BRB No. 05-0321 BLA

ARTHUR S. RILEY, Deceased	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WELLMORE COAL CORPORATION	)	DATE ISSUED: 11/15/2005
	)	
and	)	
	)	
KNOX CREEK/A.T. MASSEY	)	
	)	
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 Granting Request for Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer and carrier.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Granting Request for Modification (2003-BLA-0206) of Administrative Law Judge Alice M. Craft awarding benefits on a duplicate 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).[1] The administrative law judge credited claimant with twenty-three years of qualifying coal mine employment, and adjudicated this claim, filed on January 5, 1996, pursuant to the provisions at 20 C.F.R. Part 718.[2] The administrative law judge determined that the present duplicate claim and claimant's successive requests for modification were timely filed pursuant to 20 C.F.R. §725.308; that claimant's previous claim had been denied for failure to establish any element of entitlement; and that new evidence submitted both in support of this duplicate claim and in support of modification of the prior denial of the duplicate claim established total respiratory disability and a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). After considering all of the evidence of record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §718.202(a)(2), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge granted modification pursuant to 20 C.F.R. §725.310 (2000), and awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that this claim was timely filed under Section 725.308, and in failing to allow employer time to obtain claimant's biopsy slides and submit a responsive report from a pathologist post-hearing. Employer also challenges the administrative law judge's finding that the weight of the evidence established the existence of pneumoconiosis and disability causation at Sections 718.202(a)(2), (4), 718.204(c), and her findings with regard to the date of onset of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.503. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response to the timeliness issue only, urging

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2004). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] This case has a lengthy procedural history, which has been fully set forth in *Riley v. Wellmore Coal Co.*, BRB No. 01-0373 BLA (Jan. 8, 2002)(unpub.), Director's Exhibit 80, and in the Decision and Order of the administrative law judge.

the Board to either decline to address the issue or hold that this duplicate claim was timely filed under the analysis set forth in *Wyoming Fuel v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), to which employer replies in support of its position.

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

Employer initially contends that the administrative law judge erred in finding that the present claim was timely filed pursuant to Section 725.308. Specifically, employer argues that the 1988 medical reports of Drs. Modi and Clarke submitted in claimant's original claim triggered the statute of limitations, and therefore this duplicate claim must be dismissed under the reasoning set forth in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).[3] We disagree. The Board has declined to apply the Sixth Circuit's reasoning regarding the statute of limitations in *Kirk* beyond the boundaries of that circuit. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*). The administrative law judge accurately determined that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, Decision and Order at 5, and properly concluded that this duplicate claim was timely filed because she found that the statute of limitations applies only to the first claim filed, *see Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), and that there is no limit to the number of times a party may seek modification, *see Betty B Coal Co. v. Director, OWCP [Stanley]*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). Decision and Order at 7. As the Fourth Circuit has not adopted the approach set forth in *Kirk*, we decline to apply it in this case. *Dempsey*, 23 BLR at 1-56. Consequently, we affirm the administrative law judge's findings pursuant to Section 725.308, as they are supported by substantial evidence and in accordance with applicable law. *Andryka*, 14 BLR at 1-36-37; *Stanley*, 194 F.3d 491, 22 BLR 2-1.

[3] We reject the Director's argument that the Board need not address the timeliness issue because employer failed to specifically base its challenge below on the ground that a medical diagnosis of pneumoconiosis was communicated to the miner more than three years before this duplicate claim was filed; rather, employer argued that the modification request was made more than four years after the initial denial of the 1996 duplicate claim. Director's Brief at 2-3. Regardless of employer's explicit arguments below, employer contested the timely filing of the claim pursuant to 20 C.F.R. §725.308 and thus did not waive the issue. Director's Exhibits 87, 88.

Employer next challenges the administrative law judge's refusal to allow employer time to obtain claimant's biopsy slides post-hearing and submit a responsive report from a pathologist. Although the administrative law judge denied employer's request for an extension of time on the ground that "the original biopsy evaluation has been in the record since August 2002," see Order issued January 21, 2004, employer argues that this rationale does not constitute a proper discussion or consideration of all the relevant facts, as the slides were not made available to employer or even to the district director at that time; employer promptly undertook discovery following the district director's denial of claimant's modification petition on March 4, 2003; and after the case was scheduled for hearing before the administrative law judge, employer repeatedly sought a remand to the district director for further evidentiary development when claimant failed to fully comply with employer's discovery requests and was unable for health reasons to attend a pulmonary examination scheduled by employer.[4] Although claimant underwent a pulmonary evaluation, submitted his evidence, and completed discovery just prior to the hearing, employer was unable to obtain claimant's lung tissue slides[5] for evaluation by a pathologist within the forty-five days allowed by the administrative law judge for the parties to submit responsive evidence post-hearing.[6] Employer asserts it took appropriate actions at appropriate times to obtain its evidence in response to claimant's modification

[4] While employer withdrew its initial motion to remand during a September 3, 2003 teleconference, and withdrew a subsequent motion to remand at the hearing on November 6, 2003, it appears that employer did so in order to accommodate the administrative law judge's preference that claimant not miss his opportunity for a hearing in the event that claimant's health worsened, and with the understanding that employer would be permitted to obtain and submit medical evidence necessary to defend against claimant's modification request. Teleconference Transcript at 7-8; Hearing Transcript at 6, 14-17.

[5] In a letter dated December 22, 2003, employer requested that the administrative law judge allow employer an additional 45 days within which to submit responsive evidence, as Central Baptist Hospital had yet to forward claimant's biopsy slides to employer for evaluation, and the hospital had recently advised employer that the slides had to be re-cut.

[6] The administrative law judge admitted all evidence submitted by the parties into the record at the hearing, including evidence submitted in violation of the 20-day rule at 20 C.F.R. §725.456(b)(2) over the objection of the parties. Hearing Transcript at 6-8, 14-17. The administrative law judge indicated that she would allow the parties 45 days post-hearing to submit responsive evidence; an additional 30 days to file objections; and then 15 days to reply to the objections, after which she would rule on the admissibility of the evidence submitted post-hearing. Hearing Transcript at 49-52.

petition; that the case should not even have been forwarded to the Office of Administrative Law Judges until the district director "completed evidentiary development" pursuant to 20 C.F.R. §725.421(a); and that the administrative law judge's refusal to allow employer sufficient time to obtain claimant's biopsy slides and submit a responsive report from a pathologist deprived employer of its due process right to a full and fair hearing, as the administrative law judge relied heavily on the biopsy findings in assigning weight to the conflicting medical opinions of record and in finding the existence of pneumoconiosis established. Employer's Brief at 23-29. Employer's arguments have merit under the facts of this case.

The record reflects that, following claimant's request for modification on August 22, 2002, with attached pulmonary function studies and Dr. Bensema's pathology report from a needle biopsy and lobectomy, Director's Exhibit 82, the first official action taken by the district director was on March 4, 2003, when he issued a proposed decision and order. Director's Exhibit 83. The district director found no basis for modification, as he found that total respiratory disability remained established as determined in the prior decision, and that the preponderance of medical documentation in the file did not establish the existence of pneumoconiosis. *Id*. In so finding, the district director indicated that "a needle biopsy is not accepted as evidence on its own because it deals with such a minute portion of the lungs," and that "the biopsy slides and related documentation were requested to be considered in conjunction with the report submitted by the claimant, but not received to date." *Id*. Claimant subsequently requested a formal hearing on March 17, 2003; employer responded to the motion for modification and initiated discovery on March 28, 2003; and the case was forwarded to the Office of Administrative Law Judges on June 12, 2003, for formal hearing conducted on November 6, 2003. Director's Exhibits 85-88. In view of the fact that the district director issued his proposed decision and order denying modification and forwarded the case for hearing without obtaining claimant's biopsy slides and related documentation, however, we agree with employer's argument that this case should not have been forwarded to the Office of Administrative Law Judges until the district director completed evidentiary development as required by the regulations. Consequently, we vacate the administrative law judge's findings on the merits and her award of benefits, and remand this case to the district director for further evidentiary development pursuant to 20 C.F.R. §725.421(a).[7]

[7] In the interest of avoiding future error, we note that employer correctly asserts that the provisions at 20 C.F.R. §725.503(d) are applicable in determining the date of onset of total disability due to pneumoconiosis in this case. Employer's Brief at 43-45.

Accordingly, the administrative law judge's Decision and Order Granting Request for Modification and awarding benefits is affirmed in part, vacated in part, and this case is remanded to the district director for further proceedings consistent with this decision.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

I concur in the result only.

_____
BETTY JEAN HALL
Administrative Appeals Judge