

U.S. Department of Labor

Benefits Review Board  
P.O. Box 37601  
Washington, DC 20013-7601



BRB No. 16-0047 BLA

CHARLES E. MAIDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILLENNIUM MINING, INCORPORATED	)	
	)	DATE ISSUED: 09/20/2016
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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: BOGGS, GILLIGAN, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (13-BLA-5249) of Administrative Law Judge Scott R. Morris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on September 24, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),<sup>1</sup> the administrative law judge credited claimant with at least 27.65 years of underground coal mine employment,<sup>2</sup> and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant's claim was timely filed. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, urging the Board to reject employer's contention that the claim was not timely filed. The Director also responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions.<sup>3</sup>

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<sup>1</sup> Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

<sup>2</sup> The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> Employer does not challenge the administrative law judge's finding that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis

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).

### **Timeliness of Claim**

Employer initially contends that the administrative law judge erred in finding that claimant's claim was timely filed. Section 422(f), 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis that has been communicated to the miner. The regulation at 20 C.F.R. §725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The "burden falls on the employer to prove that the claim was filed outside the limitations period." *Peabody Coal Co. v. Director, OWCP [Brigance]*, 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013). The question of whether the evidence is sufficient to establish rebuttal of the presumption of the timely filing of a claim pursuant to 20 C.F.R. §725.308(a) involves factual findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc).

Employer argues that claimant received a diagnosis of total disability due to pneumoconiosis more than three years before he filed his claim on September 24, 2010, thus rendering his claim untimely. In support of its argument, employer relies upon claimant's 2014 hearing testimony.<sup>4</sup> During the hearing, claimant testified that he was told by a physician in 1995 or 1996 that he had "black lung." Hearing Transcript at 37. Claimant, however, did not identify the physician or indicate that the physician communicated to him that he was totally disabled due to the disease. *Id.*

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pursuant to Section 411(c)(4). This finding is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

<sup>4</sup> Claimant also testified during a deposition in 2011. Although claimant testified during the deposition that Dr. Kabir told him that he was totally disabled due to "black lung," claimant did not indicate when this communication took place. Director's Exhibit 19 at 14-15. Employer does not contend that claimant's deposition testimony establishes that Dr. Kabir communicated a diagnosis of total disability due to pneumoconiosis to claimant more than three years before claimant filed his claim. Employer's Reply Brief at 2.

The administrative law judge found that claimant's deposition and hearing testimony was "vague and conclusory," and insufficient to establish that a diagnosis of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the filing of his claim for benefits. Decision and Order at 7. The administrative law judge, therefore, found that employer failed to rebut the presumption that claimant timely filed his claim for benefits. *Id.*

Employer asserts that claimant's hearing testimony establishes that "Dr. Miller" communicated to claimant in 1994 or 1995 (the time of claimant's retirement from coal mine employment) that claimant "could not return to work on account of his black lung disease." Employer's Brief at 2; Employer's Reply Brief at 2. Employer, however, has failed to explain how claimant's hearing testimony supports a finding that Dr. Miller communicated to claimant a medical determination of total disability due to pneumoconiosis.<sup>5</sup> A review of the hearing transcript does not reveal that claimant made any statements at all in regard to Dr. Miller. Claimant's hearing testimony, therefore, contains no evidence that Dr. Miller communicated a diagnosis of total disability due to pneumoconiosis to claimant. 20 C.F.R. §725.308(a). Employer has not alleged that there is any other medical evidence that could trigger the three-year statute of limitations. We, therefore, affirm the administrative law judge's finding that employer failed to rebut the presumption of timeliness, and further affirm his determination that the claim was timely filed.

### **Merits of Entitlement**

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,<sup>6</sup> 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R.

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<sup>5</sup> Employer does not identify the location in the transcript at which the relevant testimony of claimant appears.

<sup>6</sup> "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

§718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have clinical pneumoconiosis. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 43. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.<sup>7</sup> 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(ii). Employer specifically contends that Dr. Rosenberg's opinion is sufficient to establish this second means of rebuttal. We disagree. As the Director accurately notes, Dr. Rosenberg's opinion regarding the cause of claimant's pulmonary disability is undermined by his failure to diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013); *Consolidation Coal Co. v. Director, OWCP [Burris]*, 732 F.3d 723, 735, 25 BLR 2-405, 2-425 (7th Cir. 2013). Review of the record reflects that, other than his belief that claimant does not suffer from clinical pneumoconiosis, Dr. Rosenberg sets forth no opinion as to why "no part" of claimant's respiratory or pulmonary disability was caused by clinical pneumoconiosis. Employer's Exhibits 7, 8. Dr. Rosenberg's opinion, therefore, is insufficient to support employer's burden of establishing that "no part" of claimant's respiratory or pulmonary total disability was caused by clinical pneumoconiosis. We, therefore, affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20 C.F.R. §718.305(d)(1)(ii).

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<sup>7</sup> Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

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

SO ORDERED.

JUDITH S. BOGGS  
Administrative Appeals Judge

RYAN GILLIGAN  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge