

BRB No. 06-0629 BLA

BENJAMIN KESSLER)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
ISLAND CREEK COAL COMPANY)	DATE ISSUED: 03/28/2007
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia for employer.

Jeffrey S. Goldberg ((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 BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (04-BLA-6812) of Administrative Law Judge Daniel F. Solomon denying benefits 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). Claimant filed his claim on March 13, 2003. Director's Exhibit 2. On May 6, 2004, the district director issued a Proposed Decision and Order awarding benefits. At employer's request, the matter was forwarded to the Office of Administrative Law Judges for a formal hearing, which was held on January 25, 2006.¹ In his Decision and Order dated April 20, 2006, the administrative law judge first addressed employer's contention that the claim was barred by the statute of limitations pursuant to Section 422(f) of the Act, 30 U.S.C. §932(f) and 20 C.F.R. §725.308(a) of the regulations.² The administrative law judge noted that, under Section 725.308(c), claimant was entitled to a presumption that his claim was timely filed. However, the administrative law judge found that employer had successfully rebutted the presumption because the evidence established that claimant had received a medical determination of total disability due to pneumoconiosis more than three years prior to the filing of his claim. 20 C.F.R. §725.308(a). In reaching his determination, the administrative law judge noted that claimant received written notice of a state award for disability from the

¹ At the hearing, claimant testified on direct examination that he filed for occupational pneumoconiosis or silicosis benefits with the State of West Virginia. Hearing Transcript at 14. On cross-examination, employer questioned claimant as to when he was first told by a doctor that he had black lung. Claimant answered, "I'm going to take a wild guess around 1988, Sir, whenever I first filed for state black lung benefits." Hearing Transcript at 15. Claimant agreed that it was the West Virginia Occupational Pneumoconiosis Board (WV OP Board) that told him he had black lung and that he was totally disabled as a result of that disease. *Id.* When employer's counsel asked claimant if he recalled the name of the first doctor to tell him he was totally disabled, claimant testified, "[Doctor] at Elkins. I forget just what his name is. He's the one that filled out the papers and everything for me to go into the state black lung." Hearing Transcript at 15. Later, in response to a leading question posed by employer's counsel, as to whether claimant remembered having been told by a doctor "sometime in the late '80's[.]" that he was totally disabled by black lung, claimant responded, "To the best of my knowledge, yes." *Id.*

² Because the hearing transmittal Form CM-1025 prepared by the district director did not list timeliness as a contested issue for the hearing, the administrative law judge asked the parties to file post-hearing briefs addressing whether employer had waived its right to challenge the timeliness of the claim. Hearing Transcript 27-28; Director's Exhibit 37. In his Decision and Order dated April 20, 2006, the administrative law judge determined that employer's December 11, 2003 letter, submitted in response to the district director's scheduling order, established that employer had neither challenged nor "specifically authorized a waiver" of the issue of timeliness. Decision and Order at 3; Director's Exhibit 30. The administrative law judge also found that 20 C.F.R. §725.308(a) "precludes a stipulation on timeliness." Decision and Order at 3.

West Virginia Occupational Pneumoconiosis Board (WV OP Board) in 1994, and that claimant had testified that he was told first by a doctor in 1988 that he was totally disabled by black lung, and then later by the WV OP Board. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in finding that he did not timely file his claim for benefits within three years of a medical determination of total disability. Claimant asserts that the evidence is insufficient to support the administrative law judge's finding of rebuttal, aside from "claimant's belief that some doctor may have told him that he was 'totally disabled' in 1988." Claimant's Brief (unpaginated). Claimant asserts that his continued employment in the mines after 1988 belies the validity of any diagnosis of total disability he may have received until he left the mines in 1993. *Id.*

The Director, Office of Workers' Compensation Programs (the Director), has filed a brief, asserting that the administrative law judge erred in his treatment of the 1994 state award by the WV OP Board as a medical determination of "total disability" sufficient to rebut the presumption of timeliness afforded the claim. Director's Brief at 5. The Director also contends that the administrative law judge failed to fully consider claimant's testimony in the context of other relevant evidence.³ Director's Brief at 6. Thus, the Director requests that the Board vacate the denial of benefits, and remand the case to the administrative law judge for further consideration as to whether employer established rebuttal of the presumption of timeliness pursuant to Section 725.308(a). Director's Brief at 7.

Employer responds to claimant's appeal, urging affirmance of the denial of benefits. Employer asserts that the award by the WV OP Board constitutes a "reasoned, documented medical determination that [c]laimant was totally disabled[,]" sufficient to support the administrative law judge's finding of rebuttal. Employer's Brief at 5. Employer also argues that claimant's testimony substantiates his understanding that he

³ The Director, Office of Workers' Compensation Programs (the Director), contends that claimant's recollection of what a doctor told him in 1988 is undermined by his continued employment in the mines and the fact that he only stopped working after he suffered a heart attack, which indicates either that the 1988 doctor did not communicate to claimant that he was totally disabled, or that claimant did not believe the doctor, even if he did receive such a diagnosis. Director's Brief at 7. The Director contends that the administrative law judge erred in failing to consider "the possibility that the doctor actually diagnosed [claimant] with a lesser degree of impairment" in keeping with the forty percent impairment findings of the WV OP Board. *Id.*

was totally disabled due to pneumoconiosis more than three years prior to filing his claim. *Id.*

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).

After reviewing the administrative law judge's Decision and Order, the briefs of the parties, and the evidence of record, we conclude that the administrative law judge erred in evaluating the evidence relevant to whether the claim was timely filed. Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by Section 725.308, requires that a claim be filed within three years of a medical determination of total disability due to pneumoconiosis that is communicated to the miner or claimant. Section 725.308, in pertinent part, states:

(a) 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 or a person responsible for the care of the miner, or within three years after the date of enactment of the Black Lung Benefits Reform Act of 1977, whichever is later.

(c) There shall be a rebuttable presumption that every claim for benefits is timely filed. However, except as provided in paragraph (b) of this section, the time limits in this section are mandatory and may not be waived or tolled except upon a showing of extraordinary circumstances.

20 C.F.R. §725.308.

Furthermore, in defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, we are guided by *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 291 (6th Cir. 2001), wherein the court stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.3d at 607, 22 BLR at 2-298. Applying this standard, the Board has held that, under the language set forth in *Kirk*, a claimant's mere statement that he was told by a physician that he was totally disabled by black lung is insufficient to trigger the running of the statute of limitations. See *Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006) (*en banc*); *Furgerson v. Jericol Mining Co.*, 22 BLR 1-216 (2002) (*en banc*).

In the instant case, the administrative law judge found that employer satisfied its burden of proof to rebut the presumption of timeliness. In support of his determination, the administrative law judge noted claimant's admission on cross-examination that he had been told in 1988 that he was totally disabled by black lung. Decision and Order at 3. The administrative law judge further noted that claimant filed a state claim for disability and received "written notice" on December 20, 1994 that he had prevailed in his claim.⁴ *Id.* Based on this evidence, the administrative law judge found that "the documentation indicates that [c]laimant received a medical determination of total disability due to pneumoconiosis. Moreover, [the administrative law judge found that claimant] substantiates by testimony that he received the notification, and it is reasonable that his understanding was that he was totally disabled due to pneumoconiosis at that time." Decision and Order at 3.

We agree with the Director that the administrative law judge erred in his consideration of whether employer established rebuttal because he failed to consider whether the forty percent disability finding of the WV OP Board was sufficient to constitute a medical determination of total disability due to pneumoconiosis.⁵ Contrary to the administrative law judge's determination, the disability award from the WV OP Board, which is composed of three physicians, does not *per se* establish that claimant is totally disabled due to pneumoconiosis for the purposes of the Act. *See Schegan v. Waste Management & Processors, Inc.*, 18 BLR 1-41 (1994); *Miles v. Central Appalachian Coal Co.*, 7 BLR 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984). An award by a state workers' compensation board may be supportive of a finding of total disability, if the administrative law judge determines that the degree of impairment determined by the board prevents a miner from performing the requirements of his usual coal mine work in accordance with the regulatory criteria. *See* 20 C.F.R.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner's last coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 4. We note that the Fourth Circuit held in *Island Creek Coal Co. v. Henline*, 456 F3d 421, 23 BLR 2-321 that the language of 30 U.S.C. §932(f) and the language of 20 C.F.R. §725.308(a) plainly do not contain the written notice requirement adopted by the Board in *Adkins v. Donaldson Mine Co.*, 19 BLR 1-36 (1993). *See Henline*, 456 F.3d at 424, 23 BLR at 2-330.

⁵ Claimant initially received an award from the WV OP Board for thirty percent permanent partial respiratory disability due to "occupational" pneumoconiosis on August 3, 1990. Director's Exhibit 8. Claimant later received an additional ten percent award on December 20, 1994 for a total of "[forty] percent pulmonary function impairment" due to pneumoconiosis. *Id.*

§718.204(b)(2); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). Moreover, in assessing the weight to accord the findings of a state board, the administrative law judge should consider how that agency reached its finding of disability. *See Clark*, 12 BLR at 152; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In this case, because the December 20, 1994 report fails to explain either the medical or legal criteria relied upon by the WV OP Board in reaching its determination of respiratory disability,⁶ the administrative law judge must assess the probative value of the report in light of employer's burden of proof at Section 725.308.

The administrative law judge also erred in his consideration of claimant's testimony. If the findings of the WV OP Board are determined to be insufficient to constitute a reasoned, medical determination of total disability due to pneumoconiosis, the only available means for employer to establish rebuttal is based on claimant's statements at the hearing. However, claimant's sole statement, as to what he believed a doctor told him in 1988, may be insufficient to trigger the running of the statute, unless the administrative law judge also finds that claimant received a "reasoned" diagnosis of total disability due to pneumoconiosis. *See Brigance*, 23 BLR at 1-172. Because the administrative law judge failed to evaluate the evidence in totality to determine whether claimant received a reasoned diagnosis of total disability due to pneumoconiosis, prior to finding that employer established rebuttal at Section 725.308(a), the administrative law judge erred in his consideration of the timeliness issue.

Therefore, we vacate the administrative law judge's finding of rebuttal pursuant to Section 725.308(a), and remand the case for further consideration. On remand, we direct the administrative law judge to reconsider the findings of the WV OP Board and claimant's testimony. The administrative law judge must determine whether employer has met its burden to rebut the presumption of timelines by showing that a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the 2003 filing of his claim. *See* 20 C.F.R. §718.308(a). If the administrative law judge finds that employer has not established rebuttal of the

⁶ The reports of the WV OP Board do not address whether claimant received his award based on pneumoconiosis related to coal dust exposure. The August 3, 1990 report contains no information as to how the disability determination was reached. Director's Exhibit 8. The December 20, 1994 report notes that claimant worked as a construction worker and that he had a history of "dust exposure." *Id.* There is a brief discussion of claimant's medical history and respiratory symptoms. *Id.* The WV OP Board stated that claimant quit work in 1994 due to heart disease. Director's Exhibit 8. Although the report indicates that an x-ray and ventilatory test had been obtained, the results of those tests are not disclosed. *Id.*

timeliness presumption, he must consider the merits of the claim to determine whether claimant has established his entitlement to benefits.

Accordingly, the Decision and Order of the administrative law judge is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge