U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0229 BLA

WALLACE H. UZZLE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 02/13/2018
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

William S. Mattingly and Elizabeth A. Combs (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05876) of Administrative Law Judge Jonathan C. Calianos, rendered on a claim filed on June 24, 2011, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with twenty-six years of coal mine employment, based on the stipulation of the parties, and found that all of his work was at an underground mine. The administrative law judge

also determined that claimant established total disability at 20 C.F.R. §718.204(b)(2) and, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[1] The administrative law judge further found that employer failed to rebut the presumption and awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant timely filed his claim. Employer also asserts that the administrative law judge did not properly weigh the evidence relevant to rebuttal. Claimant responds, stating that that his claim is timely and urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, filing a limited brief, requests that the Board vacate the administrative law judge's timeliness finding.[2]

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359, 362 (1965).

I. Timeliness of the Claim

Pursuant to Section 422(f) of the Act, "[a]ny claim for benefits by a miner . . . shall be filed within three years after . . . a medical determination of total disability due to

[1] Under Section 411(c)(4) of the Act, claimant is presumed to be 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established: twenty-six years of underground coal mine employment; a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 3, 5, 41.

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 50; Director's Exhibit 3. Accordingly, we will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

pneumoconiosis . . . ." 30 U.S.C. §932(f). The implementing regulation, set forth at 20 C.F.R. §725.308, requires that the medical determination of total disability due to pneumoconiosis be "communicated to the miner or a person responsible for the care of the miner," and provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). The regulation also provides that the three-year time limit for filing is mandatory and can be waived only under extraordinary circumstances. 20 C.F.R. §725.308(c). To rebut the presumption of timeliness, employer must show, by a preponderance of the evidence, 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); *see Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 594-95, 25 BLR 2-273, 2-282 (6th Cir. 2013); *Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001). In the current case, the administrative law judge found that employer did not meet its burden of rebutting the presumption of timeliness. Decision and Order at 8.

Relying on claimant's testimony at the hearing, employer argues that claimant was informed by Dr. Houser "around 2000 or 2001" that he was totally disabled due to pneumoconiosis but failed to file his federal claim for benefits until 2011. Employer's Brief in Support of Petition for Review at 10, *citing* Hearing Transcript at 46-47. Employer also maintains that claimant has not established extraordinary circumstances to waive or toll the statute of limitations. Employer further contends that the administrative law judge erred in addressing the statute of limitations in the context of a subsequent claim when the current claim is an initial claim. Finally, employer asserts that the administrative law judge erred in relying on case law from the United States Court of Appeals for the Third Circuit to find that employer failed to rebut the presumption of timeliness. We agree with employer that the administrative law judge's findings under 20 C.F.R. §725.308 contain errors requiring remand.

At the hearing, the following exchange occurred on cross-examination between claimant and employer's counsel:

> Q: One of the things that we need to know is if a doctor has ever told you that you have a breathing problem that is totally disabling due to coal workers' pneumoconiosis or black lung disease. Has a doctor ever told you that?
>
> A: Yes.
>
> Q: Do you remember what doctor told you that?
>
> A: Dr. Houser.

Q: Do you remember when Dr. Houser told you [that] you were totally disabled by a breathing problem caused by black lung disease?

A: I've been examined by Dr. Houser three different times. Each time, he's told me that.

Q: Do you remember about when those examinations were?

A: One would probably be around 2000, 2001.

Q: Okay. That was the first one?

A: Might've been the middle one. The other one would've been back in the nineties.

Q: But just to make sure I understand, he told you that you had black lung disease –

A: Yes.

Q: -- that was causing disabling pulmonary problems?

A: Yes.

Q: He told you [that] you couldn't go back to work because of your breathing problems?

A: No, he didn't tell me that.

Q: Did he tell you your breathing was bad?

A: Yes.

Q: Did he tell you that it would interfere with your ability to work?

A: I can't recall.

Q: Okay. But he has told you the same thing each time you've seen him?

A: Yes.

Hearing Transcript at 46-47.

The administrative law judge found that "[t]his testimony *suggests* that the [c]laimant *may have had* a diagnosis of total disability due to coal worker[s'] pneumoconiosis more than three years before he filed his claim." Decision and Order at 6 (emphasis added). However, relying on the Third's Circuit's decision in *Eighty Four Mining Co. v. Director, OWCP* [*Morris*], 812 F.3d 308, 25 BLR 2-821 (3d Cir. 2016), the administrative law judge determined that the denial of claimant's state claim rendered Dr. Houser's medical determination a misdiagnosis, thus resetting the statute of limitations to file a federal claim.[4] *Id*. at 7-8.

The administrative law judge erred as he did not consider the factual differences between *Morris* and the current case. In *Morris*, the employer argued that the statute of limitations was triggered by a medical opinion that was expressly rejected by the state court and, therefore, deemed a misdiagnosis by the Third Circuit. *Morris*, 812 F.3d at 313, 25 BLR at 2-829. In the present case, the state claim decision did not address Dr. Houser's opinion but merely reflected a finding that claimant failed to prove the existence of clinical pneumoconiosis based on the x-ray evidence. *See* Director's Exhibit 8. Thus, the administrative law judge failed to adequately explain how the reasoning in *Morris* supported his determination that the narrower decision on claimant's state claim rendered Dr. Houser's opinion a misdiagnosis and therefore did not comply with the Administrative Procedure Act (APA).[5] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

The administrative law judge also erred in failing to render a definitive finding as to whether claimant's testimony credibly established that a diagnosis of totally disabling

[4] Claimant submitted a claim for state workers' compensation benefits to the Kentucky Department of Workers' Claims (KDWC) on December 3, 2002, alleging that he had coal workers' pneumoconiosis. Director's Exhibit 8. The KDWC dismissed the claim on December 2, 2003, on the ground that claimant did not meet the threshold requirement for benefits because his x-rays did not show a classification of at least category 1/0. *Id*.

[5] The Administrative Procedure Act, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a).

pneumoconiosis was communicated to him more than three years before he filed his federal black lung claim. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Rather, as employer alleges, the administrative law judge merely found that claimant's testimony "suggests" that he "may have" received such a communication from Dr. Houser. Decision and Order at 6. The administrative law judge also neglected to address relevant portions of claimant's testimony. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Although claimant initially agreed that Dr. Houser told him that he was totally disabled due to coal workers' pneumoconiosis, he subsequently testified that Dr. Houser did not inform him that he could not return to work based on respiratory issues and that he could not recall if Dr. Houser told him that his breathing problems would interfere with his ability to perform his coal mine employment.[6] Hearing Transcript at 46-47. Because the administrative law judge did not make a conclusive determination on claimant's testimony and did not address all relevant testimony from claimant, he did not comply with the APA. *See Wojtowicz*, 12 BLR at 1-165.

In light of these errors, we vacate the administrative law judge's determination that employer failed to rebut the presumption that claimant timely filed his claim and we remand this case to the administrative law judge.[7] On remand, the administrative law judge must review the entirety of claimant's testimony to determine whether it is sufficient to establish that Dr. Houser's statements constituted the communication to claimant of a diagnosis of total disability due to pneumoconiosis. If the administrative law judge finds that Dr. Houser's statements satisfy this requirement, he must also

[6] The Director, Office of Workers' Compensation Programs (the Director), argues that "[t]hese inconsistencies suggest [claimant] did not understand the meaning of being disabled in this context and certainly cast doubt on his initial apparent agreement that Dr. Houser had diagnosed disabling pneumoconiosis." Director's Brief at 4. The Director further states that "[o]n remand, the [administrative law judge] should find that [claimant's] inconsistent testimony does not credibly prove that Dr. Houser told him he was totally disabled due to pneumoconiosis." *Id*. at 5.

[7] While our dissenting colleague would hold as a matter of law that the claim was timely filed, we believe, under the facts of this case, that it is the duty of the administrative law judge as fact-finder to initially weigh the evidence and determine whether employer has sufficiently rebutted the presumption of timeliness. Moreover, determining the credibility of a witness and the reliability of the evidence is within the sound discretion of the administrative law judge. *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, 1-23 (1988); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986).

determine whether claimant's testimony is sufficient to prove that Dr. Houser's communication occurred more than three years prior to the filing of claimant's June 24, 2011 claim. The administrative law judge may not rely on the disposition of claimant's state claim when rendering his findings, as it is not relevant to the timeliness inquiry in claimant's federal claim. The administrative law judge must comply with the APA on remand by identifying the relevant evidence, making findings as to its credibility and probative value, and setting forth his findings in detail, including the underlying rationales. *See Wojtowicz*, 12 BLR at 1-165.

II. Rebuttal of the Section 411(c)(4) Presumption

In the interest of judicial economy, we also address employer's contention that the administrative law judge erred in finding that employer failed to rebut either the presumed existence of legal pneumoconiosis or the presumed fact that claimant's totally disabling respiratory impairment is due to legal pneumoconiosis. Once the Section 411(c)(4) presumption is invoked, the burden shifts to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[8] or by establishing that "no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in § 718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting). The administrative law judge found that employer rebutted the presumed existence of clinical pneumoconiosis but failed to establish that claimant does not have legal pneumoconiosis or that he is not totally disabled due to pneumoconiosis.

A. Legal Pneumoconiosis

Relevant to rebuttal of the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Chavda, Houser, Baker, Selby and Basheda. Decision and Order at 44-47; Director's Exhibit 12; Claimant's Exhibits 1, 8; Employer's

[8] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id.* Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Exhibits 14-16, 18, 20. Drs. Chavda, Houser and Baker diagnosed claimant with chronic obstructive pulmonary disease (COPD) due to coal dust exposure and cigarette smoking, while Drs. Selby and Basheda attributed claimant's disabling respiratory or pulmonary impairment to conditions unrelated to coal dust exposure. Director's Exhibit 12; Claimant's Exhibits 1, 8; Employer's Exhibits 1, 11, 14, 15, 18. The administrative law judge discredited the opinions of Drs. Selby and Basheda, and concluded that employer failed to rebut the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A). Decision and Order at 47.

Employer argues that the administrative law judge did not properly weigh the opinions of Drs. Selby and Basheda because he did not consider the treatment records supporting their opinions. Employer also contends that the opinions of claimant's treating physicians, as contained in these records, should be given controlling weight. Further, employer asserts that the administrative law judge repeatedly substituted his judgment for that of the medical experts.[9] Employer's allegations of error are without merit.

Contrary to employer's argument, the administrative law judge's finding that the opinions of Drs. Selby and Basheda are insufficient to establish that claimant does not have legal pneumoconiosis is rational and supported by substantial evidence. Dr. Selby diagnosed claimant with asthma, symptoms of congestive heart failure, obesity, probable sleep apnea, and emphysema due to cigarette smoking. Employer's Exhibit 1. Dr. Selby testified that, in terms of lung disease, claimant has "likely suffered from some asthma" based on treatment reflected in his medical records, emphysema due to cigarette smoking, and some restriction from a previous injury to the pleura and parenchyma on his left side. Employer's Exhibit 14 at 24. Dr. Selby attributed the "diminution in the oxygen tension" to the congestive heart failure he diagnosed. *Id*. at 14-15. Similarly, Dr. Basheda attributed claimant's respiratory impairment to "persistent asthma." Employer's Exhibit 11. Dr. Basheda also stated:

> [W]e're looking at someone who had some bronchial reversibility, normal pulmonary function and then developed persistent obstruction over the years, long after stopping smoking and leaving the coal mines, and this kind of scenario along with his treating records where his treating physicians told – said he had asthma, this most likely reflects initially intermittent

[9] Employer also asserts that the administrative law judge erred in crediting the opinions of Drs. Baker, Chavda, and Houser. We need not address employer's arguments, as the diagnoses of legal pneumoconiosis made by these physicians do not assist employer in carrying its burden on rebuttal.

> asthma where he had symptoms intermittently, pretty much normal pulmonary function tests and then developed persistent airway obstruction due to persistent asthma, and persistent asthma is related to permanent changes in the airways due to lack of treatment or lack of recognition that someone actually has asthma, and it can mimic tobacco induced obstructive lung disease in the fact it can be variable and have an acute bronchodilator response, but the FEV1/FVC ratio remains abnormal.

Employer's Exhibit 15 at 23.

The administrative law judge permissibly found that although Drs. Selby and Basheda explained that claimant's respiratory impairment was due to asthma, they "[did] not refute the possibility that the Claimant could have had both COPD [due to coal dust exposure] *and* asthma."[10] Decision and Order at 47; *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325-26 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003). Thus, we affirm the administrative law judge's determination that the opinions of Drs. Selby and Basheda are insufficient to rebut the existence of legal pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i)(A).[11]

B. Total Disability Causation

Employer contends that the administrative law judge erred in relying on his discrediting of the medical opinions of Drs. Selby and Basheda on legal pneumoconiosis

[10] In contrast to employer's allegation, the administrative law judge reviewed claimant's treatment records and permissibly found that the "intermittent" references to asthma, and the lack of a childhood history of the disease, were insufficient to substantiate a finding that claimant suffered only from asthma. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 33-38, 46-47. We also note that, unlike Drs. Selby and Basheda, claimant's treating physicians – Drs. Pandit and Johnson – diagnosed claimant with asthma *and* chronic obstructive pulmonary disease. Claimant's Exhibits 4-5; Employer's Exhibits 9-10. However, neither physician commented as to whether coal dust exposure played a role in claimant's obstructive impairment. *Id*.

[11] As employer must disprove both legal and clinical pneumoconiosis under 20 C.F.R. §718.305(d)(1)(i), employer's failure to disprove legal pneumoconiosis precludes rebuttal under the first method.

to find that employer did not rebut the presumption of total disability causation at 20 C.F.R. §718.305(d)(1)(ii). We disagree.

Because Drs. Selby and Basheda did not diagnose legal pneumoconiosis, contrary to his finding that employer failed to disprove its existence, the administrative law judge permissibly discounted their opinions on the cause of claimant's totally disabling respiratory or pulmonary impairment. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-444 (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-474 (6th Cir. 2013); Decision and Order at 48-49. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that "no part" of claimant's totally disabling respiratory impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 49.

In light of our affirmance of the administrative law judge's determination that employer has not rebutted the Section 411(c)(4) presumption by either method, we affirm the administrative law judge's finding that claimant has established entitlement to benefits. Thus, if the administrative law judge finds on remand that claimant timely filed his federal black lung claim, he must reinstate the award of benefits.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur.

RYAN GILLIGAN
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring and dissenting:

I concur with the majority's affirmance of the administrative law judge's finding that employer failed to rebut the presumption of total disability due to pneumoconiosis. I respectfully dissent, however, from the majority's decision to vacate the administrative law judge's determination that employer failed to rebut the presumption that claimant timely filed his claim.

To rebut the presumption of timeliness, employer must show by a preponderance of the evidence 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 held that, because claimant's denied state claim reset the statute of limitations, whether or not employer met that burden here was immaterial. Decision and Order at 6-7. While I agree with the majority that the administrative law judge failed to adequately address factual disparities between the authority cited for that point and the present case, that critique ignores a far more fundamental issue: in order for the statute of limitations to be reset, employer needs first to establish the facts necessary for its commencement. And because employer has not -- and cannot -- credibly establish those facts on this record, I would hold as a matter of law that the claim was timely filed.

Employer has identified no definitive evidence to establish the year, much less the date, that claimant received a medical determination of total disability due to

pneumoconiosis in either its brief to the administrative law judge or on appeal. It instead pins its entire case on a selective portion of the single passage of claimant's hearing testimony quoted above. Claimant's inherently contradictory testimony, however, cannot fulfill employer's burden on its own.

The first portion of the testimony admittedly might help support an inference that the claim is time-barred. All three of the dates claimant identified that he received such a diagnosis predate the filing of this claim by more than three years. Hearing Transcript at 46: 14-25; 47: 1-12. But the interpretation of that limited portion of the passage was not the task before the administrative law judge at trial or this Board on review. The rest of the passage is just as relevant to our inquiry and, in it, claimant directly contradicts his initial assertions. In the immediately subsequent portion, he unambiguously denies that he was ever told that he could not go back to work because of his pulmonary problems. *Id.* at 47: 13-15. And in the final portion, when asked whether he was told "his breathing" would interfere with his ability to work, claimant responded plainly, "I can't recall." *Id.*: at 18-20. At that point, rather than attempting to clarify three distinctly divergent answers to essentially the same question, employer's counsel simply gave up this line of questioning and moved on.

Missing from the majority's opinion, and all of the pleadings before us, is any attempt to explain why the first portion of the quoted testimony is entitled to more weight than the remaining two-thirds. In my view, it is not. As such, even if we were to consider claimant's hearing testimony in a vacuum, as employer urges, it could not logically satisfy employer's burden: demonstrating that an interpretation of testimony is one of three equally plausible interpretations does not establish its truth by a preponderance of the evidence.

More importantly, given the contradictions and lack of corroboration, there is no attempt to show how the first portion of testimony could possibly satisfy employer's burden on the record as a whole. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a). Again, in my view, it simply cannot. In this regard, the facts of this case are fundamentally different from those in *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d 590, 595-96, 25 BLR 2-273, 2-283 (6th Cir. 2013), which employer primarily relies on in support of its argument. In that case, the miner testified that he submitted a report from two physicians who opined that he was totally disabled due to black lung disease as part of his application for state benefits. *Brigance*, 718 F.3d at 592, 25 BLR at 2-282. He also specifically admitted at his hearing that he saw the report and knew at that time that the doctors had medically determined that he was totally disabled due to pneumoconiosis. *Id.* Here, by contrast: claimant's testimony presents three equally plausible versions of whether he was told he was disabled; there is no medical report in the record stating that

he is disabled that predates the filing of his claim by three years; and employer has not submitted any other evidence to corroborate its interpretation of claimant's testimony.

Employer has had ample opportunity to establish a more definitive evidentiary record regarding the timeliness of the claim. *See, e.g.*, 20 C.F.R. §725.414(a)(3)(i)(A) (permitting employer to obtain medical records); 20 C.F.R. §725.414(c) (permitting physician depositions). It failed to do so. Therefore, while factual determinations normally are the province of the administrative law judge, in my view, "no factual issues remain to be determined" and "[n]o further factual development is necessary" in this case. *See generally Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 187, 25 BLR 2-601, 2-614 (4th Cir. 2014). Because I can see no way employer can meet its burden to rebut the presumption of timeliness of this claim based on the totality of the evidence, I would affirm the award of benefits.[12]

JONATHAN ROLFE
Administrative Appeals Judge

[12] Given the majority's view that the administrative law judge failed to address relevant portions of claimant's testimony, it would remand this case for him to consider the testimony in its entirety. But, at least with regard to that portion most favorable to employer, he already has: "[t]his testimony *suggests* that the [c]laimant *may have had* a diagnosis of total disability due to coal worker[s'] pneumoconiosis more than three years before he filed his claim." Decision and Order at 6 (emphasis added). On its face, that characterization is insufficient to meet employer's burden. Employer must establish a conclusion supported by a preponderance of all the evidence, not a suggestion based on some of it. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).