BRB No. 95-1989 BLA

KENNETH DYE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

Michael F. Blair (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (87-BLA-0721) of Administrative Law Judge Daniel J. Roketenetz denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1] Claimant is Kenneth Dye, the miner, who filed this claim for benefits on March 14, 1978. Director's Exhibit 1.

of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the third time. Initially, Administrative Law Judge Ben L. O'Brien found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1) but concluded that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2), (3) and denied

benefits. On appeal, the Board vacated the denial of benefits[2] and remanded the case for the administrative law judge to consider rebuttal pursuant to Section 727.203(b)(2)-(3) and *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987) and *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). *Dye v. Clinchfield Coal Co.*, BRB No. 88-3250 BLA (July 27, 1992)(unpub.).

On remand, the case was re-assigned without objection to Judge Roketenetz, who found that although rebuttal was not established pursuant to Section 727.203(b)(3), it was established at Section 727.203(b)(2). Accordingly, he denied benefits.

On appeal, the Board vacated the administrative law judge's finding pursuant to Section 727.203(b)(2) and remanded the case for him to reconsider all the relevant evidence. *Dye v. Clinchfield Coal Co*., BRB No. 93-1359 BLA (Feb. 27, 1995)(unpub.).

On remand, the administrative law judge discussed the five medical opinions

[2] The Board affirmed as unchallenged on appeal the administrative law judge's findings of thirty-two years of coal mine employment and invocation of the interim presumption at Section 727.203(a)(1), and held that rebuttal at subsection (b)(4) was precluded because invocation was established pursuant to Section 727.203(a)(1). *Dye*, slip op. at 2 n.2.; *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Curry v. Beatrice Pocahontas Coal Co*., 18 BLR 1-59 (1994)(Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

of record.[3] He found that the 1979 and 1981 opinions of Drs. Abernathy and Buddington did not support the inference that claimant is totally disabled because "the reality of the situation was that the claimant's physical condition did not preclude him from engaging in coal mine employment as evidenced by" his ongoing "coal mine employment throughout 1981 and continuing until 1987 when he retired." [1995] Decision and Order on Remand at 3. The administrative law judge credited as well-reasoned and documented the opinions of Drs. Sargent and Fino, found that claimant was not totally disabled, and concluded that rebuttal was established pursuant to Section 727.203(b)(2). [1995] Decision and Order on Remand at 4.

On appeal, claimant requests reversal, contending that the administrative law judge failed to apply the proper legal standard at Section 727.203(b)(2). Claimant's Brief at 5. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge failed to apply the proper standard pursuant to Section 727.203(b)(2). Claimant's Brief at 5. The United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, has held that pursuant to Section 727.203(b)(2), the party opposing entitlement must establish that claimant is not totally disabled for any reason. *Sykes*, *supra*. Medical opinions addressing only respiratory impairment are insufficient to establish rebuttal at subsection (b)(2). *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 150, 16 BLR 2-1, 2-7 (4th Cir. 1991).

[3] The administrative law judge permissibly accorded no weight to Dr. V. D. Modi's opinion because of his fraud conviction. [1995] Decision and Order on Remand at 3 n.4; *see* 20 C.F.R. §18.609(a); *Sisak v. Helen Mining Co*., 7 BLR 1-178 (1984).

In this case, neither of the opinions credited by the administrative law judge is sufficient to establish rebuttal at Section 727.203(b)(2).[4] Dr. Fino's opinion cannot establish rebuttal because he states that, "from a respiratory standpoint, this man is neither partially nor totally disabled from returning to his last job in the mines or a job requiring similar effort. This man's dyspnea is on the basis of both deconditioning and obesity." Employer's Exhibit 19 (emphasis supplied). Dr. Sargent's opinion is similarly flawed because he concludes that, "the magnitude of [claimant's] ventilatory impairment is certainly minimal . . . . With respect to his ventilatory impairment, I would . . . expect him to be able to do any job required in the mining of coal without undue dyspnea." Employer's Exhibit 11 (emphasis supplied).

[4] Both medical opinions were rendered post-*Sykes*.

The only other opinion potentially supportive of rebuttal is Dr. Byers' 1979 report, discussed but not weighed by the administrative law judge. Dr. Byers concluded that claimant's "mild respiratory impairment . . . . would not disable [him] from performing his usual coal mine job. Pulmonary function testing . . . indicate[s] minimal if any respiratory impairment." Director's Exhibit 22 (emphasis supplied). Dr. Byers also noted that "by physical examination there would appear to be no significant physical impairment." *Id*. Because Dr. Byers addressed only claimant's respiratory impairment in his discussion of total disability, *see Henderson*, *supra*, and did not direct his statement about claimant's physical condition to his ability to perform his usual coal mine employment, *see Sykes*, *supra*, his opinion[5] is also legally insufficient to establish rebuttal pursuant to Section 727.203(b)(2).

Inasmuch as the reports submitted by employer are legally insufficient to establish rebuttal and the record contains no other evidence of rebuttal, we reverse the administrative law judge's finding pursuant to Section 727.203(b)(2) and remand the case for him to determine the date of onset of total disability due to pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

On remand, the administrative law judge must determine the date on which claimant became totally disabled due to pneumoconiosis, not the date on which he became totally disabled. 20 C.F.R. §725.503(b); *see Carney v. Director, OWCP*, 11 BLR 1-32 (1987). The first evidence of disability does not establish the date of onset of such disability but merely indicates that claimant became totally disabled at sometime prior to that date. *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990). Where the record fails to establish an earlier onset date, claimant is entitled to benefits from the month of filing, unless uncontradicted medical evidence indicates that claimant was not disabled at some point subsequent to the filing date. *Edmiston v. F & R Coal Co*., 14 BLR 1-65 (1990). Where claimant continues to work after filing a claim but ceases to work prior to a finding of entitlement, claimant's

[5] Moreover, the report does not address whether claimant was totally disabled at the time of the hearing, which took place almost nine years after Dr. Byers rendered his opinion and three years after claimant retired. Director's Exhibits 22, 33; Hearing Transcript; *see Cooley v. Island Creek Coal Co*., 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

benefits commence on the first day of the month in which he ceased working. *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990).

Accordingly, the administrative law judge's Decision and Order on Remand denying benefits is reversed and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge