



BRB No. 22-0266 BLA

JOHNNY K. NEACE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOL OF KENTUCKY,)	
INCORPORATED)	
)	
and)	
)	DATE ISSUED: 7/25/2023
CONSOL ENERGY, INCORPORATED, c/o)	
SMART CASUALTY CLAIMS)	
)	
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 Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly, PLLC) Lexington, Kentucky, for Employer and its Carrier.

David Casserly (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Andrea J. Appel, Counsel for Administrative Appeals), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Joseph E. Kane's Decision and Order Granting Benefits (2020-BLA-05331) rendered on a claim filed on April 12, 2018, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ found Claimant timely filed his claim. He then credited Claimant with 28.66 years of coal mine employment and found he established complicated pneumoconiosis. 20 C.F.R. §718.304. Thus he found Claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018). He further found Claimant's complicated pneumoconiosis arose out of his coal mine employment and awarded benefits. 20 C.F.R. §718.203.

On appeal, Employer argues the ALJ erred in finding Claimant timely filed his claim. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a response urging the Benefits Review Board to reject Employer's argument.

The Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.¹ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

We are not persuaded by Employer's argument that the ALJ erred in finding this claim timely filed. Employer's Brief at 4-13. Section 422(f) of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to pneumoconiosis" 30 U.S.C. §932(f). The medical determination must have "been communicated to the miner or a person responsible for the care of the miner." 20 C.F.R. §725.398(a). A miner's claim is presumed to be timely filed. 20 C.F.R. §725.308(b). To rebut this presumption, Employer must show 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.

¹ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because Claimant performed his coal mine employment in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4; Hearing Transcript at 26.

§725.308(a); *see Peabody Coal Co. v. Director, OWCP [Brigance]*, 718 F.3d 590, 594-95 (6th Cir. 2013).

Employer relied on Claimant's hearing testimony to support its assertion that a medical determination of total disability due to pneumoconiosis was communicated to him in 2009 and thus the claim was not timely filed. Employer's Brief at 9. Employer's counsel asked Claimant if he saw Dr. Baker "once in 2011 and once in 2014" in relation to a successful state workers' compensation claim. Claimant stated, "It seems like I did. I don't know whether I did or not." Hearing Tr. at 24-25. When asked if Dr. Baker told him he had "black lung disease," Claimant responded, "Well, no. I don't -- Dr. Baker, I don't remember that." *Id.* Employer's counsel then asked if he won his state workers' compensation claim because a doctor told him he "had black lung disease and [was] totally disabled by it." Claimant answered, "We filed and my doctor -- or my lawyer and everybody said I had black lung." *Id.* Employer's counsel again asked Claimant if a doctor told him around 2009 that he "had black lung disease and [was] totally disabled by that condition." *Id.* He stated that in "two thousand and right around nine, yes, he did." *Id.* When asked whether he "got out of coal mining" because a doctor told him that he was totally disabled due to pneumoconiosis in 2009, Claimant responded, "No, I got disabled." *Id.* at 25. When asked why he was disabled in 2009, Claimant responded, "Because of my back and my black lung too, I guess. I don't—." *Id.* Then, when asked a fourth time whether a doctor told him he was "totally disabled by [his] black lung disease in 2009," Claimant responded, "Yes." *Id.*

The ALJ permissibly found Claimant's testimony is not credible on the issue of whether a medical determination of total disability due to pneumoconiosis was communicated to Claimant in 2009 "[g]iven the evidence in the record of Claimant's low comprehension abilities and evidence of poor memory" Decision and Order at 5; *see Zurich Am. Ins. Grp. v. Duncan*, 889 F.3d 293, 299-300 (6th Cir. 2018); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983). The ALJ noted:

During his testimony Claimant often demonstrated confusion regarding the nature of the question being asked and was sometimes unable to provide pertinent responses. . . . In a response to a line of questions regarding when he ceased smoking, Claimant stated that it was his "remembering" that he quit in 2009, but added "I ain't got a very good remembering." The record contains a 2012 Opinion Awarding Benefits in Claimant's Workers' Compensation claim for injuries to Claimant's low back and left wrist, wherein the ALJ found the Claimant was "functionally illiterate" and had "difficulty communicated [his] thoughts in an understandable fashion."

Decision and Order at 5,² quoting Hearing Tr. at 16, 23 and citing Director's Exhibit 9 (internal citations omitted).

Employer argues the ALJ erred in discrediting Claimant's testimony. Employer's Brief at 4-13. It contends he erred in finding Claimant's memory lacking based on his answers regarding his smoking history without accounting for Claimant's specific answers regarding his employment history. *Id.* It also contends the ALJ was not present at the hearing as it was presided over by ALJ Larry A. Temin and thus he did not have a basis to assess Claimant's demeanor. *Id.* It maintains Claimant's ability to read is not pertinent to whether a doctor told him he was totally disabled due to pneumoconiosis. *Id.* Further, it argues the ALJ erred in requiring Claimant to specify which doctor told him he was totally disabled due to pneumoconiosis. *Id.* It asserts Claimant's testimony was adequately detailed. *Id.*

We reject Employer's arguments as they are simply requests to reweigh Claimant's testimony. The ALJ specifically addressed Claimant's responses about whether he had previously been diagnosed as totally disabled due to pneumoconiosis, and permissibly found "[d]uring his testimony Claimant often demonstrated confusion regarding the nature of the question being asked and was sometimes unable to provide pertinent responses." Decision and Order at 5-6. The ALJ also identified other factors, such as Claimant's testimony about his poor memory and evidence of his difficulty communicating in "an understandable fashion." *Id.* The ALJ evaluates the credibility and weight of the evidence, including witness testimony. *Rowe*, 710 F.2d at 255 (ALJ is granted broad discretion in evaluating the credibility of the evidence, including witness testimony); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 670 (4th Cir. 2017); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190, 1-192 (1989). The Board will not disturb an ALJ's credibility findings unless they are inherently unreasonable. *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc). Thus we reject these arguments. As Employer raises no other argument, we affirm the ALJ's finding that Employer did not rebut the presumption that Claimant's claim was timely filed. 20 C.F.R. §725.308(b); Decision and Order at 4-6.

² The ALJ also found the medical evidence and the evidence from Claimant's state workers' compensation claim are insufficient to rebut presumption of timeliness. Decision and Order at 5-6. We affirm these findings as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

As Employer does not otherwise challenge the ALJ's finding that Claimant is entitled to benefits, we affirm it. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Accordingly, the ALJ's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge