

BRB No. 09-0457 BLA

AMPLE L. HILL)
(o/b/o CLEDITH D. HILL, deceased))
)
 Claimant-Respondent)
)
 v.)
)
 SCOTTS BRANCH COAL COMPANY)
) 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 on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

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

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Barry H. Joyner (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-5870) of Administrative Law Judge Janice K. Bullard (the administrative law judge) awarding benefits on a 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). This case involves a subsequent claim filed on March 17, 2004.¹ In the initial decision, the administrative law judge found that the miner's 2004 claim was timely filed. The administrative law judge further found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered the miner's 2004 claim on the merits. After crediting the miner with twenty-one years of coal mine employment,² the administrative law judge found that the miner was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established that the miner was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's findings on the merits of entitlement, but vacated the administrative law judge's finding that the miner's 2004 subsequent claim was timely filed pursuant to 20 C.F.R. §725.308. *A.L.H. [Hill] v. Scotts Branch Coal Co.*, BRB No. 07-0697 BLA (May 28, 2008) (unpub.). Citing *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), the Board noted that medical reports predating the denial of the miner's prior claim could trigger the running of the three-year statute of limitations period for filing his subsequent claim. The Board, therefore, remanded the case to the administrative law judge to determine whether the opinions of Drs. Penman, Fritzhand, and Clarke were

¹ The miner initially filed a claim for benefits on April 27, 1988. Director's Exhibit 1. In a Decision and Order dated March 11, 1992, Administrative Law Judge Daniel L. Stewart found that the evidence did not establish the existence of pneumoconiosis. *Id.* Accordingly, Judge Stewart denied benefits. *Id.* Pursuant to the miner's appeal, the Board affirmed Judge Stewart's denial of benefits. *Hill v. Scotts Branch Coal Co.*, BRB No. 92-1292 BLA (May 27, 1993) (unpub.). There is no indication that the miner took any further action in regard to his 1988 claim.

² The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

reasoned medical opinions of total disability due to pneumoconiosis that were communicated to the miner more than three years before he filed his subsequent claim.

On remand, the administrative law judge found that the miner's 2004 subsequent claim was timely filed. The administrative law judge, therefore, reinstated the award of benefits.

On appeal, employer's sole contention of error is that the administrative law judge erred in finding that the miner's 2004 subsequent claim was timely filed. Claimant³ responds in support of the administrative law judge's finding that the miner's 2004 claim was timely filed. The Director, Office of Workers' Compensation Programs, has filed a response brief, urging the Board to reject employer's argument that the miner's 2004 claim was untimely filed.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Timeliness of Claim

Employer challenges the administrative law judge's determination that the miner's 2004 subsequent claim was timely filed. Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . 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." 30 U.S.C. §932(f). Miners' claims for black lung benefits are presumptively timely filed. 20 C.F.R. §725.308(c). To rebut the timeliness presumption, employer must show that 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. §725.308(a). The three-year statute of limitations is applicable to the filing of both the miner's initial claim and any subsequent claims. *Kirk*, 264 F.3d at 607, 22 BLR at 2-297; *J.O. [Obush] v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009).

Subsequent to the issuance of the Board's 2008 Decision and Order remanding this case to the administrative law judge for further consideration of the timeliness issue, the United States Court of Appeals for the Sixth Circuit held that a medical determination of total disability due to pneumoconiosis does not begin the running of the three-year time limit for filing a claim if it was discredited, or found to be outweighed by contrary

³ The miner died on March 27, 2007. Claimant, the miner's widow and executrix of the miner's estate, is pursuing the miner's claim.

evidence, in a prior adjudication. *Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 24 BLR 2-135 (6th Cir. 2009). In the adjudication of the miner's prior claim, Administrative Law Judge Daniel L. Stewart found that, although Drs. Penman, Fritzhand, and Clarke diagnosed pneumoconiosis, their diagnoses were not reasoned or were otherwise not sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Director's Exhibit 1. Consequently, the administrative law judge, on remand, found that the previously considered and rejected medical reports of Drs. Penman, Fritzhand, and Clarke could not trigger the running of the three-year time limit for filing the 2004 claim. The administrative law judge, therefore, rejected employer's contention that claimant's 2004 subsequent claim was untimely filed. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

In this case, the final determination, that the miner did not suffer from pneumoconiosis as of May 27, 1993, necessarily repudiated the 1988, 1990, and 1991 opinions of Drs. Penman, Fritzhand, and Clarke that the miner was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, the 1988, 1990, and 1991 medical reports of Drs. Penman, Fritzhand, and Clarke could not trigger the running of the three-year time limit for filing the miner's 2004 claim. *Hatfield*, 556 F.3d at 483; 24 BLR at 2-154; *Obush*, BRB No. 08-0671 BLA, slip op. at 5. We, therefore, affirm the administrative law judge's finding that the miner's 2004 subsequent claim was timely filed, 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), and affirm the administrative law judge's award of benefits.⁴

⁴ Employer contends that medical opinions supportive of an award of benefits in the miner's "state black lung case" should have triggered the three year statute of limitations for filing a federal claim. Although the miner was awarded disability benefits in a 1990 state award, the portion of the miner's claim for pneumoconiosis was dismissed. Director's Exhibit 1. More importantly, because the state award predated Judge Stewart's denial of the miner's prior claim, the evidence associated with the state claim is insufficient as a matter of law to trigger the running of the three-year statute of limitations. *See Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 483, 24 BLR 2-135, 2-154 (6th Cir. 2009) (holding that the administrative law judge's "decision served not only to deny that claim for benefits, but also to reset the clock on any subsequent claim made by [the miner].").

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge