BRB Nos. 98-0351 BLA
and 98-0351 BLA-A

EDWARD GRISKELL	)	
	)	
Claimant-Respondent/	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner/	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Michael J. Philippi and Frank E. Pasquesi (Ungaretti & Harris), Chicago, Illinois, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

J. Matthew McCracken (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr., awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case is on appeal before the Board for a second time. In his initial Decision and Order issued on April 13, 1990, Administrative Law Judge Daniel Lee Stewart credited claimant with fourteen years and eight months of qualifying coal mine employment, and determined that on February 27, 1981, the district director denied claimant's original claim, filed on January 19, 1976, and that claimant's second claim, filed on March 26, 1982, was governed by the duplicate claim provisions at 20 C.F.R. §725.309. The administrative law judge found that new evidence submitted subsequent to the prior denial was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(4), thus claimant failed to establish a material change in conditions pursuant to Section 725.309. Accordingly, benefits were denied.

On appeal, the Board rejected claimant's constitutional challenge to the district director's Department of Labor Form CM-1000 denial notice, but agreed with claimant's argument that his letter of December 2, 1981, requesting reconsideration of the district director's denial of benefits on February 27, 1981, constituted a request for modification pursuant to 20 C.F.R. §725.310, as it was filed within one year of the denial. Because the original claim remained viable, the Board vacated the administrative law judge's findings under 20 C.F.R. Part 718, and remanded this case for adjudication under 20 C.F.R. Part 727 and a determination of whether claimant established a change in conditions or a mistake in a determination of fact pursuant to Section 725.310. The Board instructed the administrative law judge to consider entitlement under Part 718 if, on remand, entitlement was not established under Part 727. *Griskell v. Zeigler Coal Co.*, BRB No. 90-1463 BLA (Jan. 28, 1993)(unpublished).

On remand, the administrative law judge found that the weight of the evidence established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4), and that employer failed to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings pursuant to Sections 727.203(a)(4), 727.203(b)(2)-(4), 725.310, and his findings with regard to the date of onset of total disability due to pneumoconiosis

pursuant to 20 C.F.R. §725.503. Claimant responds, urging affirmance of the administrative law judge's award of benefits, and cross-appeals, contending that because the date of onset cannot be precisely determined, benefits are payable beginning with the month during which the claim was filed as specified in the provisions at Section 725.503(b). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments pursuant to Section 725.310, and has declined to take a position regarding the administrative law judge's findings on the merits.[1]

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 may not be disturbed. 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).

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(3), and insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the administrative law judge erred in finding modification established pursuant to Section 725.310 based upon a mistake in a determination of fact.[2] Employer asserts that the administrative law judge did not identify what the mistake of fact was, but simply reevaluated the evidence of record with no comparison to the prior denial by Judge Stewart, and presumed that a mistake in fact was demonstrated when newly submitted evidence established one element of entitlement not found in the prior denial, in contravention of the Supreme Court's holding in *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 117 S.Ct. 1953, 31 BRBS 54 (CRT)(1997), and the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §556(d), as incorporated by 30 U.S.C. §932(a). The Director counters that the administrative law judge was not required to make a threshold determination that a mistake in fact or change in condition actually occurred; rather, pursuant to the Board's holdings in *Kott v. Director, OWCP*, 17 BLR 1-9 (1992); *Motichak v. Bethenergy Mines, Inc.*, 17 BLR 1-14 (1992), in cases such as this where a claimant seeks modification of a denial rendered by the district director, the administrative law judge must conduct a *de novo* review of all the evidence of record, and any finding as to whether there was a mistake in a determination of fact or a change in condition is subsumed in the administrative law judge's findings on the issue of entitlement.

In the present case, after finding that the weight of the evidence established entitlement pursuant to the provisions at Part 727, the administrative law judge found that the claim was previously denied based upon Judge Stewart's application of the provisions at Part 718, and concluded that a mistake in a determination of fact was demonstrated pursuant to Section 725.310. Decision and Order at 18. Contrary to the administrative law judge's findings and employer's arguments, however, the prior denial from which claimant sought modification was the district director's denial of benefits on February 27, 1981, and not Judge Stewart's Decision and Order. Inasmuch as the basis for modification, if applicable, may affect the date from which benefits are payable, *see Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991), we vacate the administrative law judge's findings pursuant to Section

[2] Employer additionally urges the Board to reconsider its holding in claimant's prior appeal that claimant's letter dated December 2, 1981 requesting reconsideration of the district director's denial of benefits on February 27, 1981 constituted a request for modification pursuant to 20 C.F.R. §725.310. We decline to revisit this issue, inasmuch as employer failed to timely request reconsideration of our prior decision, *see generally Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991), and no exception to the law of the case doctrine has been demonstrated. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

725.310, and remand this case for the administrative law judge to consider the evidence submitted subsequent to the district director's 1981 denial of benefits in conjunction with the previously submitted evidence, and determine whether claimant established a change in conditions or a mistake in a determination of fact pursuant to the appropriate standard enunciated by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises. *See Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *see also Old Ben Coal Co. v. Scott*, _ F.3d _, 21 BLR 2-391 (7th Cir. 1998); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993).

Turning to the merits, employer contends that the administrative law judge erred in finding invocation established pursuant to Section 727.203(a)(4). Specifically, employer maintains that the administrative law judge mischaracterized Drs. Barnett and Hessl as treating physicians and mechanically credited their opinions on that basis while summarily rejecting the consultative opinion of Dr. Castle.[3] Employer also argues that the administrative law judge erred in applying different standards to the various physicians; in rejecting opinions based on objective evidence and crediting opinions based on subjective complaints; and in inferring total respiratory disability from Dr. Cugell's report rather than accepting the physician's opinion that claimant's pulmonary impairment was not totally disabling. Employer's arguments have merit. A review of the Decision and Order indicates that the administrative law judge automatically assigned greater or lesser weight to the medical opinions of record on the basis of whether or not the physician examined the claimant. The Seventh Circuit, however, has held that it is error for an administrative law judge to discount a reviewing opinion by a qualified expert which is consistent with the opinion of an examining physician, *see Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); or to accord more weight to an examining physician's opinion solely because that doctor personally treated the claimant, *see Consolidation Coal Co. v. Director, OWCP [Sisson]*, 54 F.3d 434, 19 BLR 2-155 (7th Cir. 1995); *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Peabody Coal Co. v. Helms*, 901 F.2d 571, 13

[3] While employer correctly notes that at Section 727.203(a)(4), the administrative law judge credited the opinions of Drs. Hessl, Barnett and Cugell over the opinion of consulting physician Dr. Castle because the former physicians "personally treated" claimant, *see* Decision and Order at 15, the administrative law judge subsequently characterized Dr. Barnett as an examining physician and Dr. Hessl, who conducted pulmonary evaluations of claimant four times over a period of eight years, as a treating physician, *see* Decision and Order at 17.

BLR 2-449 (7th Cir. 1990). Additionally, the administrative law judge did not determine whether the preconditions for according greater weight to the opinions of treating physicians were met, *i.e.*, whether the ability to observe the claimant over an extended period of time is essential to understanding his condition and whether the treating physician knows something about the disease in question. *See Franklin, supra*. The administrative law judge's observation that "a comparison of medical reports and tests over a long period of time may conceivably provide a physician with a better perspective than the pioneer physician," *see* Decision and Order at 15, 17, was incorrectly offered as a ground for discounting rather than crediting Dr. Castle's consultative opinion, which was based on a review of all of the medical evidence of record. Moreover, Dr. Castle's opinion was consistent with that of Dr. Cugell, an examining and reviewing physician, who opined that claimant had a mild degree of obstructive lung disease which was of insufficient severity to entitle him to benefits. The administrative law judge, however, improperly discounted Dr. Cugell's conclusions and inferred total respiratory disability from the history portion of Dr. Cugell's report, wherein the physician recorded the subjective complaints and limitations narrated to him by claimant. Decision and Order at 12, 15, 17; Employer's Exhibit 3. While an administrative law judge may properly infer total respiratory disability by comparing a physician's assessment of a miner's physical limitations with the exertional requirements of his usual coal mine employment, a miner's recitation of subjective complaints to a physician is not equivalent to a medical assessment.[4] *See Parsons v. Director, OWCP*, 6 BLR 1-272 (1983).

[4] The administrative law judge additionally found that Dr. Hessl's initial report of November 21, 1989, finding an AMA Class 2 respiratory impairment and deeming claimant totally disabled due to pneumoconiosis, *see* Claimant's Exhibit 2, was insufficient to support invocation at Section 727.203(a)(4) because "Dr. Hessl failed to assess the severity of Claimant's respiratory impairment in terms of his physical ability and exertional levels." Decision and Order at 13. Contrary to the administrative law judge's finding, however, a physician's assessment of total respiratory disability, if credited, is sufficient in itself to support invocation.

We also agree with employer's argument that the administrative law judge failed to subject all of the medical opinions of record to the same scrutiny, but credited those opinions of total respiratory disability which listed claimant's subjective complaints and limitations, and rejected those opinions which were based primarily on objective evidence on the ground that "[t]otal disability cannot be determined by x-ray evidence, pulmonary function tests, or arterial blood gas studies under the 'other medical evidence' language of §727.203(a)(4)," *see* Decision and Order at 14. A medical opinion itself, however, falls under the "other medical evidence" language of Section 727.203(a)(4), and in determining whether a physician's assessment of disability is reasoned, the administrative law judge must examine the documentation relied upon by the physician and determine whether it adequately supports the physician's conclusions.[5] *See Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990);

[5] We reject employer's argument that the administrative law judge erred in giving little weight to the opinions of Drs. Swanger and Cohen at Section 727.203(a)(4) because they merely evaluated objective evidence in the record. Dr. Swanger's report of May 7, 1976, which detailed his radiographic findings, is not relevant to disability, and the reports of Dr. Cohen, who conducted cardiopulmonary exercise studies on November 21, 1989, December 6, 1989, July 24, 1991, July 6, 1993, and December 4, 1996, simply set forth the results of those objective tests and his interpretation thereof. Inasmuch as Drs. Hessl and Barnett based their conclusions in part upon Dr. Cohen's findings, however, the administrative law judge, in evaluating whether the medical opinions are well-reasoned, should determine whether the physicians' conclusions are adequately supported by their underlying documentation. *See generally Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990), *cert. denied*, 498 U.S. 958 (1990).

Parsons, supra. Inasmuch as the administrative law judge mischaracterized evidence and provided invalid reasons for assigning greater or lesser weight to the medical opinions of record, we vacate his findings pursuant to Section 727.203(a)(4) and remand this case for reevaluation of the evidence thereunder. If on remand the administrative law judge finds the evidence insufficient to establish invocation at Section 727.203(a)(4), he must consider entitlement under Part 718.

Employer also challenges the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(2)-(4). Inasmuch as the administrative law judge's invalid credibility determinations at Section 727.203(a)(4) may have tainted his weighing of the evidence on rebuttal, we vacate the administrative law judge's findings at Section 727.203(b)(2)-(4) for reconsideration of all relevant evidence thereunder on remand pursuant to the appropriate standards as articulated by the United States Court of Appeals for the Seventh Circuit. Specifically, at Section 727.203(b)(2), the administrative law judge must determine whether the miner is able to perform his usual coal mine employment or comparable and gainful work, *see Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995); *Freeman United Coal Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987);[6] at Section 727.203(b)(3), the administrative law judge must determine whether the weight of the evidence establishes that pneumoconiosis was not a contributing cause of claimant's disability, *see Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Beasley, supra*; *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15

[6] We reject employer's argument that rebuttal pursuant to Section 727.203(b)(2) is established as a matter of law in light of *Foster, supra*, because claimant did not retire due to a respiratory impairment but was terminated from his coal mine employment in 1974 for possession of stolen property. At the hearing, the administrative law judge properly found that employer's allegation was not relevant to entitlement, *see* Hearing Transcript at 69-71, and employer's reliance on *Foster* is misplaced. In *Foster*, the Seventh Circuit held that entitlement was precluded where a miner who had pneumoconiosis was disabled by a physical condition occurring during coal mine employment which was unrelated to pneumoconiosis. In the present case, assuming *arguendo* that claimant was terminated from his coal mine employment for reasons unrelated to any physical condition, the relevant inquiry at Section 727.203(b)(2) is the severity of claimant's disability on the date of the hearing. *See Wolfe, supra*.

BLR 2-26 (7th Cir. 1991); *Wolfe, supra*; *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985); and at Section 727.203(b)(4), the administrative law judge must determine whether employer has established by persuasive evidence that claimant has neither clinical nor presumed pneumoconiosis, *see Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990).[7]

Lastly, both employer and claimant challenge the administrative law judge's designation of November 1989 as the month of onset of total disability due to pneumoconiosis pursuant to Section 725.503(b). The administrative law judge determined that Dr. Hessl's first report, dated November 21, 1989, was insufficient to establish total respiratory disability, but that his second report, dated July 24, 1991, supported invocation at Section 727.203(a)(4), thus the date of onset was "sometime between 1989 and 1991." Decision and Order at 19. Claimant asserts that because the administrative law judge was unable to pinpoint the date of onset, pursuant to Section 725.503(b) and the Seventh Circuit's holding in *Kelley, supra*, benefits are payable commencing with the month in which the claim was filed. Employer counters that the Board affirmed Judge Stewart's 1993 finding that the evidence was insufficient to establish the existence of pneumoconiosis, and thus the earliest possible date of onset is February 1995, when the first new x-ray was interpreted as positive for pneumoconiosis. As discussed *infra*, however, modification herein was sought from the district director's denial of benefits on February 27, 1981. The United States Court of Appeals for the Seventh Circuit has held that modification based on a change in condition entitles the claimant to benefits from the date of the change, whereas the correction of a mistake in a determination of fact entitles him to benefits from the date on which he became totally disabled. *See Eifler, supra*. Additionally, the administrative law judge made conflicting findings regarding Dr. Hessl's November 1989 report, *i.e.*, that it was insufficient to establish total disability and that it constituted the first evidence of claimant's total respiratory disability. We therefore vacate the administrative law judge's findings pursuant to Section 725.503(b). If on remand the administrative law judge again finds that claimant is entitled to benefits, he must reconsider the

[7] Employer correctly notes that the administrative law judge mischaracterized Dr. Nay's opinion by stating that Dr. Nay failed to state a cause for claimant's mild bronchitis, when in fact he attributed the bronchitis to smoking. *See* Employer's Exhibit 37 at 8, 12, 15.

evidence relevant to the date of onset of total disability due to pneumoconiosis and render findings consistent with *Eifler, supra*. *See also Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the Decision and Order - Award of Benefits of the administrative law judge is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge