

BRB No. 03-0495 BLA

CALVIN DUNFORD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SEA "B" MINING COAL COMPANY	)	
	)	DATE ISSUED: 02/25/2004
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 on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Timothy S. Williams (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (00-BLA-0589) of Administrative Law Judge Alice M. Craft 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).<sup>1</sup> This claim, initially filed on August 10, 1979, has been before the Board previously.<sup>2</sup> On October 9, 2001, the administrative law judge granted claimant's request for modification, finding that the presumption of total disability due to pneumoconiosis was established by pulmonary function studies pursuant to 20 C.F.R. §727.203(a)(2), and that employer had failed to rebut the interim presumption at 20 C.F.R. §727.203(b)(3), (4). Accordingly, benefits were awarded as of June 1, 1987. The Board affirmed the award of benefits, but vacated the administrative law judge's finding as to the date of onset of total disability due to pneumoconiosis and the case was remanded for further consideration of that issue. *Dunford v. Sea "B" Mining Coal Co.*, BRB No. 02-0161 BLA (Oct. 30, 2002) (unpublished).

On remand, the administrative law judge found that August 1988 was the onset of claimant's total disability due to pneumoconiosis. On appeal, employer contends that the administrative law judge erred in his determination of the onset date of claimant's disability. Additionally, employer continues to challenge entitlement under 20 C.F.R. Part 727, arguing that the administrative law judge erred in finding a mistake in a determination of fact in the prior denial. Claimant responds, stating that the correct onset date of claimant's disability was August 10, 1979, the date of claimant's application for black lung benefits. Claimant further asserts that employer's arguments are beyond the scope of the Board's remand as the Board affirmed the administrative law judge's prior determination of a mistake in a determination of fact. The Director, Officer of Workers' Compensation Programs (the Director), has filed a brief urging the Board to affirm the administrative law judge's finding that claimant was totally disabled due to pneumoconiosis as of August 1988. The Director further states that because the Board has already rejected employer's arguments regarding the weighing of the evidence relevant to rebuttal, the Director will not respond to employer's arguments on the merits of entitlement.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and

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<sup>1</sup> 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 (2001). The regulations at 20 C.F.R. §727.203 (2000), however, were not affected by the revised regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

<sup>2</sup> The prior procedural history is set forth in the Board's Decision and Order of October 30, 2002. *Dunford v. Sea "B" Mining Coal Co.*, BRB No. 02-0161 BLA (Oct. 30, 2002) (unpublished), slip opinion at 2-3.

may not be disturbed. 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 contends that the administrative law judge erred in relying on the August 16, 1988 pulmonary function study that yielded qualifying pre-bronchodilator values and non-qualifying post-bronchodilator values to determine the onset of claimant’s total disability due to pneumoconiosis. Employer argues that the administrative law judge “failed to properly address why she gave more weight to the qualifying prebronchodilator tests over the nonqualifying post bronchodilator tests.” Employer’s Brief at 4. Additionally, employer states that the first pulmonary function study that yielded both pre - and post-bronchodilator qualifying values was performed on February 23, 1989, and that these values were inconsistent with a subsequent non-qualifying post-bronchodilator pulmonary function study performed in 1994. Employer further argues that “the successful application of bronchodilators resulting in an improvement in lung function as measured by post bronchodilator PFTs cannot be pneumoconiosis or due to pneumoconiosis.” *Id.*

We reject employer’s arguments. The administrative law judge considered the pulmonary function studies and relevant medical opinions together and rationally concluded that August 1, 1988 was the date of onset of claimant’s total disability due to pneumoconiosis. Decision and Order on Remand at 6; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989) The administrative law judge found that of the seven pulmonary function studies performed between 1988 and 1999, four produced qualifying FEV1 values, both pre - and post-bronchodilator. Decision and Order on Remand at 5; Director’s Exhibits 120, 155, 202. The administrative law judge also found that the August 16, 1988 and October 18, 1994 studies were the only studies with non-qualifying post-bronchodilator FEV1 values. The administrative law judge further explained that in both studies, the post-bronchodilator FEV1 values of 2.76 and 2.77 were very close to the qualifying value of 2.70 and that in the 1988 test, the MVV produced qualifying, pre - and post-bronchodilator values and in the 1994 test, no MVV was taken post-bronchodilator. Decision and Order on Remand at 6; Director’s Exhibits 109, 155, 165.

Additionally, the administrative law judge found that the opinions of the majority of physicians who diagnosed coal dust related disease, including Drs. Modi, Robinette, Strader and Ugolini, support the conclusion that the pre-bronchodilator values accurately reflected claimant’s capacity to perform coal mine work. Decision and Order on Remand at 6; Director’s Exhibits 82, 120, 147, 155, 177. This finding was not challenged on appeal and is, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We also reject claimant’s argument that the date of onset of total disability due to pneumoconiosis was August 10, 1979, the date he applied for black lung benefits.

Claimant did not cite any medical evidence establishing that he was totally disabled due to pneumoconiosis as of August 10, 1979 and he ignores the August 2, 1979, November 8, 1979, March 10, 1987 and June 24, 1987 pulmonary function studies, which were all non-qualifying. Director's Exhibits 6, 7, 23, 30, 31, 82-84, 155. We, therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant was totally disabled due to pneumoconiosis as of August 1988. See *Lykins*, 12 BLR 1-181; *Carney v. Director, OWCP*, 11 BLR 1-32 (1987).

Next, employer argues that because the administrative law judge erred in finding a mistake in a determination of fact in the prior denial, the Board must vacate the award of benefits and remand this case to the administrative law judge for further consideration. The Board has already rejected these arguments in its October 30, 2002 Decision and Order. *Dunford v. Sea "B" Mining Coal Co.*, BRB No. 02-0161 BLA (Oct. 30, 2002) (unpublished), slip opinion at 4-6. Employer now relies on *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 864, --- BLR --- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001) to assert that the administrative law judge erred in rejecting Dr. Fino's opinion, that claimant does not have legal pneumoconiosis, on the ground that his opinions are contrary to the Act's definition of pneumoconiosis as a latent and progressive disease. We reject employer's arguments.

The administrative law judge gave less weight to Dr. Fino's opinion for being contrary to the Act as an alternative ground for finding a mistake in fact under Section 727.203(b)(4). *Dunford*, slip opinion at 6. Decision and Order Awarding Benefits on Modification at 20. The administrative law judge also found that the opinion of Dr. Ugolini, that claimant had legal pneumoconiosis, and Dr. Fino's contrary opinion were "equally documented with reference to the pertinent studies" and that "at best" their opinions were in "equipoise." Decision and Order Awarding Benefits on Modification at 20. We affirmed this finding. *Dunford*, slip op at 6. Because the administrative law judge reasonably found the opinions of Drs. Ugolini and Fino in "equipoise" and that employer had not therefore submitted sufficient evidence to support rebuttal of the presumption under Section 727.203(b)(4), error, if any, in the administrative law judge's alternative ground for finding a mistake in fact, is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We conclude, therefore, that employer has not advanced any argument in support of altering the Board's previous decision affirming the award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge