

BRB No. 09-0329 BLA

WILLIAM GREEN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY, C/O)	
ACORDIA EMPLOYERS SERVICE)	
)	DATE ISSUED: 12/16/2009
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Michelle S. Gerdano (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 (2007-BLA-5617) of Administrative Law Judge Alice M. Craft rendered on a request for modification of the

denial of a subsequent claim¹ 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). Upon stipulation of the parties,² the administrative law judge credited claimant with sixteen years of coal mine employment, and adjudicated this subsequent claim, filed on November 21, 2005, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge found that claimant's current claimant was timely filed, and that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b). Considering the entire record, the administrative law judge found the evidence sufficient to establish that claimant was totally disabled from legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the current claim was timely filed. Employer also challenges the administrative law judge's weighing of the evidence on the merits of the claim on the issues of the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203, and disability causation at 20 C.F.R. §718.204(c). The Director, Office of Workers' Compensation Programs, has filed a limited response asserting that the miner's claim was timely filed.³

¹ Claimant's initial claim for benefits, filed on September 28, 1983, was denied by Administrative Law Judge Thomas W. Murrett on August 3, 1987, because claimant failed to establish the existence of pneumoconiosis or a totally disabling respiratory impairment. No further action was taken on this claim. Director's Exhibit 1. Claimant's current claim was denied by the district director on July 19, 2006, because claimant failed to establish any element of entitlement, and claimant petitioned for modification on August 23, 2006. Director's Exhibit 36, 38, 39. Claimant's request for modification was denied by the district director on January 30, 2007, and claimant requested a formal hearing on February 12, 2007. Director's Exhibits 48, 49.

² Claimant appeared *pro se* before the administrative law judge. Hearing Transcript at 5.

³ We affirm, as unchallenged on appeal, the administrative law judge's findings that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d); that the evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b); and that the evidence was insufficient to establish clinical pneumoconiosis at 20 C.F.R. §718.202(a). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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.⁴ 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).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Turning first to the issue of timeliness, the Black Lung Benefits Act 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. 30 U.S.C. §932(f);⁵ 20 C.F.R. §725.308(a);⁶ *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). In order to trigger the running of the three-year statute of limitations, the medical determination must be a

⁴ The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibits 1-35, 36.

⁵ 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.

⁶ 20 C.F.R. §725.308 was promulgated to implement 30 U.S.C. §932(f). It provides in relevant part:

(a) A claim for benefits filed under this part by, or on behalf of, a miner 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, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later. There is no time limit on the filing of a claim by the survivor of a miner.

reasoned opinion of a medical professional, and must not have been discredited or found to be outweighed by contrary evidence in a prior adjudication. *Arch of Kentucky, Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009); *Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006)(*en banc*); *Sturgill v. Bell County Coal Co.*, 23 BLR 1-159, 1-166 (2006)(*en banc*). Additionally, the regulation provides a rebuttable presumption that all claims are timely filed. 20 C.F.R. §725.308(c). The question of whether the evidence is sufficient to establish rebuttal of the presumption of timely filing of a claim pursuant to 20 C.F.R. §725.308(a), (c) involves factual findings that are appropriately made by the administrative law judge. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*).

In the present case, the administrative law judge rationally concluded that claimant's testimony, and claimant's 2002 Social Security Administration (SSA) award of disability benefits,⁷ were insufficient to rebut the presumption of timeliness. Decision and Order 6-8. The administrative law judge acted within her discretion in finding that claimant's treatment for breathing problems in 1983, and claimant's ambiguous testimony that he was told by his treating physician that he had black lung or that he was disabled by knee and breathing problems, did not constitute sufficient evidence to support employer's burden on rebuttal. Decision and Order at 7; Hearing Transcript at 35; *see Brigance*, 23 BLR at 1-175; *Sturgill*, 23 BLR at 1-166. Likewise, claimant's SSA award of disability benefits in 2002 is insufficient to start the running of the statute of limitations, as the SSA claim was adjudicated under a different standard than the current claim, and the award constitutes a legal determination, rather than a medical determination of disability, as required by Section 725.308. *See Kirk*, 264 F.3d at 607, 22 BLR at 2-297; *Sturgill*, 23 BLR at 1-166; Decision and Order at 7. Furthermore, contrary to employer's argument, reference to Dr. Bell's 1989 medical findings⁸ in the body of the

⁷Claimant filed a claim for disability benefits with the Social Security Administration (SSA) on January 26, 1996, which was initially denied on April 8, 1996, and again denied upon reconsideration on May 9, 1996. After claimant filed a request for a hearing, the claim was denied on September 11, 1997. On March 19, 1999, the SSA Appeals Council vacated the denial and remanded the case, and the claim was subsequently denied by an administrative law judge. The case was appealed to the United States District Court for the Western District of Kentucky, which remanded the case for further vocational expert testimony. On May 21, 2002, claimant was awarded disability insurance benefits. Claimant's Exhibit 5.

⁸ The Social Security decision states that, "On November 6, 1989, Dr. Bell opined that claimant's most severe disability was related to his pulmonary fibrosis and pneumoconiosis with recurrent bronchitis, progressive shortness of breath, the loss of vital capacity with secondary hypertension." Claimant's Exhibit 5.

SSA award does not establish that Dr. Bell found claimant to be totally disabled in 1989, or that such an opinion was communicated to claimant. *See Ken Lick Coal Co. v. Director, OWCP [Lacy]*, No. 06-4512 (6th Cir. Nov. 2, 2007)(unpub.); *W.C. [Cook] v. Benham Coal, Inc.*, 24 BLR 1-50, 1-53 (2008); Decision and Order at 7. Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that employer failed to rebut the presumption of timeliness pursuant to 20 C.F.R. §725.308.

Employer next challenges the administrative law judge's weighing of the medical opinion evidence at Section 718.202(a)(4), contending that the administrative law judge's crediting of the opinions of Drs. White and Simpao, over the contrary opinions of Drs. Repsher, Selby, and Castle, is irrational, not supported by substantial evidence, and contrary to law. Employer's arguments are without merit. The administrative law judge accurately summarized the conflicting medical opinions of record, noting their underlying documentation, the relative qualifications of the physicians, and the physicians' explanations for their respective conclusions. Decision and Order at 18-27, 33-37. The administrative law judge acted within her discretion in finding that Dr. Simpao's diagnosis of a severe obstructive and moderate restrictive airway disease significantly related to smoking and aggravated by claimant's sixteen years of coal mine employment, was documented and reasoned, and entitled to probative weight. Decision and Order at 34-35; Director's Exhibits 1, 14, 16, 41; *see Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003) *citing Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). In evaluating the opinion of Dr. White, claimant's treating physician, pursuant to the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge properly considered the nature and extent of the doctor's treatment of claimant, and permissibly determined that Dr. White's diagnosis of legal pneumoconiosis, based on clinical history, medical examination, and regular observation and treatment of claimant since 1995, was documented and reasoned. Decision and Order at 34-35; Employer's Exhibit 3; Director's Exhibits 17, 18. In light of the other relevant evidence and the record as a whole, the administrative law judge permissibly accorded the opinion great weight. Decision and Order at 35; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); 20 C.F.R. §718.104(d). The administrative law judge rationally accorded little weight to Dr. Selby's opinion, that claimant's obstructive lung disease was caused by smoking, asthma, obesity, and a heart condition, as she found that the physician's statement, that "the coalmine was protective of claimant's lungs," was contrary to congressional findings. Employer's Exhibits 1, 5; *see Roberts & Schaefer Co. v.*

Director, OWCP [Williams], 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005). Further, the administrative law judge found that Dr. Selby failed to offer any reason for ruling out coal dust exposure as a contributing cause of claimant's obstructive respiratory impairment. Decision and Order at 37; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1998). The administrative law judge also permissibly found that Dr. Repsher's opinion, that claimant did not have legal pneumoconiosis, but had smoking-related chronic obstructive pulmonary disease and centrilobular emphysema, was not well-reasoned, as the physician's analysis was premised on medical and scientific studies that pre-dated the amendments to the current regulations, and that conflicted with "the prevailing view of the medical community," *i.e.*, that coal dust exposure and smoking have additive effects on lung function; that dust-induced and smoking-induced emphysema occur through similar mechanisms; and that coal dust causes clinically significant obstructive disease, as demonstrated by "the substantial weight of the medical and scientific literature" underlying the current regulations. Decision and Order at 36; *see* 65 Fed. Reg. 79,940-79,941 (Dec. 20, 2000); *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994). Lastly, the administrative law judge rationally accorded little weight to Dr. Castle's opinion, that claimant's obstructive impairment with a reduction in diffusing capacity was due solely to smoking, because she found that it was based on the absence of radiographic evidence of pneumoconiosis, as Dr. Castle explained that coal workers' pneumoconiosis does not normally cause a reduction in diffusing capacity, except in the presence of a high profusion of either "p" or "r" type opacities. Decision and Order at 37; Employer's Exhibit 6. Further, the administrative law judge determined that, while Dr. Castle stated that claimant's sixteen years of coal mine employment was sufficient time to develop pneumoconiosis in a susceptible host, he failed to acknowledge that coal dust can cause or contribute to an obstructive impairment, and he did not explain why coal dust exposure played no part in claimant's obstructive impairment. *Id.*; *see* 20 C.F.R. §718.202(a)(4); *J.O. [Obush] v. Helen Mining Co.*, ___ BLR ___, BRB No. 08-0671 BLA (June 24, 2009); *Clark*, 12 BLR at 1-155. Because the administrative law judge addressed all relevant evidence, assigned the evidence appropriate weight, and provided valid reasons for crediting the opinions of Drs. White and Simpao over the contrary opinions of Drs. Shelby, Repsher, and Castle, her Decision and Order comports with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Contrary to employer's contention, since this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge was not required to consider whether the evidence at Section 718.202(a)(1)-(4), when weighed together as a whole, was sufficient to establish the existence of pneumoconiosis. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *but cf. Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, 22 BLR 2-162, 2-170 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 24-25, 21 BLR 2-104, 2-111 (3d Cir. 1997). As substantial evidence supports

the administrative law judge's finding that the weight of the evidence was sufficient to establish legal pneumoconiosis pursuant to Section 718.202(a)(4), it is affirmed.

Lastly, employer maintains that the administrative law judge erred in finding the opinions of Drs. White and Simpao sufficient to establish disability causation at Section 718.204(c). We disagree. Based on her weighing of the conflicting medical opinions on the issue of legal pneumoconiosis, the administrative law judge permissibly determined that the doctors' reasoned and documented opinions were entitled to determinative weight on the issue of disability causation. Decision and Order at 38-39. Although the doctors conceded that both smoking and coal dust exposure played a part in the miner's obstructive impairment, they were not required to apportion the relative contribution of each contributing cause of disability. *See Cornett*, 227 F.3d at 569, 22 BLR at 2-107. Consequently, we affirm the administrative law judge's finding that the weight of the evidence established disability causation at Section 718.204(c), as supported by substantial evidence, and we affirm her award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge