U.S. Department of Labor

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

BRB No. 20-0320 BLA

CLARA S. TOLER (Survivor of ARVIS R. TOLER) Claimant-Respondent v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Petitioner	)	DATE ISSUED: 12/29/2021 DECISION and ORDER

Appeal of the Decision and Order Granting Modification of Paul C. Johnson, Jr., District Chief Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for Claimant.

Jeffrey S. Goldberg (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

The Director, Office of Workers' Compensation Programs (the Director),[1] appeals District Chief Administrative Law Judge (ALJ) Paul C. Johnson, Jr.'s Decision and Order

[1] The Miner's employer in this case was Eastern Associated Coal Company, an affiliate of Alpha Natural Resources. Due to Alpha Natural Resources' bankruptcy,

Granting Modification (2017-BLA-05472) rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act). This case involves a request for modification of a subsequent miner's claim. Although Claimant established entitlement to benefits in the subsequent claim, she requested modification of the ALJ's finding as to the date benefits should commence.[2] In granting modification, the ALJ found the Miner was totally disabled due to pneumoconiosis by November 1998, the month after the order denying the Miner's prior claim became final in October 1998, and thus benefits should commence at that time. On appeal, the Director challenges the ALJ's commencement date finding. Claimant responds, urging affirmance.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Benefits commence in the month the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If that date is not ascertainable from all the relevant evidence, benefits commence in the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green*, 790 F.2d at 1119 n.4; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, benefits may not be paid

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Eastern Associated Coal Company no longer has sufficient assets to satisfy the award in this claim as the responsible operator. Thus, the Director, in his fiduciary role as trustee of the Black Lung Disability Trust Fund, advised the district director it is liable for this claim and the payment of any benefits. Director's Exhibit 83; *see* 26 U.S.C. §9501(a)(2); 20 C.F.R. §§725.1(e), 725.101(a)(15), 725.360(a)(5).

[2] The Miner filed this subsequent claim, but he died on March 19, 2015 while it was pending. *Toler v. E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, n.5 (4th Cir. 2015). Claimant, the Miner's surviving spouse, is pursuing the claim on behalf of his estate. *Id*.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the Miner performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 5, 7.

for any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Procedural History

In order to understand the ALJ's commencement date finding, we set forth the procedural history of this case.

Initial February 4, 1993 Claim

The Miner filed an initial claim on February 4, 1993. Director's Exhibit 1. In a July 30, 1996 Decision and Order on Remand adjudicating that claim, ALJ Christine McKenna found there "is no dispute that [the Miner] suffer[ed] from a severe obstructive pulmonary illness and that he [was] totally disabled as a result of that illness." Director's Exhibit 1 (internally July 30, 1996 Order at 1). She denied the claim, however, because the Miner failed to establish clinical or legal pneumoconiosis. 20 C.F.R. §718.202; Director's Exhibit 1 (internally July 30, 1996 Order at 6-8). She credited the opinions of Drs. Tuteur and Zaldivar that the Miner did not suffer from legal pneumoconiosis over Dr. Rasmussen's contrary opinion that he did have the disease. Director's Exhibit 1 (internally July 30, 1996 Order at 6-8).

Both the Board and the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, affirmed the denial of benefits. *Toler v. E. Assoc. Coal Co.*, 162 F.3d 1156 (Table) (4th Cir. Aug. 19, 1998) (unpub.), *aff'g Toler v. E. Assoc. Coal Co.*, BRB No. 96-1499 BLA (July 29, 1997) (unpub.).

February 28, 2008 Subsequent Claim

The Miner thereafter filed this subsequent claim on February 28, 2008. Director's Exhibit 2. In a June 15, 2010 Decision and Order, ALJ Daniel F. Solomon found the Miner was totally disabled as stipulated by Employer, and worked at least fifteen years in underground coal mine employment. Director's Exhibit 47. Thus he found the Miner invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4) (2018), which was reinstated as part of the Affordable Care Act following the denial of the Miner's prior claim. Director's Exhibit 47; *see* Public Law No. 111-148, §1556 (2010). He further found Employer failed to rebut the presumption and awarded benefits. *Id.* In a subsequent Decision and Order Denying Motion on

[4] Section 411(c)(4) provides a rebuttable presumption that a miner's total disability was due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Reconsideration, ALJ Solomon clarified that the Miner's "entitlement begins as of the date of application, February 26, 2008, by operation of law." July 23, 2010 Decision and Order Denial of Motion to Reconsider at 2.

Employer appealed, and the Board vacated ALJ Solomon's award of benefits because he failed to provide the parties an opportunity to submit additional evidence relevant to the change in law occasioned by the reinstatement of the Section 411(c)(4) presumption. *Toler v. E. Assoc. Coal Corp.*, BRB No. 10-0640 BLA, slip op. at 3-4 (July 28, 2011) (unpub.). The Board thus remanded the case so that the parties could submit such evidence. *Id.* In an August 1, 2013 Decision and Order on Remand on Reconsideration, ALJ Solomon again found the Miner invoked the Section 411(c)(4) presumption and Employer failed to rebut it. Thus he again awarded benefits. Director's Exhibit 67. He did not revisit his prior finding that benefits commence in February 2008. *Id*.

Both the Board and the Fourth Circuit affirmed the award. *Toler v. E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502 (4th Cir. 2015), *aff'g Toler v. E. Assoc. Coal Corp.*, BRB No. 13-0531 BLA (July 7, 2014) (unpub.).

Claimant timely requested modification, asserting that the date for the commencement of benefits in this subsequent claim is September 1998, the month after the Fourth Circuit issued its decision affirming ALJ McKenna's denial of the initial claim. Director's Exhibit 79. The district director denied the request for modification. Director's Exhibit 83. Claimant requested a hearing and the case was assigned to ALJ Johnson (the ALJ).

ALJ's Findings

In his Decision and Order Granting Modification that is the subject of this appeal, the ALJ agreed with Claimant that benefits should commence in November 1998, the month after the Fourth Circuit's August 1998 decision, affirming the denial of the Miner's initial February 4, 1993 claim, became final.[5] He relied on the United States Court of Appeals for the Sixth Circuit's holding in *Coleman v. Christen Coleman Trucking*, 784 F. App'x 431 (6th Cir. 2019) (unpub.) that evidence of total disability from a prior claim, combined with the subsequently reinstated Section 411(c)(4) presumption, establishes the date that a miner became totally disabled due to pneumoconiosis for purposes of the benefits commencement date. The ALJ explained that in determining the commencement date for benefits in a subsequent claim, he may "consider and assess" the medical evidence

[5] The ALJ stated the Fourth Circuit's August 1998 decision affirming the denial of the Miner's initial February 4, 1993 claim actually "went into effect on October 13, 1998." Decision and Order at 6, *citing* 20 C.F.R. §725.502(a)(2).

from the Miner's initial February 4, 1993 denied claim to ascertain when the Miner became totally disabled due to pneumoconiosis for purposes of the benefits commencement date. Decision and Order at 3-5. Because the Miner was found to be totally disabled in his initial claim, and the record establishes he had at least fifteen years of underground coal mine employment, the ALJ concluded the Miner would have invoked the Section 411(c)(4) presumption. *Id*. at 5-6. The ALJ further determined that the opinions of Employer's medical experts, Drs. Zaldivar and Tuteur, would not have persuasively disproved legal pneumoconiosis or disability causation. *Id*.

Based on these findings, and because the Miner's prior claim included a March 1993 medical report from Dr. Rasmussen diagnosing the Miner as totally disabled due to legal pneumoconiosis, the ALJ concluded the Miner had been totally disabled due to pneumoconiosis "since at least March 1993." Decision and Order at 5-6. Because the regulations prohibit the payment of benefits in a subsequent claim "for any period prior to the date upon which the order denying the prior claim became final," the ALJ determined the commencement date for benefits should be November 1998, the month after the Fourth Circuit's affirmance of ALJ McKenna's denial of benefits in the Miner's initial claim became final in October 1998. *Id.* at 6, *citing* 20 C.F.R. §725.309(c)(6).

We affirm the ALJ's determination that benefits commence in November 1998. In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358 (4th Cir. 1996) (en banc), the Fourth Circuit explained that a prior final determination that a miner was not entitled to benefits, and "its necessary factual underpinning" at that time, must be accepted as legally correct. *Rutter*, 86 F.3d at 1360-62; *see also Consol. Coal Co. v. Williams*, 453 F.3d 609, 615-16 (4th Cir. 2006).[6] Thus, in the present case, the ALJ was required to "accept the correctness" of ALJ McKenna's determination (and the Fourth Circuit's affirmance of her determination) that the Miner was not totally disabled due to pneumoconiosis. That determination is "off-limits to criticism" by the parties and the ALJ. *Rutter*, 86 F.3d at 1361.

Although *Rutter* precludes a finding that the Miner was "totally disabled due to pneumoconiosis during the period before the prior claim was denied," Director's Brief at 4, it does not preclude a finding that the Miner was totally disabled due to pneumoconiosis during the period *after* the denial of his prior claim became final. *Rutter*, 86 F.3d at 1360-62. The ALJ found the Fourth Circuit's order affirming the denial of the Miner's prior claim "went into effect on October 13, 1998." Decision and Order at 6. This finding is affirmed as unchallenged. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Based on the procedural history of this case and the ALJs' factual findings, substantial

[6] The Fourth Circuit reiterated its holding in *Rutter* in *Consol. Coal Co. v. Williams*, 453 F.3d 609, 615-16 (4th Cir. 2006).

evidence in the record supports that the Miner was totally disabled due to pneumoconiosis as of November 1998. We therefore affirm the ALJ's commencement date finding.

Critically, contrary to our dissenting colleague's assessment, the ALJ did not "revisit[]" any "factual underpinning" of ALJ McKenna's earlier denial of benefits and thereby violate *Rutter*. The ALJ based his commencement date finding, i.e., the date upon which the Miner became totally disabled due to pneumoconiosis, on the Miner's entitlement to the Section 411(c)(4) presumption. This provision was not in effect when ALJ McKenna denied the Miner's prior claim – and thus, she did not render a finding on this pertinent issue. As the ALJ found, because Claimant invoked the presumption in this subsequent claim, the Miner is by law presumed to have been totally disabled due to pneumoconiosis, at a minimum, in March 1993 – the point in time when he met the presumption's two prerequisites: having a totally disabling respiratory impairment and fifteen years of qualifying coal mine employment.

Moreover, the ALJ's finding that the prerequisites were met "since at least March 1993" – thus entitling the Miner to benefits as of November 1998 – is wholly consistent with the factual underpinnings of ALJ McKenna's and ALJ Solomon's decisions, the overwhelming weight of the evidence, and Employer's repeated concessions throughout these proceedings that the Miner was totally disabled. As discussed above, ALJ McKenna found the record from the Miner's initial February 4, 1993 claim establishes the Miner was totally disabled by a respiratory or pulmonary impairment at that time. Director's Exhibit 1 (internally July 30, 1996 Order at 1) ("There is no dispute that Mr. Toler suffers from a severe obstructive pulmonary illness and that he is totally disabled as a result of that illness."); *see also* ALJ Moore's September 30, 1994 Order at 2 (noting Employer's agreement that the Miner was totally disabled); June 18, 1994 Hearing Transcript at 7 (Employer stipulated the Miner was totally disabled). No party appealed that finding to the Board. *Toler*, BRB No. 96-1499 BLA. The ALJ agreed with ALJ McKenna that the evidence from the Miner's prior claim establishes he was totally disabled at that time.[7] Decision and Order at 6 (noting that in the Miner's prior claim, "there was no dispute [he] was totally disabled"). No party disputes that finding in this appeal, *Skrack*, 6 BLR at 1-711, and the record consistently demonstrates the Miner's total disability.

Dr. Rasmussen examined the Miner on March 8, 1993, and opined he was totally disabled as a result of pulmonary insufficiency. Director's Exhibit 1 (internally Director's Exhibit 10). Employer's expert, Dr. Zaldivar, examined the Miner on September 29, 1993, and agreed the Miner had "severe pulmonary insufficiency which totally disabled him for

[7] As the ALJ correctly noted, 20 C.F.R. §725.309(c)(2) requires that evidence submitted in a prior claim must be made a part of the record in a subsequent claim. Decision and Order at 6.

any work." Director's Exhibit 1 (internally Employer's Exhibit 1). Its other expert, Dr. Tuteur, examined the Miner on June 3, 1994, and opined the Miner was "totally disabled in part a result of a pulmonary/respiratory impairment." Director's Exhibit 1 (internally Employer's Exhibit 5).

In this 2008 subsequent claim, ALJ Solomon found the Miner was totally disabled by a respiratory or pulmonary impairment, as stipulated by Employer; no party disputed that finding on appeal to the Board, which affirmed it as unchallenged. *Toler*, BRB No. 13-0531 BLA, slip op. at 3-4 n.6; Director's Exhibit 67. Similar to the Miner's initial 1993 claim, all the doctors agreed he was totally disabled. In his April 30, 2008 report, Dr. Burrell opined the Miner's "chronic pulmonary disease would prevent his performance of his previous coal mining duties." Director's Exhibit 14. Employer's experts agreed. In his January 11, 2011 report, Dr. Rosenberg opined the Miner had "severe airflow obstruction" that prevented him from performing his usual coal mine employment, and in his February 22, 2010 report, Dr. Renn opined he was totally disabled as a result of "tobacco smoke-induced chronic bronchitis and bullous emphysema." Director's Exhibits 33 (internally Employer's Exhibits 5, 6), 61.

Moreover, Claimant correctly notes she submitted new evidence in the form of pulmonary function testing taken on September 9, 1997, October 9, 1997, and September 10, 1999.[8] Claimant's Response Brief at 16-17, *citing* Director's Exhibit 79. Each of these pulmonary function studies is qualifying[9] for total disability.

In other words, there is no dispute – factually or legally – that the Miner suffered from a totally disabling respiratory impairment for decades prior to his death. Contrary to

[8] The Director incorrectly argues Claimant submitted no evidence relevant to the commencement date finding in support of this modification request. Director's Brief at 5. Claimant submitted qualifying pulmonary function testing that predated the filing of this subsequent claim. Director's Exhibit 79. Our dissenting colleague acknowledges that Claimant submitted new evidence indicating the Miner may have been disabled as of September 10, 1999. But, like the Director, our dissenting colleague ignores that the record also contains newly submitted pulmonary function studies from September 9, 1997 and October 9, 1997, indicating the Miner was totally disabled prior to the ALJ's commencement date finding of November 1998. Remanding the claim for the ALJ to consider this evidence is unnecessary as the newly-submitted qualifying pulmonary function studies simply reinforce his finding.

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values listed in Appendix B of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

our dissenting colleague, far from revisiting or ignoring an issue that was adjudicated in ALJ McKenna's denial of the Miner's prior claim, the ALJ in this subsequent claim simply agreed with ALJ McKenna's unchallenged 1996 finding and ALJ Solomon's unchallenged 2013 finding, as well as the overwhelming weight of the evidence, old and new, that the Miner was totally disabled since at least March 1993. Although res judicata required the ALJ to accept ALJ McKenna's earlier denial of benefits, *Rutter*, 86 F.3d at 1361, it did not require him, in setting the commencement date for benefits in this valid claim, to outright ignore Employer's concessions, the findings of two other ALJs, or the overwhelming weight of the evidence, spanning more than two decades, that the Miner was totally disabled well before November 1998. Our dissenting colleague inexplicably construes res judicata as requiring new evidence to prove a fact that has been uncontested for twenty-five years.

Substantial evidence in the record clearly supports that the Miner had been continuously totally disabled from a pulmonary standpoint on March 8, 1993, was still totally disabled on September 9, 1997, October 9, 1997, and September 10, 1999, and further still totally disabled at the time of his subsequent February 28, 2008 claim. This is based on the unanimous medical opinions, as well as qualifying pulmonary function testing taken in 1997 and 1999. We therefore affirm the ALJ's conclusion that the Miner was totally disabled as of March 1993 and continued to be totally disabled in November 1998, the month after the denial of the Miner's prior claim became final.

Similarly, there is no dispute that the Miner had more than fifteen years of underground coal mine employment for purposes of invoking the Section 411(c)(4) presumption. Based on the parties' stipulation, ALJ Solomon found the Miner had twenty-seven years of coal mine employment with at least sixteen years in underground coal mines. Director's Exhibits 47, 57. The Board affirmed this finding as it was unchallenged by the parties. *Toler*, BRB No. 13-0531 BLA, slip op. at 3 n.6. The Fourth Circuit acknowledged this finding, noting that for "twenty-seven years, [the Miner] worked in and about [Employer's] coal mines in southern West Virginia, primarily as an electrician. For sixteen of those years, [he] toiled underground, where he was exposed to high concentrations of coal dust." *Toler*, 805 F.3d at 509. The Miner's uncontradicted testimony supports the finding, as he testified he worked for twenty-seven years in coal mine employment, with at least seventeen of those years in underground coal mines. Director's Exhibit 40 at 15.

Having found the Miner had at least fifteen years of qualifying coal mine employment and was totally disabled as of March 1993, the ALJ rationally found, by operation of the Section 411(c)(4) presumption, that the Miner is presumed to have been totally disabled due to pneumoconiosis at that time. However, recognizing the principles of res judicata, the finality of ALJ McKenna's denial, and the regulatory prohibition on payment of benefits for any month preceding the date that prior denial became final, *see* 20 C.F.R. §725.309(c)(6), the ALJ rationally set the benefits commencement date as

November 1998.[10] The Section 411(c)(4) presumption was not rebutted in this case and the Director points to no credited evidence establishing that the Miner was not totally disabled due to pneumoconiosis at any subsequent time.[11] 20 C.F.R. §725.503(b).

Therefore based on the facts of this case and as supported by substantial evidence, we affirm the ALJ's finding that Claimant established the Miner's totally disabling pneumoconiosis became compensable as of November 1998, the month after ALJ McKenna's denial of the Miner's prior claim became final.[12] *See* 20 C.F.R. §725.503(b);

[10] Our dissenting colleague criticizes the ALJ and the majority for "intertwining" evidence of total disability with the Section 411(c)(4) presumption to determine when benefits commence. But as previously noted, it is universally acknowledged that the Miner was totally disabled as far back as 1993, had greater than fifteen years of underground coal mine employment, and is therefore presumed to be totally disabled due to pneumoconiosis. While res judicata may prohibit awarding benefits prior to the month that ALJ McKenna's denial became final, it does not preclude an award of benefits immediately thereafter. In fact, the regulations explicitly permit it. *See* 20 C.F.R. §725.309(c)(6). Rather than relying on ALJ McKenna's denial of benefits to "bootstrap" a new commencement date finding, the ALJ simply applied the law to the relevant facts, as is required.

[11] Although ALJ McKenna found the 1993 and 1994 medical opinions of Drs. Tuteur and Zaldivar establish the Miner did not have pneumoconiosis, Director's Exhibit 1 (internally July 30, 1996 Order at 6-8), her findings are relevant to the denial of the Miner's initial claim which became final as of October 1998. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358 (4th Cir. 1996) (en banc); *Toler v. E. Assoc. Coal Co*., 162 F.3d 1156 (Table) (4th Cir. Aug. 19, 1998) (unpub.). Her findings do not preclude the conclusion that the Miner was totally disabled due to pneumoconiosis as of November 1998. The ALJ found Dr. Tuteur's and Dr. Zaldivar's opinions unpersuasive and inconsistent with the preamble to the 2001 revised regulations and thus insufficient to rebut the presumption that the Miner was totally disabled due to pneumoconiosis as of November 1998. Decision and Order at 6.

[12] ALJ Solomon awarded benefits more than eight years ago, in 2013. Both the Board and the Fourth Circuit affirmed that award. *Toler v. E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502 (4th Cir. 2015), *aff'g Toler v. E. Assoc. Coal Corp.*, BRB No. 13-0531 BLA (July 7, 2014) (unpub.). The sole question before us now is the date from which benefits should commence in that 2013 award. In seeking to overturn the ALJ's finding, our dissenting colleague conflates the standard for establishing entitlement to benefits in a subsequent claim at 20 C.F.R. §725.309(c)(4) with the standard for determining when those benefits commence at 20 C.F.R. §725.309(c)(6). While Section 725.309(c)(4) requires a change in an applicable condition of entitlement based on new evidence as a threshold finding, once that change is established – as was the case here –

see also Consolidation Coal Co. v. Director, OWCP [*Bailey*], 721 F.3d 789, 794 (7th Cir. 2013); *Dalton v. OWCP*, 738 F.3d 779 (7th Cir. 2013) (record contains ample evidence miner was totally disabled as of August 1991 based on qualifying pulmonary function testing and substantial evidence supports conclusion his total disability in August 1991 was attributable to pneumoconiosis); *Zettler v. Director, OWCP*, 886 F.2d 831, 837-37 (7th Cir. 1989) (a 1971 positive chest x-ray used to invoke the 20 C.F.R. Part 727 interim presumption of total disability due to pneumoconiosis, combined with the miner's testimony that he was disabled as of 1973, constituted substantial evidence supporting an award of benefits commencing prior to the regulatory default date).

Accordingly, the ALJ's Decision and Order Granting Modification is affirmed.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

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the claimant is entitled to a review of her claim on the merits based on all relevant evidence, including evidence submitted in the Miner's prior claim. *See* 20 C.F.R. §725.309(c)(2) (Any evidence submitted in connection with any prior claim must be made a part of the record in the subsequent claim, provided that it was not excluded in the adjudication of the prior claim). Thus, the ALJ properly considered evidence from the prior claim, which was made part of the record in the current claim, while also respecting the finality of ALJ McKenna's earlier denial by setting the date for commencement of benefits *after* the date that the denial became final, *as the regulations expressly permit.* 20 C.F.R. §725.309(c)(4) ("no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final"). Our affirmance of the ALJ's decision that the Miner was totally disabled for decades prior to his death – which is consistent with decisions from two prior ALJs, Employer's concessions, and the overwhelming weight of the evidence, old and new – hardly "plays havoc" with res judicata as our colleague alleges.

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to affirm the ALJ's commencement date finding of November 1998 as it is inconsistent with applicable law.

Benefits commence in the month the miner became totally disabled due to pneumoconiosis. *Green v. Director, OWCP*, 790 F.2d 1118, 1119 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989); 20 C.F.R. §725.503(b). If that date is not ascertainable from all the relevant evidence, benefits commence in the month the claim was filed, unless credited evidence establishes the miner was not totally disabled due to pneumoconiosis at any subsequent time. *Green*, 790 F.2d at 1119 n.4; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990); 20 C.F.R. §725.503(b). In a subsequent claim, benefits may not be paid for any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

In order to reach his commencement date finding, the ALJ determined the Miner had been totally disabled due to pneumoconiosis "since at least March 1993." Decision and Order at 3-6. That finding is erroneous, however, because the ALJ improperly revisited ALJ McKenna's finding in the February 4, 1993 claim that the Miner was not totally disabled due to pneumoconiosis. The ALJ specifically erred by stating he may "consider and assess" the medical evidence from that claim to ascertain the date of total disability due to pneumoconiosis. *Id*.

When ALJ McKenna denied benefits, the denial and its underlying finding that the Miner was not totally disabled due to pneumoconiosis became final upon the Fourth Circuit's decision affirming it in October 1998. *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361 (4th Cir. 1996) (en banc) (a prior final determination that a miner was not entitled to benefits and "its necessary factual underpinning" must be accepted as legally correct); *see also Consol. Coal Co. v. Williams*, 453 F.3d 609, 615-16 (4th Cir. 2006). Thus the ALJ was bound to "accept the correctness" of ALJ McKenna's finding that the Miner was not totally disabled due to pneumoconiosis during the period

before the prior claim was denied, as that determination is "off-limits to criticism" in subsequent proceedings. *Rutter*, 86 F.3d at 1361. Simply put, the ALJ was precluded from finding the Miner was totally disabled due to pneumoconiosis "since at least March 1993." Decision and Order at 3-6.

Notwithstanding this error, the ALJ attempted to reconcile his finding with the regulation that precludes benefits from commencing in any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6); Decision and Order at 3-6. Thus he set the commencement date for benefits as November 1998, the month after the month that the prior denial became final. *Id.* The majority endorses this approach by concluding *Rutter* does not preclude a finding that the Miner was totally disabled due to pneumoconiosis after the Miner's prior claim was finally denied but before there is any evidence – in the present claim – that the Miner was totally disabled by pneumoconiosis. *See supra* pp. at 4-10, *citing Rutter*, 86 F.3d at 1360-62.

Notably, the ALJ made no finding that the Miner was totally disabled due to pneumoconiosis on a date after the prior claim was finally denied. Instead, he found the Miner was totally disabled due to pneumoconiosis on March 1993 by "consider[ing] and assess[ing]" the prior claim medical evidence. Decision and Order at 3-6. He then set the commencement date for benefits as November 1998, the month after the month that the prior denial became final, when there is no basis in the regulations to do so.

Further, while I agree that *Rutter* does not foreclose the ALJ from finding that the Miner was totally disabled due to pneumoconiosis based on evidence post-dating the prior denial and pre-dating the filing of the new claim, there is no evidence of record to establish he was totally disabled due to pneumoconiosis on November 1998. The ALJ cited to no such evidence and neither does the majority.

Rather, like the ALJ, the majority utilizes the evidence from the previously denied claim to bootstrap a finding of total disability due to pneumoconiosis to November 1998. *See supra* pp. 4-10. The majority holds the evidence from the prior claim establishes the Miner was totally disabled "as early as March 8, 1993." *Id.* Thus it concludes it was rational for the ALJ to find the Miner was totally disabled as of *November 1998*. *Id*. In light of the undisputed finding that the Miner had at least fifteen years of qualifying coal mine employment, the majority concludes the ALJ reasonably found, by operation of the Section 411(c)(4) presumption, that the Miner was totally disabled due pneumoconiosis as of November 1998.

There are two problems with this approach. First, utilizing evidence pertaining to the Miner's physical condition prior to the previous (and final) determination denying benefits naturally results in contravention of the finality of the prior determination. *See Williams*, 453 F.3d at 615-16; *Rutter*, 86 F.3d at 1361; *Cumberland River Coal Co. v.*

Banks, 690 F.3d 477 (6th Cir. 2012). Like the ALJ, the majority intertwines evidence of total disability with the Section 411(c)(4) presumption to ascertain the commencement date. That is precisely what the ALJ found in this case, as he determined the Miner was totally disabled due to pneumoconiosis "since at least March 1993." Decision and Order at 3-6. *Rutter* outright precludes such a finding.

Second, this approach is inconsistent with the regulation applicable to subsequent claims. In a claim filed one year after the final denial of a prior claim, a miner can establish entitlement to benefits only by establishing a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c). The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. 20 C.F.R. §725.309(c)(3). Importantly, as the Director points out, if the applicable conditions of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if *new evidence* submitted in connection with the subsequent claim establishes at least one of the applicable condition of entitlement. 20 C.F.R. §725.309(c)(4). Because the Miner's prior claim was denied because he failed to establish he was totally disabled due to pneumoconiosis, 20 C.F.R. §718.204(c), Claimant had to establish this element in the subsequent claim through new evidence. *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004); 20 C.F.R. §725.309(c).

Although invocation of the Section 411(c)(4) presumption can help Claimant establish an element of entitlement for purposes of demonstrating a change in an applicable condition of entitlement in a subsequent claim, *E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502, 512 (4th Cir. 2015) ("The fifteen-year presumption merely helps the miner to establish the conditions of entitlement in the second claim. It does not allow the ALJ to "waive finality by presuming that something changed."), Claimant was still required to establish a change through new evidence, and she did so in tandem with the presumption. *Toler*, 805 F.3d at 511-16; *Toler v. E. Assoc. Coal Corp.*, BRB No. 13-0531 BLA (July 7, 2014) (unpub.); Director's Exhibit 67; 20 C.F.R. §725.309(c)(4). By setting the date of entitlement in this subsequent claim based on the old, prior claim evidence and determination, the majority has ignored the limitations set forth in the subsequent claim regulations.[13]

In light of the foregoing, I would remand this case for the ALJ to reconsider whether the evidence which post-dates the final denial of the prior claim establishes when the Miner

[13] Contrary to the majority's mischaracterization, *see* n.12, it is not my position that Claimant is precluded from entitlement to benefits because she failed to establish a change in an applicable condition of entitlement based on new evidence. Rather, consistent with the statute and regulations, and as argued by the Director, I contend the date of entitlement must either be established by new evidence or be the default date established by regulation, i.e., the date the subsequent claim was filed. Director's Brief at 9. The previous

determination was that the disability shown was *not caused by pneumoconiosis.* The majority is revisiting the previous determination, taking the *same* showing of disability which was found *not* caused by pneumoconiosis and using it, without other evidence, to say the Miner was disabled by pneumoconiosis prior to the filing of the new claim. That is not permissible.

It is clear ALJ Solomon found a change in an applicable condition of entitlement based on new evidence rather than the evidence before ALJ McKenna. Director's Exhibit 67. Thus, as the Board and the Fourth Circuit previously affirmed, ALJ Solomon properly followed the regulations in finding entitlement. 20 C.F.R. §725.309(c); *Toler v. E. Assoc. Coal Corp. v. Director, OWCP* [*Toler*], 805 F.3d 502 (4th Cir. 2015), *aff'g Toler v. E. Assoc. Coal Corp.*, BRB No. 13-0531 BLA (July 7, 2014) (unpub.).

The only question in this case is whether Claimant is entitled to benefits as of a date other than the date the subsequent claim was filed. The majority determines the Miner was totally disabled due to pneumoconiosis as of November 1998 based on the evidence which was before ALJ McKenna. This ignores the requirements of 20 C.F.R. §725.309(c)(4) ("If the applicable condition(s) of entitlement relate to the miner's physical condition, the subsequent claim may be approved only if new evidence . . . establishes at least one applicable condition of entitlement."). As the Director argues, any "retrospective finding that the miner was totally disabled due to pneumoconiosis during the pendency of his prior claim plays havoc with res judicata." *See* Director's Brief at 8-9. He correctly points out the Fourth Circuit, in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361 (4th Cir. 1996) (en banc), "prohibits what the ALJ explicitly did [and the majority does by affirming his determination] here – readjudicate the evidence from the finally denied claim and rely solely on that evidence to establish total disability due to pneumoconiosis and an onset date that predates the subsequent claim's filing." Director's Brief at 6. Subsequent claims do not violate the doctrine of res judicata so long as the miner establishes that his condition has changed since the prior denied claim was issued. Consequently, entitlement is set as of the date the subsequent claim is filed, unless the evidence establishes the miner was totally disabled due to pneumoconiosis at some other date; however, entitlement cannot be earlier than the date the prior denial became final. 20 C.F.R. §§725.309, 725.503(b). The regulations essentially allow a miner to establish an earlier (than the subsequent claim filing) *commencement* date for disability caused by pneumoconiosis in a subsequent claim based on the *new evidence* submitted, but not to depend upon the evidence and finding of disability from the prior claim which rejected the existence of disability caused by pneumoconiosis. There is new evidence in this case, a September 10, 1999 pulmonary function study, which might enable establishment of entitlement earlier than the filing of the subsequent claim. However, there is no new evidence relating to the Miner's condition in November 1998.

became totally disabled due to pneumoconiosis. Arguably, the record contains evidence which, if credited, could establish the Miner became totally disabled due to pneumoconiosis at a point in time between the final denial of the prior claim and the filing date of this subsequent claim. In support of the request for modification, Claimant submitted pulmonary function testing taken on September 10, 1999. Director's Exhibit 79. I would remand this case for the ALJ to determine if the September 10, 1999 study, when considered with any other appropriate evidence and Section 411(c)(4), establishes (for purposes of the commencement of entitlement to benefits) that the Miner was totally disabled due to pneumoconiosis as of the date of the study. If so, the ALJ could set the date for commencement of benefits as of September 1999.

I would not, however, set the commencement date for benefits because the parties, including the Director, should have an opportunity to address the evidence in this context, and the Board lacks the authority to render factual findings to fill gaps in the ALJ's opinion. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *McCune v. Cent. Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge