BRB No. 01-0611 BLA

WOODROW BRINKLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	DATE ISSUED:
	)	
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 Decision and Order – Denying Modification of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

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

Rita Roppolo (Eugene Scalia, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Denying Modification (00-BLA-0311) of

Administrative Law Judge Rudolf L. Jansen 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).[1] Claimant[2] filed the instant claim on March 6, 1978. In a Decision and Order dated October 16, 1985, Administrative Law Judge Bernard J. Gilday, Jr. credited claimant with ten years of coal mine employment and considered the claim under 20 C.F.R. Part 727 (2000). Judge Gilday found the x-ray evidence insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) (2000), but further found the pulmonary function study evidence sufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(2) (2000).[3] Judge Gilday determined that employer failed to establish rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(1)-(4) (2000). Accordingly, he awarded benefits. Employer appealed. The Board rejected employer's arguments with regard to Judge Gilday's finding at Section 727.203(b)(4) (2000), and affirmed this finding. *Brinkley v. Peabody Coal Co.*, BRB No. 85-2652 BLA (May 17, 1988)(unpublished). In addition, the Board affirmed Judge Gilday's

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued a decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

[2]Claimant is a deceased miner, who died on August 24, 1995 while his claim was pending. Director's Exhibit 32.

[3]Judge Gilday stated that, inasmuch as he found invocation of the interim presumption at 20 C.F.R. §727.203(a)(2) (2000), consideration of invocation of the interim presumption at 20 C.F.R. §727.203(a)(3) and (a)(4) (2000) was irrelevant, and he declined, therefore, to make findings thereunder.

findings under Section 727.203(b)(1)-(3) (2000) as unchallenged on appeal. *Id*. The Board vacated, however, Judge Gilday's finding under Section 727.203(a)(2) (2000), and remanded the case for further consideration of the relevant evidence thereunder. *Id*. In remanding the case, the Board instructed that, if the administrative law judge were to find on remand that entitlement to benefits was not established under 20 C.F.R. Part 727 (2000), then the administrative law judge must consider whether entitlement to benefits could be established under 20 C.F.R. Part 718 (2000). *Id*.

In a Decision and Order on Remand dated August 1, 1988, Judge Gilday again found invocation of the interim presumption established under Section 727.203(a)(2) (2000), and awarded benefits. Employer appealed. The Board affirmed Judge Gilday's finding at Section 727.203(a)(2) (2000) and the consequent award of benefits on remand. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Employer filed an appeal with the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit vacated Judge Gilday's Decision and Order and the Board's Decision and Order in *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). *Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992). In its decision, the court held that the Board erred in affirming Judge Gilday's finding that the conflicting evidence on the validity of the qualifying pulmonary function studies in the record was equally probative, and that, therefore, the pulmonary function study evidence was sufficient to establish invocation of the presumption under Section 727.203(a)(2) (2000). *Id*. In an Order on Remand dated December 8, 1993, the Board determined that the intent of the Seventh Circuit in vacating the Board's decision, while not made explicit by the court, was to remand the case for reconsideration of the claim on the merits. *Brinkley v. Peabody Coal Co.*, BRB No. 88-2929 BLA (Dec. 8, 1993)(unpublished Order). The Board thus remanded the case to the administrative law judge for consideration under the interim presumption, holding that the administrative law judge was not precluded from considering this claim under all of the subsections under Section 727.203 (2000). *Id*. The Board also instructed that if entitlement were not established under 20 C.F.R. Part 727 (2000), the administrative law judge must consider the claim pursuant to the regulations found at 20 C.F.R. Part 718 (2000). *Id*.

In a Decision and Order dated March 7, 1995, Judge Gilday determined that invocation of the interim presumption was not established under any of the subsections at Section 727.203(a)(1)-(4) (2000). Turning to consideration of the claim under 20 C.F.R. Part 718 (2000), Judge Gilday also found the evidence insufficient to establish the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1)-(4) (2000) and 718.203 (2000). Judge Gilday further found that, even had claimant established the existence of pneumoconiosis, the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). Consequently, Judge Gilday denied benefits. Claimant appealed. The Board vacated Judge Gilday's finding that the evidence was insufficient to establish invocation of the interim presumption under Section 7272.203(a)(4)

(2000), and remanded the case for reconsideration of the relevant evidence thereunder. *Brinkley v. Peabody Coal Co.*, BRB No. 95-1195 BLA (Oct. 26, 1995)(unpublished). The Board also instructed the administrative law judge to determine whether employer established rebuttal of the interim presumption under Section 727.203(b) (2000) in the event he were to find invocation established under Section 7272.203(a)(4) (2000).[4] *Id*.

