

BRB No. 14-0167 BLA

JESSIE J. SPAULDING)
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 Claimant-Petitioner)
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 v.)
)
 EAGLE COAL COMPANY,) DATE ISSUED: 07/15/2014
 INCORPORATED)
)
 Employer-Respondent)
)
 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

John C. Collins (Law Offices of John C. Collins), Salyersville, Kentucky, for claimant.

H. Brett Stonecipher (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer.

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

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-5958) of Administrative Law Judge Richard A. Morgan, rendered on a subsequent claim filed on September 19, 2011,¹ pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge

¹ Claimant filed an initial claim for benefits on February 14, 2001, which was finally denied by the district director for failure to establish total disability. Director's Exhibit 1. Claimant took no further action with regard to the denial of benefits until filing the current subsequent claim. *Id.*

determined that the subsequent claim was not timely filed pursuant to 20 C.F.R. §725.308. Based on the filing date of the subsequent claim, the administrative law judge also considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge found that claimant established at least twenty-five years of underground coal mine employment, but failed to establish a totally disabling respiratory or pulmonary impairment and, therefore, was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Under the regulations at 20 C.F.R. Part 718, the administrative law judge also determined that claimant failed to establish any of the requisite elements of entitlement. *See* 20 C.F.R. §718.202(a), 718.203, 718.204(b), (c), 725.309. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred by not crediting the opinion of his treating physician that he is totally disabled due to pneumoconiosis. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal, unless specifically instructed to do so by the Board.

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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis" 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). Every claim is presumed timely, and to rebut the timeliness presumption, employer must

² Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

³ The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, because claimant's most recent coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 1, 4.

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 administrative law judge found that the claimant’s subsequent claim was not timely filed, based on claimant’s hearing testimony indicating that he was “repeatedly” told by his treating physician that he was totally disabled by black lung disease, subsequent to the denial of his prior claim and more than three years before the filing of his current subsequent claim. Decision and Order at 4. Claimant does not address this finding in his brief and raises no argument on appeal with regard to the timeliness of his subsequent claim.

The Board is not permitted to undertake a *de novo* adjudication of the claim. To do so would upset the carefully allocated division of power between the administrative law judge as the trier-of-fact, and the Board as a review tribunal. *See* 20 C.F.R. §802.301(a); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). The Board’s circumscribed scope of review requires that a party challenging the Decision and Order explain why substantial evidence does not support the result reached or why the Decision and Order is contrary to law. *See* 20 C.F.R. §802.211(b); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff’g* 7 BLR 1-610 (1984); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Unless the party identifies errors and briefs its allegations in terms of the relevant law and evidence, the Board has no basis upon which to review the decision. *See Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109. Because claimant does not identify any error with regard to the administrative law judge’s determination that his subsequent claim is time-barred pursuant to 20 C.F.R. §725.308(a), we are compelled to affirm it.⁴

⁴ Because we affirm the administrative law judge’s determination that the subsequent claim was not timely filed, it is not necessary to address claimant’s arguments regarding the administrative law judge’s findings with regard to application of amended 411(c)(4) or entitlement under 20 C.F.R. Part 718.

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

SO ORDERED.

BETTY JEAN HALL, Acting
Chief Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge