employer did not rebut the presumption that the miner's duplicate claim was timely filed because employer did not show that a reasoned medical determination of total disability due to pneumoconiosis had been communicated to the miner more than three years before the filing of his fourth claim. The Court noted that the three-year limitations clock begins to tick the first time 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 the clock may only be turned back if the miner returns to the mines after a denial of benefits. The Court distinguished between premature claims that are unsupported by a medical determination, such as the miner's previous three claims, and medically supported claims that may ultimately be deemed "premature" because the weight of the evidence fails to establish entitlement. ***Tennessee Consolidated Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

A party does not waive its right to raise, for the first time on appeal, the issue of the timeliness of a duplicate claim when raising this issue before the administrative law judge would have been futile. ***Furgerson v. Jericol Mining, Inc.***, 22 BLR 1-216 (2002); ***Abshire v. D&L Co.***, 21 BLR 1-202 (2002).

The Board remanded this case for the administrative law judge to determine whether the claim was timely filed pursuant to 20 C.F.R. §725.308(c), and the Sixth Circuit's holding in ***Tennessee Consolidation Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). ***Furgerson v. Jericol Mining, Inc.***, 22 BLR 1-216 (2002); ***Abshire v. D&L Co.***, 21 BLR 1-202 (2002).

The Board affirmed an administrative law judge's finding that claimant's subsequent claim was timely filed, as the statute of limitations at Section 422(f) of the Act, as implemented by 20 C.F.R. §725.308, applies only to the first claim filed. In this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the Board declined to apply the contrary holding of ***Tennessee Consolidation Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) regarding the statute of limitations, as it is not apparent that the holding in ***Kirk*** is mandated by the Act or implementing regulations, and because the Fourth Circuit court has not adopted the

approach set forth in ***Kirk***. ***Dempsey v. Sewell Coal Corp.***, 23 BLR 1-47 (2004)(*en banc*).

The Seventh Circuit affirmed the Board's affirmance of the administrative law judge's award of benefits. The Seventh Circuit rejected employer's argument that this claim, filed in 1998, was time-barred because claimant was diagnosed with chronic obstructive pulmonary disease in 1992. The Seventh Circuit noted that it was undisputed that Dr. Carandang's 1999 medical opinion, that claimant was totally disabled by chronic obstructive pulmonary disease due to coal mine employment and smoking, was the first such determination to be communicated to claimant. *See* 20 C.F.R. §725.308(a), (c). The Seventh Circuit also rejected employer's argument that the equitable doctrine of laches bars the claim in light of the gap between the time claimant last worked for employer in 1984 and when he filed the claim in 1998. The Seventh Circuit determined that given the administrative law judge's finding that claimant was first informed that he had pneumoconiosis in 1999, after he filed his claim, the administrative law judge correctly concluded that claimant could not have been expected to file the claim any earlier; there was no lack of diligence on claimant's part. The Seventh Circuit further denied employer's request to have liability for the payment of benefits transferred to the Black Lung Disability Trust Fund, and rejected employer's argument that its procedural due process rights were violated by the Department of Labor's delay in naming it the responsible operator. The Seventh Circuit held that employer failed to prove that the delay deprived it of an opportunity to defend against the claim. ***Roberts & Schaefer Co. v. Director, OWCP [Williams]***, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005).

The Board held that the administrative law judge erroneously considered the propriety of the district director's 1992 denial of the prior claim as untimely filed under 20 C.F.R. §725.308, where that denial is final and not subject to challenge. The Board determined that the pertinent issue is, rather: What effect does the district director's final denial of the prior claim have on the instant subsequent claim filed in 2002? The Board agreed with employer's argument that the district director's final denial of the prior claim based on its untimeliness is *res judicata* and its effect is to bar the filing of the instant subsequent claim. The Board thus held that the administrative law judge's Order Denying Employer's Motion to Dismiss is erroneous as a matter of law and reversed it. Consequently, the Board vacated the administrative law judge's Order Denying Employer's Motion for Reconsideration and Decision and Order – Awarding Benefits in the instant subsequent claim. ***Stolitza v. Barnes & Tucker Co.***, 23 BLR 1-93 (2005).

The Board held that the facts of this case reflect that the 1981 preliminary determination of eligibility rendered by the district director was a legal determination, rather than a determination by a physician based on medical evidence of total disability due to pneumoconiosis. Therefore, the Board held the district director's 1981 preliminary determination of eligibility was insufficient to trigger the statute of limitations pursuant to 20 C.F.R. §725.308(a) and ***Tennessee Consol. Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Accordingly, the Board instructed the administrative law

judge, on remand, to analyze the evidence of record to determine whether employer has met its "burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [claimant]" more than three years prior to the 2001 filing of the instant claim, citing *Kirk*, 264 F.2d at 607, 22 BLR at 2-296. ***Sturgill v. Bell County Coal Corp.***, 23 BLR 1-159 (2006) (McGranery, J., concurring in part and dissenting in part).

The Board held that under the language set forth in ***Tennessee Consol. Coal Co. v. Kirk***, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), claimant's mere statement that he was told by two physicians that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations. Accordingly, the Board affirmed the administrative law judge's finding that employer failed to rebut the presumption of timeliness provided at Section 725.308(c) and, therefore, further affirmed his finding that the instant claim is timely filed. Additionally, the Board stated that, based on the facts of this case, it need not address the assertion of the Director and employer that a medical determination of total disability due to pneumoconiosis need not be in writing for the purpose of triggering the three-year limitations period. ***Brigance v. Peabody Coal Company***, BLR , BRB No. 05-0722 BLA (June 29, 2006).

The Fourth Circuit held that neither the Black Lung Benefits Act nor the implementing regulations requires that the notice to a miner of a medical determination of his total disability due to pneumoconiosis be in writing to trigger the start of the three-year statute of limitations clock on black lung claims. The Fourth Circuit held that the language of 30 U.S.C. §932(f) and the language of 20 C.F.R. §725.308(a) plainly do not contain the written-notice requirement adopted by the Board in ***Adkins v. Donaldson Mine Co.***, 19 BLR 1-36 (1993). ***Island Creek Coal Co. v. Henline***, 456 F.3d 421 (4th Cir. Aug. 8, 2006).

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