[4]The Board affirmed, as unchallenged on appeal, Judge Gilday's findings at 20 C.F.R. §§718.202(a) (2000), 718.203 (2000), and 718.204(c) (2000). *Brinkley v. Peabody Coal Co.*, BRB No. 95-1195 BLA (Oct. 26, 1995)(unpublished). The Board did not address Judge Gilday's findings at 20 C.F.R. §727.203(a)(1)-(3) (2000). *Id*.

In a Decision and Order on Remand dated April 27, 1997, Administrative Law Judge J. Michael O'Neill[5] found the evidence sufficient to establish invocation of the interim presumption at Section 727.203(a)(4) (2000), and insufficient to establish rebuttal of the interim presumption under Section 727.203(b)(1)-(4) (2000). Accordingly, he awarded benefits. Employer appealed. The Board affirmed Judge O'Neill's findings that invocation was established under Section 727.203(a)(4) (2000), and that rebuttal was not established under Section 727.203(b)(1)-(4) (2000). *Brinkley v. Peabody Coal Co.*, BRB No. 97-1174 BLA (May 19, 1998)(unpublished). The Board thus affirmed Judge O'Neill's determination on the merits that claimant established entitlement to benefits. *Id*. The Board remanded the case, however, for further consideration on the issue of the date of onset of total disability due to pneumoconiosis because Judge O'Neill did not determine if there was credible evidence that claimant was not totally disabled after March 6, 1978, the filing date of the instant claim. *Id*. Employer filed a timely Motion for Reconsideration, which the Board summarily denied in an Order dated August 3, 1998. *Brinkley v. Peabody Coal Co.*, BRB No. 97-1174 BLA (Aug. 3, 1998)(unpublished Order). On April 22, 1999, employer filed a Petition for Modification with the district director while the case was pending on remand from the Board before the Office of Administrative law Judges (OALJ). Director's Exhibit 32. In a Decision and Order on Remand – Establishing Onset Date of Disability for Payment of Benefits dated August 3, 1999, Administrative Law Judge Clement J. Kichuk[6] determined that, after a review of the record, he could not make a finding as to the month of the onset of claimant's total disability. Judge Kichuk stated that, therefore, pursuant to 20 C.F.R. §725.503(b) (2000), claimant was entitled to benefits commencing on March 6, 1978, the date when he filed his claim for benefits.

Subsequent to Judge Kichuk's Decision and Order on Remand, on September 29, 1999, employer filed additional medical evidence in support of its modification request which had been pending before the district director. Director's Exhibit 34. The district director referred the case to the OALJ for modification proceedings. The case was referred to Administrative Law Judge Rudolf L. Jansen (the administrative law judge). In his Decision and Order dated April 3, 2001, the administrative law judge credited claimant with ten years of coal mine employment, and noted that, prior to employer's request for modification, it had been determined that claimant established total disability due to pneumoconiosis pursuant to the presumption at Section 727.203 (2000), which employer did not successfully rebut. The administrative law judge then stated that he gave little weight to

[5]The case was reassigned to Judge O'Neill as Judge Gilday was no longer available to the Office of Administrative Law Judges to render a decision on remand.

[6]The case was reassigned to Judge Kichuk as Judge O'Neill was no longer available to the Office of Administrative Law Judges to render a decision on remand.

the newly submitted medical opinions indicating that claimant did not have pneumoconiosis or was not totally disabled by it, and thus found the newly submitted evidence insufficient to establish a change in conditions under 20 C.F.R. §725.310 (2000). The administrative law judge further stated that he reviewed the entire record of evidence, and found it insufficient to establish a mistake in a determination of fact pursuant to Section 725.310 (2000), having found the evidence sufficient to establish invocation of the interim presumption at Section 727.203(a)(4) (2000), and insufficient to establish rebuttal of the presumption under Section 727.203(b)(1)-(4) (2000). Consequently, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's weighing of the evidence of record under Section 727.203(b)(3) and (b)(4) (2000), and argues that the administrative law judge erred in failing to render a finding on the issue of the onset date of total disability due to pneumoconiosis. Claimant responds in support of the administrative law judge's decision awarding benefits.[7] Employer has filed a reply brief reiterating contentions raised in its Petition for Review and brief. The Director, Office of Workers' Compensation Programs, has filed a letter indicating he does not presently intend to respond to the merits of

[7]In his response brief, claimant contends that the administrative law judge erred in determining that any federal benefits awarded must be offset by workers' compensation benefits received by claimant from the State of Illinois. *See* Decision and Order at 4; Claimant's Response Brief at 20-21. Cross-appeals are required, however, where the prevailing party seeks to alter or amend the final order below. *See King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87 (1983). Inasmuch as claimant has not filed a cross-appeal, we decline to address claimant's contention.

employer's appeal.[8]

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).

[8]We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment finding and findings under 20 C.F.R. §727.203(a)(1)-(4) and (b)(1) and (b)(2) (2000). *See Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 4, 11-12. We note that in the introductory remarks in the "Argument" section of employer's brief, employer states that it challenges the administrative law judge's findings at 20 C.F.R. §727.203(b)(2) (2000) in addition to the findings under 20 C.F.R. §727.203(b)(3) and (b)(4) (2000). Employer does not develop an argument, however, as to how the administrative law judge erred in finding that rebuttal was not established under subsection (b)(2) (2000).

In challenging the administrative law judge's findings under Section 727.203(b)(3) and (b)(4) (2000), employer contends that the administrative law judge erred by crediting the opinion of Dr. Hauptmann over the opinions of employer's experts simply on the basis that Dr. Hauptmann was claimant's treating physician. We agree. Claimant testified at his deposition on May 29, 1984 that he had been seeing Dr. Hauptmann "for about three months;" *i.e.*, since approximately March 1984.[9] Director's Exhibit 23, Deposition Tr. at 11. Claimant further testified at his deposition that Dr. Hauptmann prescribed medication for him and maintained medical records on him. *Id*. at 12. The record contains, however, only one report from Dr. Hauptmann, a letter dated March 6, 1985 in which Dr. Hauptmann states that claimant was totally disabled from chronic lung disease due to coal workers' pneumoconiosis. Director's Exhibit 23. Dr. Hauptmann stated that he based his opinion on claimant's coal mine employment history, symptoms which included shortness of breath, an x-ray finding of pneumoconiosis, and pulmonary function tests showing abnormal lung function. *Id*. Dr. Hauptmann was silent in his brief report with regard to the circumstances surrounding his treatment of claimant. *Id*. The administrative law judge found that Dr. Hauptmann was claimant's treating physician for over one year. Decision and Order at 12, 14-15. He did not make any determination as to the nature and extent of the alleged patient/treating physician relationship between claimant and Dr. Hauptmann. We thus find merit in employer's contention that the administrative law judge erred in crediting Dr. Hauptmann's opinion simply on the basis that the doctor was claimant's treating physician for over a year without considering whether the record establishes a basis for holding that Dr. Hauptmann was claimant's treating physician and whether that fact put him in a better position to evaluate claimant. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992) and *Peabody Coal Co. v. Helms*, 901 F.2d 571, 3 BLR 2-449 (7th Cir. 1990); Decision and Order at 14-15. We thus vacate the administrative law judge's basis for crediting Dr. Hauptmann's report in considering the evidence under Section 727.203(b)(3) and (b)(4) (2000), and remand the case for the administrative law judge to reconsider the report and explain whether the record supports a conclusion that Dr. Hauptmann was in a better position to render an opinion on claimant's condition than were employer's physicians.

We find merit in employer's additional argument that because the administrative law judge mechanically credited Dr. Hauptmann's opinion based upon the doctor's alleged treating physician status, the administrative law judge failed to consider several factors bearing on whether Dr. Hauptmann's medical opinion was adequately explained: (1) Dr.

[9]At a subsequent hearing, which was held on March 20, 1985 before Administrative Law Judge Bernard J. Gilday, Jr., claimant appeared and incorporated his previous deposition testimony into the hearing transcript by reference rather than again testifying at the hearing.

Hauptmann's reliance on an exaggerated coal mine employment history,[10] (2) the doctor's failure to account for claimant's approximate forty to fifty year cigarette smoking history, and (3) the doctor's reliance upon a discredited positive x-ray reading and a discredited pulmonary function study. Employer also points to the administrative law judge's failure to consider the discussion and criticism of Dr. Hauptmann's opinion by Drs. Repsher, Fino and Tuteur. The United States Court of Appeals for the Seventh Circuit has held in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, BLR , (7th Cir. 2001), that the administrative law judge must have a medical reason for preferring one physician's conclusion over another's, and that a treating physician's views "must be supported by medical reasons if they are to be given legal effect." *McCandless, supra* at 470. The court in *McCandless* thus held that it was not enough for the administrative law judge to conclude simply that the treating physician was by definition more familiar with the miner's condition than the non-treating physicians. *Id*. On remand, the administrative law judge must reweigh Dr. Hauptmann's opinion in compliance with *McCandless*, and should consider whether the factors referred to by employer, discussed *supra*, bear on the credibility of Dr. Hauptmann's opinion.

Employer next argues that the administrative law judge improperly discounted the opinions of Drs. Fino, Repsher, Tuteur and Dahhan when considering rebuttal under Section 727.203(b)(3) (2000) on the ground that these physicians relied upon invalid pulmonary function studies. Employer contends that the administrative law judge mischaracterized its experts' opinions by failing to recognize that the doctors based their opinions on more information than simply the invalid studies, and by failing to note that, at any rate, these doctors stated that while the pulmonary function studies were invalid measures of the *extent* of claimant's impairment, they were valid for purposes of measuring the *type* of impairment claimant exhibited, *i.e.*, an obstructive impairment. Employer's Brief at 17-18. Employer's argument has merit insofar as Dr. Fino's opinion is concerned. Decision and Order at 13. In reconsidering the opinions on remand, the administrative law judge should take the entirety of Dr. Fino's opinion into consideration, rather than selectively analyzing it. *See Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983). Employer is incorrect in averring, however, that the administrative law judge rejected the opinions of Drs. Repsher, Tuteur and Dahhan on the basis that these three physicians relied upon invalid pulmonary

[10]Employer notes that Dr. Hauptmann stated in his opinion, consisting of a letter dated March 6, 1985, that claimant worked in coal mining from 1936 to 1977, a period of forty-one years, four times greater than the ten years credited by the administrative law judge. Director's Exhibit 23.

function studies. The administrative law judge did not specifically reject Dr. Repsher's opinion for that reason and, in fact, found the opinions of Drs. Tuteur and Dahhan to be well-reasoned and documented. Decision and Order at 13-14.

Employer further argues that the administrative law judge erred in rejecting the opinions of Drs. Repsher and Fino under Section 727.203(b)(3) and (b)(4) (2000) because Drs. Repsher and Fino believed that the obstructive nature of claimant's impairment militated against a finding of pneumoconiosis. We agree. As employer notes, the United States Court of Appeals for the Seventh Circuit held in *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995), that medical opinions which indicate that coal dust exposure does not cause obstructive impairment are not "hostile to the Act" or inherently incredible and necessarily less persuasive. In addition, we find merit in employer's argument that the administrative law judge mischaracterized Dr. Tuteur's opinion that claimant did not have physiologically, radiographically or clinically significant pneumoconiosis as a positive diagnosis of pneumoconiosis. Decision and Order at 14. As employer argues, the administrative law judge construed Dr. Tuteur's opinion out of context. While Dr. Tuteur's opinion that claimant did not have physiologically, radiographically or clinically significant pneumoconiosis is susceptible to more than one interpretation if read in isolation, it was irrational for the administrative law judge to conclude that Dr. Tuteur diagnosed pneumoconiosis in light of Dr. Tuteur's deposition testimony that while claimant could have pneumoconiosis at the microscopic level, it would be of insufficient profusion and severity to produce an abnormal x-ray, physiologic abnormalities, impairment or symptoms or signs on examination.[11] Employer's Exhibit 16 at 22.

[11]Employer also states that while it does not claim that there was a change in condition in this modification case, it takes issue with the administrative law judge's finding that claimant's condition could not have changed as a matter of law because previous administrative law judges determined that claimant had pneumoconiosis, and pneumoconiosis is a progressive disease. Employer's Brief at 20, n.1; *see* Decision and

Employer also contends that the administrative law judge erred in failing to discuss relevant evidence, specifically, treatment records and a report from Dr. Seten. Director's Exhibit 32. Employer contends that Dr. Seten's statement in his report dated December 12, 1995, that he did not have any data in his chart on claimant that claimant had been diagnosed with pneumoconiosis, supports a finding of rebuttal under Section 727.203(b)(4), and that it was a violation of the Administrative Procedure Act, (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), for the administrative law judge not to consider this evidence. We agree. On remand, the administrative law judge should consider Dr. Seten's report and treatment records and weigh this evidence against the other relevant evidence of record under Section 727.203(b)(4) (2000).

Order at 13. Employer correctly argues that to the extent the administrative law judge relied upon the prior findings in this case by the various administrative law judges that claimant had pneumoconiosis to find no rebuttal under 20 C.F.R. §727.203(b)(4) (2000) and rejected employer's physicians' opinions on the ground that pneumoconiosis is a progressive disease, he must not do so on remand, but must consider whether employer's experts' testimony that claimant's condition worsened due to cigarette smoking establishes the absence of pneumoconiosis.

In light of the above-referenced errors, we vacate the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and remand the case for further consideration. We note that claimant asserts in his response brief that the administrative law judge should have denied employer's request for modification without discussion of the merits because reopening this case on modification did not render justice under the Act. On remand, should the administrative law judge find a mistake in a determination of fact, he must ultimately determine whether reopening the claim rendered justice under the Act. *See Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999).[12]

[12] In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), a case arising under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (citing *Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)). We note that *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, No. 00-3222 (7th Cir.), cited by employer as controlling on the issue, was argued before the United States Court of Appeals for the Seventh Circuit on May 15, 2001, but a decision has not yet been issued by the court in the case.

Finally, we agree with employer that the administrative law judge erred in not making a determination as to the date of onset of claimant's total disability due to pneumoconiosis. A review of the administrative law judge's Decision and Order reveals that the administrative law judge did not address the issue or even refer to the prior determination on this issue by Administrative Law Judge Kichuk. Employer is correct in contending that, to the extent the administrative law judge implicitly adopted Judge Kichuk's prior finding, remand is required because Judge Kichuk did not have jurisdiction to address the issue, given that a motion for modification filed by employer was pending with the district director on the date Judge Kichuk's Decision and Order was issued, as discussed *supra*.[13] *See Lee v. Consolidation Coal* Co., 843 F.2d 159, 11 BLR 2-106 (4th Cir. 1988). Moreover, employer is correct that the administrative law judge's failure to render a finding with regard to whether the record establishes the date of onset of claimant's total disability due to pneumoconiosis does not comport with the APA. If, on remand, the administrative law judge finds that employer has failed to establish rebuttal of the interim presumption under Section 727.203(b)(3) and (4) (2000), resulting in an award of benefits, he must then 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 due to pneumoconiosis, then claimant is entitled to benefits as of his filing date, unless there

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[13]Employer also challenges the validity of the regulatory scheme pursuant to which Judge Kichuk previously determined that claimant's benefits in this case commenced on March 6, 1978, when claimant filed the instant claim for benefits. Specifically, employer argues that 20 C.F.R. §725.503(b) violates the Administrative Procedure Act, (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), and runs afoul of the United States Supreme Court's ruling in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) by improperly shifting the burden of production with regard to the onset date of claimant's total disability due to pneumoconiosis from claimant to employer. Employer's contention lacks merit. Section 725.503(b) does not improperly shift the burden of establishing the onset date of total disability due to pneumoconiosis from a miner to the party opposing entitlement, but rather adopts a presumptive onset date where the evidence does not establish an actual date on which the miner became totally disabled due to pneumoconiosis, and shifts the burden to the party opposing entitlement. Where the party opposing entitlement submits credible evidence that the miner was not totally disabled due to pneumoconiosis during a period covered by the presumptive onset date, then the miner has the burden to prove by a preponderance of the evidence that he was, in fact, totally disabled due to pneumoconiosis during the disputed period. Thus, Section 725.503(b) does not violate the APA or run afoul of *Ondecko*. *See* 5 U.S.C. §556(d), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a); *Ondecko, supra*.

is credited evidence which establishes that he was not totally disabled at some point subsequent to his filing date.[14] 20 C.F.R. §725.503(b);[15] *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

[14]The onset date is not established, in and of itself, by the first medical opinion establishing total disability due to pneumoconiosis, since the first such medical opinion only indicates that the miner became totally disabled due to pneumoconiosis at some point prior to it. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985).

[15]20 C.F.R. §725.503(b) provides in pertinent part:

> In the case of a miner who is totally disabled due to pneumoconiosis, benefits are payable to such miner beginning with the month of the onset of total disability. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed....

20 C.F.R. §725.503(b).

With the exception of providing guidelines for determining the date of onset of total disability due to pneumoconiosis for benefits awarded based upon a modification petition, the amended regulations do not substantively change the old regulation at 20 C.F.R. §725.503 (2000). *See* 20 C.F.R. §725.503.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge