

BRB No. 08-0671 BLA

J.O.)
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 Claimant-Respondent)
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 v.)
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 HELEN MINING COMPANY)
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 and)
)
 VALLEY CAMP COAL COMPANY) DATE ISSUED: 06/24/2009
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Helen H. Cox (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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (07-BLA-5205) of Administrative Law Judge Thomas M. Burke awarding benefits 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 involves a subsequent claim filed on January 31, 2006.¹ The administrative law judge found that claimant's 2006 claim was timely filed because the statute of limitations does not apply to subsequent claims. Decision and Order at 3, citing *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) and *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). The administrative law judge credited claimant with twenty-eight years and four months of coal mine employment and, based on employer's concession that the evidence established the existence of a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b), the administrative law judge found that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 2006 claim on the merits. Although the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), he found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant's 2006 claim was timely filed. Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response. The Director requests that the Board revisit its decisions in *Faulk* and *Andryka*, and hold that the three-year statute of limitations applies to all claims, not just the initial claim. Claimant has not filed a response brief.²

¹ Claimant initially filed a claim for benefits on July 1, 1989. Director's Exhibit 1. In a Decision and Order dated May 16, 1991, Administrative Law Judge Gerald M. Tierney denied benefits because he found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). *Id.* There is no indication that claimant took any further action in regard to his 1989 claim.

² Because no party challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.204(b)(2), 725.309, these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a 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. 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*).

Timeliness of Claim

Employer initially contends that the administrative law judge erred in finding that claimant's 2006 claim was 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 presumptively timely filed. 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); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit,³ which has not addressed the applicability of the statute of limitations to subsequent claims. The Board, however, has held that the three-year statute of limitations applies only to a miner's initial claim and not to any subsequent claims. *Andryka*, 14 BLR at 1-36-37; *Faulk*, 14 BLR at 1-21-22. Relying upon *Faulk* and *Andryka*, the administrative law judge found that the three-year statute of limitations did not apply to claimant's 2006 subsequent claim, and therefore, found that the claim was timely filed. Decision and Order at 3.

Employer argues that the three-year statute of limitations applies to all claims, not just the initial claim. The Director agrees with employer that the statute of limitations is applicable to both the initial claim and any subsequent claims. As the Director accurately notes, the United States Courts of Appeals for the Fourth, Sixth, and Tenth Circuits have

³ The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

held that the three-year statute of limitations applies to all claims. *Energy West Mining Co. v. Oliver*, 555 F.3d 1211, 1221, BLR (10th Cir. 2009); *Sewell Coal Co. v. Director, OWCP [Dempsey]*, 523 F.3d 257, 259, 24 BLR 2-128, 2-133 (4th Cir. 2008); *Kirk*, 264 F.3d at 607, 22 BLR at 2-297. No court that has addressed this issue has held that the statute of limitations applies only to a miner's initial claim for benefits.

The Director urges the Board to hold that the statute of limitations applies to all claims filed by a miner. Neither the statute, 30 U.S.C. §932(f), nor the regulation, 20 C.F.R. §725.308(a), makes a distinction between initial and subsequent claims, referring to “any” or “a” claim for benefits, respectively. Because the Director's position that the statute of limitations applies to all claims is consistent with the plain language of the Act and regulation and is not plainly erroneous, we defer to the Director's interpretation. *See Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (2004); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994). Consequently, we hold that the three-year statute of limitations is applicable to the filing of both the initial claim by a miner and any subsequent claims. We, therefore, overrule our previous holdings in *Faulk* and *Andryka*. In light of our holding, we agree with employer and the Director that the administrative law judge erred in holding that claimant's 2006 claim was timely filed because it was not subject to the statute of limitations.

Employer argues that Dr. Turco's November 30, 1990 medical report, submitted in connection with the prior claim, constitutes a medical determination of total disability due to pneumoconiosis that was communicated to claimant. Employer's Brief at 7. Employer, therefore, contends that claimant was required to file his claim for benefits within three years of receiving notification of Dr. Turco's findings. The Director takes the position that a medical determination of total disability due to pneumoconiosis predating a prior denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. This position is consistent with the approach adopted by the Fourth, Sixth, and Tenth Circuits. *Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 483, BLR (6th Cir. 2009); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006); *Wyo. Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 1507, 20 BLR 2-302, 2-312 (10th Cir. 1996). It is also consistent with the Third Circuit's holding that, in a subsequent claim, the prior denial must be accepted as final and correct. *See Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314, 20 BLR 2-76, 2-89 (3d Cir. 1995)(holding that a claimant filing a subsequent claim is “precluded from collaterally attacking the prior denial of benefits”). We, therefore, agree with the Director, and hold 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 for filing a subsequent claim.

Administrative Law Judge Gerald M. Tierney's final determination that claimant did not have pneumoconiosis as of May 16, 1991, necessarily repudiated Dr. Turco's 1990 opinion that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, Dr. Turco's medical report could not trigger the running of the three-year time limit for filing this claim. *Williams*, 453 F.3d at 618, 23 BLR at 2-365; *Hatfield*, 556 F.3d at 483; *Brandolino*, 90 F.3d at 1507, 20 BLR at 2-312. We, therefore, reject employer's contention, and affirm the administrative law judge's determination that claimant's 2006 claim was timely filed.⁴ 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

The Existence of Pneumoconiosis

Employer contends that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).⁵ In this case, the administrative law judge considered the medical opinions of Drs. Schaaf, Begley, Martin, Fino, and Renn.⁶ Drs. Schaaf, Begley, and Martin diagnosed legal pneumoconiosis, opining that claimant suffers from chronic obstructive pulmonary disease (COPD) due to both cigarette smoking and coal mine dust exposure. 20 C.F.R. §718.201(a)(2); Director's Exhibits 13, 14; Claimant's Exhibits 3, 5; Employer's Exhibits 1, 9. Although Dr. Fino diagnosed severe obstructive airways disease, he indicated that he was unable to determine the cause of the disease. Claimant's Exhibit 1. Dr. Renn diagnosed cigarette smoking-induced emphysema and asthma, neither of which he found to be caused, or contributed to, by claimant's coal mine dust exposure. Employer's Exhibits 10, 15.

⁴ Other than Dr. Turco's 1990 medical report, employer has not alleged that there is any medical evidence that could effectively trigger the three-year statute of limitations. A review of the record reveals no medical determination that post-dates the 1991 denial of claimant's prior claim, and that was communicated to claimant more than three years prior to claimant's filing of his 2006 claim. Thus, employer did not rebut the presumption that claimant's claim was timely filed.

⁵ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁶ The administrative law judge noted that the record also contains medical opinion evidence submitted in connection with claimant's 1989 claim. However, the administrative law judge reasonably relied upon the more recent medical opinions, which he found more accurately reflected claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 12; Director's Exhibit 1.

The administrative law judge found that the opinions of Drs. Schaaf and Begley, that claimant's COPD is due to both cigarette smoking and coal dust exposure, were well-documented and well-reasoned. Decision and Order at 11. The administrative law judge also noted that the opinions of Drs. Schaaf and Begley were supported by that of Dr. Martin. *Id.* The administrative law judge accorded less weight to Dr. Fino's opinion because he found that it was equivocal, and he discredited Dr. Renn's opinion because he found that it was based upon a mistaken belief that coal mine dust-related emphysema is not possible without radiographic evidence of coal workers' pneumoconiosis. *Id.* The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer argues that the administrative law judge erred in finding that the opinions of Drs. Schaaf and Begley, that claimant's COPD is due to both cigarette smoking and coal mine dust exposure, were well-reasoned. A determination of whether a medical opinion is reasoned is committed to the discretion of the administrative law judge. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986). In this case, the administrative law judge found that Drs. Schaaf and Begley “[b]oth relied upon [claimant’s] long-term occupational exposure to coal dust as well as the remoteness and moderation of [claimant’s] smoking habit⁷ to justify their attribution of [claimant’s] disabling obstructive impairment to his work as a coal miner.”⁸ Decision

⁷ Employer argues that the administrative law judge erred in revisiting the length of claimant's smoking history. Employer asserts that the administrative law judge was required to accept the cigarette smoking history determination made by Judge Tierney in his adjudication of claimant's prior claim, rather than make his own finding that claimant had a twenty-five pack year history that ended in 1968. Employer's Brief at 28. We initially note that Judge Tierney did not make a finding regarding the length of claimant's smoking history. *See* Director's Exhibit 1. However, even if Judge Tierney had made such a finding, we reject employer's contention that the current administrative law judge would have been bound by it. The regulations provide that, if a claimant demonstrates a change in one of the applicable conditions of entitlement, the parties are not bound by any findings made in connection with the prior claim, except those that were made because a party failed to contest an issue, or where a party stipulated an issue. 20 C.F.R. §725.309(d)(4).

⁸ Although Dr. Schaaf noted that claimant smoked cigarettes for approximately twenty-four years, he also noted that claimant stopped smoking in 1968. Director's Exhibit 13. Dr. Schaaf concluded that claimant's coal mine dust exposure was significant because it “lasted a lot longer than the cigarette exposure,” it “continued long after [the] cigarette exposure,” and it was “the exposure that is most proximately associated with the development of symptoms of obstructive airways disease.” Employer's Exhibit 9 at 48.

and Order at 11. The administrative law judge also found that both doctors “concluded that their diagnosis of COPD arising from coal dust exposure did not depend upon radiographic evidence of coal workers’ pneumoconiosis.”⁹ *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that the opinions of Drs. Schaaf and Begley are well-reasoned. *Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

Employer also contends that the administrative law judge erred in his consideration of Dr. Fino’s opinion. Dr. Fino stated that he found it difficult to attribute the miner’s symptoms to any single cause, noting that the clinical findings did not “really fit anything.” Claimant’s Exhibit 1 at 16. Dr. Fino explained that he could not reach a definitive diagnosis because claimant’s findings were not “classical” for a coal mine dust-related, cigarette smoking-related, or an asthma-related pulmonary condition. *Id.* at 18. Dr. Fino indicated that he could not exclude a diagnosis of legal pneumoconiosis, noting that he could not determine the cause of claimant’s severe obstructive airways disease. *Id.* at 19, 27. Because Dr. Fino indicated that he was unable to determine the cause of claimant’s obstructive pulmonary disease, the administrative law judge permissibly found that Dr. Fino’s opinion was equivocal on this issue and entitled to less weight. *See* 20 C.F.R. §718.201(a)(2); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 11.

Dr. Begley relied upon a similar smoking history, noting that claimant smoked cigarettes for twenty-three years, before quitting in 1968. Claimant’s Exhibit 2. Dr. Begley explained why he attributed claimant’s pulmonary impairment to his coal mine dust exposure:

[Claimant] has had progressive decline in his respiratory status over many years. This decline [was] even occurring with the lack of exposure to cigarette smoke. Therefore, I have come to the conclusion that the coal dust exposure with subsequent damage to the lungs is a significant contributing factor along with the cigarette smoke.

Claimant’s Exhibit 5 at 22.

⁹ The administrative law judge found that the x-ray evidence did not establish the existence of pneumoconiosis. Decision and Order at 5. Dr. Schaaf opined that, even if claimant’s x-ray was negative for pneumoconiosis, it would still be his opinion that claimant’s coal dust exposure is a substantial contributing factor in claimant’s emphysema. Employer’s Exhibit 9 at 38. Dr. Begley opined that, even if claimant had a negative x-ray, it would not change his opinion in regard to the cause of claimant’s chronic obstructive pulmonary disease (COPD). Claimant’s Exhibit 5 at 22-23.

Employer also argues that the administrative law judge erred in according less weight to Dr. Renn's opinion. Dr. Renn opined that claimant suffers from tobacco smoke-induced emphysema and asthma, neither of which was caused, or contributed to, by his coal mine dust exposure. Employer's Exhibit 10. In explaining why claimant does not suffer from legal pneumoconiosis, Dr. Renn stated:

Well, this would have to be a direct result of coal mine dust exposure having either caused or contributed to an existing respiratory condition and there is no causation or contribution from coal mine dust exposure because, number one, he doesn't have radiological evidence of coal workers' pneumoconiosis.

Therefore, he could not have the focal emphysema. Without the focal emphysema, it could not be contributing to the emphysema caused by his tobacco smoking and, as I've already said, the asthma that he has is a disease of the general population.

Employer's Exhibit 15 at 16-17.

The administrative law judge permissibly found that Dr. Renn's opinion, that coal mine dust-related emphysema is not possible without radiographic evidence of coal workers' pneumoconiosis, is inconsistent with both the definition of legal pneumoconiosis and the preamble to the revised regulations. Decision and Order at 11-12. There is no requirement that a finding of legal pneumoconiosis be accompanied by radiographic evidence of clinical pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2). Moreover, the administrative law judge permissibly evaluated Dr. Renn's opinion in conjunction with the Department of Labor's discussion of prevailing medical science in the preamble to the revised regulations. The preamble sets forth how the Department of Labor has chosen to resolve questions of scientific fact. *See Midland Coal Co. v. Director, OWCP [Shores]*, 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). A determination of whether a medical opinion is supported by accepted scientific evidence, as determined by the Department of Labor, is a valid criterion in deciding whether to credit the opinion. *See generally Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001). In this case, the administrative law judge correctly noted that the Department of Labor, in the preamble to the revised regulations, recognizes that coal mine dust exposure can be associated with significant deficits in lung function in the absence of clinical pneumoconiosis. Decision and Order at 12, citing 65 Fed. Reg. 79941 (Dec. 20, 2000). Because the administrative law judge determined that Dr. Renn's opinion was predicated on a view of the medical evidence at odds with that credited by the Department of Labor, the administrative law judge permissibly determined that Dr. Renn's opinion was entitled to less weight on the issue of whether claimant's emphysema was related to his coal mine dust exposure. *Soubik v.*

Director, OWCP, 366 F.3d 226, 233, 23 BLR 2-85, 2-97 (3d Cir. 2004); *Shores*, 358 F.3d at 490, 23 BLR at 2-26.

It is the function of the administrative law judge to evaluate the physicians' opinions, see *Balsavage v. Director, OWCP*, 295 F.3d 390, 396, 22 BLR 2-386, 2-394-95 (3d Cir. 2002); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8, and the Board will not substitute its inferences for those of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). As the administrative law judge properly analyzed the medical opinions and explained his reasons for crediting or discrediting the opinions he reviewed, we affirm his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).¹⁰ See *Soubik*, 366 F.3d at 233, 23 BLR at 2-97.

Total Disability Due to Pneumoconiosis

Employer does not explicitly challenge the administrative law judge's finding that the medical evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).¹¹ The administrative law judge

¹⁰ Although the administrative law judge did not explicitly weigh the negative x-ray evidence and the medical opinion evidence together, he accurately noted that Drs. Schaaf and Begley both indicated that their respective diagnoses of COPD arising out of coal dust exposure were not dependent upon radiographic evidence of coal workers' pneumoconiosis. Decision and Order at 11. Consequently, the administrative law judge effectively considered all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a). *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997).

¹¹ Section 718.204(c)(1) provides that:

A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

- (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
- (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

found that claimant established that his disabling obstructive impairment arose out of his coal mine dust exposure. Decision and Order at 12. As previously discussed, the administrative law judge, in finding that the evidence established the existence of legal pneumoconiosis, credited the opinions of Drs. Schaaf and Begley. Drs. Schaaf and Begley both opined that claimant's coal mine dust exposure was a significant contributing cause of his total disability. Employer's Exhibit 9 at 62; Claimant's Exhibit 5 at 22. We, therefore, affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

20 C.F.R. §718.204(c)(1).