

BRB No. 08-0876 BLA

C.B.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KENTUCKY CARBON CORPORATION	)	
	)	
Employer-Respondent	)	DATE ISSUED: 07/20/2009
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order and Order on Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Carol A. DeDeo, 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:

Claimant appeals the Decision and Order and Order on Reconsideration (07-BLA-5878) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) dismissing 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 September 18, 2006.<sup>1</sup> On February 29, 2008, employer filed a motion to dismiss with the administrative law judge, alleging that the claim was untimely filed. When claimant did not respond to employer's motion, the administrative law judge issued an order to show cause why claimant's 2006 claim should not be dismissed. Although claimant responded to the order, the administrative law judge noted that claimant did not address the timeliness issue or provide any explanation for his failure to provide a timely answer to employer's motion to dismiss. Consequently, the administrative law judge, by Decision and Order dated April 3, 2008, dismissed the claim.

Claimant subsequently moved for reconsideration. In an Order on Reconsideration dated August 28, 2008, the administrative law judge found that claimant's 2006 claim was untimely filed. The administrative law judge, therefore, denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that his 2006 claim was untimely filed. Employer responds in support of the administrative law judge's dismissal of the claim. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in finding that claimant's 2006 claim was untimely filed.

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<sup>1</sup> Claimant initially filed a claim for benefits on July 15, 1985. Director's Exhibit 1-1477. The district director denied benefits on April 5, 1988, finding that the evidence did not establish that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1-1289. Although claimant requested a formal hearing, he did not submit proof of coal mine employment that the district director informed him was necessary for the processing of his claim. When claimant did not respond to the district director's order to show cause why his claim should not be denied by reason of abandonment, the district director advised the parties, by letter dated September 28, 1988, that claimant's 1985 claim was deemed abandoned. Director's Exhibit 1-1280. There is no indication that claimant took any further action in regard to his 1985 claim.

Claimant filed a second claim on October 31, 1994. Director's Exhibit 1-1588. In a Decision and Order dated August 19, 1996, Administrative Law Judge Paul H. Teitler found that the evidence did not establish the existence of pneumoconiosis, and denied benefits. Director's Exhibit 1-1053. Pursuant to claimant's appeal, the Board affirmed Judge Teitler's denial of benefits. [*C.B.*] *v. Ky. Carbon Corp.*, BRB No. 97-0376 BLA (Nov. 20, 1997) (unpub.). Claimant's two subsequent requests for modification were also denied, the second request being finally denied on August 2, 2005. Director's Exhibit 1-5. There is no indication that claimant took any further action in regard to his 1994 claim.

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.<sup>2</sup> 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).

Claimant contends that the administrative law judge erred in finding that his 2006 claim was not 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 initial claim by a miner and any subsequent claims. *Tenn. Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-297 (6th Cir. 2001); *J.O. v. Helen Mining Co.*, BLR , BRB No. 08-0671 BLA (June 24, 2009).

The administrative law judge determined that Dr. Clarke’s March 1, 1986 medical report and Dr. Wright’s August 16, 1986 medical report, submitted in connection with claimant’s 1985 claim, each constituted a medical determination of total disability due to pneumoconiosis that was communicated to claimant, and which therefore commenced the running of the statute of limitations. The administrative law judge found that, because claimant’s 2006 subsequent claim was filed more than three years after a “medical determination of total disability due to pneumoconiosis” was communicated to claimant, his 2006 claim was untimely filed. 20 C.F.R. §725.308(a).

The Director argues that the medical reports of Drs. Clarke and Wright are insufficient as a matter of law to trigger the time limitations of 20 C.F.R. §725.308. We agree with the Director. A medical determination of total disability due to pneumoconiosis predating a prior denial of benefits is legally insufficient to trigger the running of the three-year time limit for filing a subsequent claim, because the medical determination must be deemed a misdiagnosis in view of the superseding denial of benefits. *Arch of Ky., Inc. v. Director, OWCP [Hatfield]*, 556 F.3d 472, 483, BLR (6th Cir. 2009); *J.O.*, BRB No. 08-0671 BLA, slip op. at 4.

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<sup>2</sup> The record reflects that claimant’s coal mine employment was in Kentucky. Director’s Exhibit 1. 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*).

In this case, the district director's final determination, that claimant was not totally disabled due to pneumoconiosis as of April 5, 1988, necessarily repudiated the 1986 opinions of Drs. Clarke and Wright that claimant was totally disabled due to pneumoconiosis. Director's Exhibit 1. Consequently, the 1986 medical reports of Drs. Clarke and Wright could not trigger the running of the three-year time limit for filing claimant's 2006 claim. *Hatfield*, 556 F.3d at 483; *J.O.*, BRB No. 08-0671 BLA, slip op. at 5. We, therefore, vacate the administrative law judge's finding that claimant's 2006 subsequent claim was not timely filed, 30 U.S.C. §932(f); 20 C.F.R. §725.308(a), and remand the case to the administrative law judge for his consideration of claimant's 2006 subsequent claim.

Accordingly, the administrative law judge's Decision and Order and Order on Reconsideration dismissing claimant's 2006 claim are vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge