

BRB No. 05-0127 BLA

MANFORD HENLINE)
)
 Claimant-Respondent)
)
 v.)
) DATE ISSUED: 07/31/2007
 ISLAND CREEK COAL COMPANY)
)
 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 of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Jennifer U. Toth (Jonathan L. Snare, Acting Solicitor of Labor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

This case involves employer's appeal of the Decision and Order (01-BLA-0709) of Administrative Law Judge Robert J. Lesnick with respect to a claim filed pursuant to the provisions of the Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act) and is presently before the Board on remand

from the United States Court of Appeals for the Fourth Circuit. In a Decision and Order issued on February 25, 2004, the Board affirmed the administrative law judge's finding that claimant's application for benefits, submitted on July 18, 2000, was timely filed under 20 C.F.R. §725.308. *Henline v. Island Creek Coal Co.*, BRB No. 03-0403 BLA (Feb. 25, 2004)(unpub.). The administrative law judge determined that, contrary to employer's assertion, claimant's testimony regarding what his doctors told him about his pulmonary condition was too vague and contradictory to establish that a diagnosis of total disability due to pneumoconiosis had been communicated to him more than three years before he filed his claim on July 18, 2000. Accordingly, the administrative law judge determined that employer failed to rebut the presumption of timeliness set forth in 20 C.F.R. §725.308(c). Employer appealed to the Board, challenging the administrative law judge's timeliness finding and the award of benefits.

The Board affirmed the administrative law judge's finding that the claim was timely filed on a different ground than that relied upon by the administrative law judge. The Board held that claimant did not receive a written medical report which contained a reasoned diagnosis of total disability due to pneumoconiosis. *Id.* at 4, citing *Adkins v. Donaldson Mine Co.*, 19 BLR 1-36 (1993). The Board vacated the award of benefits, however, and remanded the case to the administrative law judge for reconsideration of the evidence under 20 C.F.R. §§718.202(a)(4) and 718.204(c). On remand, the case was reassigned to Administrative Law Judge Daniel L. Leland, who awarded benefits. The Board affirmed the award in a Decision and Order issued on August 26, 2005. *Henline v. Island Creek Coal Co.*, BRB No. 05-0127 BLA (Aug. 26, 2005)(unpub.).

Employer appealed to the Fourth Circuit, raising arguments concerning the timeliness of the claim for benefits and the merits of entitlement. The Fourth Circuit vacated the Board's holding that the communication to the claimant of a medical determination of total disability due to pneumoconiosis must be in writing. Without addressing employer's arguments concerning the merits of entitlement, the court remanded the case to the Board "to consider on remand the administrative law judge's actual reason for rejecting [employer's] statute of limitations defense." *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 424, 23 BLR 2-321, 2-323 (4th Cir. 2006).

Employer has filed a brief in which it argues that the administrative law judge erred in finding that claimant's hearing testimony lacked credibility and, therefore, was insufficient to establish rebuttal of the presumption of timeliness set forth in Section 725.308(c). In response, claimant urges the Board to affirm the administrative law judge's credibility determination and the Director, Office of Workers' Compensation

Programs, also urges affirmance of the administrative law judge's finding that employer did not rebut the presumption of timeliness.¹

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).

In his initial Decision and Order awarding benefits, the administrative law judge addressed the timeliness issue and determined that there is "no evidence of a 'reasoned opinion' by Drs. Asher, Gray, and/or Osbourne that the claimant is totally disabled due to pneumoconiosis." 2003 Decision and Order at 6, citing *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001). The administrative law judge further found that claimant's testimony, that Drs. Asher, Gray, and Osbourne told claimant that he was totally disabled due to pneumoconiosis more than three years before the filing of his claim, was not credible. In support of his finding, the administrative law judge noted that claimant said that Dr. Asher informed him that he was totally disabled due to pneumoconiosis in 1993 but also stated that Dr. Rasmussen, who examined claimant subsequent to the filing of his application for benefits, was the first doctor to tell him that he had "black lung." 2003 Decision and Order at 6. The administrative law judge also indicated that claimant tended to respond to questions with short, affirmative answers and that claimant stated that he had suffered a stroke and had memory problems. *Id.* Based upon these findings, the administrative law judge concluded that employer failed to rebut the presumption of timeliness set forth in Section 725.308(c).

Employer contends that the administrative law judge erred in finding that claimant's testimony was not credible. Employer asserts that on cross-examination, claimant explicitly stated that Dr. Asher told him that he was totally disabled due to pneumoconiosis in 1993 and reiterated this statement in response to questioning by his own attorney. Employer also notes that claimant's predilection for providing short

¹ Claimant and the Director, Office of Workers' Compensation Programs, also assert that employer waived any challenge to the administrative law judge's credibility findings by failing to raise this issue in its first appeal to the Board. In light of the instruction from the Fourth Circuit that we "consider on remand the administrative law judge's actual reason for rejecting [employer's] statute of limitations defense," we decline to hold that employer waived its challenge to the administrative law judge's weighing of claimant's hearing testimony. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 424, 23 BLR 2-321, 2-323 (4th Cir. 2006).

responses reflected his style of speech, rather than an inability to recall details of his medical history.

Determining whether claimant's hearing testimony is sufficient to rebut the presumption of timeliness is a matter that is committed to the discretion of the administrative law judge. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988). In this case, the administrative law judge rationally found that claimant's testimony was too vague to support a finding that a physician had communicated a reasoned medical determination of total disability due to pneumoconiosis to claimant. The administrative law judge's determination is supported by the conflict in claimant's testimony regarding which doctor first told him that he had pneumoconiosis, the absence of detail sufficient to permit the administrative law judge to determine whether the alleged diagnosis was reasoned, and claimant's statement that he has experienced problems with his memory due to the effects of a stroke. *Underwood*, 105 F.3d at 949, 22 BLR at 2-28; Hearing Transcript at 22, 34-38. We reject employer's allegation of error, therefore, and affirm the administrative law judge's finding that employer has not rebutted the presumption that claimant's July 18, 2000 application for benefits was timely filed pursuant to Section 725.308(a).

Accordingly, we reaffirm our Decision and Order affirming the award of benefits in this case.²

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

² In its decision, the Fourth Circuit stated that “[b]ecause a resolution on remand...in favor of [employer] with respect to [employer’s] statute of limitations defense would completely bar [the] claim for black lung benefits, we decline to address, on prematurity grounds, such claim on the merits.” *Henline*, 456 F.3d at 424 n.3, 23 BLR at 2-323 n.3. The court did not, therefore, instruct the Board to address any findings on the merits of entitlement, but rather, directed the Board to consider only the timeliness issue. Now that the Board has complied with the court’s instructions and affirmed the administrative law judge’s finding that the July 18, 2000 claim was timely filed under 20 C.F.R. §725.308, the award of benefits in this case will become final unless a timely request for reconsideration, a timely request for review by the Fourth Circuit, or a timely petition for modification is filed. *See* 20 C.F.R. §§725.310, 802.406, 802.407.