BRB No. 02-0643 BLA

JESSIE CHAFFIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/17/2003
	)	
PETER CAVE COAL COMPANY	)	
	)	
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Mary Forrest-Doyle (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (01-BLA-0387) of Administrative Law Judge Linda S. Chapman on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30

U.S.C. §901 *et seq.* (the Act).[1] This case involves a duplicate claim filed on January 26, 1999.[2] The administrative law judge conducted a hearing on September 10, 2001. At the hearing, employer withdrew its contention that the instant claim was not timely filed, and stipulated to seventeen years of coal mine employment. Hearing Transcript at 7-8. In her Decision and Order, the administrative law judge found the newly submitted x-ray evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge found that, therefore, claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Considering the claim on the merits, the administrative law judge credited the newly submitted, positive x-ray evidence over the previously submitted x-ray evidence, which she found was overwhelmingly negative, on the basis of its recency, and upon stating that she recognized pneumoconiosis is a progressive disease. The administrative law judge thus found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). With regard to total disability, the administrative law judge found the pulmonary function and arterial blood gas study evidence insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(i) and (ii). The administrative law judge also found the evidence insufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iii), as the record did not contain evidence of cor pulmonale with right-sided congestive heart failure. The administrative law judge found the medical opinion evidence sufficient, however, to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). She further found the evidence sufficient to establish disability

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[1]The Department of Labor 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.

[2] Claimant filed an initial claim for benefits on November 13, 1989, which was finally denied on May 7, 1990 by the district director, who found that claimant failed to establish any of the elements of entitlement under 20 C.F.R. Part 718 (2000). Director's Exhibit 38. Claimant filed a second claim on August 6, 1992. Director's Exhibit 39. In a Decision and Order dated September 19, 1995, Administrative Law Judge Jeffrey Tureck credited claimant with seventeen years of coal mine employment, and found the newly submitted evidence insufficient to establish any of the elements of entitlement under Part 718 (2000). *Id.* Judge Tureck thus found claimant failed to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), and denied benefits. *Id.* Claimant did not take any further action in pursuit of benefits until filing a third claim, on August 14, 1997. Director's Exhibit 40. This claim was finally denied on January 13, 1998 by the district director, who found claimant failed to establish any of the elements of entitlement under Part 718 (2000). *Id.* Claimant took no further action until filing the instant duplicate claim on January 26, 1999. Director's Exhibit 1.

causation pursuant to 20 C.F.R. §718.204(c). Consequently, the administrative law judge awarded benefits. The administrative law judge ordered benefits to commence on January 26, 1999.

On appeal, employer contends that the administrative law judge erred in failing to dismiss the instant claim as untimely filed, in failing to perform the proper material change in conditions analysis, and in failing to properly explain her basis for finding the existence of pneumoconiosis, total disability and disability causation established pursuant to Sections 718.202(a)(1) and 718.204(b)(2)(iv), (c). Employer further argues that the administrative law judge erred in failing to determine if the medical evidence established a date of onset of total disability due to pneumoconiosis. Claimant responds, contending that the administrative law judge's decision is supported by substantial evidence. Claimant further asserts that employer waived the issue of timeliness, and that the regulations at 20 C.F.R. §725.308 do not bar his duplicate claim because there had been no reasoned opinion of a medical professional as required by the Act to begin the three year statute of limitations. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that employer has waived any argument with respect to the timeliness of the claim. The Director declines to take a position with respect to the administrative law judge's material change in conditions finding at Section 725.309 (2000) or her weighing of the evidence under Sections 718.202(a)(1) and 718.204(b)(2)(iv), (c). Employer has filed a reply brief, reiterating contentions advanced in its Petition for Review and brief.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. '921(b)(3), as incorporated by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address employer's contention that, based on the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001), this claim was untimely filed. Employer argues that the instant duplicate claim is time barred by 20 C.F.R. §725.308, since it was not filed within three years after February 1989, when Dr. Chaffin determined that claimant was totally disabled due to pneumoconiosis. In response, claimant and the Director contend that employer waived its argument as to timeliness because it withdrew its contest to the issue at the hearing on September 10, 2001, after the court's decision in *Kirk* had been issued. In its reply brief, employer asserts that subsequent to its withdrawal of the timeliness issue, the Board issued its decisions in *Furgerson v. Jericol Mining, Inc.*, 22 BLR 1-217 (2002), and *Abshire v. D & L Coal Co.*, 22 BLR 1-203 (2002), which employer argues constitute intervening authority because in these two cases, the Board clarified how it would construe and apply *Kirk.* In *Furgerson* and *Abshire*, the Board held that *Kirk* changed the law in the Sixth Circuit by making the

statute of limitations applicable to duplicate claims. The Board held that, contrary to the position of the Director, the court's discussion regarding the statute of limitations' applicability to duplicate claims was not dicta, but the holding of the court. Employer thus contends that, notwithstanding the fact that *Kirk* had been issued four days prior to employer's withdrawal of its contest of the timeliness issue, it would have been futile for employer to raise the timeliness issue before the administrative law judge because, not until the Board issued *Furgerson* and *Abshire,* was it clear how the Board would construe and apply *Kirk.*

We hold that employer waived its argument as to the timeliness issue. As claimant and the Director assert, *Kirk* was not intervening authority because it was issued on September 6, 2001, four days prior to employer's withdrawal of opposition on the issue at the hearing. Hearing Transcript at 7. Furthermore, as the Director notes, employer did not attempt to cure its failure to raise the timeliness argument pursuant to *Kirk* even eight months after *Kirk* was issued, when it filed its closing brief before the administrative law judge. Employer's suggestion that the Board's decisions in *Furgerson* and *Abshire* constitute intervening law is misplaced. Notwithstanding that the Board did not construe and apply the court's decision in *Kirk* until it issued *Furgerson* and *Abshire*, the court's holding in *Kirk*, that the time limitation set forth in Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308, applies to duplicate claims, became controlling law at the time the court issued *Kirk* on September 6, 2001. Accordingly, we hold that employer waived its timeliness argument. *See Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154, 157-159 (1996).

Employer next asserts that the administrative law judge failed to make the proper inquiry in determining if a material change in conditions was established, because she failed to compare the newly submitted evidence with the previously submitted evidence. Employer also contends that the administrative law judge's analysis is flawed because she failed to make a specific finding that the new evidence differs qualitatively from the evidence submitted with the previously denied claim. We agree.

The administrative law judge found that the instant claim was subject to the provisions of Section 725.309 (2000) as claimant filed his claim more than one year after the final denial of the prior claim. Decision and Order at 3. She noted that the prior claim was denied for claimant's failure to establish the existence of pneumoconiosis or any other element necessary for establishing entitlement. *Id*. at 4. Further, the administrative law judge correctly stated that when assessing whether the evidence is sufficient to establish a material change in conditions under Section 725.309(2000), she must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); Decision and Order at 3-4. Ultimately, the administrative law judge concluded that a material change in conditions was established upon finding the newly

submitted x-ray interpretations sufficient to establish the existence of pneumoconiosis. Decision and Order at 5-10.

Employer argues that the administrative law judge failed to make a specific finding as to whether claimant's condition worsened, however, and whether there was thus an actual change in claimant's condition pursuant to the standard set forth in *Ross.* In determining whether a material change in conditions is established pursuant to the appropriate standard, the administrative law judge must analyze whether the new evidence submitted with the duplicate claim differs qualitatively from the evidence submitted with the previously denied claim. *Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000)(*en banc*); *Flynn v. Grundy Mining Co.*, 21 BLR 1-40 (1997). In the instant case, the administrative law judge has not addressed whether the newly submitted evidence differs qualitatively from the previously submitted evidence. Accordingly, we vacate the administrative law judge's finding that the evidence submitted since the prior denial supports a finding of a material change in conditions pursuant to Section 725.309 (2000). On remand, the administrative law judge must reconsider whether the newly submitted evidence is sufficient to establish a material change in conditions in a manner consistent with the holdings in *Ross, Stewart* and *Flynn*.

Employer further contends that the administrative law judge committed numerous errors when weighing the x-ray evidence pursuant to Section 718.202(a)(1) while considering the instant claim on the merits. Employer first contends that the administrative law judge improperly engaged in "number counting" of the x-ray interpretations. Employer's Brief at 15-18. Moreover, employer argues that a quantitative analysis was particularly inappropriate because the administrative law judge erred in allowing claimant to submit additional readings of the films taken on July 13, 1998, October 26, 1998, February 24, 1999, and October 20, 1999 in response to employer's physicians' readings of these films. Employer's Exhibits 1, 3, 5, 9, 11, 13, 15, 17; Claimant's Exhibits 7-14, 16, 18, 20, 22, 24-28. Employer argues that these films were in claimant's possession prior to the re-readings by employer's physicians because claimant's treating physician, Dr. Thorarinsson, took the films. Claimant's Exhibit 27. Employer contends that claimant thus had ample time to obtain additional readings of these films before they were exchanged with employer, and that the administrative law judge improperly allowed claimant to submit additional readings of these films after the hearing. Decision and Order at 2; Claimant's Exhibits 7-14, 16, 18, 20, 22, 24-28. These contentions lack merit. First, the administrative law judge properly stated that she could rely on the qualifications and the number of positive and negative interpretations of record in resolving the conflict posed by the x-ray evidence at Section 718.202(a)(1). *Staton v. Norfolk & Western Railroad Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); Decision and Order at 5. Second, contrary to employer's contention, the administrative law judge properly admitted the rereadings of the films taken on July 13, 1998, October 26, 1998, February 24, 1999, and October 20,

1999 into the record after the hearing. Decision and Order at 2; Claimant's Exhibits 7-14, 16, 18, 20, 22, 24-28. The administrative law judge has broad discretion over procedural matters, including the admission of evidence. 20 C.F.R. §§725.455, 725.456; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Furthermore, the administrative law judge properly admitted these rereadings pursuant to her Orders dated February 1, 2002 and March 4, 2002, upon finding in her Decision and Order that employer and the Director did not object to the admission of the exhibits. *See Peyton v. Brown Badgett Coal Co.*, 10 BLR 1-122 (1987); Decision and Order at 2.

Employer further argues that, at any rate, the case must be remanded as the administrative law judge mischaracterized the x-ray evidence. We agree. Employer is correct in contending that the administrative law judge improperly found that the October 20, 1999 film was positive in light of the weight of the positive readings submitted by dually-qualified radiologists. Decision and Order at 9. Specifically, as employer contends, the administrative law judge incorrectly found that Dr. Aycoth, who read the October 20, 1999 film as positive for pneumoconiosis, is dually-qualified as a B reader/Board-certified radiologist. The record reflects that Dr. Aycoth is a B reader only. Claimant's Exhibits 5, 22. Thus, contrary to the administrative law judge's finding, there were six, not seven, positive readings of the October 20, 1999 x-ray by dually-qualified B reader/Board-certified radiologists. Decision and Order at 9; Director's Exhibits 32, 33; Claimant's Exhibits 16, 18, 20, 28. Furthermore, the administrative law judge erred in failing to consider that there were eight dually-qualified radiologists who read the October 20, 1999 film as negative, incorrectly stating that there were six dually-qualified physicians submitting negative readings of the film. Decision and Order at 9; Employer's Exhibits 1, 3, 5, 9, 11, 12, 15, 17. Inasmuch as the administrative law judge's analysis of the various interpretations of the October 20, 1999 x-ray is not supported by the record evidence, we vacate the administrative law judge's finding that the weight of the October 20, 1999 x-ray readings is positive for pneumoconiosis. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); Decision and Order at 9.

Employer also argues that it is unclear whether the administrative law judge included Dr. Binns' interpretations of the films dated July 13, 1998, October 26, 1998, February 24, 1999, and March 17, 1999 among the other negative interpretations of these films submitted by dually-qualified radiologists. For each one of these films, the administrative law judge calculated the number of negative readings by dually-qualified radiologists, and then separately stated that the films were also read by Dr. Binns as indicative of pleural thickening. Decision and Order at 9; Director's Exhibit 31; Employer's Exhibit 3. On remand, the administrative law judge is instructed to consider Dr. Binns' readings of the July 13, 1998, October 26, 1998, February 24, 1999, and March 17, 1999 films as negative readings, as Dr. Binns, in addition to stating that the films showed evidence of pleural thickening, affirmatively indicated that the films show no evidence of pneumoconiosis. Director's Exhibit 31; Employer's Exhibit 3.

Employer further contends that the administrative law judge treated "like evidence" differently by crediting positive interpretations by Drs. Baker and Wright, who are not dually-qualified, and by discounting negative readings by those physicians who are not dually-qualified. The readings of Drs. Baker and Wright to which employer refers were readings of films dated March 18, 1998 and June 9, 1998. Dr. Baker read the March 18, 1998 film as positive, and Dr. Wright read the June 9, 1998 film as positive. Director's Exhibit 11. Neither film was read as negative. Thus, contrary to employer's suggestion, the administrative law judge did not selectively analyze the evidence by inconsistently crediting the positive reading by Dr. Baker, who is only a B reader, and the positive reading by Dr. Wright, whose qualifications are not in the record, while rejecting negative readings of employer's doctors because they are only B readers. Rather, the readings of Drs. Baker and Wright of the March 18, 1998 and June 9, 1998 films were uncontroverted. Director's Exhibit 11. The administrative law judge properly determined that the weight of the readings of those two specific films was positive for pneumoconiosis. Decision and Order at 9. We thus reject employer's suggestion that the administrative law judge inconsistently weighed the conflicting interpretations by physicians with similar credentials in finding that the positive readings of the March 18, 1998 and June 9, 1998 films "counted against employer." Employer's Brief at 18.

Employer next argues that the administrative law judge erred in failing to consider that Drs. Spitz and Wiot are professors of radiology, and thus show evidence of superior qualifications aside from their Board-certification and B reader status. Employer suggests that their readings should have been accorded greatest weight. While, contrary to employer's suggestion, the additional qualifications of Drs. Spitz and Wiot do not mandate that their opinions be accorded greatest weight, the administrative law judge should consider these qualifications on remand, as they may bear on the quality of the various x-ray interpretations of record. *Staton*, 65 F.3d at 59-60, 19 BLR at 2-280-281; *Woodward*, 991 F.2 at 321, 17 BLR at 2-86.

In addition, employer argues that the administrative law judge's reliance on the more recent positive x-ray evidence is inconsistent with her statement that, even if the October 20, 1999 film (the most recent of record) were negative, she would still find pneumoconiosis established based on the earlier positive films. Decision and Order at 10 n.6. Employer asserts that the "later is better" rule only holds true if the later evidence is *consistently* positive. Employer's Brief at 19. In reconsidering the x-ray evidence on remand, the administrative law judge may permissibly credit the most recent evidence of record where it is positive, but should recognize that it is irrational to credit the most recent evidence strictly on the basis of its chronology, if that evidence is negative for pneumoconiosis. W*oodward*, 991 F.2d at 319, 17 BLR at 2-85.

A review of the record in the instant case also reveals that the administrative law judge failed to consider two films dated July 24, 1999 and October 17, 1999, which were read uniformly as negative for pneumoconiosis by dually-qualified physicians.[3] Director's Exhibits 26, 29, 31; Employer's Exhibits 3, 9. On remand, the administrative law judge must additionally consider this evidence under Section 718.202(a)(1).

In light of the foregoing, we vacate the administrative law judge's findings with respect to the x-ray evidence under Section 718.202(a)(1), both in the context of her material change in conditions discussion, and on the merits. We remand the case for the administrative law judge to reconsider the evidence thereunder. If, on remand, the administrative law judge finds the x-ray evidence insufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1), she must consider whether claimant has established the existence of pneumoconiosis by one of the alternative methods pursuant to Section 718.202(a)(2)-(4).

Employer next challenges the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(b)(2)(iv). Employer argues that the administrative law judge improperly relied upon the opinions of Drs. Wright and Thorarinsson, indicating that claimant is totally disabled, and erred in discounting Dr. Zaldivar's opinion that it was possible that claimant could return to his usual coal mine employment as a roof bolter if he were treated with bronchodilators.

Citing *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), employer specifically argues that Drs. Wright and Thorarinsson failed to indicate that they were aware of the exertional requirements of claimant's job as a roof bolter, and that the administrative law judge thus improperly credited their opinions. In *Cornett*, however, the doctors' opinions the administrative law judge improperly credited, to find that the miner was not totally disabled, were opinions indicating that claimant had a mild impairment or no impairment. *Cornett*, 227 F.3d at 578, 22 BLR at 2-124. In the instant case, Drs. Wright and Thorarinsson indicated that claimant has a totally disabling pulmonary impairment. Director's Exhibits 11, 12. Thus, the administrative law judge's reliance upon the opinions of Drs. Wright and Thorarinsson was not proscribed by *Cornett*. Employer also argues that the administrative law judge erred in finding the opinions of Drs. Wright and Thorarinsson supported by objective tests since the post-bronchodilator results of the pulmonary function studies the doctors relied upon were non-qualifying. The respective pre-bronchodilator results relied upon by Drs. Wright and

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[3]A review of the record reveals a film dated July 24, 1999, read as negative by Dr. Binns, a B reader/Board-certified radiologist, Employer's Exhibit 3, and a film dated October 17, 1999, read as negative by six dually-qualified readers, Director's Exhibits 26, 29; Employer's Exhibits 3, 9.

Thorarinsson were qualifying. Thus, the administrative law judge properly found that the opinions were supported by objective evidence. *Clark*, 12 BLR at 1-155*; Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Decision and Order at 14-15; Director's Exhibits 11, 12. Whether an opinion is reasoned and documented is for the administrative law judge to decide, and employer's argument amounts to a request to reweigh the evidence, which the Board is not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer also argues that the administrative law judge erred in discounting Dr. Zaldivar's opinion as speculative. We disagree. The administrative law judge permissibly found Dr. Zaldivar's opinion, that claimant's breathing capacity may improve enough with proper treatment "to *perhaps* allow him to perform his usual coal mine work," Director's Exhibit 30 (emphasis added), was speculative and, therefore, insufficient to outweigh the opinions of Drs. Wright and Thorarinsson under Section 718.204(b)(2)(iv). *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); Decision and Order at 15. Inasmuch as employer raises no other arguments with respect to the administrative law judge's finding that claimant established total disability pursuant to Section 718.204(b), we affirm the administrative law judge's finding thereunder.

Employer contends, at Section 718.204(c), that the administrative law judge erred in discounting Dr. Zaldivar's opinion and relying upon Dr. Wright's opinion to find that claimant established total disability due to pneumoconiosis. The administrative law judge discounted Dr. Zaldivar's opinion that claimant's impairment is due to asthma, and not pneumoconiosis, solely because Dr. Zaldivar opined that claimant does not have pneumoconiosis, which was contrary to the administrative law judge's finding that claimant suffers from the disease. Decision and Order at 16; Director's Exhibit 30. Employer is correct in arguing that the administrative law judge improperly rejected Dr. Zaldivar's opinion under Section 718.204(c) without considering that Dr. Zaldivar opined that, even if claimant has pneumoconiosis, his opinion regarding disability causation would be the same. *Id*. Additionally, there is merit to employer's contention that the administrative law judge erred in relying upon Dr. Wright's opinion because Dr. Wright considered that claimant had a mild smoking history, and had not smoked for fifteen years. As employer argues, the record contains conflicting evidence regarding the extent of claimant's smoking habit, evidence which the administrative law judge did not consider and resolve. Director's Exhibits 6, 20; Hearing Transcript at 27-29. Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis is not supported by the record, the basis for the administrative law judge's credibility determinations in this case at Section 718.204(c) cannot be affirmed. *See Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). If the administrative law judge reaches the issue of disability causation on remand, she must reconsider all relevant medical evidence to determine whether it is sufficient to establish disability causation pursuant to Section 718.204(c) and the applicable case law. 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 818, 21 BLR 2-181 (6th

Cir. 1998); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). In weighing the medical opinion evidence, the administrative law judge must determine whether each opinion is adequately reasoned and documented with regard to the issue of total disability causation and must set forth the rationale underlying her findings. *See Trumbo v. Reading Anthracite Coal Co.*, 17 BLR 1-85 (1993); *see Fields*, 10 BLR at 1-22.

Finally, employer argues that the administrative law judge erred in failing to review the evidence to determine if it establishes a date of onset of total disability due to pneumoconiosis, as required pursuant to 20 C.F.R. §725.503. The administrative law judge summarily found that benefits were to commence as of the filing date of the instant claim – January 26, 1999. We vacate this finding. If a miner is found entitled to benefits, he is entitled to benefits beginning with the first day of the month of onset of his total disability due to pneumoconiosis. 20 C.F.R. ' 725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should the administrative law judge find claimant entitled to benefits on remand, she must determine whether the medical evidence establishes when claimant became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless there is credited evidence which establishes that claimant was not totally disabled at some point subsequent to his filing date. *Lykins*, 12 BLR at 1-183.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge