

BRB No. 11-0480 BLA

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| JOSEPH B. BROWN |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | DATE ISSUED: 03/26/2012 |
| |) | |
| MINGO LOGAN COAL COMPANY |) | |
| |) | |
| 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-5728) of Administrative Law Judge Richard A. Morgan denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(l)) (the Act). This case involves a claim filed on October 6, 2008. After crediting claimant with at least twenty-nine years of coal mine employment,¹ the administrative law judge

¹ The record reflects that claimant’s coal mine employment was in West Virginia. Director’s Exhibit 3. Accordingly, this case arises within the jurisdiction of the United

found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Alternatively, even if the evidence did not establish the existence of complicated pneumoconiosis, the administrative law judge found that the evidence established that claimant was totally disabled due to simple pneumoconiosis. 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b), (c). However, because the administrative law judge found that claimant's 2008 claim was untimely filed, he denied benefits. 20 C.F.R. §725.308.

On appeal, claimant contends that the administrative law judge erred in finding that his 2008 claim was untimely filed. Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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

Claimant contends that the administrative law judge erred in finding that his 2008 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 United States Court of Appeals for the Fourth Circuit has held that written notice of a medical determination of total disability due to pneumoconiosis is not required to begin the running of the three-year statute of limitations period. *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006).

In considering whether a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years before he filed his 2008 claim, the administrative law judge focused upon the following evidence: (1)

States Court of Appeals for the Fourth Circuit. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

findings by the West Virginia Occupational Pneumoconiosis Board; (2) claimant's testimony; and (3) the testimony of two physicians, Drs. Wisman and Boustani.

The administrative law judge noted that the West Virginia Occupational Pneumoconiosis Board notified claimant on August 14, 2003 that the evidence was sufficient to establish that he suffered from occupational pneumoconiosis with total pulmonary function impairment attributable to the disease.² Decision and Order at 4; Director's Exhibit 7. Moreover, the administrative law judge noted that claimant testified that Dr. Wisman informed him in 2003, after an office visit, that he was totally disabled due to pneumoconiosis. Decision and Order at 5-6; Hearing Transcript at 19-20, 27-28. The administrative law judge further noted that claimant testified that Dr. Wisman repeated this information during each subsequent office visit, "probably two or three times a year." Hearing Transcript at 28. The administrative law judge noted that claimant's testimony was supported by that of Dr. Wisman, who testified that, around 2004 or 2005, he "probably" communicated to claimant that he was totally disabled due to pneumoconiosis. Employer's Exhibit 6 at 19-20. The administrative law judge noted that claimant further testified that another physician, Dr. Boustani, who began treating him in 2003, informed him that he was totally disabled due to pneumoconiosis. Decision and Order at 5; Hearing Transcript at 22-24. Although Dr. Boustani testified that she does not perform "disability testing," the administrative law judge noted that Dr. Boustani acknowledged that the results from claimant's pulmonary function study revealed that he was disabled from performing heavy labor. Employer's Exhibit 2 at 5, 11-12. Dr. Boustani further agreed that she would convey the results of pulmonary function testing to her patients "most of the time." *Id.* at 12-13.

In considering this evidence, the administrative law judge found that claimant's testimony was "not equivocal" in regard to when he was informed that he was totally disabled due to pneumoconiosis. Decision and Order at 5. In evaluating the credibility of claimant's testimony, the administrative law judge noted that claimant has a 12th grade education, and found that, based upon his observations of claimant at the hearing, claimant was "able to understand the information communicated to him." *Id.* at 4. The administrative law judge further found that, "despite their less than straight-forward testimony . . . , Drs. Wisman and Boustani did, in fact, communicate [claimant's] total disability due to [coal workers' pneumoconiosis]." *Id.* at 5. Finally, the administrative law judge noted that claimant was aware of the reasoned and documented findings of the West Virginia Occupational Pneumoconiosis Board that he was totally disabled due to pneumoconiosis. *Id.* In light of the above, the administrative law judge found that

² In addition to claimant's pulmonary function studies, the West Virginia Occupational Pneumoconiosis Board based its findings on claimant's work and medical histories, a physical examination, and x-rays. Director's Exhibit 7.

employer successfully rebutted the presumption of timeliness set forth at 20 C.F.R. §725.308(c).

Claimant contends that the medical determinations relied upon by the administrative law judge are insufficient to trigger the running of the three-year statute of limitations period. We disagree. It is within the administrative law judge's discretion to determine the credibility of a claimant's hearing testimony. See *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988). In this case, the administrative law judge permissibly credited claimant's unequivocal testimony that Drs. Wisman and Boustani each told him, in 2003, that he was totally disabled due to pneumoconiosis. Moreover, while Dr. Boustani could not recall whether she communicated to claimant that he was totally disabled due to pneumoconiosis, the administrative law judge found that claimant's testimony was supported by that of Dr. Wisman, who testified that he "probably" informed claimant of his total disability due to pneumoconiosis in 2004 or 2005. Employer's Exhibit 6 at 19-20. Consequently, after weighing claimant's own testimony, in conjunction with the deposition testimony of Drs. Wisman and Boustani,³ the administrative law judge found that employer rebutted the presumption, that claimant's 2008 was timely filed, by establishing that claimant received a reasoned medical determination of total disability due to pneumoconiosis more than three years before he filed his 2008 claim. See *Brigance v. Peabody Coal Co.*, 23 BLR 1-170 (2006) (*en banc*). Because it is based upon substantial evidence,⁴ this finding is affirmed. We,

³ Because the administrative law judge's finding is supported by the testimony of claimant and Dr. Wisman, we need not address whether the findings of the West Virginia Occupational Pneumoconiosis Board are also sufficient to constitute "a medical determination of total disability due to pneumoconiosis." See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁴ 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 superceding denial of benefits. See *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-122 (2009). Claimant argues that such a denial occurred on November 9, 2005, when a state claims administrator initially denied claimant's state law claim for permanent total disability benefits. We disagree. An initial denial of a state law claim for disability benefits by a claims administrator does not have the effect of rendering, as misdiagnoses, all prior medical determinations of total disability due to pneumoconiosis communicated to a claimant. See *Williams*, 453 F.3d at 618, 23 BLR at 2-365; *Obush*, 24 BLR at 1-122.

therefore, affirm the administrative law judge's finding that claimant's 2008 claim was untimely filed. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

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