U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0252 BLA

ERMIL A. FREEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF WEST VIRGINIA/	)	
APOGEE COAL COMPANY	)	DATE ISSUED: 02/20/2015
	)	
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 Awarding Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2011-BLA-5069) of Administrative Law Judge Richard A. Morgan, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves a subsequent claim filed on September 22, 2005, and is before the Board for the third time.[1]

As the Board summarized in its last decision, in 2008 Administrative Law Judge Adele Higgins Odegard found that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309, by proving that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). However, Judge Odegard denied the claim on its merits, because she found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Freeman v. Arch of W. Va./Apogee Coal Co.*, BRB Nos. 12-0173 BLA/A, slip op. at 2 (Jan. 17, 2013)(unpub.)(Boggs, J., concurring). Following the Board's September 29, 2009 affirmance of Judge Odegard's decision denying benefits, claimant timely sought modification pursuant to 20 C.F.R. §725.310.[2] *Id.*

Administrative Law Judge Richard A. Morgan (the administrative law judge) initially denied modification in a Decision and Order issued on December 12, 2011. The administrative law judge found that claimant established more than fifteen years of underground coal mine employment[3] and that he is totally disabled under 20 C.F.R. §718.204(b)(2), but did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge determined that because claimant could not establish the existence of pneumoconiosis, he was "not entitled to the benefit of the rebuttable presumption" of total disability due to pneumoconiosis at Section 411(c)(4)

[1] The Board set forth the full history of this case in its prior decisions. *Freeman v. Arch of W. Va./Apogee Coal Co.*, BRB Nos. 12-0173 BLA/A (Jan. 17, 2013)(unpub.)(Boggs, J., concurring); *E.F.* [*Freeman*] *v. Arch of W. Va./Apogee Coal Co.*, BRB No. 09-0212 BLA (Sept. 29, 2009)(unpub.).

[2] An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a).

[3] The record reflects that claimant's coal mine employment was in West Virginia. 2011 Hearing Tr. at 9-11. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

of the Act, 30 U.S.C. §921(c)(4).[4] 2011 Decision and Order at 24. Accordingly, the administrative law judge denied benefits.

Upon review of claimant's appeal, the Board vacated the denial of benefits. Specifically, the Board held that, because this claim was filed after January 1, 2005 and was pending on March 23, 2010, and it was undisputed that claimant established more than fifteen years of underground coal mine employment and that he is totally disabled, the administrative law judge erred in determining that claimant was not entitled to the benefit of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. *Freeman*, slip op. at 4-6. Accordingly, the Board remanded the case for the administrative law judge to consider the claim pursuant to Section 411(c)(4), and to reconsider claimant's request for modification.[5]

On remand, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer failed to rebut the presumption. Finding that claimant established a change in conditions pursuant to 20 C.F.R. §725.310,[6] the administrative law judge granted modification, and awarded benefits.

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[4] As part of the Patient Protection and Affordable Care Act, Public Law No. 111-148, Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

[5] The Board rejected employer's argument, on cross-appeal, that the administrative law judge erred in discounting Dr. Tuteur's opinion that claimant does not have pneumoconiosis, and affirmed the administrative law judge's determination that Dr. Tuteur's opinion was not well-reasoned. *Freeman*, slip op. at 6-7.

[6] The administrative law judge found that claimant did not establish a mistake in a determination of fact. Decision and Order on Remand at 6. Because the administrative law judge granted modification based on a change in conditions, he found that claimant was entitled to benefits as of December 2009, the month in which he requested modification. Decision and Order on Remand at 15; 20 C.F.R. §725.503(d)(2).

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[7] Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the award of benefits. Employer filed a reply brief, reiterating its contentions on 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant does not have pneumoconiosis, or by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either legal or clinical pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii). The

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[8] In its reply brief, employer notes that the Director, Office of Workers' Compensation Programs (the Director), filed his response brief out of time. Employer's Reply Brief at 1 n.1. We accept the Director's response brief as part of the record before the Board. 20 C.F.R. §§802.212, 802.217.

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

administrative law judge found that employer failed to establish rebuttal by either method.

In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Crisalli and Zaldivar.[10] Drs. Crisalli and Zaldivar opined that claimant does not have legal pneumoconiosis, but suffers from severe airway obstruction caused by emphysema due to smoking, and by asthma that is unrelated to coal mine dust exposure. Director's Exhibits 31, 47, 57, 58.

The administrative law judge discounted the opinions of Drs. Crisalli and Zaldivar. Initially, he found that the physicians' reliance on the partial reversibility of claimant's impairment after bronchodilator administration did not necessarily exclude coal mine dust exposure as a contributing factor in claimant's residual, disabling impairment. Decision and Order on Remand at 13. Additionally, the administrative law judge discounted the physicians' opinions, in part, because he found their views that coal mine dust exposure does not cause asthma or bullous emphysema to be in conflict with the principles underlying the regulations and set forth in the preamble to the 2001 regulatory revisions. *Id*. Finally, the administrative law judge discounted Dr. Crisalli's explanation, that coal mine dust exposure was not a cause of claimant's emphysema because claimant left coal mining in 1982 but continued to smoke until 2005; the administrative law judge determined that this explanation was "not in accord with the premise" that pneumoconiosis may be latent and progressive. *Id*. at 14. Therefore, the administrative law judge stated that he gave "less credit" to the opinions of Drs. Crisalli and Zaldivar, and he concluded that employer "failed to rule out the existence of . . . legal coal workers' pneumoconiosis." *Id*. at 12, 14.

Employer contends that a remand is required because the administrative law judge applied an improper standard by stating that employer did not rule out the existence of legal pneumoconiosis. Employer's Brief at 8-9. A review of the administrative law judge's Decision and Order as a whole reflects that, before beginning his analysis of the medical evidence, the administrative law judge correctly stated that employer bore the burden of "establishing . . . that: (1) the miner does not have pneumoconiosis," and accurately stated that it was employer's "burden to affirmatively show that the miner does not suffer from pneumoconiosis . . . ." Decision and Order on Remand at 5; *see* 20

[10] The administrative law judge reiterated his determination that Dr. Tuteur's medical opinion was not well-reasoned. Decision and Order on Remand at 12. Additionally, he summarized Dr. Rasmussen's opinion that claimant suffers from chronic obstructive pulmonary disease and emphysema that are due to both smoking and coal mine dust exposure. *Id.*; Director's Exhibit 12.

C.F.R. §718.305(d)(1)(i). Moreover, the administrative law judge did not reject the opinions of Drs. Crisalli and Zaldivar as insufficient to meet a "rule out" standard. Rather, he found that their opinions on the existence of legal pneumoconiosis were not credible, for the reasons he gave after considering the physicians' explanations. Decision and Order on Remand at 13-14. Because the administrative law judge correctly stated employer's burden to establish that claimant does not have pneumoconiosis and found that employer's physicians' opinions were not credible, we reject employer's argument that he applied an improper standard. For the same reasons, even if, as employer contends, the administrative law judge's brief, concluding statement that employer did not rule out legal pneumoconiosis was error, it was harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985).

Employer argues that the administrative law judge did not provide valid reasons for discounting the opinions of Drs. Crisalli and Zaldivar that claimant does not have legal pneumoconiosis. Employer's Brief at 17-22. We disagree.

Initially, employer contends that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Zaldivar because the physicians relied on the reversibility of claimant's impairment as a reason for eliminating coal mine dust exposure as a cause. Employer's Brief at 17. Contrary to employer's contention, the administrative law judge concluded, as was within his discretion, that Drs. Crisalli and Zaldivar did not adequately explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of his remaining obstructive impairment, and he permissibly accorded their opinions less weight on that basis.[11] *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. 2004); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); 20 C.F.R. §718.201(a)(2).

Additionally, employer contends that the administrative law judge erred in discounting the opinions of Drs. Crisalli and Zaldivar because he found that their opinions, that asthma and bullous emphysema are not caused by coal mine dust exposure, were contrary to premises underlying the regulations and set forth in the preamble to the 2001 regulatory revisions. Employer contends that the preamble does not specifically

[11] Employer asserts that the administrative law judge found the opinions of Drs. Crisalli and Zaldivar to be "antithetical to the Act," because the physicians "relied solely" upon impairment reversibility, Employer's Brief at 17, but does not identify specific findings in support of its assertion.

state that coal mine dust causes asthma or bullous emphysema. Employer's Brief at 17-19.

Upon review, we agree with the Director that the administrative law judge properly discounted the physicians' opinions, because they do not provide reasoning that coal dust exposure did not aggravate claimant's asthma or emphysema, and thus do not establish that those diseases are not legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2),(b). Decision and Order on Remand at 14. Legal pneumoconiosis includes "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment," 20 C.F.R. §718.201(a)(2), and a pulmonary disease arises out of coal mine employment if it is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). As the Director notes, in explaining the Department of Labor's decision to include obstructive diseases arising out of coal mine employment within the definition of pneumoconiosis, the preamble lists asthma as a type of chronic obstructive pulmonary disease. Director's Brief at 7, *citing* 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000). Additionally, the Director points out that the preamble states, without qualification or limitation as to a particular form, that emphysema "may be legal pneumoconiosis if it arises from coal-mine employment." Director's Brief at 8, *citing* 65 Fed. Reg. at 79,939. Further, as the administrative law judge noted, the preamble also states that "observations support the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms . . . ." 65 Fed. Reg. at 79943; Decision and Order on Remand at 13 n.12.

Given that it was employer's burden to prove that claimant's asthma and emphysema are not legal pneumoconiosis, the administrative law judge did not err in keeping the above principles in mind when weighing the medical opinions. *See* 20 C.F.R. §718.305(d)(1)(i)(requiring the party opposing entitlement to establish that the miner does not have "[l]egal pneumoconiosis as defined in §718.201(a)(2)"). Therefore, the administrative law judge reasonably discounted the opinions of Drs. Crisalli and Zaldivar as inadequately explained, because the physicians did not offer a reason for opining that claimant's asthma and bullous emphysema were not substantially aggravated by his coal mine dust exposure, beyond their belief that coal mine dust cannot cause those conditions. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 323, 25 BLR 2-255, 2-264-65 (4th Cir. 2013)(Traxler, C.J., dissenting); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); 20 C.F.R. §718.201(a)(2).

The administrative law judge further found that Dr. Crisalli excluded coal mine dust exposure as a cause of claimant's emphysema because claimant's coal mine dust exposure ceased in 1982, but claimant continued to smoke until 2005. Contrary to employer's argument on this issue, the administrative law judge rationally discounted Dr.

Crisalli's explanation because he found that it was inconsistent with the Department of Labor's recognition of pneumoconiosis as "a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, 24 BLR 2-199, 2-216 (6th Cir. 2009); Decision and Order on Remand at 13-14; Employer's Brief at 20-22.

The administrative law judge acted within his discretion in evaluating the credibility of the opinions of Drs. Crisalli and Zaldivar regarding the existence of legal pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The Board is not empowered to reweigh the evidence. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis. The failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis.[12] *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer rebutted the presumed fact of disability causation. The administrative law judge discredited the opinions of Drs. Crisalli and Zaldivar, that pneumoconiosis did not cause claimant's total respiratory disability, because Drs. Crisalli and Zaldivar did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. Decision and Order on Remand at 14.

Employer argues that the administrative law judge erred in relying on the "presumed" finding of legal pneumoconiosis to discredit the disability causation opinions of Drs. Crisalli and Zaldivar. Employer's Brief at 25. Contrary to employer's contention, the administrative law judge reasonably determined that the same reasons he provided for discrediting the opinions of Drs. Crisalli and Zaldivar on the issue of legal pneumoconiosis also undercut their opinions that claimant's disabling obstructive

[12] Consequently, we need not address employer's arguments regarding the administrative law judge's finding that employer also failed to establish that claimant does not have clinical pneumoconiosis. Employer's Brief at 9-14; *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

impairment is unrelated to pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. E. Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013)(rejecting the employer's contention that an administrative law judge may not discredit a disability causation opinion that ruled out legal pneumoconiosis where legal pneumoconiosis is presumed, rather than factually found). Thus, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the award of benefits. 30 U.S.C. §921(c)(4).

Finally, a plain error is apparent on the face of the administrative law judge's decision regarding his determination of the date for the commencement of benefits. Therefore, the Board will address the issue. *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 522 n.8, 20 BLR 2-1, 2-10 n.8 (4th Cir. 1995)(holding that review of an issue "may proceed (even completely *sua sponte*) when the equities require"); *Mansfield v. Director, OWCP*, 8 BLR 1-445, 1-446 (1986).

Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b); *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603, 12 BLR 2-178, 2-184 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). In a subsequent claim, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any time period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Additionally, where, as here, benefits are awarded pursuant to 20 C.F.R. §725.310, the basis for granting modification affects the determination of the date from which benefits commence. *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991). If modification is based on a change in conditions, claimant is entitled to

benefits as of the month he became totally disabled due to pneumoconiosis, or if that date is not ascertainable, as of the month in which he requested modification. 20 C.F.R. §725.503(d)(2). If modification is based on the correction of a mistake in fact, the date for the commencement of benefits is determined pursuant to 20 C.F.R. §725.503(b). That is, claimant is entitled to benefits as of the month in which he first became totally disabled due to pneumoconiosis or, if that date is not ascertainable, from the month in which he filed his claim, unless credited evidence establishes that he was not disabled at any subsequent time. 20 C.F.R. §725.503(d)(1); *see Eifler*, 926 F.3d at 666, 15 BLR at 2-4; *Edmiston*, 14 BLR at 1-69. The scope of modification based on correcting a mistake of fact is broad, encompassing "the ultimate issue of benefits eligibility." *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28-29 (4th Cir. 1993).

Here, the administrative law judge determined that benefits should commence as of December 2009, the month in which claimant requested modification, because the administrative law judge found that claimant established a change in conditions under 20 C.F.R. §725.310. Decision and Order on Remand at 14. However, a change in conditions must be based on new evidence. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994). Here, the administrative law judge did not identify new evidence that established a change in conditions, nor is any such evidence apparent. The record reflects that, based on the originally submitted evidence, claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Although employer submitted a new medical opinion on modification from Dr. Tuteur to support its burden to rebut the presumption, the administrative law judge discredited the opinion. Thus, the new evidence that claimant does not have legal pneumoconiosis and is not totally disabled due to legal pneumoconiosis was rejected.[13] Additionally, the administrative law judge discredited employer's originally submitted opinions from Drs. Crisalli and Zaldivar, thereby rejecting all of the evidence in this claim record stating that claimant does not have pneumoconiosis and is not totally disabled due to pneumoconiosis. Therefore, it follows that on this record, as weighed by the administrative law judge, claimant did not establish a change in conditions but rather, a mistake in the ultimate fact of entitlement.[14] *Stanley*, 194 F.3d at 497, 22 BLR at 2-11. Consequently, we hold that

[13] The only new evidence that claimant submitted on modification was a positive x-ray reading for clinical pneumoconiosis from Dr. Ahmed, Director's Exhibit 78, which is not relevant to the issue of when claimant became totally disabled due to legal pneumoconiosis.

[14] The administrative law judge included no explanation for his finding that "[a] review of the record does not show that there has been a mistake of fact." Decision and Order on Remand at 6.

the administrative law judge erred by designating December 2009 as the commencement date for benefits.

We further hold that a remand to the administrative law judge for reconsideration of this issue is not warranted. Because employer failed to rebut the Section 411(c)(4) presumption, claimant established all of the elements of entitlement. *See* 20 C.F.R. §§718.305(c); 718.202(a)(3); 718.204(c)(2). The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Since the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis,[15] benefits are payable from the month in which he filed this claim. 20 C.F.R. §725.503(b). Therefore, we modify the date of commencement of benefits from December 2009 to September 2005, the month and year in which claimant filed his claim. 20 C.F.R. §725.503(b),(d)(1).

[15] Dr. Rasmussen's December 8, 2005 opinion that claimant is totally disabled due to pneumoconiosis indicates only that claimant became totally disabled due to pneumoconiosis at some time prior to Dr. Rasmussen's examination. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is affirmed, as modified to reflect September 2005 as the date from which benefits commence.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge