

BRB No. 06-0381 BLA

LARRY M. LACY)
)
 Claimant-Respondent)
)
 v.)
)
 KEN LICK COAL COMPANY)
)
 and)
)
 AMERICAN RESOURCES INSURANCE) DATE ISSUED: 10/26/2006
 COMPANY)
)
 Employer/Carrier-)
 Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer/carrier.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (04-BLA-5941) of Administrative Law Judge Rudolf L. Jansen with respect to 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). The administrative law judge determined that the claim before him was a timely filed subsequent claim pursuant to 20 C.F.R. §§725.308 and 725.309 and that the newly submitted evidence supported a finding of total disability due to pneumoconiosis, which was the element of entitlement previously adjudicated against claimant. The administrative law judge credited claimant with thirteen years of coal mine employment and considered whether the evidence of record, as a whole, was sufficient to establish the remaining elements of entitlement. The administrative law judge determined that claimant proved that he suffers from pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a), is totally disabled pursuant to 20 C.F.R. §718.204(b)(2) and that pneumoconiosis is a contributing cause of his total disability under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer argues that the administrative law judge erred in finding claimant’s subsequent claim to be timely under 20 C.F.R. §725.308. Claimant responds, urging affirmance of the administrative law judge’s award of benefits. The Director, Office of Workers’ Compensation Programs (the Director), has responded and urges the Board to reject employer’s allegation of error.

The Board’s scope of review is defined by statute. The administrative law judge’s Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that “one of the applicable conditions of entitlement . . . has changed

since the date upon which the order denying the prior claim became final.” 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The “applicable conditions of entitlement” are “those conditions upon which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because he failed to establish that he was totally disabled due to pneumoconiosis. Director’s Exhibit 2. Consequently, claimant had to submit new evidence establishing this element to proceed with his claim. 20 C.F.R. §725.309(d)(2), (3); *see also Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)(holding under the former provision that claimant must establish, with qualitatively different evidence, at least one element of entitlement previously adjudicated against him).

On appeal, employer does not contend that the evidence is insufficient to establish entitlement but that entitlement should not have been considered because the administrative law judge should have found the instant claim time barred. Employer alleges that the administrative law judge erred in determining that Dr. Westerfield’s 1995 report and deposition, submitted in conjunction with claimant’s initial claim, did not constitute a communication to claimant of a medical determination of total disability due to pneumoconiosis in accordance with Section 725.308. Claimant and the Director respond, asserting that there is no proof that Dr. Westerfield’s conclusions were ever communicated to claimant and, therefore, that the administrative law judge did not err in finding that this claim was timely filed.

Section 725.308 requires that a living miner’s claim for benefits be filed within three years “after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a party responsible for the care of the miner” 20 C.F.R. §725.308(a); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001).¹ The regulation also provides that there is a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). Whether the evidence is sufficient to establish rebuttal of the presumption of the timely filing of a claim pursuant to Section 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*).

In *Adkins v. Donaldson Coal Co.*, 19 BLR 1-34 (1993), the Board held that “communication to the miner” requires that the medical determination “is actually received by the miner.” *Adkins*, 19 BLR at 1-43. The Board reiterated this principle in *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993), in which it held that

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director’s Exhibit 1.

receipt of a medical determination of total disability due to pneumoconiosis by a claimant's attorney does not constitute communication to the miner. *Daugherty*, 18 BLR at 1-101. In accordance with these holdings, the administrative law judge rationally determined that claimant's testimony was not specific as to the doctor who informed him of his breathing problem or the date and time of the communication and therefore, that the evidence was insufficient to establish his awareness that he was totally disabled by pneumoconiosis. Decision and Order at 6. In addition, the administrative law judge permissibly found that employer had not met his burden of establishing that Dr. Westerfield's opinion, although part of the prior record, was actually communicated to claimant. *Id.* Consequently, the administrative law judge properly found employer failed to rebut the presumption of timeliness set forth in Section 725.308(c).² Decision and Order at 5; *Daugherty*, 18 BLR at 1-101.

Furthermore, because employer has not raised any allegations of error with respect to the administrative law judge's findings on the merits of entitlement in this case, we affirm the administrative law judge's determination that claimant established the existence of pneumoconiosis arising out of coal mine employment and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), (c); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We also affirm, therefore, the award of benefits under 20 C.F.R. Part 718. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

² Dr. Westerfield examined claimant on February 9, 1995, and was deposed on March 29, 1995, at the request of employer's attorney. Dr. Westerfield recorded the results of his examination on a Kentucky Department of Workers' Claims form, and addressed his report to employer's counsel. Dr. Westerfield determined that claimant had pneumoconiosis and pulmonary fibrosis caused by dust exposure in coal mine employment. Dr. Westerfield also reported that claimant was not capable of performing his usual coal mine employment. Director's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge