BRB No. 11-0489 BLA

HENRY JEFFREY CHAPMAN and LINDA MARIE SMOOT, on behalf of HENRY LEE CHAPMAN	)	
Claimants-Respondents	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 04/30/2012
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5142) of Administrative Law Judge Alice M. Craft, with respect to a deceased miner's subsequent claim filed on October 30, 2006,[1] pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited the miner with at least thirty-seven years of coal mine employment and adjudicated this claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that at least fifteen years of the miner's coal mine work were performed in conditions that were substantially similar to those of an underground coal mine. Because the administrative law judge also found, based on the newly submitted evidence, that the miner was totally disabled by a respiratory or pulmonary impairment, she determined that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d), and that claimants were entitled to the presumption that the miner was totally disabled due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further determined that employer failed to rebut that presumption. Accordingly, the administrative law judge awarded benefits, commencing October 2005, the month in which she determined that the evidence established the miner's total disability.

On appeal, employer argues that the case should be held in abeyance pending resolution of the constitutionality of the Patient Protection and Affordable Care Act (PPACA), of which the recent amendments to the Act were a part. Employer also challenges the administrative law judge's findings that the evidence was sufficient to invoke the presumption at amended Section 411(c)(4), and that the evidence was insufficient to establish rebuttal. Further, employer contends that the administrative law judge's determination as to the date for the commencement of benefits is not supported by the record or consistent with law.

Claimants respond, urging affirmance of the award of benefits. Regarding the onset date, claimant argues that it is supported by substantial evidence. Claimants,

[1] The miner filed an initial claim on January 26, 1990, which was denied by the district director on October 4, 1990, because the evidence failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. There was no further action with regard to the 1990 claim, until the miner filed the current subsequent claim on October 20, 2006. Director's Exhibit 4. The miner died on April 11, 2009, while his case was pending before the Office of Administrative Law Judges. Because the miner's wife predeceased him, his children are pursuing the miner's subsequent claim on his behalf and are referred to as "claimants" herein.

however, contend that, if the Board concludes that there is insufficient evidence to support a commencement date of October 2005, remand is not necessary, as the Board could hold that the date from which benefits commence is the month in which the miner's subsequent claim was filed, or October 2006. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response brief, asserting that the Board should, consistent with other opinions, deny employer's request to hold the case in abeyance. The Director also indicates that, contrary to employer's assertion, an administrative law judge may rely on the preamble to the regulations when evaluating the medical opinion evidence. Employer replies, reasserting his arguments on appeal.[2]

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

On March 23, 2010, amendments to the Act, contained in the PPACA, were enacted, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[4] Pursuant to amended Section 411(c)(4), a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner worked at least thirty-seven years in coal mine employment, during which time he spent at least fifteen years in conditions that were substantially similar to those of an underground coal mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that the miner's coal mine employment was in Indiana. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] We deny employer's request to hold this case in abeyance pending resolution of the constitutional challenges to the Patient Protection and Affordable Care Act. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-197-200 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (unpub. Order), *appeal docketed* No. 11-1620 (4th Cir. June 13, 2011); *Fairman v. Helen Mining Co.*, 24 BLR 1-227, 1-229 (2011).

presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

I. Invocation of the Presumption

A. The Administrative Law Judge's Findings

In considering whether the miner was totally disabled by a respiratory or pulmonary impairment, a requirement for invocation of the amended Section 411(c)(4) presumption, the administrative law judge noted that the miner underwent pulmonary function testing on a yearly basis from 1993 to 2006, but that none of the tests was qualifying for total disability until 2006. Decision and Order at 46. The administrative law judge also found that the testing from 2006 forward was "inconclusive," since "only three of the six pre-bronchodilator tests administered between 2006 and 2008 were qualifying (two in 2006, and one in 2008), and the March 2008 qualifying pre-bronchodilator test was of questionable validity according to Dr. Repsher, who administered the test." *Id*. She noted that "[t]he other three pre-bronchodilator tests were non-qualifying, as were all of the post-bronchodilator tests." *Id*. Thus, the administrative law judge concluded that, while the pulmonary function tests showed a decline in the miner's function over the years, the tests did not establish the miner's total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id*.

The administrative law judge found that the only qualifying blood gas studies for total disability were taken while the miner was hospitalized in April 2004, returning to normal thereafter or showing only mild hypoxia and, thus, failed to establish the miner's total disability at 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 46. The administrative law judge also found that there was no evidence of record, indicating that the miner had cor pulmonale with right-sided congestive heart failure to establish total disability at 20 C.F.R. §718.204(b)(2)(iii). *Id*.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered four medical opinions. She found that Dr. Niazi performed the examination of claimant at the request of the Department of Labor (DOL) and diagnosed a "severe impairment," but considered his opinion to be "ambiguous" because he did not specify whether the miner's impairment was based on his respiratory condition. Decision and Order at 46. The administrative law judge also noted that Dr. Niazi did not offer a specific opinion as to whether the miner had been disabled from performing his usual coal mine work. *Id*. In contrast, the administrative law judge found that both Dr. Houser, the miner's treating physician, and Dr. Renn opined that the miner was disabled from performing his coal mine employment. *Id*. The administrative law judge found that their opinions took into account the demands of the miner's previous coal mine employment, and were supported by the objective evidence. *Id*. at 47.

The administrative law judge found that Dr. Repsher is the only physician who opined that the miner did not have a pulmonary impairment, but she gave his opinion little weight because she found that it was "internally inconsistent" and also "not consistent with the objective evidence." Decision and Order at 46. The administrative law judge observed that Dr. Repsher "conceded in his final report that the [m]iner had a respiratory impairment, but his abrupt about-face was not adequately explained in view of the substantial evidence of obstructive disease which was available to him when he prepared his other reports."[5] *Id*. at 46. The administrative law judge also determined that medical opinions from 1990, submitted with the miner's initial claim, "are not material to a determination of the [m]iner's pulmonary status during his later years." *Id*. at 47.

The administrative law judge concluded that the opinions of Drs. Houser and Renn were reasoned and documented and established total disability at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 47. Weighing all of the evidence together, the administrative law judge found that "the preponderance of the pulmonary function testing, which showed a decline of the [m]iner's function over time, and the weight of the medical opinion evidence, support a finding of total disability." *Id*. The administrative law judge noted that, while the blood gas study evidence did not result in qualifying or declining values, that evidence "[does] not contradict the pulmonary function study evidence, as they measure a different aspect of lung function." *Id*. at 47. Thus, she concluded that the miner had a totally disabling respiratory or pulmonary impairment. *Id*. Based on her determination that the miner had at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, the administrative law judge concluded that claimants were entitled to the presumption that the miner was totally disabled due to pneumoconiosis at amended Section 411(c)(4). *Id*.

B. Arguments on Appeal

Employer asserts that the administrative law judge mischaracterized Dr. Renn's opinion to support a finding of total disability. Employer contends that, although Dr. Renn stated that the miner could no longer work, Dr. Renn explained that this was due to old age and not a primary respiratory or pulmonary disease. Employer also asserts that the administrative law judge's observation, that the miner's pulmonary function study values declined over the years, is irrelevant and does not establish that he was totally disabled.

[5] In his initial October 24, 2007 report, Dr. Repsher found that the miner did not have a respiratory impairment based on the pulmonary function studies and arterial blood gas studies, which he determined were within normal limits, when adjusted for effort, cooperation, body habitus, age, and altitude. Employer's Exhibit 1.

Contrary to employer's contention, the administrative law judge did not mischaracterize Dr. Renn's opinion. In his March 2, 2008 report, Dr. Renn stated that "[w]hen considering [the miner's] respiratory system, it is with a reasonable degree of medical certainty that he is totally and permanently impaired to the extent that he would be unable to perform his last known coal mining job of coal truck driver or any similar work effort." Employer's Exhibit 9. In his June 30, 2010 report, Dr. Renn also specifically concluded that the miner had "a totally disabling respiratory disease." Employer's Exhibit 38. Thus, we reject employer's assertion of error and affirm, as supported by substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.204(b)(2)(iv), and her overall determination that the miner was totally disabled by a respiratory or pulmonary impairment.[6] *See Killman v. Director, OWCP*, 415 F.3d 716, 23 BLR 2-250 (7th Cir. 2005). We, therefore, affirm the administrative law judge's finding that a change in an applicable condition of entitlement was established at 20 C.F.R. §725.309(d) and his determination that claimants invoked the presumption that the miner's total disability was due to pneumoconiosis pursuant to amended Section 411(c)(4).

II. Rebuttal of the Presumption

A. The Administrative Law Judge's Findings

In order to rebut the presumption at amended Section 411(c)(4), the administrative law judge required employer to prove either that the miner did not have clinical or legal pneumoconiosis or that pneumoconiosis did not contribute to the miner's respiratory disability. Decision and Order at 48, 52. Regarding the existence of clinical pneumoconiosis, the administrative law judge noted that the miner underwent two biopsies in September 2008, neither of which resulted in a diagnosis of coal workers' pneumoconiosis. *Id*. at 48.-49. The administrative law judge also found, however, that there were five x-rays and five CT scans taken between November 2004 and January 2009, which were interpreted for the presence or absence of pneumoconiosis. She found that one of the x-rays was positive, three of the x-rays were negative, one x-ray was inconclusive, three of the CT scans were negative, and two of the CT scans were

[6] Employer asserts that the administrative law judge's observation, that the miner's pulmonary function studies declined over the years, "is not only gratuitous but irrelevant," as the administrative law judge did not consider the "source" of the decline. Employer's Brief in Support of Petition for Review at 18. Employer maintains that the only doctor who addressed the decline attributed it to age and not a respiratory condition. *Id*. We, however, consider any error committed by the administrative law judge in making her observation to be harmless, since her ultimate finding of total disability is support by substantial evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

inconclusive. *Id*. at 49-50. The administrative law judge concluded that the "radiological evidence weighs against a finding of clinical pneumoconiosis." *Id*. at 49.

Considering the existence of legal pneumoconiosis, the administrative law judge determined that Dr. Niazi's opinion, that the miner's obstructive disease was due entirely to smoking, was unreasoned and entitled to little weight, as he did not explain why coal dust was not a contributing factor. Decision and Order at 51. The administrative law judge reiterated that Dr. Repsher's opinion was entitled to little weight regarding the etiology of the miner's respiratory condition, because he initially found that the miner did not have any respiratory impairment. *Id*. The administrative law judge noted that, at his deposition, Dr. Repsher testified that the miner's symptoms were due to congestive heart failure, but conceded that the miner "was not in congestive heart failure" on the day he examined him. *Id*.; Employer's Exhibit 16 at 39. The administrative law judge found that the miner's treatment records did not include a diagnosis of congestive heart failure. Decision and Order at 51. Further, the administrative law judge found that, while Dr. Repsher generally alleged that several of the pulmonary function studies were invalid, Dr. Renn had specifically validated each of the studies from 1999 to 2007, showing that the miner had obstructive disease that progressed from mild to moderate. *Id*. at 51-52. Additionally, the administrative law judge stated that "Dr. Repsher's belated adoption of Dr. Renn's diagnosis of asthma, along with a diagnosis of obstructive disease due to smoking, did not restore his credibility." *Id*. at 52. Furthermore, the administrative law judge rejected Dr. Repsher's explanation that coal dust exposure was not a factor in the miner's obstructive respiratory disease because he appeared to rely on statistical averages, as opposed to the specifics of the miner's case, and expressed views at odds with accepted medical science relied upon by the DOL in the preamble to the regulations showing that coal dust exposure results in significant decreases in the FEV1 and FEV1/FVC ratio. Consequently, the administrative law judge concluded that Dr. Repsher's opinion was not well reasoned and was entitled to little weight. *Id*.

The administrative law judge found that Dr. Renn diagnosed a "moderately severe but significantly reversible obstructive defect due to asthma." Decision and Order at 37. The administrative law judge noted that, as a basis for excluding coal dust exposure as a cause for the miner's disabling respiratory condition, Dr. Renn "cited to medical literature for the proposition that most studies have found an inconsequential loss of FEV1 related to coal mine dust exposure, far exceeded by that from smoking and aging." *Id*. The administrative law judge concluded that Dr. Renn expressed views that were contrary to DOL's position in the preamble that a decline in FEV1 values is consistent with an obstructive respiratory impairment caused by coal dust exposure. *Id*. at 52. Thus, the administrative law judge concluded that Dr. Renn's opinion was not well reasoned and was entitled to little weight, in comparison to Dr. Houser's better reasoned opinion, based on his years of treatment, and that the miner had disabling chronic

obstructive lung disease caused by his coal dust exposure.[7] *Id*. Consequently, the administrative law judge found that employer failed to disprove that the miner had legal pneumoconiosis. *Id*.

As to the issue of disability causation, the administrative law judge rejected the opinions of Drs. Niazi, Repsher, and Renn, that the miner's disability was unrelated to coal dust exposure, because she did not credit their opinions regarding the etiology of the miner's obstructive respiratory impairment. The administrative law judge therefore concluded that employer failed to disprove that the miner was totally disabled due to pneumoconiosis and, therefore, did not satisfy its burden to establish rebuttal of the presumption at amended Section 411(c)(4).

B. Arguments on Appeal

Employer asserts that the administrative law judge's reliance on the preamble to the regulations was improper, since it resulted in a denial of employer's due process right to a full and fair hearing. Specifically, employer contends that the administrative law judge erred in failing to give the parties notice of her intent to rely on the preamble, despite employer's motion requesting that the administrative law judge identify pertinent portions of the preamble that she intended to rely on to evaluate the credibility of the medical opinions. Additionally, employer contends that the administrative law judge applied an impermissible presumption that coal dust exposure always causes obstructive lung disease and is always additive, without focusing on the particulars of this case and holding claimants to their burden of proof. Employer also asserts that the comments in the Federal Register, as a legal matter, are neither controlling, nor supportive, and do not carry the force of law.[8] Thus, employer argues that, in rejecting the opinions of Drs.

[7] In the paragraph discussing her evaluation of Dr. Renn's opinion, the administrative law judge inadvertently referred to Dr. Renn as Dr. Repsher several times. *See* Decision and Order at 52.

[8] Employer argues that neither *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008), nor *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011), condone the administrative law judge's reliance on the preamble. Contrary to employer's argument, however, the Seventh Circuit held in *Beeler* that the administrative law judge permissibly rejected a physician's opinion that was contrary to medical authority, cited in 65 Fed. Reg. 79,938 (Dec. 20, 2000), indicating that nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners. *Beeler*, 521 F.3d at 723, 24 BLR at 2-103. Furthermore, the United States Court of Appeals for the Third Circuit specifically rejected employer's argument that "the preamble to the regulations lacks the force of law

Repsher and Renn, the administrative law judge has substituted her views for that of the medical expert. Employer also maintains that the administrative law judge's credibility findings do not comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

We reject employer's arguments that the administrative law judge did not comply with the APA and erred in relying on the preamble to the regulations in weighing the medical opinion evidence, relevant to the issue of whether the miner suffered from legal pneumoconiosis. The preamble to the amended regulations sets forth the Department's resolution of questions of scientific fact relevant to the elements of entitlement that a claimant must establish in order to secure an award of benefits. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 355, 23 BLR 2-472, 2-482 (6th Cir. 2007); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004). Therefore, an administrative law judge may evaluate expert opinions in conjunction with the Department's discussion of sound medical science in the preamble. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

We also hold that, contrary to employer's assertion, the administrative law judge did not treat the preamble as a presumption that all obstructive lung disease is legal pneumoconiosis or that the effects of coal dust and cigarette smoking must be additive. The administrative law judge noted correctly that Dr. Repsher opined that obstruction caused by coal dust exposure is generally very mild and is negligible, compared to the effects of smoking on the pulmonary function testing and the reduction in the FEV1 value. Decision and Order at 37; Employer's Exhibit 16. The administrative law judge permissibly found Dr. Repsher's opinion to be inconsistent with the views of DOL that, "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis" and that "[t]he risk is additive with smoking." Decision and Order at 51, *quoting* 65 Fed. Reg. at 79,940 (Dec. 20, 2000); *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Obush*, 24 BLR at 1-125-26.

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and cannot provide a legal basis to give an opinion less weight." *Obush*, 650 F.3d at 256-57, 24 BLR at 2-383. The court held that the administrative law judge's "reference to the preamble to the regulations, 65 Fed. Reg. 79941 (Dec. 20, 2000), unquestionably supports the reasonableness of his decision to assign less weight to [a physician's] opinion." *Id*.

We also see no merit in employer's contention that the administrative law judge erred in finding Dr. Renn's opinion to be inconsistent with the preamble to the amended regulations, based on his views regarding whether coal mine dust exposure may cause a clinically significant reduction in FEV1 values. Decision and Order at 52. As noted by the administrative law judge, Dr. Renn specifically stated that "most studies have found an inconsequential loss of FEV1 related to coal mine dust exposure" and listed medical literature to support such a conclusion. Decision and Order at 37; *see* Employer's Exhibit 9. We see no error in the administrative law judge's rational finding that Dr. Renn's belief, that coal dust exposure does not cause a clinically significant decline in FEV1 in most miners, undermines the credibility of his opinion because it is contrary to the findings of the DOL in the preamble. S*ee* 65 Fed. Reg. at 79,940-1, 79,943; *Barrett*, 478 F.3d at 355; 23 BLR at 2-482; *Obush*, 24 BLR at 1-125-26; Decision and Order at 52.

Employer assertions of error with regard to the weight accorded the medical opinions of Drs. Repsher and Renn amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge permissibly exercised her discretion in weighing the evidence, we affirm her findings that employer did not disprove the existence of legal pneumoconiosis or that the miner's disability did not arise out of coal mine employment. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990). Thus, we affirm the administrative law judge's finding that employer did not establish rebuttal of the presumption at amended Section 411(c)(4) and the award of benefits. *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

III. Date for the Commencement of Benefits

A. The Administrative Law Judge's Findings

The administrative law judge found that when the miner was examined by Dr. Niazi in November 2006, he was already totally disabled and that there is no evidence that he was not disabled at any point after that examination. Decision and Order at 53. The administrative law judge noted that Dr. Houser, the miner's treating pulmonologist, reported that "pulmonary function testing after 2004 showed that [the miner] was disabled" and that "[t]esting at St. Mary's Medical Center in April 2004 showed a mild defect" while "[t]esting by Dr. Houser in October 2005 showed a moderate impairment." *Id*. In conclusion, the administrative law judge stated that the miner "was entitled to benefits, commencing in October 2005 when pulmonary function testing showed that he was disabled by his obstructive disease." *Id*.

B. Arguments on Appeal

Employer contends that even if the miner is entitled to benefits, the administrative law judge applied the wrong test by stating that "benefits commence with the month of onset of total disability." Employer's Brief at 28, *quoting* Decision and Order at 53. Employer also asserts that the administrative law judge's statement that the miner was totally disabled at the time of Dr. Niazi's examination cannot be reconciled with her finding, at 20 C.F.R. §718.204(b)(2)(iv), that Dr. Niazi offered an ambiguous opinion on the issue of total disability and did not offer an opinion as to whether the miner would be able to perform his coal mine work. Employer's Brief at 28. Employer further contends that the administrative law judge erred in relying on the October 2005 non-qualifying pulmonary function study, showing only a "a moderate impairment," in reaching her findings as to the date for commencement of benefits. Consequently, employer requests that the case be remanded for additional consideration.

Claimants assert, in response, that the administrative law judge correctly relied on the October 2005 pulmonary function test and Dr. Niazi's November 2006 examination in designating October 2005 as the date from which benefits commence. Claimants further state that, if there is insufficient evidence to support the administrative law judge's finding of October 2005 as the month for commencement of benefits, the Board should hold, as a matter of law, that benefits commence as of October 2006, the month and year in which the subsequent claim was filed.

There is merit to employer's argument that the administrative law judge erred in stating, "benefits commence with the month of onset of total disability." *See* Decision and Order at 53. The regulation at 20 C.F.R. §725.503(b) specifically provides that benefits commence the month in which claimant establishes that his totally disabling respiratory impairment *due to pneumoconiosis* began. Simply establishing a disabling impairment at that time is not enough. *See Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989).

In addition, the evidence that the administrative law judge relied on is insufficient to support her determination. Pursuant to 20 C.F.R. §718.204(b), the administrative law judge specifically found that Dr. Niazi's opinion was ambiguous and insufficient to establish that the miner was totally disabled. *See* Decision and Order at 46; Director's Exhibit 13. Therefore, the administrative law judge could not rationally determine that the miner was totally disabled at the time of Dr. Niazi's examination in November 2006. Additionally, the administrative law judge's onset determination cannot be reconciled with the fact that Dr. Niazi specifically opined that the severe respiratory impairment present at the time of his November 2006 examination of the miner, was due to smoking. Director's Exhibit 13. Regarding the October 2005 pulmonary function study, no

physician opined that the results of this study demonstrated that the miner's totally disabling respiratory impairment was due to pneumoconiosis. Due to these flaws, we must vacate the administrative law judge's designation of October 2005, as the date for the commencement of benefits. *See Krecota*, 868 F.2d at 603-04, 12 BLR at 2-184-85; *Lykins*, 12 BLR at 1-182-83.

We further hold, however, that remand to the administrative law judge for reconsideration of this issue is not required. Based on the lack of evidence that the miner was totally disabled due to pneumoconiosis prior to the filing of his subsequent claim on October 20, 2006, and claimants' concession that, in the absence of such evidence, the Board should find, as a matter of law, that benefits commence as of the filing date, we modify the date of commencement of benefits from October 2005 to October 2006.[9] 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

[9] Where a claimant is awarded benefits in a subsequent claim, the date for the commencement of benefits can be before the filing of the subsequent claim, with the proviso that no benefits may be paid for any time period prior to the date upon which the denial of the previous claim became final. 20 C.F.R. §725.309(d)(5).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed, as modified to reflect October 2006 as the date from which benefits commence.

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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BETTY JEAN HALL
Administrative Appeals Judge