BRB No. 99-0891 BLA

BOBBY RAY COOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
WESTMORELAND COAL COMPANY	)	
	)	
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 Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (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: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits

(87-BLA-3681) of Administrative Law Judge Paul H. Teitler 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 before the Board for the fourth time. In the original Decision and Order Denying Benefits, Administrative Law Judge Victor Chao credited claimant with thirty-six years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718, based on claimant's May 1986 filing date. In weighing the evidence, Judge Chao found the medical evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and also insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, Judge Chao denied benefits. Pursuant to claimant's appeal, the Board vacated Judge Chao's denial of benefits and remanded the case for further consideration of the issues. In particular, the Board instructed Judge Chao to render a specific finding regarding a material change in conditions pursuant to 20 C.F.R. §725.309, in this duplicate claim.[1] Additionally, the Board

[1] Claimant filed his initial application for benefits with the Social Security Administration (SSA) on October 27, 1971. Director's Exhibit 32. This claim was denied by the SSA Appeals Council on December 19, 1974. A final SSA denial was issued on March 23, 1979. *Id*. During the pendency of the SSA claim, claimant filed an application for benefits with the Department of Labor (DOL) on January 14, 1975. *Id.* This claim was initially denied on April 14, 1975, pending a determination in the SSA claim. *Id*. DOL stated again on August 20, 1975 that no action would be taken pending a final determination in the SSA claim. *Id*. Claimant filed a second DOL application for benefits on October 29, 1975. Director's Exhibit 31. This claim was finally denied by the district director on February 2, 1980, finding that claimant established none of the elements of entitlement. *Id.*

instructed Judge Chao to reconsider the relevant medical evidence pursuant to Sections 718.202(a) and 718.204, including instructions to render separate Section 718.204(c) and 718.204(b) findings. *Cook v. Director, OWCP*, BRB No. 91-0759 BLA (May 27, 1994)(unpub.).

On remand, the case was reassigned to Administrative Law Judge Paul H. Teitler (the administrative law judge), who issued his Decision and Order - Granting Benefits on Remand (1995 Decision and Order) on April 20, 1995. Within his decision, the administrative law judge found that claimant established a material change in conditions pursuant to Section 725.309. Addressing the merits, the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3). However, he found the medical opinion evidence sufficient to establish pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b). The administrative law judge further found that the evidence was insufficient to demonstrate total disability pursuant to Section 718.204(c)(1)-(3). Nonetheless, the administrative law judge found that claimant established a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(c)(4). Accordingly, the administrative law judge awarded benefits. The administrative law judge further found that the May 1986 medical opinion of Dr. Rasmussen established that claimant was totally disabled within the meaning of Part 718 in May 1986 and, therefore, determined that the date from which benefits commence was May 1986. Pursuant to employer's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings pursuant to Sections 718.202(a)(1)-(3), 718.203(b) and 718.204(c)(1)-(3), as well as his determination of May 1, 1986 as the date of onset. In addition, the Board rejected employer's arguments and affirmed the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309. However, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the medical opinion evidence pursuant to Sections 718.202(a)(4) and 718.204(c)(4), as well as for the administrative law judge to render a separate finding on causation pursuant to Section 718.204(b). *Cook v. Director, OWCP*, BRB No. 95-1453 BLA (Apr. 30, 1996)(unpub.).

In his second Decision and Order - Granting Benefits on Remand (1997 Decision and Order), the administrative law judge again found the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that the evidence was sufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(c)(4). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board again vacated the administrative law judge's award of benefits and remanded the case to the administrative law judge for further consideration of the evidence. Initially, the Board held that the administrative law judge failed to follow the remand instructions from its previous Decision and Order and, therefore, instructed the administrative law judge on remand to consider the evidence in light of these instructions. Additionally, the Board held that the administrative law judge improperly rejected Dr. Zaldivar's opinion as hostile to the Act inasmuch as his opinion was not based strictly on hostile assumptions, and instructed the administrative law judge to consider the totality of Dr. Zaldivar's opinion as set forth in his 1988 and 1990 opinions. The Board also instructed the administrative law judge, on remand, to analyze the opinion of Dr. Walker to determine whether it is a reasoned and documented diagnosis of pneumoconiosis. Lastly, the Board again instructed the administrative law judge to provide separate findings under Sections 718.204(c) and 718.204(b). *Cook v. Director, OWCP*, BRB No. 97-1081 BLA (Apr. 28, 1998)(unpub.).

On remand, having set forth the remand instructions from the Board's 1998 Decision and Order, the administrative law judge initially found that claimant's usual coal mine employment was as a brattice man in an underground coal mine, which required heavy and arduous labor. Addressing the merits, the administrative law judge found the medical opinion evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(4) and 718.203(b). The administrative law judge further found the evidence sufficient to establish total respiratory disability pursuant to Section 718.204(c)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b). Accordingly, the administrative law judge awarded benefits and stated that the date from which benefits commence was May 1, 1986.

In challenging the administrative law judge's award of benefits, employer contends that the administrative law judge erred in his weighing and consideration of the medical evidence of record. In addition, employer contends that the administrative law judge erred in failing to render a specific material change in conditions finding pursuant to Section 725.309. Employer also contends that the onset regulation, as set forth at 20 C.F.R. §725.503(b), violates the Administrative Procedure Act because it impermissibly shifts the burden to employer to establish a date of onset of total disability. In response, the Director, Office of Workers' Compensation Programs (the Director), addresses two points within employer's Petition for Review and brief. First, the Director urges the Board to reject employer's request to extend the holding of the United States Court of Appeals for the Third Circuit in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), inasmuch as it is not applicable to the facts of this case

arising within the United States Court of Appeals for the Fourth Circuit. Second, the Director urges the Board to reject employer's challenge to the validity of the onset date regulations. Claimant has not responded in this 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. 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).

Initially, we reject employer's contention that the administrative law judge erred in failing to render a material change in conditions finding pursuant to Section 725.309. Within his 1995 Decision and Order, the administrative law judge reviewed the new evidence and found that it was sufficient to establish a material change in conditions pursuant to Section 725.309. Employer challenged this finding on appeal. The Board, in its 1996 Decision and Order, rejected employer's argument and affirmed the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309. *Cook*, BRB No. 95-1453 BLA, slip op. at 2-3. However, subsequent to the Board's decision, but prior to the administrative law judge's 1997 Decision and Order on remand, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, clarified its standard for establishing a material change in conditions pursuant to Section 725.309 in *Lisa Lee Mines v. Director, OWCP* [*Rutter II*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Therefore, while an intervening change in law can be a sufficient basis for raising an exception to the application of the doctrine of law of the case, under the facts in this case, we decline to reopen the issue. The Fourth Circuit court issued its decision in *Rutter II* in June 1996, following the Board's 1996 Decision and Order, but prior to the administrative law judge's 1997 Decision and Order. However, employer chose not to raise this issue either before the administrative law judge in 1997 or in its subsequent appeal to the Board of

[2] The parties do not challenge the administrative law judge's determination that claimant's usual coal mine employment required heavy and arduous labor. Therefore, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

that decision, *see Cook*, BRB No. 97-1081 BLA. Similarly, employer did not raise this issue before the administrative law judge, in 1998, following the Board's remand of that decision. Inasmuch as employer has had ample opportunity to raise this issue in prior proceedings and chose not to do so, we hold that it has waived its right to now raise this issue. Consequently, we hold that the prior finding of a material change in conditions constitutes the law of the case, and we decline to address employer's allegation of error in this appeal. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *see generally Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Owens v. Jewell Smokeless Coal* Corp., 14 BLR 1-47 (1990); *Bernardo v. Director, OWCP*, 9 BLR 1-97 (1986); *Witherow v. Rushton Mining Co.*, 8 BLR 1-232 (1985).

Furthermore, we reject employer's general contention that the administrative law judge erred in failing to weigh the credentials of the physicians in his weighing of the medical evidence pursuant to Sections 718.202(a)(4) and 718.204. While an administrative law judge must consider the respective qualifications of the physicians providing medical opinions, the administrative law judge is not required to defer to a doctor with superior qualifications. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998)*; Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Rather, this is one element to be considered in his weighing of the relevant evidence. *Id*. Therefore, contrary to employer's suggestion, merely because a physician has superior professional qualifications does not abrogate the administrative law judge's responsibility of weighing the relevant medical opinions, including their underlying documentation, in determining the credibility of these opinions. *Id*. However, as employer correctly contends, the administrative law judge did not adequately discuss which evidence of record supports his determination that because Dr. Walker is a member of the West Virginia Occupational Pneumoconiosis Board, his opinion is entitled to greater weight because of his extensive experience with pneumoconiosis. Decision and Order at 4. Consequently, on remand, the administrative law judge must weigh all elements of a physician's opinion, including his relative professional qualifications, in determining the weight to accord such opinion.

With respect to the administrative law judge's findings on the merits, employer challenges the administrative law judge's weighing of the medical opinion evidence as to the existence of pneumoconiosis and total disability due to

pneumoconiosis.[3] In particular, employer contends that the administrative law judge erred in crediting the medical report of Dr. Walker, the surgeon who performed claimant's 1986 thoracotomy, as well as erred in crediting the medical opinions of Drs. Diaz, Aguilar and Rasmussen, each of whom provided a diagnosis of pneumoconiosis and total respiratory disability due to pneumoconiosis. Specifically, employer contends that the administrative law judge erred in failing to render a specific finding as to whether these opinions were well-reasoned, arguing that the physicians did not explain how their underlying documentation supported their diagnoses. Employer further contends that the administrative law judge erred in failing to adequately discuss the bases for discrediting the contrary opinions of Drs. Zaldivar, Fino and Hippensteel, in which the physicians opined that claimant was not suffering from pneumoconiosis or a totally disabling respiratory impairment. Inasmuch as the administrative law judge has not provided an adequate rationale for his crediting of the medical opinion evidence of record, we vacate his findings pursuant to Section 718.202(a)(4) as well as his findings at Section 718.204(c)(4) and 718.204(b).

In finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge determined that the record contains the medical opinions of Drs. Aguilar, Diaz, Rasmussen and Walker, each of which included a diagnosis of pneumoconiosis, and the contrary opinions of Drs. Zaldivar, Fino and Hippensteel. Decision and Order at 4; Director's Exhibits 16, 17, 31; Claimant's Exhibit 1; Employer's Exhibits 1, 2, 4, 6, 7. The administrative law judge found the opinion of Dr. Walker entitled to the most weight inasmuch as the physician was in the unique position to have viewed claimant's entire lung while performing a thoracotomy in August 1986.[4]

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[3] Employer also contends that the administrative law judge erred in failing to consider the 1997 medical opinion of Dr. Daniel, *see* Director's Exhibit 31. However, contrary to employer's contention, Dr. Daniel's opinion was authored in 1977 and not 1997. In addition, in its 1998 Decision and Order, the Board affirmed, as unchallenged on appeal, the administrative law judge's decision to accord this report less weight because it was not a recent medical opinion. *Cook v. Director, OWCP*, BRB No. 97-1081 BLA, slip op. at 2, n.1 (Apr. 28, 1998)(unpub.). We, therefore, decline to address this issue. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

[4] Dr. Walker, in the discharge summary from claimant's August 1986 hospitalization, diagnosed a parasternal hernia and pneumoconiosis. Additionally, in his operative report dated August 5, 1986, Dr. Walker reported

Decision and Order at 4; Claimant's Exhibit 1. While noting that the tissue sample taking during this surgery was insufficient to diagnose the presence or absence of pneumoconiosis pursuant to Section 718.202(a)(2) inasmuch as it did not contain lung tissue, *see* Claimant's Exhibit 1; Employer's Exhibit 5, the administrative law judge, nonetheless, found that Dr. Walker's advantage of having viewed the lung itself provided the basis for crediting his opinion regardless of the biopsy results. Decision and Order at 4. The administrative law judge further found that Dr. Walker's opinion outweighed the contrary opinions of record as well as the negative x-ray interpretations because it was based on the gross examination of the lung. *Id*. In addition, the administrative law judge found that Dr. Walker's diagnosis lent strong support to the opinions of claimant's treating physicians, Drs. Aguilar, Diaz and Rasmussen, in establishing the existence of pneumoconiosis. *Id.*

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findings that included "the right lung was black ... small, palpable nodules throughout...right lung - fissures were approximately 50% fused. Lung was emphysematous." Claimant's Exhibit 1.

Prior to weighing the medical opinion evidence, the administrative law judge set forth the documentation upon which the medical opinions were based. In particular, he stated that the opinions of Drs. Aguilar, Diaz and Rasmussen were based on positive x-ray reports, examination findings, work history and laboratory testing, and, thus, has implicitly found these opinions to be documented. Decision and Order at 4; Director's Exhibits 16, 17, 31; Claimant's Exhibit 1; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). In addition, contrary to employer's contention, it was not unreasonable for the administrative law judge to determine that the opinion of Dr. Walker was based on his experience as claimant's surgeon with the opportunity to view claimant's lung and that his impressions, as set forth in his operative report, provided the underlying documentation for his opinion. Decision and Order at 4; Claimant's Exhibit 1; *see Fields, supra; Perry, supra*. Moreover, we reject employer's contention that a diagnosis of pneumoconiosis cannot be made on the basis of a gross examination alone but rather a microscopic finding of pneumoconiosis is necessary to diagnosis the presence of the disease inasmuch as none of the physicians who reviewed Dr. Walker's operative notes stated that such a finding was necessary.[5] To the contrary, Dr. Zaldivar, in his 1990 follow-up report, stated "[t]he report given by Dr. Walker that at the time of thoracotomy the lungs appeared black and there were palpable nodules may indicate that coal workers' pneumoconiosis might be present that is not seen radiographically." Employer's Exhibit 6. Furthermore, based on this statement by Dr. Zaldivar, the administrative law judge did not substitute his judgment for that of the medical experts in finding that the gross examination of Dr. Walker outweighed the x-ray

[5] In this case, the physicians who reviewed the tissue sample only commented that the present sample was not sufficient to diagnosis the presence or absence of pneumoconiosis inasmuch as the tissue sample contained no lung tissue. *See* Claimant's Exhibit 1; Employer's Exhibits 5, 7.

Furthermore, the quality standards set forth at 20 C.F.R. §718.106 are not applicable in this case inasmuch as Dr. Walker's report was not a biopsy report within the meaning of Section 718.106 inasmuch as it did not contain lung tissue as required for a biopsy report. 20 C.F.R. §718.106; *see* Claimant's Exhibit 1; Employer's Exhibits 5, 7. Moreover, Dr. Walker's report is not being considered as a biopsy report of the tissue removed under Section 718.202(a)(2), but rather, as a general medical report under 20 C.F.R. §718.202(a)(4) and, thus, the administrative law judge was required to determine whether it is in keeping with the standards therein set forth.

evidence of record inasmuch as the x-ray reports "are not complete in reflecting the actual state of the miner's lungs." Decision and Order at 4. Rather, this finding was within a reasonable exercise of the administrative law judge's discretion in weighing the conflicting evidence of record. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Therefore, based on the facts of this case, we hold that it was not unreasonable for the administrative law judge to determine that Dr. Walker's opinion was documented as it was based on his evaluation of claimant's condition during surgery.

However, as employer correctly contends, the administrative law judge has not determined whether these opinions are reasoned, that is, whether the underlying documentation is adequate to support the physicians' conclusions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). In weighing these medical opinions, the mere fact that an opinion is asserted to be based upon medical studies cannot, by itself, establish that it is documented and reasoned. Rather, the administrative law judge must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based. *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *see also Fields, supra.* In addition, the detail or thoroughness of the analysis in the physician's opinion is just one of the several factors to be considered by the administrative law judge in determining the weight to accord the various medical opinions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000); *see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, n.9, 21 BLR 2-323, 2-335, n.9 (4th Cir. 1995), citing *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 19 BLR 2-23 (4th Cir. 1997) (lists factors to be considered by the administrative law judge). Consequently, on remand, the administrative law judge must weigh the medical opinion evidence of record and determine whether these opinions are reasoned opinions, and state the bases for his findings. *See Hicks, supra; Underwood, supra; Fields, supra*.

Moreover, subsequent to the issuance of the administrative law judge's current Decision and Order, the Fourth Circuit court held that while Section 718.202(a) does list alternative methods for establishing the existence of pneumoconiosis, the administrative law judge must, nonetheless, weigh all types of relevant evidence together to determine whether a claimant suffers from the disease. *Compton, supra*. Consequently, if, on remand, the administrative law judge again finds the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), he must then weigh all of the evidence relevant to Section 718.202(a)(1)-(4) together in determining whether claimant has established the existence of pneumoconiosis. *Compton, supra; see*

generally Williams, supra.

Employer also challenges the administrative law judge determination that claimant established total respiratory disability pursuant to Section 718.204(c), arguing that the medical opinions relied upon by the administrative law judge are not reasoned medical opinions. Inasmuch as this case is being remanded for the administrative law judge to render a specific finding regarding the credibility of the medical opinion evidence, we vacate his finding that the evidence is sufficient to establish a totally disabling respiratory impairment. On remand, based on his credibility determinations, the administrative law judge must weigh the medical opinion evidence and determine whether it is sufficient to establish total respiratory disability. If the administrative law judge finds the medical opinion evidence sufficient to establish total respiratory disability pursuant to Section 718.204(c)(4), he must then weigh all of the contrary probative evidence, like and unlike, to determine whether it is sufficient to establish a totally disabling respiratory impairment. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*); *Fields, supra*.

In light of our holding which vacates the administrative law judge's finding of the existence of pneumoconiosis at Section 718.202(a)(4), we likewise vacate the administrative law judge determination that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) inasmuch as this finding was based, at least in part, on his Section 718.202(a) findings. Pursuant to Section 718.204(b), in this case arising within the Fourth Circuit, claimant must prove by a preponderance of the evidence that pneumoconiosis was at least a contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b); *see Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). Consequently, if on remand, the administrative law judge again finds that claimant has established the existence of pneumoconiosis arising out of coal mine employment under Sections 718.202(a) and 718.203(b) and a totally disabling respiratory impairment under Section 718.204(c), he must then determine whether the evidence also establishes that claimant's pneumoconiosis was a contributing cause of his total disability. *Id.*

Lastly, employer contends that the administrative law judge erred by arbitrarily establishing the date of onset of total disability due to pneumoconiosis as the month in which claimant filed his application for benefits. Employer further contends that 20 C.F.R. §725.503(b) is invalid under Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a),

inasmuch as this section allows for payment of benefits without claimant having affirmatively established entitlement as of that date and also because, in effect, the regulation improperly shifts the burden to employer to establish the date of onset. These contentions lack merit.

Initially, we note that the administrative law judge, in his 1995 Decision and Order, found that the May 27, 1986 medical report by Dr. Rasmussen established that claimant was totally disabled due to his pneumoconiosis and, therefore, established May 1986 as the month from which benefits commence. 1995 Decision and Order at 13. The Board, in its 1996 Decision and Order, affirmed this finding as unchallenged by the parties on appeal. *Cook*, BRB No. 95-1453 BLA, slip op. at 2, n.1. Consequently, while the administrative law judge's finding of May 1986 as the month in which benefits commence coincides with the month in which claimant filed his claim, it is, nonetheless, based on the administrative law judge's weighing of the medical evidence and his finding that the opinion of Dr. Rasmussen establishes May 1986 as the month of onset of total disability pursuant to Part 718. Therefore, contrary to employer's contention, the administrative law judge did not rely on the month of filing in determining the date from which benefits commence. 20 C.F.R. §§725.503(b), 727.302; *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *see generally Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). However, in light of our holding which vacates the administrative law judge's award of benefits, the administrative law judge's determination of a date from which benefits commence is premature and, therefore, is vacated. If, on remand, the administrative law judge finds the evidence sufficient to again award benefits, he must then consider the relevant, credible evidence to determine the date from which claimant's pneumoconiosis progressed to the point of being totally disabling. *Id*.

However, if the administrative law judge determines, after weighing the medical evidence, that it is insufficient to establish a specific date that claimant's pneumoconiosis became totally disabling, Section 725.503(b) provides that benefits are properly awardable as of the month during which claimant filed his application for benefits. *Id*. Inasmuch as the administrative law judge may award benefits as of the claimant's date of filing, we will address employer's contention regarding the validity of Section 725.503(b).

Contrary to employer's contention, Section 7(c) of the APA, is not applicable in the current situation inasmuch as it states that "...except as otherwise provided by statute, the proponent of a rule or order has the burden of proof ..." However,

the Black Lung Benefits Act (BLBA), which incorporates the APA, through its incorporation of parts of the Longshore and Harbor Workers' Compensation Act, does so "except as otherwise provided ... by regulations of the Secretary." 30 U.S.C. §932(a). Herein, as distinguishable from the facts in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the Secretary has promulgated specific regulations addressing a party's burden in establishing the date from which benefits are to commence. *See* 20 C.F.R. §§725.503(b), 727.302.

Under Sections 725.503(b) and 727.302, the Secretary determined that, in cases where claimant has established entitlement to benefits by establishing total disability due to pneumoconiosis, benefits are payable beginning with the month of onset of total disability. 20 C.F.R. §§725.503(b), 727.302; *Green, supra; Lykins, supra; see also Krecota, supra*. However, in promulgating these regulations, the Secretary also codified the acknowledged, inherent difficulties in fixing the precise date that a progressive disease, which may take a period of time in which to manifest itself, advances to the level of being totally disabling. The Secretary, thus, created an alternate method of determining the date of onset, therefore, providing that, in cases where the evidence is not sufficient to determine the specific date from which claimant's pneumoconiosis advanced to the level of being totally disabling, benefits will be payable from the month during which claimant filed his application for benefits.[6] 20 C.F.R. §§725.503(b), 727.302; *Green, supra;*

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[6] In adopting this alternate entitlement date, the Secretary stated:

> This approach was adopted in view of the great difficulty encountered in establishing a date certain on which pneumoconiosis, often a latent, progressive, and insidious disease, progressed to total disability. The filing date was thought to be fair since proof of onset, which was usually after filing, would likely fix the date of total disability at the time the medical tests were administered. The filing date, on the other hand, was likely to be a more accurate measure of onset since it would be the date, or close to the date, on which the claimant felt the need to file for benefits, presumably because disability had become total.

Discussion and changes (b), 43 Fed. Reg. 36828-36829 (Aug. 18, 1978).

Lykins, supra. Consequently, as distinguishable from *Ondecko*, wherein the Court held that the regulations set forth in support of the "true doubt rule" did not in any way mention the "true doubt rule" or reject the APA's allocation of the burden of proof and, therefore, were not sufficient to nullify Section 7(c)'s applicability, Section 725.503(b) specifically includes the criteria necessary for finding that the APA's burden of persuasion is not applicable. 20 C.F.R. §§725.503(b), 727.203; *Krecota, supra*. Consequently, we reject employer's contention that Section 725.503(b) violates Section 7(c) of the APA.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge