BRB No. 89-2902 BLA

GROVER L. ADKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DONALDSON MINE COMPANY	)	
	)	
Employer-Respondent	)	
	)	
	)	
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 Peter McC. Giesey, Administrative Law Judge, United States Department of Labor.

Grover L. Adkins, Fayetteville, West Virginia, *pro se*.

Stacy V. Killen (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant,[1] without the assistance of counsel, appeals the Decision and Order (89-BLA-0682) of Administrative Law Judge Peter McC. Giesey dismissing this 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). The administrative law judge, applying the regulations at 20 C.F.R. Part 725, determined that claimant's application for benefits was untimely filed pursuant to 20 C.F.R. §725.308, and, accordingly, dismissed the claim with prejudice. The administrative law judge found that Dr. Rasmussen's opinion dated March 23, 1981 was a medical determination of total disability due to pneumoconiosis, that claimant's application for state benefits, dated March 30, 1981, was proof that he understood this determination, Decision

[1]Claimant is Grover L. Adkins, the miner, who filed his claim for benefits on May 20, 1987. Decision and Order at 1; Director's Exhibit 1.

and Order at 2, and that claimant did not file a federal application for benefits until May 20, 1987, six years later. Decision and Order at 1. Thus, the administrative law judge granted employer's motion to dismiss the federal claim as untimely filed. Decision and Order at 2.

On appeal, claimant contends that he tried to file a claim for benefits in March of 1982 and was told that he need not file until he was disabled or quit work. Claimant's Letter at 1. Claimant also states that the first time he was told he would never work again was in October 1986. Claimant's Letter at 1. Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs, as party-in-interest, has declined to participate in this appeal.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law. 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).

The administrative law judge found that Dr. Rasmussen's medical opinion of March 23, 1981 "certainly rules out continued performance of [claimant's] usual and regular work as a roof bolter which is commonly known to be a strenuous job requiring heavy lifting and overhead exertion." Decision and Order at 2. Additionally, the administrative law judge concluded that there "can be no question on this record" that claimant's application for benefits with the State of West Virginia was proof that claimant "understood and acted upon a `medical determination of total disability due to pneumoconiosis' in March 1981." Decision and Order at 2. Based on the rationale that follows, we vacate the administrative law judge's dismissal of this claim as untimely filed and remand for reconsideration of the timeliness issue under Section 422(f), particularly with respect to the crucial question of what constitutes "a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. . . ." 20 C.F.R. §725.308(a).

The statute of limitations found at Section 422(f), 30 U.S.C. §932(f), provides:

> Any claim for benefits by a miner under this section 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.

The implementing regulation 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.

The statute of limitations contained in the Act is absent any qualifying language indicating how to determine whether its requirements have been met. The statutory history does not explain why the statute of limitations was included in the Act. The general purpose of any statute of limitations in workers' compensation is to protect an employer from claims too old to litigate successfully, *see* A. Larson, *The Law of Workmen's Compensation* §78.10 (1989); however, the progressive nature of pneumoconiosis diminishes the need for early notice to employer. *See Faulk v. Peabody Coal Co.*, 14 BLR 1-18, 1-21 (1990).

The legislative history of Section 422(a) establishes that Congress intended to permit the Secretary of Labor "to publish additional provisions by regulation, when he believes such publication will facilitate the administration of this part . . . ." *Legislative History of the Federal Coal Mine Health and Safety Act of 1969 (Pub. L. 91-173); Committee Print; Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate; Section-by-Section Analysis and Explanation*; 94th Cong., 1st Sess. at 1624 (1975). "The objective of [Section 422(a)] is to provide adequate flexibility" to the Secretary in carrying out this provision. *Id.* Thus, in promulgating the regulations, the Secretary is permitted to dilute the effect of the statute where he deems it necessary in view of the benevolent purposes of the Act. *See generally Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

While the apparent purpose of Section 422(f) is to aid the miner by prompting the filing of a claim that may result in an award of benefits to him, the traditional purpose of a statute of limitations, *i.e.*, early notice of claims will serve to forestall staleness of evidence, is largely irrelevant in black lung cases because of the progressive nature of pneumoconiosis. Thus, the effect of the statute's implementing regulation is to ensure that a miner will have a colorable claim, *i.e.*, that he is aware of a medical determination that he is, in fact, totally disabled due to pneumoconiosis.

As discussed below, the regulatory provision implementing Section 422(f) also reflects the presumption of timeliness of notice in a claim that is provided by Section 20(b) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §920(b), as incorporated into the Act by 30 U.S.C. §932(a), and is consistent with the much-quoted premise that the Act is remedial legislation to be liberally construed so as to encompass the largest number of miners within its entitlement provisions, *see Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-62 (6th Cir. 1989); *see also Director, OWCP v. Consolidation Coal Co. [Petracca]*, 884 F.2d 926, 13 BLR 2-38 (6th Cir. 1989); *Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). The United States Court of Appeals for the Third Circuit commented that twice Congress has had to specify its intention that the Act have as broad coverage as possible. *Echo v. Director, OWCP*, 744 F.2d 327, 330, 6 BLR 2-110, 2-115 (3d Cir. 1984), *citing S. Rep. No. 743, 92nd Cong., 2d Sess. 17, reprinted in 1972 U.S. Code Cong. & Ad. News* at 2321. The United States Supreme Court stated in *Pauley v. Bethenergy Mines, Inc.*, 111 S.Ct 2524, 2529, 15 BLR 2-155, 2-157 (1991) that the Black Lung Benefits Reform Act further liberalized eligibility criteria in several ways. Finally, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recently emphasized that claims must be evaluated with Congress' beneficent intent in mind. *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). The Fourth Circuit court also followed the Third Circuit court in adopting an interpretation of Section 718.205(c)(2) which greatly diminishes claimants' burden of proof in survivor's claims. *See Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 13 BLR 2-100 (3d Cir. 1989). Against this background, it logically follows that the Act's statute of limitations must be construed in a manner that does not unduly restrict the filing and pursuit of claims under the Act.

Toward that end, the statute's implementing regulation, 20 C.F.R. §725.308, contains additional language, not found in the statute, that qualifies the bare statutory requirements. Specifically, the regulation requires that the medical determination of total disability be communicated to the miner,

whereas the statute does not contain such a provision. Also, the regulation places the burden on employer to prove untimeliness inasmuch as it provides a rebuttable presumption "that every claim is timely filed." Finally, while the time limit of three years is mandatory, waiver is possible if a claimant can demonstrate "extraordinary circumstances." 20 C.F.R. §725.308(a), (c).

The substance of the regulatory provision implementing Section 422(f) has changed from 1973. The prior regulation (in effect then) included time limitations on filing survivor's claims and a provision that "[t]he time limitations. . .are mandatory and may not be waived or otherwise avoided for any reason." 20 C.F.R. §725.124(b), (c)(1973). The regulation in effect from 1974 to 1978 contained language indicating that the miner must be "informed by competent medical authority" of a determination of total disability due to pneumoconiosis based on criteria "substantially similar" to those applicable to claims filed under the Act, and added a rebuttable presumption of timeliness. 20 C.F.R. §725.124 (1973). The current regulation does not contain language identifying the criteria on which "a medical determination of total disability due to pneumoconiosis" must be based, the provision regarding time limits on survivor's claims has been deleted, and the provision allowing an exception to the timeliness requirement for "extraordinary circumstances" was added. 20 C.F.R. §725.308. Neither the legislative history nor the comments in the regulatory history explain why these changes were implemented or how the phrases "medical determination of total disability due to pneumoconiosis" or "communication to the miner" shall be interpreted. *See* 39 Fed. Reg. 13265 (1974); 41 Fed. Reg. 41912 (1976); 43 Fed. Reg. 17732 (1978); 43 Fed. Reg. 36785 (1978); 45 Fed. Reg. 44264 (1980); H.R. Rep. No. 95-151, 95th Cong., *reprinted in* 1978 U.S. Code Cong. & Ad. News, 237.

The fact that the implementing regulation has been gradually modified to emphasize the timeliness presumption and to provide claimants relief from the timeliness bar in "extraordinary circumstances," substantiates our strict interpretation of this provision. In essence, strictly construing "a medical determination of total disability communicated to the miner" logically parallels the evolution of the pertinent regulatory provision since 1969.

Section 725.308(c), quoted above, provides a "rebuttable presumption that every claim for benefits is timely filed." 20 C.F.R. §725.308(c). In this case, the administrative law judge did not accord claimant the benefit of this presumption of timeliness. Rather than reviewing the evidence of record to determine whether employer had carried its burden of rebutting the timeliness presumption, the administrative law judge merely found that claimant received, understood, and acted upon a

medical determination of total disability due to pneumoconiosis in March 1981, but did not file a federal claim until 1987. Decision and Order at 2. Further, upon finding that this claim was not timely filed, the administrative law judge did not then determine whether claimant established "a showing of extraordinary circumstances," as required by the regulation. 20 C.F.R. §725.308(c). Therefore, we vacate the administrative law judge's findings pursuant to Section 725.308 and remand this case to him to make the appropriate findings.

Because the determination of whether the evidence is sufficient to rebut the timeliness presumption is fact-specific and depends on the administrative law judge's credibility assessments of the documentary and testimonial evidence, we next address the meaning of "a medical determination of total disability due to pneumoconiosis." Obviously, a "medical determination" must be rendered by a physician, but may include an oral statement to a claimant, a state workers' compensation board finding based on medical conclusions, a doctor's written report, a medical opinion found by an administrative law judge to be documented, and/or reasoned, and/or probative, and, therefore, capable of establishing that claimant is totally disabled due to pneumoconiosis.

Claims filed under the Act reflect a wide range of physicians' findings, *e.g.*, a simple diagnosis of chronic obstructive pulmonary disease or coal workers' pneumoconiosis, advice to avoid coal mine dust, an opinion noting only physical limitations or some respiratory impairment, or a comprehensive diagnosis of total respiratory impairment or total disability due to pneumoconiosis. For purposes of Section 725.308, the terminology used in the medical determination must be such 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.

In this case, the administrative law judge noted that the record contains Dr. Rasmussen's report, dated March 23, 1981, which diagnosed coal workers' pneumoconiosis and "minimal to moderate impairment," concluding

> This patient would appear to be capable of performing steady work at light to strictly light work levels. A numerical estimate of the overall loss of functional capacity in this case would be placed in the neighborhood of 50% - 60%.

Director's Exhibit 12. On its face, this report does not attribute claimant's "minimal to moderate" pulmonary impairment to pneumoconiosis. Nor does it state that claimant is totally disabled due to pneumoconiosis. Rather, the report indicates that the patient could perform "light work," thus raising a

question of claimant's ability to perform his usual coal mine employment, *see* Decision and Order at 2; *see generally Budash v. Bethlehem Mines Corp.* 9 BLR 1-48 (1986)(*en banc*), *aff'd on recon.*, 9 BLR 1-104 (1986). 20 C.F.R. §718.204(b)(2). The administrative law judge did not provide an adequate rationale for his implied conclusion that this report represents a "medical determination of total disability due to pneumoconiosis," and seemed instead to rely on the fact that claimant filed a state claim and thus must have known that he was disabled under the Act.

However, claimant testified that he left work in October 1981 because he broke his back, Decision and Order at 2; Hearing Transcript at 7, 12; that he did not file a federal claim sooner because he was hoping that he could return to work; and that he waited until he found out that he was never going to be able to return to work before he filed his claim under the Act.[2] Hearing Transcript at 21-22. On remand, we instruct the administrative law judge to consider claimant's assertions made at the hearing in conjunction with the contents of Dr. Rasmussen's report in determining the issue of timeliness pursuant to Section 725.308.[3]

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

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[2]In his appeal letter to the Board, claimant states that he went to the Department of Labor office in Beckley, West Virginia, in March of 1982 and was told that he could not file until he "was disabled on Social Security" or quit work. Claimant's Letter at 1. Claimant also contends that he waited to file until 1987 because it was not until October of 1986 that he was told he would never work again. *Id.*

Although we cannot consider such assertions for the first time on appeal because to do so would exceed our scope of review, *see* 20 C.F.R. §802.301; *see also Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985); *see generally Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988)(modification is permitted based on mistake of fact in initial decision), we note that such assertions tend to support claimant's explanation of why he waited until 1987 to file a federal black lung claim.

[3]We note that it is within the administrative law judge's discretion to re-open the record for admission of additional evidence. *See Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989)(*en banc*).

The second prong of the regulation "communication to the miner" must also be liberally construed, both in terms of communication and comprehension. Regarding the communication element, under Sections 12 and 13 of the Longshore Act, a claimant must give notice of an injury to employer and file a claim within a certain time period. *See* 33 U.S.C. §§912, 913. In hearing loss cases, the Board has held that Section 8(c)(13)(D) requires claimant to have actual physical receipt of a copy of the audiogram and its accompanying report before the time periods pursuant to Sections 12 and 13 can begin to run. *See* 33 U.S.C. §§908(c)(13)(D), 912, 913; *see Ranks v. Bath Iron Works Corp.*, 22 BRBS 301 (1989); *Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988); *Swain v. Bath Iron Works Corp.*, 18 BRBS 148 (1986). "Mere knowledge of the results of an audiogram is insufficient to start the running of the statute of limitations." *Ranks, supra*.

While the notice and filing requirements, as well as Section 8, were expressly excluded from the Act, *see* 30 U.S.C. §932(a), we believe that the communication requirement of Section 8(c)(13)(D) is somewhat analogous to that of Section 725.308(a). In view of the regulatory history as previously discussed, *supra*, we construe "communication to the miner" to require that a written report is actually received by the miner. Obviously, oral statements to the miner (or by the miner) and hearsay communications such as "the doctor told my wife" are insufficient. Claimant testified that he saw Dr. Rasmussen in March of 1981 and filed his state claim in 1982 after he got the results of the testing. Hearing Transcript at 21. Thus, the appropriate inquiry on remand would be whether claimant had actual physical receipt of this medical opinion or merely had knowledge of its contents.

The next question concerns the miner's comprehension of what he has received. The administrative law judge's determination should be guided by the miner's level of education and acumen, *i.e.*, was the miner, given all the circumstances, truly aware that he had a viable claim for benefits because he had been found to be totally disabled due to pneumoconiosis arising out of coal mine employment. For example, in any given case an administrative law judge will have to consider the layers of a miner's comprehension, *i.e.*, can the miner read, if so, at what level, and does this level enable the miner to understand a physician's medical opinion. We note that the pertinent facts will vary widely from case to case and emphasize the highly subjective nature of the comprehension of the miner in each case. Thus, 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. *See* 20 C.F.R. §725.308; *Lucas v. Director, OWCP*, 14 BLR 1-112, 1-114 (1990)(*en banc* with McGranery, J., dissenting); *Budash*, *supra*; *see also Eplion v.*

Director, OWCP, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986); *see generally Keener v. Eastern Associated Coal Corp.*, 954 F.2d 209, 213, 16 BLR 2-9, 2-15, 2-16 (4th Cir. 1992)(miner's clear statements indicate understanding of need to apply for benefits within three years of medical determination of total disability due to pneumoconiosis; *Director, OWCP v. Forsyth Energy [McCluskie]*, 666 F.2d 1104, 1107, 4 BLR 2-26, 2-30 (7th Cir. 1981)(most persuasive evidence of congressional intent is words selected).

Finally, when 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).

Accordingly, the administrative law judge's Decision and Order dismissing this claim with prejudice is vacated, and this case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge