BRB No. 06-0807 BLA

CHARLES W. LOVE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LEECO, INCORPORATED	)	DATE ISSUED: 07/24/2007
	)	
and	)	
	)	
TRANSCO ENERGY 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 Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

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

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (04-BLA-06221) of Administrative Law Judge Alan L. Bergstrom 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). The parties stipulated to, and the administrative law judge found, nineteen years of qualifying coal mine employment and, based on the date of

filing, adjudicated this subsequent claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 1-3; Hearing Transcript at 6; Director's Exhibit 1. The administrative law judge determined, however, that the instant claim was not timely filed pursuant to 20 C.F.R. §725.308(a). Decision and Order at 12-18. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in failing to find the claim timely filed. Employer responds, urging affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that the denial of benefits is supported by the Board's interpretation of *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 608, 22 BLR 2-288, 2-298 (6th Cir. 2001).[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Pursuant to *Kirk*, 264 F.3d at 608, 22 BLR at 2-298 a claim must be filed within three years of the date when a miner *first* learns that a physician has determined that he is totally disabled due to pneumoconiosis. The three year statute of limitations period is not stopped by the resolution of a miner's claim, or claims, and is only restarted upon a return to coal mine employment after the denial of a prior claim. Moreover, the burden is on employer to rebut the presumption of timeliness by proving a reasoned medical

[1] Claimant filed his first claim for benefits with the Social Security Administration (SSA) on July 20, 1973. That claim was denied by the SSA on December 5, 1973 and by the Department of Labor (DOL) on April 21, 1980 because claimant failed to establish pneumoconiosis. Director's Exhibit 1. Claimant filed a second application for benefits on February 1, 1995. Benefits were initially awarded on this claim, based in part on Dr. Clarke's 1994 report, but finally denied by DOL on November 22, 1999 because claimant failed to establish a material change in conditions. Director's Exhibit 1. Claimant filed his third claim, the instant claim, on September 27, 2002, which was denied by the district director on October 29, 2003. Director's Exhibits 3, 23. Claimant subsequently requested a formal hearing before the Office of Administrative Law Judges. Director's Exhibit 24.

[2] The record indicates that claimant was last employed in the coal mine industry in Kentucky. Director's Exhibit 4; Hearing Transcript at 13. 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*).

determination of total disability due to pneumoconiosis was communicated to the miner at least three years prior to the filing of the current application.[3]

Claimant contends that the administrative law judge erred in finding that claimant's claim was not timely filed because employer has not met its burden of rebutting the presumption of timeliness provided in 20 C.F.R. §725.308(c)[4] as it offered no evidence indicating that a medical determination of total disability due to pneumoconiosis was indisputably communicated to claimant. Claimant contends that the administrative law judge erred in relying on Dr. Clarke's opinion to find that employer rebutted the presumption of timeliness as the opinion was unreasoned. Moreover, claimant does not recall that a diagnosis of total disability was ever communicated to him by Dr. Clarke, and that as claimant is illiterate, he could not read Dr. Clarke's written report.

Contrary to claimant's argument, however, we conclude that the administrative law judge properly considered the opinion of Dr. Clarke, that claimant was totally disabled due to pneumoconiosis, and found that it was reasoned and communicated to claimant more than three years prior to the filing of the claim in dispute. Decision and Order at 15-18.

In considering claimant's testimony, the administrative law judge acknowledged that when asked if any physician had told him that he was totally disabled due to pneumoconiosis, claimant responded "I don't remember. I can't say for sure." Decision and Order at 16; Hearing Transcript at 23-24. The administrative law judge found, however, that the opinion of Dr. Clarke, on which claimant relied, was mailed to claimant with the "Notice of Initial Finding," by the district director, at part of his prior claim awarding benefits on June 29, 1995. Decision and Order at 16; Director's Exhibit 1.

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[3] Section 725.308(a) provides, in pertinent part, that:

> [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….

20 C.F.R. §725.308(a).

[4] Section 725.308(c) provides, in pertinent part, that:

> There shall be a rebuttable presumption that every claim for benefits is timely filed.

20 C.F.R. §725.308(c).

Moreover, considering the miner's level of education and limited comprehension; *i.e.*, that claimant had a third grade education and could read and write a little, the administrative law judge nonetheless found that claimant had no problem understanding normal conversation and was personally present when his counsel argued in the prior claim that Dr. Clarke diagnosed total disability due to his coal mine employment. Decision and Order at 17. The administrative law judge also considered that the course of action pursued by claimant with respect to the prior claim clearly demonstrated that claimant was under the impression that he was totally disabled due to pneumoconiosis, a medical opinion only shared by Dr. Clarke. Decision and Order at 17. Based on the complete discussion of the relevant evidence of record, we conclude that the administrative law judge correctly found that the medical opinion of Dr. Clarke was communicated to claimant more than three years prior to the filing of the instant claim. *See Kirk*, 264 F.3d at 608, 22 BLR at 2-298.

Likewise, contrary to claimant's argument, the administrative law judge rationally found that the opinion of Dr. Clarke was well reasoned and well documented.[5] *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). Claimant's contention that the opinion was not reasoned, without reference to any specific findings by the administrative law judge, is essentially a request that we reconsider the credibility of this medical opinion, which we are not empowered to do. *See Clark*, 12 BLR 1-155; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, reject the allegation of error, as assessing the credibility of evidence is within the purview of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

[5] The administrative law judge noted that Dr. Clarke's June 7, 1994 diagnosis of coal worker's pneumoconiosis and resulting total disability, Director's Exhibit 1, was a well-reasoned medical determination, based on objective testing and clinical findings, as well as a subjective report of symptoms, and medical, social and work histories reported by claimant. Decision and Order at 15.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge