BRB No. 07-0562 BLA

R.W. Claimant-Respondent v. WILLIAMS BROTHERS COAL COMPANY and KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/29/2008 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Correcting Administrative Error of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

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

Barry H. Joyner (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2005-BLA-05239) of Administrative Law Judge Janice K. Bullard rendered on a subsequent 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 accepted the parties' stipulation that claimant had at least eighteen years of qualifying coal mine employment, as supported by the record, and adjudicated this subsequent claim, filed on January 12, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge determined that employer failed to rebut the presumption of timely filing pursuant to 20 C.F.R. §725.308, and found that the newly submitted evidence was sufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge then found that the weight of the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Accordingly, benefits were awarded. The administrative law judge subsequently issued an Order Correcting Administrative Error, indicating that the evidence of record did not establish the date of onset of total disability due to pneumoconiosis, and directing payment of benefits commencing as of January 2004, the month and year in which the claim was filed, consistent with the provisions at 20 C.F.R. §725.503(b).

On appeal, employer challenges the administrative law judge's finding that this subsequent claim was timely filed pursuant to Section 725.308, as well as her weighing of the evidence on the issues of the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a), 718.203(b), and disability causation at Section 718.204(c). Employer also contends that the administrative law judge lacked jurisdiction to issue her Order Correcting Administrative Error. Claimant responds, urging the Board to reject employer's arguments and affirm the award of benefits, payable from January 2004. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with employer's assertion that the administrative law judge misapplied the law in finding that this claim was timely filed, but arguing that the error was harmless. Employer has also filed a reply brief in support of its position.[1]

[1] On appeal, employer does not challenge the administrative law judge's finding that total respiratory disability was established pursuant to 20 C.F.R. §718.204(b), and employer concedes that this finding demonstrates a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Employer's Brief at 6 n.1. Consequently,

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.[2] 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).

Section 725.308 requires that a living miner's claim for benefits be filed within three years after a medical determination of total disability due to pneumoconiosis has been communicated to the miner or a party responsible for the care of the miner. 20 C.F.R. §725.308(a); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). The regulation also provides that there is a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). In the present case, employer maintains that the administrative law judge failed to apply controlling precedent in finding that the three-year statute of limitations set forth at Section 725.308 was applicable only to claimant's initial claim filed on June 21, 1989, *see* Decision and Order at 5. Consequently, employer contends that the administrative law judge erred in concluding that a medical determination of total disability due to pneumoconiosis must have been communicated to claimant prior to June 21, 1986 in order for the present claim to have been untimely filed. Employer argues that Dr. Sundaram's 1990 medical report,[3] offered into evidence in claimant's initial claim, in conjunction with claimant's answer to an interrogatory requesting the basis for claimant's belief that he had pneumoconiosis and was totally disabled by the disease, *i.e.*, "[m]y treating physician told me, as well as physicians since +/- 1985," Director's Exhibit 21 at 5, could, if credited, rebut the presumption at Section 725.308(c). Employer's arguments have merit.

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, stated in *Kirk* that:

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we affirm the administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 1.

[3] We reject the Director's argument that employer waived reliance on Dr. Sundaram's opinion by failing to plead this affirmative defense with specificity before the administrative law judge. Director's Brief at 2-3. Employer challenged the timeliness of this subsequent claim below, and the time limits are mandatory. 20 C.F.R. §725.308(c).

> The three-year limitations clock begins to tick *the first time* that a miner is told by a physician that he is totally disabled by pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale*, the clock may only be turned back if the miner returns to the mines after a denial of benefits. There is thus a distinction between premature claims that are unsupported by a medical determination. . . .and those claims that come with or acquire such support. Medically supported claims, even if ultimately deemed "premature" because the weight of the evidence does not support the elements of the miner's claim, are effective to begin the statutory period. Three years after such a determination, a miner who has not subsequently worked in the mines will be unable to file any further claims against his employer, although, of course, he may continue to pursue pending claims.

Kirk, 264 F.3d at 608, 22 BLR at 2-298-299 (emphasis in original), citing *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). Thus, contrary to claimant's and the Director's arguments, the *Kirk* court would treat a credible medical determination of total disability due to pneumoconiosis that is communicated to the miner as sufficient to trigger Section 725.308 regardless of the outcome of the claim which the physician's opinion sought to support. Further, while the Director asserts that there is no evidence that Dr. Sundaram's opinion was communicated to claimant, the question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to Section 725.308 involves factual findings that are appropriately made by the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Consequently, we must vacate the administrative law judge's finding that this claim was timely filed pursuant to Section 725.308, and remand the case to the administrative law judge for reconsideration of the issue pursuant to the holding in *Kirk*. In addressing Dr. Sundaram's report on remand, the administrative law judge must determine if the physician rendered a well-reasoned diagnosis of total disability due to pneumoconiosis such that his report constitutes a "medical determination of total disability due to pneumoconiosis which has been communicated to the miner. . . ." 20 C.F.R. §725.308(a); *see Furgerson v. Jericol Mining Inc.*, 22 BLR 1-206 (2002); *Abshire v. D&L Coal Co.*, 22 BLR 1-202 (2002)(*en banc*). If the administrative law judge determines that Dr. Sundaram's report satisfies the terms of Section 725.308(a) and, therefore, that employer has rebutted the presumption that claimant's subsequent claim was timely filed, entitlement to benefits is precluded and the administrative law judge need not reach the remaining issues in this case. *Kirk*, 264 F.3d 602, 22 BLR 2-288.

Turning to the merits, employer contends that the administrative law judge failed to engage in a rational consideration of the issues of the existence of pneumoconiosis, its etiology, and disability causation based upon the evidence in the record as a whole. Employer asserts that the administrative law judge summarily discounted all of the

relevant evidence from the miner's prior claim by stating that "its persuasive value is severely diminished due to its age," Decision and Order at 13, and thus erred by applying a "most recent evidence" rule without any actual analysis of the prior evidence. Employer's arguments have merit.

While the administrative law judge rationally found that the newly submitted x-ray evidence at Section 718.202(a)(1) was overwhelmingly positive for pneumoconiosis because eight out of nine readings of four films taken between February 11, 2004 and June 13, 2006 were classified as positive, the administrative law judge was still required to review and analyze the earlier x-ray evidence, consisting of mixed positive and negative interpretations taken between 1973 and 1990, in determining whether the weight of the evidence was sufficient to establish the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Further, although the administrative law judge correctly observed that clinical pneumoconiosis is encompassed within the definition of legal pneumoconiosis, *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005), we agree with employer's argument that a determination as to the etiology of claimant's chronic obstructive lung disease is necessary in order to properly assess the probative value of the conflicting medical opinions on the issue of disability causation at Section 718.204(c). Such a determination must be based on a weighing of all of the medical opinions of record relevant to the issue of legal pneumoconiosis at Section 718.202(a)(4). Moreover, the earlier x-ray evidence and medical opinions are also relevant to the administrative law judge's consideration of rebuttal at Section 718.203(b).[4] Consequently, we vacate the administrative law judge's findings at Sections 718.202(a)(1), (4), 718.203(b) and 718.204(c), and remand this case for consideration and weighing of all relevant evidence in the record as a whole.

We reject employer's contention that, before finding the existence of pneumoconiosis established at Section 718.202(a)(1), the administrative law judge was required to address the complete interpretations of Drs. Fino, Broudy and Halbert, who classified films as 2/1, 1/1 and 1/2, respectively, but indicated that the irregular opacities seen in the mid and lower lung zones did not represent coal workers' pneumoconiosis. Employer's Brief at 19-24. As these physicians affirmatively diagnosed parenchymal

[4] At 20 C.F.R. §718.203(b), the administrative law judge weighed the conflicting medical reports of Drs. Forehand, Broudy and Fino, and compared the conflicting classifications of the radiologists as to the shape, size and location of opacities observed on the newly submitted x-rays of record. Decision and Order at 14-15. However, the administrative law judge did not address Dr. Halbert's opinion that the opacities were not consistent with coal workers' pneumoconiosis, *see* Employer's Exhibit 1, nor did he address any of the earlier x-ray interpretations or medical opinions relevant to the etiology of any opacities observed.

abnormalities consistent with pneumoconiosis, albeit not *coal workers'* pneumoconiosis, their opinions regarding the source of the abnormalities are properly addressed at Section 718.203(b). *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc on recon*.). If, on remand, the administrative law judge again finds that the existence of pneumoconiosis is established at Section 718.202(a)(1), she must weigh the conflicting medical opinions and radiologists' reports, old and new, relevant to the etiology of the pneumoconiosis in determining whether rebuttal is established at Section 718.203(b). The administrative law judge must also determine whether the weight of the medical opinions of record is sufficient to establish legal pneumoconiosis at Section 718.202(a)(4), without the benefit of the Section 718.203(b) presumption. *See* 20 C.F.R. §718.201(b); *see generally Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

As employer concedes that total respiratory disability is established, the administrative law judge, on remand, must assess all of the record evidence relevant to the issue of whether occupational pneumoconiosis is a substantially contributing cause of claimant's disabling impairment at Section 718.204(c), taking into account the relative qualifications of the physicians, the persuasiveness and detail of the physicians' explanations, the underlying documentation, and the significance of any flaws in the opinions, such as inaccurate coal mine employment or smoking histories. 20 C.F.R. §718.204(c)(1), (2); *see generally Martin*, 400 F.3d 302, 23 BLR 2-261; *Cornett*, 227 F.3d 569, 22 BLR 2-107.

Lastly, we agree with employer's argument that the administrative law judge lacked jurisdiction to issue the Order Correcting Administrative Error while this case was pending on appeal before the Board, *see* 20 C.F.R. §725.479, and we vacate the administrative law judge's determination that benefits shall commence as of January 2004. If, on remand, the administrative law judge finds entitlement established, she must reconsider the date from which benefits commence pursuant to the regulatory criteria. 20 C.F.R. §725.503; *see also Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Owens v. Jewell Smokeless Corp.*, 14 BLR 1-47 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Order Correcting Administrative Error is vacated. The Decision and Order Awarding Benefits of the administrative law judge is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge