

BRB No. 05-0709 BLA

GLADYS MARTIN)
(Widow of JOHN W. MARTIN, JR.))
)
 Claimant-Respondent)
)
 v.)
)
 EASTERN ASSOCIATED COAL) DATE ISSUED: 06/23/2006
 CORPORATION)
)
 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
 Party-in-Interest

Appeal of the Decision and Order of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (03-BLA-0269 and 03-BLA-0270) of Administrative Law Judge Richard T. Stansell-Gamm awarding benefits on claims 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).¹ This case, involving the miner's request for modification of his denied 1978 claim, is before the Board for the third time. In its most recent consideration of this case,² the Board, by Decision and Order dated October 27, 1994, affirmed Administrative Law Judge Peter McC. Giesey's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§410.490(b), 410.416(b) and 727.203(b)(2). *Martin v. Eastern Associated Coal Corp.*, BRB No. 90-2063 BLA (Oct. 27, 1994) (unpublished). Because employer did not dispute the existence of pneumoconiosis, the Board noted that rebuttal at 20 C.F.R. §727.203(b)(4) was inapplicable. *Id.* The Board, however, remanded the case to Judge Giesey to consider whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).³ *Id.* The Board further instructed Judge Giesey that if he awarded benefits on remand, he must reconsider the date of the miner's entitlement to

¹The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to these regulations, unless otherwise noted, refer to the amended regulations.

²A complete procedural history of the instant case is set forth in *Martin v. Eastern Associated Coal Corp.*, BRB No. 90-2063 BLA (Oct. 27, 1994) (unpublished).

³In his 1987 Decision and Order, Administrative Law Judge Peter McC. Giesey found the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Director's Exhibit 82. By Decision and Order dated July 25, 1989, the Board, *inter alia*, vacated Judge Giesey's finding pursuant to 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration. *Martin v. Eastern Associated Coal Corp.*, BRB No. 87-2823 BLA (July 25, 1989) (unpublished). In his 1990 Decision and Order on Remand, Judge Giesey acknowledged that the Board had directed him to reconsider whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Director's Exhibit 107. However, Judge Giesey noted that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, had precluded such consideration. *Id.* In its 1994 Decision and Order, the Board noted that, subsequent to Judge Giesey's 1990 Decision and Order on Remand, the United States Supreme Court had upheld the validity of Section 727.203(b)(3) rebuttal. *Id.*

benefits.⁴ *Id.*

Due to Judge Giesey's unavailability on remand, the case was reassigned to Administrative Law Judge Daniel L. Stewart. By Order dated April 14, 1995, Judge Stewart ordered that the case be remanded to the district director for the purpose of allowing all of the parties an opportunity to submit medical evidence relative to the miner's death. Director's Exhibit 128. The case was subsequently forwarded to the Office of Administrative Law Judges on August 22, 2003. Director's Exhibit 139.

In his 2005 Decision and Order on Remand, Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge) found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).⁵ Accordingly, the administrative law judge awarded benefits in the miner's claim. The administrative law judge found

⁴The Board further instructed Judge Giesey that:

If on remand the administrative law judge fails to find entitlement on the miner's claim, he should consider the survivor's entitlement based on the miner's filing date pursuant to Section 422(l) of the Act, 30 U.S.C. §932(l); *see Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989). If he again finds entitlement on the miner's claim, the surviving widow takes derivatively. Section 401(a) of the Act, 30 U.S.C. §901(a).

Martin v. Eastern Associated Coal Corp., BRB No. 90-2063 BLA (Oct. 27, 1994) (unpublished), slip op. at 4 n.6.

⁵The administrative law judge noted that several findings had been previously affirmed. The administrative law judge noted that these findings included:

1. [The miner's] length of coal mine employment was 9 years and 9 months.
2. Through the preponderance of the chest x-rays that are positive for the presence of pneumoconiosis, the interim presumption under 20 C.F.R. §410.490(b)(1) has been invoked that [the miner] was totally disabled due to pneumoconiosis.
3. Under 20 C.F.R. §410.416(b), [the miner] established that his pneumoconiosis arose out of his coal mine employment.
4. Rebuttal of the interim presumption under the provisions of 20 C.F.R. §§727.203(b)(1), (2) and (4) is not established.

2005 Decision and Order on Remand at 7.

that the miner was entitled to benefits from the month in which he filed his initial claim, April 1, 1978. The administrative law judge also found that claimant⁶ was entitled to derivative survivor's benefits, commencing in the month in which the miner died, September of 1986. On appeal, employer contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Employer also argues that it cannot be held responsible for the payment of the miner's benefits because its due process rights were violated. Employer also contends that the administrative law judge erred in finding that the miner was entitled to benefits commencing on the date that he initially filed his claim for benefits. Employer argues, *inter alia*, that 20 C.F.R. §725.503 is invalid. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that employer's assertion that a due process violation has occurred has no basis in fact. The Director also urges the Board to reject employer's contention that 20 C.F.R. §725.503 is invalid. In a reply brief, employer reiterates its previous contentions. Claimant has not filed a response.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Subsection 727.203(b)(3) Rebuttal

Employer initially argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Section 727.203(b)(3) provides that the presumption "shall be rebutted if...the evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3):

[A]n employer must "rule out the causal relationship between the miner's total disability and his coal mine employment." *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984). An employer can accomplish this task with evidence that establishes either that the miner has no respiratory or pulmonary impairment of any kind or that such impairment was not caused in whole or in part by his coal mine employment.

⁶Claimant is the widow of the deceased miner who died on September 11, 1986. Director's Exhibit 92.

Consolidation Coal Co. v. Borda, 171 F.3d 175, 184-185, 21 BLR 2-545, 2-562 (4th Cir. 1999) (case citations omitted).

In his consideration of whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3), the administrative law judge stated:

[T]he record contains no medical opinion that positively or affirmatively either attributes [the miner's] pulmonary impairment solely to lung cancer or specifically excludes coal workers' pneumoconiosis and [the miner's] coal mine employment as a contributing cause of [the miner's] breathing difficulty.

Considering the high evidentiary standard for the Employer set by the court to establish rebuttal under 20 C.F.R. §727.203(b)(3), the evidentiary record establishing the presence of a pulmonary impairment and the dearth of affirmative medical opinion to rule out coal mine employment as a contributing factor in [the miner's] pulmonary impairment means the Employer has failed to rebut the interim presumption invoked by [the miner] under 20 C.F.R. §410.490(b)(1).

2005 Decision and Order on Remand at 15.

Employer argues that the administrative law judge “erred in summarily finding rebuttal precluded simply because [the miner] had pneumoconiosis.” Employer’s Brief at 13. We disagree. Because the administrative law judge found that the miner was entitled to a presumption that he was totally disabled due to pneumoconiosis, it became employer’s burden to rule out the causal relationship between the miner’s total disability and his coal mine employment. 20 C.F.R. §727.203(b)(3). *Borda, supra*. In this case, the administrative law judge found that the record contained no medical evidence that positively or affirmatively either attributed the miner’s pulmonary impairment solely to lung cancer or specifically excluded coal workers’ pneumoconiosis and the miner’s coal mine employment as a contributing cause of the miner’s pulmonary impairment.⁷ 2005 Decision and Order on Remand at 15. Employer fails to identify any medical evidence which effectively rules out the causal relationship between the miner’s total disability and

⁷Employer’s contention that the administrative law judge’s Section 727.203(b)(3) finding does not comply with the Administrative Procedure Act (APA) has no merit. The administrative law judge clearly found that the record did not contain any evidence supportive of a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Contrary to employer’s contention, the administrative law judge’s analysis of whether the medical opinion evidence was sufficient to establish subsection (b)(3) rebuttal complies with the requirements of the APA.

his coal mine employment. Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). We, therefore, affirm the administrative law judge's award of benefits in the miner's claim.

In light of our affirmance of the administrative law judge's award of benefits in the miner's claim, we also affirm the administrative law judge's finding that claimant is entitled to derivative survivor's benefits. *See* 30 U.S.C. §901(a); 20 C.F.R. §§725.212(a), 718.1(a); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

Due Process

Relying upon *North American Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989), *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998) and *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), employer argues that liability for benefits in this case should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Employer contends that claimant's failure to produce the documents necessary to release the miner's medical records, coupled with the passage of time, resulted in a deprivation of its right to due process. Employer specifically argues that because relevant evidence was destroyed, it was deprived of a fair hearing at a meaningful time.⁸ Employer also argues that the administrative law judge erred in failing to find that claimant abandoned the claims.⁹

⁸Employer sets out the following facts as supportive of a due process violation:

Starting in 1986, [employer] repeatedly requested a valid medical records release. Although [claimant] provided a release in 1997, it was not valid in the absence of any documentation by which she qualified as the executor of [the miner's] estate and she failed to provide that documentation. Only after DOL finally issued a Show Cause Order in April 2003, did [claimant] inform the parties that she did not administer her husband's estate. By then according to [claimant], the record [sic] were destroyed.

Employer's Brief at 15.

⁹In support of this contention, employer states:

[Claimant's] repeated refusals to respond to [employer's] requests for authorizations and interrogatories, failure to notify DOL of the status of her husband's estate or to attend the informal conference on November 8, 1995,

The issue before the Board is whether employer was deprived of a fair opportunity to mount a meaningful defense of the miner's claim. Under the facts of this case, we hold that employer was provided a fair opportunity to mount such a defense. The miner filed for benefits on April 13, 1978. After his claim was denied, the miner filed a request for modification on November 22, 1983. On December 4, 1985, Judge Giesey conducted a hearing in regard to the miner's request for modification. Director's Exhibit 77. At the hearing, employer's counsel did not attempt to submit any evidence or request an extension in which to do so.

Judge Giesey had not yet issued a decision on the miner's request for modification when the miner died on September 11, 1986. Director's Exhibit 92.

On September 25, 1986, employer's counsel, George D. Blizzard, submitted a medical authorization and a questionnaire to claimant's counsel with a request that they be completed and returned to employer. Director's Exhibit 79. By letter dated November 13, 1986, claimant submitted twenty-nine pages of records from the Princeton Community Hospital to Judge Giesey. Director's Exhibit 80. These records include treatment records from May 7, 1984 to the miner's death on September 11, 1986.¹⁰ *Id.*

On September 10, 1987, Judge Giesey issued his Decision and Order awarding benefits. Director's Exhibit 82. In that decision, Judge Giesey noted that post-hearing evidence had been submitted, including the miner's death certificate. However, because

put [employer] in the impossible position of defending itself in the absence of an opposing party. The regulations provide that a claim may be denied at any time by reason of abandonment where the claimant fails to pursue the claim with reasonable diligence or to attend an informal conference without good cause. Here, [employer] requested that Judge Stansell-Gamm find the claims abandoned, but the judge denied the request, as well as the alternative request to compel [claimant] to qualify as administrator or executor of her husband's estate for the sole purpose of prosecuting these claims. Awarding benefits against [employer] in the absence of any responsive party and without the full complement of requested medical records violates the employer's due process rights and requires that liability be transferred to the Trust Fund.

Employer's Brief at 15-16 (citations omitted).

¹⁰In a November 20, 1986 letter addressed to Judge Giesey, employer noted that claimant had filed documents relating to the miner's last illness and death. Director's Exhibit 81. To the extent that Judge Giesey considered claimant's filing to be a request to reopen the record, employer reserved the "right to file an appropriate response." *Id.*

he had not received a motion to add the issue of the cause of the miner's death to the list of contested issues, Judge Gieseey did not consider the post-hearing evidence.

In its 1997 appeal to the Board, employer did not argue that its due process rights had been violated or that it had been deprived of a fair opportunity to mount a meaningful defense. *See* Director's Exhibit 97.

By Decision and Order dated July 25, 1989, the Board affirmed in part, and vacated in part, Judge Gieseey's Decision and Order awarding benefits and remanded the case for further consideration. *Martin v. Eastern Associated Coal Corp.*, BRB No. 87-2823 BLA (July 25, 1989) (unpublished). The Board did not instruct the administrative law judge to reopen the record for further development of the evidence.

Judge Gieseey issued a Decision and Order on Remand on May 30, 1990 wherein he found that the miner was entitled to benefits. Director's Exhibit 107. In its appeal to the Board, employer did not argue that its due process rights had been violated or that it had been deprived of a fair opportunity to mount a meaningful defense. Director's Exhibit 119.

By Decision and Order dated October 27, 1994, the Board affirmed in part, and vacated in part, Judge Gieseey's Decision and Order awarding benefits and remanded the case to Judge Gieseey for further consideration. *Martin v. Eastern Associated Coal Corp.*, BRB No. 90-2063 BLA (Oct. 27, 1994) (unpublished). The Board did not instruct the administrative law judge to reopen the record for further development of the evidence.

Due to Judge Gieseey's unavailability on remand, the case was reassigned to Administrative Law Judge Daniel L. Stewart. By Order dated April 14, 1995, Judge Stewart ordered that the case be remanded to the district director "for the purpose of allowing all of the parties an opportunity to submit medical evidence relative to the miner's death."¹¹ Director's Exhibit 128.

¹¹Judge Stewart noted that the Board had directed the fact-finder, on remand, that if he failed to find entitlement on the miner's claim, he should consider the survivor's entitlement to benefits. Judge Stewart explained that:

A review of the record reveals that the medical evidence as to the circumstances surrounding the miner's death in 1986 are missing. In my opinion, these records are necessary for the final disposition of all the issues in this case. If the allegation contained in [employer's] brief of March 25, 1995, is correct, a prior administrative law judge mistakenly refused to allow [claimant] the opportunity to admit this evidence.

This case was not remanded to the district director in order to provide employer with an opportunity to develop its evidence regarding its defense of the miner's claim. It was remanded for the limited purpose of providing claimant with an opportunity to develop evidence regarding the survivor's claim in the event that she was found to be not entitled to derivative survivor's benefits. Moreover, as the administrative law judge noted, the hospital records provided to employer contain extensive information about the miner's test results. Administrative Law Judge's May 17, 2004 Notice of Decision on the Record.

The administrative law judge also noted that employer's former counsel was somewhat responsible for the present incompleteness of the hospital record. On November 13, 1986, the miner's attorney sent employer's attorney a copy of 29 pages of the miner's Princeton Community Hospital record. In light of the ongoing litigation, and receipt of the hospital records, the administrative law judge noted that employer's counsel had ample notice of both the various x-rays and tests conducted at the Princeton Community Hospital and the potential significance of such evidence. However, the administrative law judge noted that there is no indication in the record that employer's counsel attempted, at that time, to obtain additional evidence from the hospital.

The administrative law judge also noted that claimant was not responsible for the delay caused by the fact that this case was transferred between the Office of Administrative Law Judges and the Board several times, resulting in a significant passage of time.

We also find it noteworthy that employer did not argue that its due process rights were violated during the two previous occasions that this case was before the Board.

The cases relied upon by employer in support of its position that its due process rights were violated are not persuasive. In *Miller*, the United States Court of Appeals for the Third Circuit held that due process requires an opportunity for rebuttal where it is necessary to the full presentation of a case. In *Miller*, the claimant had exchanged a report with the employer exactly twenty days prior to the hearing, thereby foreclosing the employer from responding to claimant's evidence prior to the expiration of the twenty-day deadline imposed by 20 C.F.R. §725.456. Under such circumstances, the Third Circuit held that due process required that the employer be provided with an opportunity to respond to this evidence. In this case, employer was not denied an opportunity to respond to any evidence submitted by claimant.

In *Holdman*, the United States Court of Appeals for the Sixth Circuit held that liability should be transferred to the Trust Fund because the Department of Labor (DOL)

had failed to safeguard the record, resulting in employer not having access to certain evidence. In this case, there is no indication that the DOL failed to safeguard the record. The DOL has no responsibility for securing the records of a physician in private practice. Moreover, there is no indication that claimant had access to any evidence not made available to employer.

In *Lockhart*, the Fourth Circuit held that the DOL's inexcusable delay in notifying the employer of its potential liability deprived it of the opportunity to mount a meaningful defense. The Fourth Circuit, therefore, held that benefits were to be paid from the Trust Fund. In this case, the DOL provided timely notification to employer of its potential liability.

In *Borda*, the Fourth Circuit noted that *Lockhart* established a straightforward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: Did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property." *Borda*, 171 F.3d at 183, 21 BLR at 2-559-60 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay." *Borda*, 171 F.3d at 183, 21 BLR at 2-560. In this case, there was no government delay in notifying employer of its potential liability.

Under the facts of this case, we hold that employer was not deprived of its right to due process based upon claimant's failure to produce the documents necessary to release the miner's medical records. Consequently, we reject employer's argument that liability for benefits should be transferred to the Trust Fund. We also reject employer's contention that the administrative law judge erred in failing to find that claimant had abandoned the claims. There is no evidence that claimant abandoned pursuit of the miner's claim or the survivor's claim.

Date of Commencement of Benefits

Employer finally contends that the administrative law judge erred in determining that the miner's date of entitlement to benefits was the filing date of his claim, April of 1978. The provisions at 20 C.F.R. §725.503 are applicable in determining the date from which the miner's benefits are payable. Section 725.503 provides that if a claim is awarded pursuant to a request for modification, the date from which benefits are payable shall be determined in accordance with Section 725.503(d)(1) (mistake in a determination of fact) or Section 725.503(d)(2) (change in conditions). *See* 20 C.F.R. §725.503(d)(1), (2).

In this case, the administrative law judge found that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). *See* 2005 Decision and Order on Remand at 17. Because no party challenges the administrative law judge's finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983). In cases in which modification is based upon a mistake in a determination of fact, Section 725.503(d)(1) directs that Section 725.503(b) governs the determination of the date from which benefits are payable. Section 725.503(b) provides that:

Benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. Where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed.

20 C.F.R. §725.503(b).

Thus, where modification is based upon a mistake in a determination of fact, a miner is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to such benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins, supra*.

In determining the date of the miner's entitlement to benefits, the administrative law judge was unable to establish the date of the onset of total disability due to coal workers' pneumoconiosis. Consequently, the administrative law judge found that the miner was entitled to benefits as of his filing date, April of 1978. 2005 Decision and Order on Remand at 18.

Citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), employer initially contends that 20 C.F.R. §725.503(b) contravenes Section 7(c) of the Administrative Procedure Act (APA) because it improperly shifts the burden to employer to establish when claimant became totally disabled due to pneumoconiosis. We disagree. The United States Court of Appeals for the Seventh Circuit is the only Circuit Court to address whether 20 C.F.R. §725.503(b) conflicts with the APA. In *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002), the Seventh Circuit, citing the reasoning of the Fourth Circuit as to other

rebuttable presumptions,¹² held that because Section 725.503(b) shifts the burden of production and not the burden of proof, it is permitted by *Greenwich Collieries* and Section 7(c) of the APA. We similarly hold that Section 725.503(b) does not conflict with Section 7(c) of the APA. The Court in *Amax* also observed that the Supreme Court noted in *Greenwich Collieries* that:

[T]he [Act] incorporates the APA, “but it does so ‘except as otherwise provided...by regulation of the Secretary.’ 30 U.S.C. §932(a).” Section 725.503 is a regulation by the Secretary. Therefore, under the express language of the Act, the APA does not trump the regulation.

Amax, 312 F.3d at 893, 22 BLR at 2-532. We, accordingly, agree that Section 7 of the APA is not contravened in this case.

Employer also argues that there is evidence that the miner was not disabled when he filed his claim on April 13, 1978 or for the next six years. Employer does not cite to any medical evidence in support of its contention. Consequently, we reject employer’s argument and affirm the administrative law judge’s determination that the miner is entitled to benefits as of his filing date, April of 1978.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

JUDITH S. BOGGS
Administrative Appeals Judge

¹²The Court cited, in particular, *Gulf & Western Industries v. Ling*, 176 F.3d 226, 233-234, 21 BLR 2-570, 2-584 (4th Cir. 1999) and *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 496-97, 15 BLR 2-135, 2-140 (4th Cir. 1991).

DOLDER, Chief Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's opinion insofar as it affirms the administrative law judge's awards of benefits in the miner's claim and the survivor's claim. However, I must respectfully disagree with the majority's decision to affirm the administrative law judge's determination that the miner is entitled to benefits as of his filing date, April of 1978.

In this case, the miner was found entitled to modification based upon a mistake in a determination of fact. Where modification is based upon a mistake in a determination of fact, a miner is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Should an administrative law judge find a miner entitled to such benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins, supra*.

In determining the date of the miner's entitlement to benefits, the administrative law judge notes that the evidence of record prior to 1984 does not pinpoint a time when the miner totally lost the pulmonary or respiratory capacity to return to his usual coal mine employment. *See* Decision and Order at 18. In the case before us, by defaulting to the date of filing, the administrative law judge's analysis is incomplete. The administrative law judge failed to determine, consistent with applicable law, whether there was evidence, which if credited, establishes that the miner was not totally disabled at some point subsequent to his filing date. Consequently, I would vacate the administrative law judge's finding regarding the commencement date of the miner's benefits and remand the case for further consideration.

NANCY S. DOLDER, Chief
Administrative Appeals Judge