BRB Nos. 88-3663 BLA,
88-3663 BLA-A, 88-3663 BLA-B

CLIFFORD DAUGHERTY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
	)	
JOHNS CREEK ELKHORN COAL CORPORATION	)	
	)	
and	)	
	)	
CANADA COAL COMPANY	)	
	)	
Employers-Respondents	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of G. Marvin Bober, Administrative Law Judge, United States Department of Labor.

Janet L. Stumbo (Stumbo Derossett & Pillersdorf), Prestonsburg, Kentucky, for claimant.

Eric R. Collis (Lynch, Cox, Gilman, & Mahan, P.S.C.), Louisville, Kentucky, for Johns Creek Elkhorn Coal Corporation.

John W. Palmore (Jackson & Kelly), Lexington, Kentucky, for Canada Coal Company.

Before: STAGE, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Decision and Order (85-BLA-7466) of Administrative Law Judge G. Marvin Bober dismissing this claim filed pursuant to the provisions of Title IV of the Federal Coal

[1]Claimant is Clifford Daugherty, the miner, who filed his claim for benefits on October 18, 1983. Decision and Order at p.2 (unpaginated); Director's Exhibit 1.

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge, applying the regulations at 20 C.F.R. Part 725, dismissed the claim as untimely filed pursuant to Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented at 20 C.F.R. §725.308, without a hearing.[2] The administrative law judge found that claimant was informed by Dr. Anderson that he was totally disabled due to pneumoconiosis on October 21, 1977, Decision and Order at p.1 (unpaginated), and that claimant informed his employer that he was totally disabled due to pneumoconiosis and could not continue his coal mine employment on October 22, 1977, but did not file his claim until October 18, 1983. Decision and Order at pp.2-3 (unpaginated). The administrative law judge also found that claimant's non-coal mine employment as a nightwatchman and janitor is not comparable to his coal mine employment. Decision and Order at p.3 (unpaginated). Thus, the administrative law judge found that there were no extraordinary circumstances allowing waiver of the statute of limitations pursuant to 20 C.F.R. §725.308(c).[3] Decision and Order at p.3 (unpaginated).

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[2]Prior to the issuance of the administrative law judge's Decision and Order, an Order to Show Cause was issued on March 7, 1988, directing any interested party to demonstrate good cause as to why this claim should not be dismissed as untimely filed. Previously, the Director, Office of Workers' Compensation Programs, had submitted a motion to dismiss this claim as untimely filed on October 17, 1986. Claimant in his response reiterated his previous response to the Director's motion to dismiss, asserting that he was not totally disabled in 1977 inasmuch as he continued working until late 1980 and that the date of his disability is the last day he was able to work and not his last day of injurious exposure, citing *Maggard v. Jewell Ridge Coal Corp.*, 1 BLR 1-112 (1977). Alternatively, claimant contended that his continued employment constituted extraordinary circumstances, permitting waiver of the statute of limitations. Canada Coal Company responded to the show cause order, but Johns Creek Elkhorn Coal Corporation did not.

[3]Section 725.308 provides in pertinent part:

> (a) A claim for benefits. . .shall be filed within three years after a medical determination of total disability due to pneumoconiosis which has been communicated to the miner or a person responsible for the care of the miner. . . .
>
> (c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However,. . .the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

Accordingly, the claim was dismissed.

On appeal,[4] claimant contends that the administrative law judge erred in dismissing this case without a *de novo* hearing pursuant to Section 725.451 inasmuch as claimant's actual employment duties require findings of fact and he should be allowed to testify on this issue. Claimant's Brief at p.2 (unpaginated). Canada Coal Company responds, asserting that the proper use of summary disposition of claims is within the power of the administrative law judge, citing *Smith v. Westmoreland Coal Co.*, 12 BLR 1-39 (1988). Canada Coal's Brief at 8-9. Johns Creek Elkhorn Coal Corporation has adopted Canada Coal's response. In its cross-appeal, Canada Coal contends that it should be dismissed as a potential responsible operator inasmuch as the record reflects that it did not employ claimant for one full year, and that claimant subsequently worked for Johns Creek for three and one-half years. Canada Coal's Brief at 4. Johns Creek, in its cross-appeal, contends that it is not a successor operator pursuant to Section 725.493(a)(2) and should be dismissed from the case. Johns Creek's Brief at 3. The Director, Office of Workers' Compensation Programs, as party-in-interest, has not responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Regarding the dismissal of this claim as untimely filed, we recently construed Section 725.308 in *Adkins v. Donaldson Mine Co.*, BLR , BRB No. 89-2902 BLA (May 24, 1993), stating:

In view of the remedial purpose of the Act, we hold that

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[4]Initially, we grant the Motion to Withdraw filed by claimant's counsel, Janet L. Stumbo, inasmuch as subsequent to filing claimant's brief, she was elected to serve as a Judge on the Kentucky Court of Appeals and thus can no longer serve as claimant's counsel.

> Section 725.308(a) requires a written medical report, found to be probative, reasoned, and documented by the administrative law judge, indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware or in the exercise of reasonable diligence, should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment.

Adkins, slip op. at 7.

We interpreted "communication to the miner" to require that a medical opinion "is actually received by the miner"; thus, mere knowledge of the contents of a medical report is insufficient. *Adkins, slip op.* at 7. Further, we stated that "only those medical opinions using the phrase, `total disability due to pneumoconiosis,' or otherwise clearly indicating a medical determination of total disability due to pneumoconiosis should be found sufficient to trigger the statutory time limit for filing a claim." *Adkins slip op.* at 8.

In this case, the administrative law judge found that "claimant first learned that he was totally disabled on October 21, 1977 when he was thus informed by his physician, Dr. Anderson." Decision and Order at p.1 (unpaginated). The administrative law judge concluded "from the evidence adduced" that this information came from "competent medical authority." Decision and Order at p.3 (unpaginated).

The record reveals that Dr. Anderson's medical report, dated October 7, 1977, does not state that claimant is totally disabled due to pneumoconiosis; rather, the report merely states that claimant has category II pneumoconiosis according to a chest x-ray. Director's Exhibit 21. Moreover, Dr. Anderson's report is addressed to an attorney, and there is no evidence in the record that claimant physically received this report, or a copy of the doctor's subsequent deposition, taken on May 21, 1979, in which he stated that while claimant was vocationally disabled, he was not functionally disabled by pneumoconiosis. Director's Exhibit 21. *See* 30 U.S.C. §901(f)(1)(A); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-707 n.4 (1985)(evidence that claimant is vocationally disabled is insufficient to establish an inability to perform usual coal mine work); *see also Bentley v. Director, OWCP*, 7 BLR 1-612 (1984). Therefore, we vacate the administrative law judge's finding that Dr. Anderson's opinion constitutes a "medical determination of total disability due to pneumoconiosis" sufficient to trigger the statutory limitation.[5]

[5]In this case, while claimant testified at the Kentucky Workers' Compensation Board hearing on March 27, 1979 that Dr. Anderson informed him he had pneumoconiosis, claimant did not say that the physician also told him that he was totally disabled due to pneumoconiosis. Unmarked Exhibit. Moreover, it appears from the record that

See Adkins, slip op. at 8.

Claimant contends that the administrative law judge erred in dismissing this case without a *de novo* hearing pursuant to Section 725.451 inasmuch as evaluation of claimant's actual employment duties requires findings of fact and that he should therefore be allowed to testify on this issue. Claimant's Brief at p.2 (unpaginated). We agree. Section 725.450 provides that "[a]ny party. . .shall have a right to a hearing concerning any contested issue of fact or law unresolved" by the administrative law judge. 20 C.F.R. §725.450. While Section 725.452(c) authorizes summary proceedings under the Act, where there is "no genuine issue as to any material fact," *see Smith v. Westmoreland Coal Co.*, 12 BLR 1-39 (1988); *see also* 29 C.F.R. §18.1(a); *see generally Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2552 (1986), we stated in *Adkins* that a determination regarding rebuttal of the "timeliness presumption is fact-specific and depends on the administrative law judge's credibility assessments of the documentary and testimonial evidence." *Adkins, slip op.* at 5; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)*(en banc)*.

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claimant's statement to his employer in a letter dated October 22, 1977 that "I have been informed I have black lung and am disabled by the same" was based on claimant's independent conclusion regarding total disability. *See* Unmarked Exhibit. However, claimant continued to work until October, 1983 as a nightwatchman and janitor for a car dealer. On remand, the administrative law judge should inquire into the type of information claimant obtained that prompted him to submit the letter in 1977 informing his employer that he was disabled by black lung. *See* discussion, *infra*.

The record in this case contains numerous depositions of physicians testifying before the Kentucky Workers' Compensation Board[6] in May and June, 1979. Drs. Clarke and Wright testified that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 21. Drs. Myers and Penman testified that they found claimant to be limited in performing arduous or heavy manual labor, and Drs. Anderson and Pelaez testified that claimant was vocationally disabled. Director's Exhibit 21. Additionally, there is a medical report from Dr. Odom, dated November 10, 1977, stating that he found claimant "totally and permanently disabled for his usual occupation of coal mining or work in a dusty environment." Director's Exhibit 21.

In his dismissal order, the administrative law judge did not discuss any of this medical evidence relevant to the issue of total respiratory disability or whether claimant had any knowledge of these doctors' opinions. Inasmuch as resolution of the issues raised by Section 725.308, as construed in *Adkins*, requires specific findings of fact, as more fully discussed, *infra*, and as the record in the instant case clearly indicates the need for resolution of issues pertaining to material facts relevant to the Section 725.308 inquiry, we hold that the administrative law judge erred in disposing of the instant case by dismissal prior to hearing. Accordingly, we remand this case for a formal hearing.[7]

In accordance with *Adkins*, on remand the administrative law judge must determine whether any of the medical evidence of record constitutes a medical determination of total disability due to pneumoconiosis. *See* Director's Exhibit 21. In addition, if the administrative law judge determines that a medical opinion

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[6]The Kentucky Workers' Compensation Board awarded claimant benefits for 425 weeks beginning January 15, 1976, and later corrected the award to reflect benefits beginning September 13, 1980. Unmarked Exhibit.

[7]We note that it is within the administrative law judge's discretion to re-open the record for admission of additional evidence if necessary for the resolution of disputed issues. *See* 20 C.F.R. §725.456(e); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*).

satisfies the requirements of *Adkins*, *i.e.*, that it is "probative, reasoned, and documented. . .indicating total respiratory disability due to pneumoconiosis in such a manner that the miner was aware or in the exercise of reasonable diligence should have been aware, that he was totally disabled due to pneumoconiosis arising out of coal mine employment," then the appropriate inquiry is whether claimant had "actual physical receipt" of this opinion or merely knowledge of its contents. *Adkins, slip op* at 7. If claimant actually received such a medical opinion, the next question is whether he understood the opinion to indicate that he had a basis for claiming benefits under the Act. *Adkins, slip op.* at 8. Finally, we reiterate our conclusion in *Adkins*:

> [W]hen determining whether the requirements of Section 725.308 have been met, an administrative law judge should keep in mind that the regulation, which we have strictly construed, presumes that all claims are timely filed, that the party opposing entitlement bears the burden of rebutting the presumption of timeliness, and that, even if rebuttal is established, the administrative law judge must then determine whether "extraordinary circumstances" exist, thus tolling the time limit, *see* 20 C.F.R. §725.308(c); *see also* 33 U.S.C. §920(b); *Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

Adkins, slip op. at 8. If the administrative law judge determines that this claim was timely filed pursuant to Section 725.308, then he must resolve the responsible operator issue, and consider whether claimant has established entitlement under Part 718 of the regulations.[8]

[8]Inasmuch as the administrative law judge made no findings regarding the responsible operator issue, we have no basis for review of the arguments made by Canada Coal and Johns Creek, Canada Coal's Brief at 4; Johns Creek's Brief at 3. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *see also Director, OWCP v. U.S. Steel Corp. [Baluh]*, 606 F.2d 53, 2 BLR 2-25 (3d Cir. 1979); *cf. Hamric v. Director, OWCP*, 6 BLR 1-1091 (1984). On remand, if the administrative law judge

proceeds to adjudicate the claim and award benefits, he must resolve the question of liability for payment. *See* 20 C.F.R. §§725.491-725.495; *Hoover v. Manor Mines, Inc.*, 17 BLR 1-1 (1992); *Demchak v. Elliot Coal Mining Co., Inc.*, 12 BLR 1-178 (1989).

Accordingly, the Decision and Order dismissing this claim is vacated and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

NANCY S. DOLDER,
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge