

BRB No. 05-0907 BLA

JIMMY ROBERTS)
)
 Claimant-Petitioner)
)
 v.)
)
 SHAMROCK COAL COMPANY,)
 INCORPORATED)
)
 and)
) DATE ISSUED: 07/27/2006
 JAMES RIVER COAL COMPANY)
)
 Employer/Carrier-)
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Edmond Collett (Edmond Collett, P.S.C.), Hyden, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order Denying Benefits (03-BLA-6616) of Administrative Law Judge William S. Colwell in a miner's 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). Initially, the administrative law judge found claimant's subsequent claim untimely filed pursuant to the three-year limitations period for the filing of claims provided in Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a). Nevertheless, "in an abundance of caution," the administrative law judge also addressed the merits of the claim. Decision and Order at 6. The administrative law judge credited the miner with "24.5" years of coal mine employment. *Id.* at 19. Applying the regulations pursuant to 20 C.F.R. Part 718, the administrative law judge found the new evidence insufficient to establish both the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant failed to demonstrate that one of the applicable conditions of entitlement has changed since the denial of his last claim pursuant to 20 C.F.R. §725.309. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (a)(4). Claimant's Brief at 3-5. Additionally, claimant contends that the administrative law judge erred in failing to find total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* at 6-7. Claimant further asserts that the Director, Office of Workers' Compensation Programs (the Director), failed to provide him with a complete and credible pulmonary evaluation as required by the Act. *Id.* at 5-6. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The

¹Claimant is Jimmy Roberts, the miner, who filed his present claim for benefits on July 16, 2001. Director's Exhibit 3. The miner's first claim for benefits, filed on September 3, 1985, was finally denied by a Department of Labor (DOL) claims examiner on February 27, 1986. Director's Exhibit 1. On March 3, 1986, claimant requested a hearing before the Office of Administrative Law Judges (OALJs). A letter dated September 28, 1987 was sent to claimant from a DOL claims examiner in which the claims examiner stated that claimant was previously advised "that further action on [his] appeal would be deferred pending resolution of [his] State Workers' Compensation claim." *Id.* In the 1987 letter, the claims examiner further stated that since a decision has been made in claimant's state claim, his federal black lung claim has been processed and the initial denial remains unchanged. *Id.* The claims examiner advised claimant that unless he submitted additional evidence or requested a hearing before the OALJs within sixty days of the date of the letter, his case would be administratively closed. *Id.* The district director wrote a September 5, 2003 memorandum to file, stating that claimant's September 3, 1985 claim "is administratively closed and not subject to adjudication."

Director responds, urging affirmance of the administrative law judge's denial because claimant did not challenge the administrative law judge's finding that his present claim is time-barred. The Director also notes his disagreement with the administrative law judge's reliance on, and the Board's interpretation of, *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). The Director alternatively asserts that remand for a credible pulmonary evaluation is not needed in this case.

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. 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).

The administrative law judge initially considered whether the instant claim is timely filed pursuant to the three-year limitations period for the filing of claims provided in Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a). The administrative law judge discussed the holding of the United States Court of Appeals for the Sixth Circuit in *Kirk*² in conjunction with claimant's testimony that he stopped working in May of 1985 because Drs. Lowe, Hieronymus, and Bushey told him that he was totally disabled due to pneumoconiosis.³ Decision and Order at 4-6. The administrative law judge found "that Dr. Hieronymus's report is well documented and reasoned" and that "Dr. Bushey's report is also well reasoned, although supported by less medical evidence than Dr. Hieronymus in that it lacks either a pulmonary function study or a blood gas study." *Id.* at 6. The administrative law judge

²The instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. Director's Exhibit 4; see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

³The United States Court of Appeals for the Sixth Circuit held in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) that:

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. [Footnote omitted.] 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 2-298-99.

determined that claimant's 1985 claim was medically supported and, based on claimant's hearing testimony, that claimant was informed that he was totally disabled due to pneumoconiosis in 1985. *Id.* Therefore, the administrative law judge concluded that because claimant was told in 1985 that he was totally disabled due to pneumoconiosis, his present claim, filed more than three years later, in 2001, is untimely. *Id.* In his brief before the Board, claimant does not challenge the administrative law judge's finding that his present claim is untimely filed. Therefore, we affirm the administrative law judge's finding that claimant's present claim is untimely filed pursuant to Section 725.308(a). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Accordingly, we hold that entitlement to benefits is precluded because this claim was untimely filed. 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308; *see Kirk*, 264 F.3d at 608, 22 BLR at 2-298-99.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge