BRB No. 02-0592 BLA

DAVID L. CUNNINGHAM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	DATE ISSUED:
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly, PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (99-BLA-411) of Administrative Law Judge Michael P. Lesniak 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).[1] This case has been before the Board previously. In the original decision, the administrative law judge, determined that the instant case was a duplicate claim and found that a material change in conditions was established pursuant to 20 C.F.R. §725.309 (2000) in light of the standard enunciated by the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [Rutter], 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)[2] as the newly submitted evidence of record establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(c) (2000).[3] Decision and Order dated April 17, 2000 at 4, 19-21. The administrative law judge found, in accordance with the parties stipulation, twenty-eight years of coal mine employment and, based on the date of filing, adjudicated the claim pursuant to

[1]The 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 the regulations, unless otherwise noted, refer to the amended regulations.

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See* Director's Exhibit 2; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[3]Claimant filed his initial claim for benefits on July 10, 1986, which was finally denied by the district director on December 19, 1986 as claimant failed to establish the existence of pneumoconiosis, total disability and total disability due to pneumoconiosis. Director's Exhibit 34. Claimant took no further action thereafter until filing the instant duplicate claim on July 21, 1997. Director's Exhibit 1.

20 C.F.R. Part 718. Decision and Order dated April 17, 2000 at 4, 18; Director's Exhibits 2-4, 342; Hearing Transcript at 20.

Considering the evidence of record *de novo*, the administrative law judge determined that claimant established the existence of totally disabling pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203 and 718.204(b), (c) (2000). Decision and Order dated April 17, 2000 at 20-25. Accordingly, benefits were awarded commencing as of July 1, 1997, the first day of the month that claimant filed his second claim. Decision and Order dated April 17, 2000 at 25. In a Supplemental Decision and Order dated July 7, 2000, the administrative law judge awarded claimant's counsel a total fee of $28,389.29 for 110 hours of legal services at an hourly rate of $210.00 and $5,131.79 in expenses. On appeal, the Board affirmed the administrative law judge's determination that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) and his findings pursuant to 20 C.F.R. §§718.202(a), 718.203 and 718.204(b), (c) (2000). The Board further affirmed the administrative law judge's award of attorney fees. The Board vacated, however, the administrative law judge's finding that the onset date for the commencement of benefits was the filing date of claimant's claim and remanded the case for further consideration of the relevant evidence of record. *Cunningham v. Bethenergy Mines, Inc.*, BRB Nos. 00-0841 BLA and 00-0841 BLA-A (August 22, 2001)(unpublished).

On remand, the administrative law judge, after noting the Board's remand instructions, found that the relevant evidence of record was sufficient to establish that the date of onset of claimant's total disability from pneumoconiosis was January 1, 1995. Decision and Order on Remand at 1-4. Accordingly, benefits were awarded as of January 1, 1995. On appeal, employer asserts that the instant claim is untimely and also contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis and that his total disability was due to pneumoconiosis. Employer further asserts that the administrative law judge erred in finding that the onset date preceded the date of filing. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, responds asserting that the administrative law judge reasonably determined the onset date of claimant's totally disabling pneumoconiosis and urges the Board to reject employer's timeliness argument.

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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the

administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. With respect to the viability of the claim filed on July 21, 1997, employer cites the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-228 (6th Cir. 2001)[4] and argues that claimant's second application for benefits is barred by the time limitations set forth in Section 725.308.[5] Because the present case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, we are not obliged to apply the Sixth Circuit's reasoning in *Kirk* in the present case. *See* Director's Exhibit 2; *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). Although decisions rendered by a circuit court can provide guidance in cases that do not arise within its geographical jurisdiction, the Board has declined to apply the language in *Kirk* regarding Section 725.308 beyond the boundaries of the Sixth Circuit, as it is not apparent that the court's holding is mandated by the Act and the implementing regulations. In addition, in a recent unpublished decision, the Sixth Circuit suggested that some of its statements in *Kirk* constituted dicta. *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), slip op. at 6. The court also indicated that the denial of a prior claim for failure to establish one or more of the elements of entitlement renders a medical determination of total disability due to pneumoconiosis submitted with that claim a misdiagnosis for legal purposes such that it does not trigger the running of the statute of limitations. *Id*. at 4-6. For these reasons, and in light of the fact that the Fourth Circuit has not adopted the approach set forth in *Kirk*, we decline to apply it in this case. *See Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34

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[4]The Sixth Circuit indicated in *Kirk* that the three year limitations period set forth in Section 725.308 applies to all claims, not just the first application for benefits. This interpretation stands in contrast to the Board's holdings in *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990) and *Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990), in which the Board indicated that the statute of limitations contained in Section 422(f) of the Act, as implemented by Section 725.308, applies only to the filing of a claimant's initial Part C claim. *Faulk, supra*; *Andryka, supra*.

[5]The amended regulations did not alter 20 C.F.R. §725.308.

(1990); *Faulk v. Peabody Coal Co.*, 14 BLR 1-18 (1990); *see also Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996).

Employer next asserts that the administrative law judge erred in finding the evidence of record sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis. When this case was previously before the Board, it rejected employer's contentions and affirmed Judge Lesniak's findings that claimant established a material change in conditions pursuant to Section 725.309 (2000) and the existence of totally disabling pneumoconiosis pursuant to Sections 718.202(a)(1), (4), 718.203 and 718.204(b), (c) (2000), because the administrative law judge's findings were supported by substantial evidence. *See Cunningham, supra*, at 3-7. In order for the Board to alter a previous holding, employer must set forth an exception to the law of the case doctrine[6], *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or a manifest injustice. *See Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting). Because employer has not set forth any valid exception to the law of the case doctrine, nor is any apparent, we adhere to our previous affirmance of Judge Lesniak's findings at 20 C.F.R. §§718.202(a)(1), (4), 718.203 and 718.204(b), (c) (2000) and decline to address employer's contentions. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *overruled on other grounds, Peabody Coal Co. v. Director, OWCP [Brinkley]*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984).

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[6]The law of the case doctrine provides that "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). The Fourth Circuit has declared that:

> Under law of the case doctrine... the decision of an appellate court establishes the law of the case [and] it must be followed in all subsequent proceedings in the same case... unless: (1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to the issue, or (3) the prior decision was clearly erroneous and would work a manifest injustice."

United States v. Aramony, 166 F.3d 655, 661 (4th Cir. 1999), quoted in *Columbus-America Discovery Group v. Atlantic Mutual Insurance Co.*, 203 F.3d 291, 303, 304 (4th Cir. 2000)(Internal quotations omitted)(citation omitted).

Finally, employer contends that the administrative law judge erred in determining that January 1, 1995 was the proper date of onset of total disability due to pneumoconiosis. Employer asserts specifically that the administrative law judge erred in relying upon Dr. Rasmussen's opinion and in selecting a date prior to the date of filing of the second claim. The Director urges affirmance of the administrative law judge's finding, as it is rational and supported by substantial evidence.

Under the Act, a miner is entitled to receive monthly benefits for "all periods of disability" and the liable party is required to pay from the "date of disability." 30 U.S.C. §901(a); 33 U.S.C. §906(a), as incorporated by 30 U.S.C. §932(a). These portions of the Act are implemented by 20 C.F.R. §725.503(b), which provides that benefits are payable from the month of onset of total disability due to pneumoconiosis. Thus, contrary to employer's assertions, there is no proscription against the receipt of benefits for a period predating the filing of a claim and a miner's entitlement to benefits is based on the date when the miner first became totally disabled due to pneumoconiosis. *Carney v. Director, OWCP*, 11 BLR 1-32 (1987).

In identifying this date, an administrative law judge is required to consider all relevant evidence of record and identify the pertinent date. *Owens v. Jewell Smokeless Coal Corp.,* 14 BLR 1-47 (1990); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3rd Cir. 1989). If the evidence of record does not establish when the miner became totally disabled due to pneumoconiosis, then benefits commence as of the miner's filing date, unless credible uncontradicted medical evidence indicates that the miner was not totally disabled at some point subsequent to his filing date. *See Green v. Director, OWCP,* 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

In this case, the administrative law judge considered the medical reports of record and acted within his discretion in finding that the evidence established January 1, 1995 to be the specific date of onset of total disability due to pneumoconiosis. Decision and Order on Remand at 2-3; *Edmiston*, *supra*. The administrative law judge rationally determined that Dr. Rasmussen's opinion, in light of his qualifications and his experience treating claimant and as supported by the x-ray evidence and the qualifying objective studies, was the most credible evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998); *Underwood v.*

Elkay Mining, Inc., 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Decision and Order on Remand at 3. The administrative law judge permissibly concluded, therefore, that Dr. Rasmussen's opinion is sufficient to affirmatively establish a date upon which claimant became totally disabled. 20 C.F.R. §725.503; *see McFarland v. Peabody Coal Co.*, 8 BLR 1-163 (1985); *Kuhar v. Bethlehem Mines Corp.*, 5 BLR 1-765 (1983). We hold, therefore, that substantial evidence supports the administrative law judge's designation of January 1, 1995 as the date from which claimant's entitlement to benefits commences. *See Edmiston*, *supra*; *Owens*, *supra*; *McFarland*, *supra*; *Kuhar*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits to commence as of January 1, 1995 is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge