BRB No. 98-1130 BLA

WORLEY HARRIS (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MINING INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Ruling and Order on Reconsideration on Employer's Motion to Reopen the Record of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Stephen E. Arey, P.C., Tazewell, Virginia, for claimant.

Michael J. Pollack (Arter & Hadden LLP), Washington, D.C., for employer/ carrier.

Jill M. Otte (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Ruling and Order on Reconsideration on Employer's Motion to Reopen the Record (82-BLA-1065) of Administrative Law Judge Richard A. Morgan awarding benefits 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). This case is before the Board for the fourth time. Claimant filed his claim for benefits with the Social Security Administration on July 31, 1973.[1] Director's Exhibit 1. Administrative Law Judge David A. Clarke, Jr., applying the regulations at 20 C.F.R. Part 727, credited the miner with twenty-three and one half years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Clarke further found that employer established rebuttal at 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied.

On appeal, the Board affirmed Judge Clarke's finding of invocation pursuant to Section 727.203(a)(1) as unchallenged, but vacated his finding that employer established rebuttal pursuant to Section 727.203(b)(2) in light of *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). *See Harris v. Mining Incorporated* [*Harris I*], BRB No. 85-0728 BLA (May 16, 1988)(unpub.). The Board, therefore, remanded the case for further consideration of the evidence under 20 C.F.R. §727.203(b)(2) and (b)(3). *Id.*

On first remand, Judge Clarke again determined that the evidence was sufficient to establish rebuttal of the interim presumption under Section 727.203(b)(2) and accordingly, denied benefits. Claimant appealed, and the Board held that the evidence failed, as a matter of law, to support a finding of rebuttal at Section 727.203(b)(2) because there was no physician who affirmatively ruled out a totally disabling condition without regard to cause. *See Harris v. Mining Incorporated* [*Harris II*], BRB No. 88-3511 BLA (Nov. 25, 1992)(unpub.). The Board, therefore, remanded the case for Judge Clarke to consider rebuttal under Section

[1]The Board held that a second claim was filed with the Department of Labor (DOL) on April 1, 1974 and DOL was to associate this application with the original claim dated July, 1973. *Harris v. Mining Incorporated* [*Harris III*] BRB No. 94-0108 BLA (Sept. 28, 1995)(unpub.) at 1, n.1.

727.203(b)(3) in light of *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

On second remand, Judge Clarke in his Decision and Order dated September 9, 1993, determined that inasmuch as the record contained no evidence specifically "ruling out" any causal link between total disability and the miner's coal mine employment, the record was insufficient to support a finding of rebuttal at Section 727.203(b)(3). Accordingly, benefits were awarded. On appeal, the Board affirmed Judge Clarke's determination that the presumption of total disability was not rebutted at Section 727.203(b)(3). *See Harris v. Mining Incorporated* [*Harris III*], BRB No. 94-0108 BLA (Sept. 28, 1995)(unpub.). However, the Board vacated Judge Clarke's finding regarding the date of onset of disability holding that he did not explain his rationale in determining that the miner is entitled to benefits commencing January 1, 1974. *Id.* The Board, therefore, remanded the case for the administrative law judge to a determine the commencement date for the payment of benefits by finding the date of onset of the miner's total disability due to pneumoconiosis. *Id.* The Board summarily denied employer's subsequent motion for reconsideration. *See Harris v. Mining Incorporated* [*Harris IV*], BRB No. 94-0108 BLA (Jan. 8, 1997)(Order on Recon.)(unpub.)

On third remand, Administrative Law Judge Richard A. Morgan (the administrative law judge), twice denied employer's motion to reopen the record to allow for the submission of additional evidence to respond to changes in the rebuttal standards under 20 C.F.R. §727.203(b)(2) and (b)(3). The administrative law judge also found that because the medical evidence of record is insufficient to establish an exact onset of claimant's total disability due to pneumoconiosis, benefits are payable beginning on January 1, 1974. Ruling and Order on Reconsideration at 6.[2]

In its current appeal to the Board, employer continues to challenge entitlement under 20 C.F.R. Part 727, as well as the administrative law judge's refusal to reopen the record and his determination that benefits commence on January 1, 1974. The Director, Office of Workers' Compensation Programs (the Director), responds, maintaining that the administrative law judge properly determined that the commencement date for entitlement to benefits is January 1, 1974. Employer, in its

[2]The miner applied for benefits on August 6, 1973. Therefore, the claim is subject to Section 415 of the Act, 30 U.S.C. §925. The Department of Labor processed "transition" Part B claims under Part C of the Act. 20 C.F.R. §725.1(c). Part C benefits cannot be paid for any period prior to January 1, 1974. 30 U.S.C. §932(e)(2); 20 C.F.R. §725.503(d), (e).

reply brief, reiterates its challenge to the administrative law judge's date of onset finding. Claimant responds, urging the Board to affirm the administrative law judge's decision. Employer replies, requesting the Board to transfer liability to the Black Lung Disability Trust Fund.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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 (1965).

Employer argues that it "is deprived of due process" unless the record is reopened to afford employer an opportunity to present rebuttal evidence under the applicable subsection (b)(2) and (b)(3) standards. Employer further argues that the administrative law judge's suggestion that employer waived its right to reopen the record to address the new rebuttal standards is factually and legally incorrect. Employer asserts that it raised its right to submit new evidence to respond to the changes in the law at all applicable times and that the preservation was not even necessary as long as employer made the request to reopen the record some time during the course of the administrative proceedings. We disagree. Contrary to employer's assertion, regardless of whether employer was entitled to a reopening of the record and to submit new evidence, employer made no timely request that the record be reopened or for leave to submit new evidence. *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, BLR (4th Cir. 1999). The administrative law judge properly found that it would have been within Judge Clarke's discretion to reopen the record had the motion been made when the Board remanded the case twice for consideration of rebuttal under Section 727.203(b), *Harris I, supra*, and *Harris II, supra*, following the issuance of *Sykes* in 1987.

Moreover, we reject employer's suggestion that since its request to have the record reopened was made some time during the course of the administrative proceeding it was timely filed and not waived. To the contrary, employer repeatedly passed on the opportunity to request a hearing or to submit new evidence, by merely opting "to preserve its rights" under subsections (b)(2) and (b)(3). *See* Employer's 1990 Response Brief at 7, n. 3 in BRB No. 88-3511 BLA; Employer's July 2, 1993 Motion for Leave to File Employer's Brief in Case No. 82-BLA-1065; Employer's July 26, 1993 Brief on Remand at 3, n.1 in Case No. 82-BLA-1065. By failing to request that the administrative law judge reopen the evidentiary record when the Board remanded the case for the administrative law judge to further consider the case under the applicable subsection (b)(2) and (b)(3) standards, *see Harris I, supra; Harris II; supra,* employer "acquiesced in the resolution of the claim on the existing record." *See Stanley, supra.* Therefore, we hold that employer was not deprived of due process of law by the administrative law judge's refusal to reopen the record "on an issue it could have

and should have anticipated." *Id.* at 502, BLR at . Consequently, employer's request that the Board transfer liability to the Black Lung Disability Trust Fund is further denied.

Next, employer argues that the Board erred in its prior decisions in finding that the evidence fails, as a matter of law, to support Section 727.203(b)(2) rebuttal, and in its construction of the facts and the law with respect to Section 727.203(b)(3). Inasmuch as employer has not advanced any new arguments in support of altering the Board's previous holdings in *Harris II, Harris III* and *Harris IV*, and has not set forth any applicable exception to the law of the case doctrine, *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting), we reaffirm our holdings that rebuttal is not established under Section 727.203(b)(2) and (b)(3).

Finally, employer argues that the onset date for the payment of benefits due to claimant, if any, must be March 1, 1987, the first day of the month in which the United States Court of Appeals for the Fourth Circuit issued its decision in *Sykes.* Employer argues that because claimant would not have been considered totally disabled due to pneumoconiosis prior to *Sykes,* benefits may not commence before that time. Employer alleges "it is not Harris' physical condition which suddenly changed, but rather is the law which has changed. Thus, in considering the date of onset, the applicable legal criteria must be considered by the trier of fact to accurately pinpoint the date of entitlement." Employer's Brief at 25. The Director argues that the relevant inquiry for the trier-of-fact in determining the date for the commencement of benefits is the physical condition of claimant, not the condition of the law. Employer replies, alleging that while the physical condition of claimant may be a medical determination, the significance of the condition cannot escape reference to the applicable legal criteria.

We affirm, as unchallenged, the administrative law judge's review of the medical evidence and his determination that there is insufficient evidence to establish the exact date of the onset of claimant's total disability due to pneumoconiosis. *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983). Moreover, the administrative law judge properly held that, contrary to employer's assertion, the determination of an onset date is based on medical evidence regarding the miner's condition. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989). Because the administrative law judge found that the medical evidence does not establish the date on which claimant became totally disabled due to pneumoconiosis, claimant is entitled to benefits as of his filing date. In this case, January 1, 1974, provides the appropriate alternative entitlement date, *see* 20 C.F.R. §725.503(b), (d); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989), unless medical evidence which the

administrative law judge credits indicates that claimant was not totally disabled at some point subsequent to January 1, 1974. *Edmiston v. F & R Coal Co.,*14 BLR 1-65 (1990). Employer cites no legal authority to support his argument nor refers to any medical evidence establishing that claimant became totally disabled due to pneumoconiosis on March 1, 1987. Therefore, we find unpersuasive employer's suggestion that the date of the *Sykes* decision is determinative of the date from which benefits commence.

Accordingly, the administrative law judge's Ruling and Order on Reconsideration on Employer's Motion to Reopen the Record awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge