

BRB No. 05-0343 BLA

JAMES STURGILL)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BELL COUNTY COAL CORPORATION)	
)	
Employer-Respondent)	DATE ISSUED: 05/30/2006
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	<i>EN BANC</i>

Appeal of the Decision and Order Denial of Claim Granting Employer's Motion to Dismiss and Order Denying Motion for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Greenburg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox and Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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, McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Denial of Claim Granting Employer's Motion to Dismiss and Order Denying Motion for Reconsideration (03-BLA-6119) of

Administrative Law Judge Daniel F. Solomon on a subsequent claim¹ 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).² The administrative law judge found that the instant claim was filed more than three years after the district director's June 18, 1981

¹Claimant filed a claim with the Social Security Administration in 1973, which was denied in 1979 and then referred to the Department of Labor (DOL) for adjudication. Director's Exhibit 1. On June 18, 1981, the district director made a preliminary finding of eligibility, determining that claimant would be eligible for benefits if he ceased coal mine employment within one year of a final determination of entitlement. *Id.* Although claimant ceased coal mine employment on November 1, 1981, he worked in the oil industry overseas from November 11, 1981 to January of 1997. Director's Exhibits 1-3. In April of 1982, the district director indicated that liability in the 1973 claim was subject to transfer to the Black Lung Disability Trust Fund (the Trust Fund). Director's Exhibit 1. On December 13, 1982, the district director transferred liability for the claim to the Trust Fund, indicating, "Therefore, the responsible operator is relieved of responsibility for payment of actual or potential black lung benefits with regard to this claim." *Id.* More than five years later, on August 15, 1988, the district director denied the claim, following claimant's confirmation of his continued employment in the oil industry, which began on November 11, 1981, shortly after his November 1, 1981 cessation of coal mine work. *Id.* The district director specifically found that claimant did not cease "employment" within one year of the June 18, 1981 determination and continued to engage in comparable and gainful employment. *Id.* The record contains an undated letter from claimant to the district director's office in Pikeville, Kentucky, the back of which is stamped as received by that office on August 23, 1988. *Id.*

Claimant filed a second claim on June 13, 1996. Director's Exhibit 2. In February of 1997, claimant was examined by Dr. Baker at the request of the Director, Office of Workers' Compensation Programs (the Director). *Id.* The district director ultimately denied the 1996 claim on September 23, 1997. *Id.* There is no indication that claimant took any further action in regard to his 1996 claim.

Claimant filed a third claim on April 13, 2001. Director's Exhibit 4. The district director made an initial finding of entitlement on March 8, 2003, and employer controverted liability. Director's Exhibits 17, 18, 24, 25. Thereafter, the claim was referred for a hearing at claimant's request. Claimant died on December 24, 2005.

²The DOL has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

preliminary finding of eligibility in the 1973 claim, and was, therefore, untimely filed under Section 422 of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a). Therefore, the administrative law judge granted employer's motion and dismissed the claim. The administrative law judge, thereafter, denied the Motion for Reconsideration filed by the Director, Office of Workers' Compensation Programs (the Director). The administrative law judge rejected the Director's argument that the district director's June 18, 1981 preliminary finding of eligibility did not constitute a "medical determination of total disability due to pneumoconiosis" sufficient to trigger the running of the three-year limitations period at Section 725.308(a).

On appeal, claimant asserts that the administrative law judge erred in finding the instant claim 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. The Director responds, contending that employer failed to rebut the presumption of timeliness at Section 725.308(c) by failing to prove that claimant received a *medical* determination of total disability due to pneumoconiosis three years prior to the 2001 filing of the instant claim. Employer responds, urging affirmance of the administrative law judge's dismissal of the instant claim, based on his finding that it is barred by the statute of limitations. Employer has also filed a "Brief in Reply to Director's Letter Response."³ Pursuant to the Board's Order dated January 13, 2006, oral argument was held in this case on February 22, 2006 in Louisville, Kentucky.⁴

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

³By Order dated February 14, 2006, the Board acknowledged receipt of claimant's counsel's "Notice of Petitioner's Death [/] Motion to Remand" dated January 30, 2006, and denied his motion to remand this case. *Sturgill v. Bell County Coal Corp.*, BRB No. 05-0343 BLA (Feb. 14, 2006) (Order) (unpublished).

⁴In its January 13, 2006 Order, the Board requested that the parties address, at oral argument, the question of whether claimant's first claim, filed in 1973, was properly denied. After consideration of the parties' responses to this issue, we hold that claimant's first claim is no longer subject to review. The claimant's 1973 claim was finally denied and is not subject to review by virtue of the district director's 1997 denial of claimant's 1996 claim and claimant's failure to timely request review of that denial. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 12 BLR 2-89 (1988) (doctrine of *res judicata* bars readjudication of finally denied black lung claim, even if the claim was incorrectly decided).

Prior to the hearing held on May 27, 2004 before the administrative law judge, employer moved for dismissal of this claim based on its assertion that the claim was untimely filed. Specifically, employer contended that the district director's June 18, 1981 preliminary finding of eligibility triggered the running of the three-year limitations period at Section 725.308(a). Employer asserted that the instant claim, filed in 2001, was barred by the statute of limitations because it was filed more than three years after the district director's June 18, 1981 preliminary finding of eligibility. In his October 4, 2004 Decision and Order Denial of Claim Granting Employer's Motion to Dismiss,⁵ the administrative law judge found that the district director's 1981 preliminary finding of eligibility triggered the running of the three-year limitations period because, at that point, claimant was made aware that he was totally disabled due to pneumoconiosis. Therefore, the administrative law judge concluded that employer successfully rebutted the presumption of timeliness at Section 725.308(c), and granted employer's motion to dismiss the claim.

By Order dated December 28, 2004, the administrative law judge denied the Director's motion for reconsideration. In doing so, the administrative law judge rejected the Director's argument that the district director's 1981 preliminary finding of eligibility could not trigger the running of the three-year limitations period because it does not constitute a medical determination of total disability due to pneumoconiosis, as required by Section 725.308(a). The administrative law judge explained, "Fundamentally, as urged by the Employer, a finding that the Claimant was eligible for benefits necessarily required a determination that the Claimant was totally disabled due to pneumoconiosis." Order on Reconsideration at 3. The administrative law judge also rejected the Director's argument that there was no evidence in the record that any physician ever conveyed to claimant that he was totally disabled due to pneumoconiosis. Rather, the administrative law judge found that because claimant "was unequivocally aware of the initial determination entitling him to benefits," he was "necessarily...aware that he was totally disabled." *Id.*

Claimant and the Director urge the Board to reverse the administrative law judge's dismissal of the claim as untimely filed because, they argue, employer failed to rebut the presumption of timeliness pursuant to Section 725.308. Citing the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001),⁶ claimant argues that the district director's June

⁵The administrative law judge originally issued his Decision and Order on October 4, 2004, but reissued it on December 4, 2004, due to incomplete service on the parties.

⁶The instant claim arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as claimant's coal mine employment occurred in Kentucky. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 5, 7.

18, 1981 preliminary finding of eligibility does not constitute a medical determination of total disability due to pneumoconiosis sufficient to trigger the running of the three-year limitations period at Section 725.308(a). Similarly, the Director asserts that the administrative law judge's finding that the district director's 1981 preliminary finding of eligibility triggered the running of the three-year limitations period is contrary to the Sixth Circuit court's decision in *Kirk*, which requires "the reasoned opinion of a medical professional," *Kirk*, 264 F.3d at 607, 22 BLR at 2-298, to trigger the limitations period.

Additionally, the Director contends that the record from claimant's 1973 claim is "devoid of any medical opinion diagnosing total disability due to pneumoconiosis." Director's Brief at 3. The Director further contends that the administrative law judge's "implicit assumption that the [district director's] 1981 determination must have been based on such evidence does not withstand scrutiny." *Id.* The Director explains that because claimant's 1973 claim was governed by the 20 C.F.R. Part 727 regulations, claimant could obtain benefits by invoking the interim presumption provided at 20 C.F.R. §727.203(a) (2000) based on a single piece of medical evidence, as opposed to a medical determination of total disability due to pneumoconiosis. *Id.* The Director, therefore, argues that if claimant had established one element of entitlement by virtue of establishing invocation of the interim presumption provided at Section 727.203(a) (2000), then the remaining elements of entitlement would be presumed. *Id.* Accordingly, the Director maintains that in a Part 727 case, a fact-finder, such as the district director, could award benefits even in the absence of medical evidence establishing all elements of entitlement. *Id.* The Director concludes "[h]ence, the district director's 1981 determination does not imply the existence of a medical opinion of total disability due to pneumoconiosis, and none exists from the 1973 claim." *Id.*

Prior to the oral argument, the Director submitted his Supplemental Oral Argument Brief dated February 16, 2006. In that brief, the Director further discussed why the only medical report available to the district director at the time of his 1981 preliminary finding of eligibility, namely the 1979 opinion of Dr. Sebastian, is insufficient to trigger the running of the three-year limitations period.⁷ Director's

⁷In his Supplemental Brief, the Director reiterated his argument that the district director's 1981 preliminary finding of eligibility in the 1973 claim is insufficient to trigger the running of the statute of limitations because the district director's preliminary finding of eligibility is an administrative decision and does not constitute a "medical determination of total disability due to pneumoconiosis" such as is required to trigger the running of the three-year limitations period pursuant to 20 C.F.R. §725.308(a) and *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Director's Supplemental Oral Argument Brief at 6.

Supplemental Oral Argument Brief at 6. Specifically, the Director stated that Dr. Sebastian's opinion is insufficient to trigger the statute of limitations because he did not render a diagnosis of total disability due to pneumoconiosis⁸ and claimant did not testify that the physician communicated such a diagnosis to him. Rather, the Director asserted, "[Dr. Sebastian's] report militates against a finding of total disability" because Dr. Sebastian stated, "Functional limitation appears slight. (Excellent tolerance of vigorous stress test)." *Id.* The Director further noted that the fact that claimant "continued working in comparable and gainful employment until 1996 supports this logical reading of Dr. Sebastian's medical opinion." *Id.*

Conversely, in employer's reply to the Director's response letter, employer notes its disagreement with the Director's declaration that claimant's 1973 claim is devoid of any medical opinion diagnosing total disability due to pneumoconiosis. In doing so, employer refers to the 1979 report of Dr. Sebastian and states that "[i]t is difficult to understand why the Director believes that this medical evidence is sufficient to trigger a finding of entitlement, but not sufficient to trigger the statute of limitations." Employer's Brief in Reply to Director's Letter Response at 3. Additionally, employer asserts that evidence submitted in connection with claimant's second claim, specifically, the reports of Drs. Baker, Barry, and Hudson "independently trigger the statute of limitations."⁹ *Id.* at 4.

In his initial brief to the Board, the Director acknowledges that in a February 22, 1997 report submitted in support of claimant's 1996 claim, Dr. Baker opined that claimant is totally disabled due to conditions attributable to both cigarette smoking and coal dust exposure. Director's Brief at 4. The Director asserts, however, that because there is no evidence that this medical opinion was communicated to claimant, it is insufficient to trigger the running of the three-year limitations period at Section 725.308(a). *Id.* The Director argues that even if Dr. Baker's February 22, 1997 opinion had been communicated to claimant, the instant 2001 claim would be timely filed because claimant's 1996 claim was finally denied on September 23, 1997, *after* the

⁸By report dated August 18, 1979, Dr. Sebastian diagnosed chronic bronchitis due to claimant's coal mine employment history, based on "employment history, chest x-ray, blood gas data." Director's Exhibit 1.

⁹Prior to oral argument, employer submitted its Supplemental Brief dated February 16, 2006. In that brief, employer reiterated its assertion that the district director's 1981 preliminary finding of eligibility is sufficient to trigger the running of the three-year limitations period at Section 725.308(a) because it was based upon medical evidence diagnosing claimant as totally disabled due to pneumoconiosis and because claimant, in 1981, was told that the medical evidence was sufficient to prove he was totally disabled. Employer's Supplemental Brief at 5-7.

issuance of Dr. Baker's opinion. *Id.* at 4 n.6. Relying on *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), the Director asserts that the September 23, 1997 denial of the 1996 claim repudiated Dr. Baker's prior finding of total disability due to pneumoconiosis. *Id.* The Director acknowledges that "[w]hile there is language in the Sixth Circuit [court's] decision in *Kirk* indicating that the denial of a prior claim does not reset the limitations period. . .and while the Board has rejected our argument that this language is *dicta* . . ., the Sixth Circuit [court] has held (albeit in an unpublished decision) that the *Kirk* language is *dicta*, and has adopted our view that the denial of a prior claim resets the limitations period."¹⁰ *Id.*

Employer urges the Board to affirm the administrative law judge's decision to dismiss the claim as time barred. Employer disagrees with the argument advanced by both claimant and the Director that because the district director's 1981 preliminary finding of eligibility is a legal determination, and not a medical determination, it cannot trigger the running of the three-year limitations period at Section 725.308(a). Employer refers to claimant's statements in the record, that a finding of total disability due to pneumoconiosis had been communicated to claimant in connection with his 1973 claim, to support its assertion that claimant was told that he was totally disabled due to pneumoconiosis because he was aware of the 1981 preliminary finding of eligibility.¹¹ Hearing Transcript at 20; *see also* Director's Exhibit 7 (claimant's answers to interrogatories propounded by employer in November of 2001). Accordingly, employer

¹⁰The Director's reliance on the Sixth Circuit court's unpublished decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, 48 Fed.Appx. 140, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002)(Batchelder, J., dissenting), over the court's published decision in *Kirk*, is misplaced. Because *Kirk* is a published case, it constitutes binding precedent on the timeliness issue, whereas *Dukes* is unpublished and, as such, has no precedential value. *See* 6th Cir. R. 206(c); *Lopez v. Wilson*, 355 F.3d 931 (6th Cir. 2004); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d. 211, 20 BLR 2-360 (6th Cir. 1996).

¹¹Employer relies on claimant's hearing testimony and written responses to interrogatories propounded by employer. Specifically, employer relies on claimant's testimony that he was "granted black lung benefits with conditions" in connection with his 1973 claim. Hearing Transcript at 20. Claimant stated that the condition was that he cease all gainful employment within one year, which, he testified, was "an impossibility" given his financial obligations in providing for his family and maintaining his home. *Id.* at 20-21. In response to interrogatories, claimant, when asked whether he had ever received a medical report, oral or written, from any physician advising him that he was totally and permanently disabled due to coal workers' pneumoconiosis, responded in the affirmative and indicated, "Filed in 1981 and approved at that time – did not draw." Director's Exhibit 7 at 8. Employer asserts that this response by claimant "is dispositive here." Employer's Response Brief at 7.

asserts that the instant claim is time barred under Section 725.308(a) and *Kirk* because it was filed more than three years after claimant was told he was totally disabled due to pneumoconiosis by virtue of the district director's 1981 preliminary finding of eligibility.

We agree with the assertions made by claimant and the Director that the administrative law judge's determination, that the district director's 1981 preliminary finding of eligibility triggered the running of the three-year limitations period pursuant to Section 725.308(a), is contrary to law. Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a *medical* determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits filed under the Act is timely filed. 20 C.F.R. §725.308(c). The Sixth Circuit court, in *Kirk*, stated that it is "employer's burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [the claimant]" more than three years prior to the filing of his/her claim. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. Accordingly, the Act and its implementing regulation, as well as Sixth Circuit court case law, require that a *medical* determination trigger the running of the three-year limitations period.

In defining what constitutes a medical determination that is sufficient to start the running of the statute of limitations, the Sixth Circuit court, in *Kirk*, stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.2d at 607, 22 BLR at 2-298. In further discussion of this issue, the *Kirk* court specifically stated that "the three-year limitations clock begins to tick" when claimant is told by a *physician* that he is totally disabled by pneumoconiosis. *Id.* The facts of this case reflect that the 1981 preliminary determination of eligibility rendered by the district director was a legal determination, rather than a determination by a physician based on medical evidence of total disability due to pneumoconiosis. Therefore, it is insufficient to trigger the statute of limitations pursuant to 20 C.F.R. §725.308(a) and *Kirk*.

At the oral argument, employer referred to a decision by the Virginia Court of Appeals, *Ratliff v. Dominion Coal Co.*, 349 S.E.2d 147 (Va. Ct. App. 1986) which, employer stated, supports its position that the district director's 1981 preliminary determination of eligibility is sufficient to trigger the statute of limitations. In *Ratliff*, a district director with the Department of Labor (DOL) notified the claimant in 1979 that he was eligible for federal black lung benefits. *Ratliff*, 349 S.E.2d at 147. The claimant declined to pursue his federal claim at that time, and continued to work. *Id.* In 1985, the claimant sought state benefits under the Virginia Workers' Compensation Act. *Id.* The Industrial Commission in Virginia, which heard the claimant's case, held that it was barred by the statute of limitations because the 1979 decision from the DOL was a medical determination of total disability due to pneumoconiosis that triggered the running

of the three-year statute of limitations. *Id.* The claimant argued that the district director's letter was not a medical determination but, rather, was an administrative or legal determination that was insufficient to start the running of the statute of limitations. *Id.* at 149. The *Ratliff* court declined to adopt the claimant's view that the district director's letter was not a medical determination because, the court stated, "[t]he letter was in response to a federal claim filed by [the claimant] and supplemented with medical evidence." *Id.* at 149. Therefore, the Virginia Court of Appeals held that the claimant's receipt of the DOL's determination that he met the federal disability standards started the running of the statute of limitations in his claim.¹² *Id.* at 150.

Employer similarly argues, in the instant case, that because the district director found claimant to be totally disabled due to pneumoconiosis and eligible for benefits, claimant's first claim was necessarily supported by medical evidence stating that claimant was totally disabled due to pneumoconiosis. Employer's argument and its reliance on *Ratliff* are unpersuasive for the following reasons. First, the published Sixth Circuit court case of *Kirk*, discussed *supra*, interprets the phrase "medical determination"¹³ contained in Section 725.308 and, unlike the *Ratliff* decision by the Virginia Court of Appeals, constitutes binding precedent in this case. Second, while the specific evidence supporting the claimant's federal claim in *Ratliff* is unknown, the district director, in the instant case, based his finding of eligibility on the opinion of Dr. Sebastian. However, as the Director contends, Dr. Sebastian's report, on its face, does not support a finding of total disability due to pneumoconiosis. Rather, it was the district director's consideration of Dr. Sebastian's report, only in conjunction with the legal presumptions of 20 C.F.R. Part 727 available to claimant at that time, that supported the district director's finding that claimant was eligible for benefits. Accordingly, contrary to employer's assertion, the district director's finding of entitlement in a claim arising under Part 727 does not necessarily support a conclusion that the record contained a medical determination of total disability due to pneumoconiosis.

¹²The federal statute of limitations contained at Section 422 of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), applied to the claimant's claim because a provision in the Virginia Workers' Compensation Act, in effect at that time, stated that state claims for total disability "shall be required or effective only to the extent that they are allowed by the 1969 Federal Coal Mine Health and Safety Act as amended and the regulations issued thereunder." *Ratliff v. Dominion Coal Co.*, 349 S.E.2d 147, 149 (Va. Ct. App. 1986).

¹³In defining what constitutes a medical determination that is sufficient to trigger the running of the statute of limitations, the Sixth Circuit court, in *Kirk*, stated that the statute relies on the "trigger of the reasoned opinion of a medical professional." *Kirk*, 264 F.2d at 607, 22 BLR at 2-298.

Based on the foregoing, we hold that the administrative law judge erred in finding that the district director's 1981 preliminary finding of eligibility was sufficient to trigger the three-year limitations period pursuant to Section 725.308(a). We, therefore, reverse the administrative law judge's Decision and Order granting employer's motion to dismiss the claim, vacate his Order denying the Director's Motion for Reconsideration, and remand this case to the administrative law judge. We instruct the administrative law judge, on remand, to analyze the evidence of record to determine whether employer has met its "burden to rebut the presumption of timeliness by showing that a medical determination satisfying the statutory definition was communicated to [claimant]" more than three years prior to the 2001 filing of the instant claim. *Kirk*, 264 F.2d at 607, 22 BLR at 2-296.

Accordingly, the administrative law judge's Decision and Order Denial of Claim Granting Employer's Motion to Dismiss is reversed and his Order Denying Motion for Reconsideration is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in the majority's decision to reverse the administrative law judge's finding that the district director's 1981 preliminary finding of eligibility is sufficient to trigger the running of the three-year limitations period, as that finding is contrary to law. *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). However, I respectfully dissent from the majority's decision to remand the case for the administrative law judge to render findings regarding the timeliness issue. I would hold that the instant claim is timely filed as employer has not met its burden to rebut the presumption of timeliness at 20 C.F.R. §725.308(c) by proving that a specific reasoned medical opinion "satisfying the statutory definition" of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the filing of the instant claim in 2001. *Kirk*, 264 F.3d at 607, 22 BLR at 2-296. Employer has consistently argued to the administrative law judge and to the Board that the district director's preliminary finding of eligibility was sufficient to trigger the statute of limitations. By failing to raise any other argument, employer has waived all other arguments. *Lawson v. Sec'y of HHS*, 688 F.2d 436, 440, 4 BLR 2-151, 2-157-58 (6th Cir. 1982). Hence, I disagree with the majority's decision to permit employer on remand to prolong the litigation by conducting a fishing expedition into claimant's medical history. I would, therefore, remand the case for the administrative law judge to consider solely the merits of the instant claim.

REGINA C. McGRANERY
Administrative Appeals Judge