BRB No. 99-1318 BLA

CONGH H. HORN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
JEWELL RIDGE COAL CORPORATION	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Supplemental Decision and Order On Remand Awarding Benefits and Order Granting Motion for Reconsideration In Part and Erratum of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Second Supplemental Decision and Order On Remand Awarding Benefits and Order Granting Motion for Reconsideration In Part and Erratum (90-BLA-1950) of Administrative Law Judge Joan Huddy Rosenzweig 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 before the Board for

the third time. In her Second Supplemental Decision and Order On Remand Awarding

[1]Claimant originally filed a claim on March 18, 1977, Director's Exhibit 1. In a Decision and Order issued on December 5, 1983, Administrative Law Judge James W. Kerr, Jr., found at least twenty years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. §727.203, Director's Exhibit 95. While Judge Kerr found that invocation of the interim presumption was not established pursuant to 20 C.F.R. §727.203(a)(2)-(3), he did find invocation of the interim presumption established by the x-ray evidence pursuant to 20 C.F.R. §727.203(a)(1), giving claimant "the benefit of any doubt" and greater weight to the most recent x-ray evidence. However, Judge Kerr further found that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(2), crediting the opinion of Dr. Schmidt, who found that claimant was not totally disabled from a respiratory standpoint, *see* Director's Exhibit 37. Judge Kerr also found that entitlement was not established pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. Claimant appealed and the Board affirmed the administrative law judge's finding that invocation of the interim presumption was established by the x-ray evidence pursuant to Section 727.203(a)(1) as uncontested and affirmed the administrative law judge's finding that rebuttal of the interim presumption was established pursuant to Section 727.203(b)(2), Director's Exhibit 99. *Horn v. Jewell Ridge Coal Co.*, BRB No. 83-2937 BLA (Jan. 31, 1986)(unpub.).

Claimant filed a second claim on March 17, 1986, within one year of the Board's Decision and Order affirming Judge Kerr's Decision and Order denying benefits, which therefore was considered a request for modification pursuant to 20 C.F.R. §725.310, Director's Exhibits 100, 103. In a Decision and Order On Modification issued on June 4, 1992, the administrative law judge considered all of the evidence of record and found that it was sufficient to establish a change in conditions pursuant to Section 725.310, as it indicated that claimant was totally disabled, which was the basis of the prior denial. The administrative law judge also found that invocation of the interim presumption was established pursuant to Section 727.203(a)(1), in light of the Board's affirmance of Judge Kerr's finding at subsection (a)(1), which was never appealed. Alternatively, the administrative law judge found that, similar to Judge Kerr, he would find invocation established at subsection (a)(1), resolving doubts in the conflicting x-ray evidence in claimant's favor and because the most recent x-ray evidence was positive for pneumoconiosis. Thus, the administrative law judge found rebuttal pursuant to 20 C.F.R. §727.203(b)(4) was precluded. The administrative law judge also found invocation established pursuant to 20 C.F.R. §727.203(a)(2). Finally, the administrative law judge found that rebuttal pursuant to Section 727.203(b)(1)-(3) was not established. Accordingly, benefits were awarded.

Employer appealed and the Board affirmed the administrative law judge's findings

Benefits issued on October 23, 1995, at issue herein, the administrative law judge found that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(1) and (2) and that rebuttal pursuant to Section 727.203(b)(4) was precluded. Accordingly, benefits were awarded.

The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, filed a motion for reconsideration of the administrative law judge's determination as to the onset of claimant's total disability. In her Order Granting Motion for Reconsideration In Part and Erratum issued on August 25, 1999, the administrative law judge found that the medical opinion of Dr. Buddington, Director's Exhibit 12, based on a December 20, 1979, examination which was part of the record considered by Judge Kerr prior to the filing of claimant's request for modification, was sufficient to establish that claimant was totally disabled due to pneumoconiosis at that time. Thus, the administrative law judge held that the failure to rely on Dr. Buddington's opinion in order to establish total disability and/or invocation of the interim presumption pursuant to Section 727.203 in Judge Kerr's original Decision and Order constituted a mistake in a determination of fact. Consequently, the administrative law judge held that such a mistake in a determination of fact permitted the administrative law judge to determine that the date of onset of claimant's total disability due to pneumoconiosis, from which benefits should be awarded, was December, 1979, based on Dr. Buddington's examination, *i.e.*, prior to the filing of claimant's request for modification.

On appeal, employer contends that the administrative law judge erred in finding invocation of the interim presumption established by the x-ray evidence pursuant to Section 727.203(a)(1) and, therefore, erred in not considering rebuttal pursuant to Section 727.203(b)(4). Employer also contends that the administrative law judge erred in determining the date of onset of claimant's total disability due to pneumoconiosis from which benefits should be awarded. Neither claimant nor the Director, as a party-in-interest, have responded to this appeal.

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

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that a change in conditions was established pursuant to Section 725.310 and that rebuttal was not established pursuant to Section 727.203(b)(1)-(3). *Horn v. Jewell Ridge Coal Co.*, BRB No. 92-2039 BLA (Jan. 31, 1994)(unpub.). However, the Board vacated the administrative law judge's findings that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) and (2) and remanded the case for reconsideration, and for consideration of rebuttal pursuant to Section 727.203(b)(4), if necessary.

disturbed. 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 affirm the administrative law judge's finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(2), as it is not challenged by employer on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). However, employer correctly contends that the administrative law judge erred in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1) and, therefore, in finding that rebuttal was precluded pursuant to Section 727.203(b)(4). The administrative law judge gave more weight to the later x-rays of record taken between 1975 and 1989, which she noted consisted of sixteen positive readings and thirty-three negative readings of fifteen x-rays. Second Supplemental Decision and Order at 3-12. The administrative law judge held that, while seventeen of the thirty-three negative readings were uncontradicted, she did not give them "enhanced" weight because they were read solely by physicians retained by employer. Thus, the administrative law judge found the weight of the x-ray evidence established invocation at Section 727.203(a)(1).

However, as employer contends, the administrative law judge failed to consider all of the x-ray evidence of record, including the most recent x-ray of record, *see* Employer's Exhibits 5-7; Claimant's Exhibit 1, as well as two negative readings from Dr. Pendergrass, Employer's Exhibits 1-2, and an additional positive reading from Dr. Robinette, Claimant's Exhibit 1. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Moreover, as employer contends, the administrative law judge also mischaracterized the qualifications of some of the physicians who read x-rays, *see Tackett, supra*. The administrative law judge considered Drs. Rogers, Director's Exhibits 19, 22, and Austin, Director's Exhibit 105, to be board-certified radiologists when weighing their x-ray readings, but there is no indication in the record regarding their qualifications. In addition, while the administrative law judge considered Dr. Robinette to be a B-reader when considering his January, 1984, x-ray reading, Director's Exhibit 105, a review of the record indicates that Dr. Robinette did not become a B-reader until March, 1985, *see* Director's Exhibit 110.

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[2]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

[3]Employer also contends that the administrative law judge erred in considering Dr. Bassham to be a B-reader when considering his December, 1975, x-ray reading, Director's Exhibit 21, because government records indicate that Dr. Bassham did not become a B-reader

Finally, as employer contends, in refusing to give "enhanced" weight to the uncontradicted negative readings, read solely by physicians retained by employer, the administrative law judge apparently gave their opinions no weight whatsoever in concluding that the "weight" of the x-ray evidence was positive. While an administrative law judge is not compelled to credit an uncontradicted medical opinion, she must give a rational reason for rejecting it, *see Blackledge v. Director, OWCP*, 6 BLR 1-1060 (1984). Thus, the administrative law judge did not adequately explain how the "weight" of the x-ray evidence was positive, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Consequently, the administrative law judge's finding pursuant to Section 727.203(a)(1) is vacated and we remand the case for reconsideration. In addition, if the administrative law judge finds invocation of the interim presumption established pursuant to Section 727.203(a)(1) on remand, rebuttal pursuant to Section 727.203(b)(4) is precluded, *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *see also Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994)(*en banc*, Brown & McGranery, JJ., concurring and disssenting), *rev'd*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995)(Luttig, J., dissenting)(declining to hold whether (b)(4) rebuttal may "never-or-sometimes" be established following (a)(1) invocation); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988)(Brown, J., concurring). However, if the administrative law judge finds that the x-ray evidence fails to establish invocation at subsection (a)(1), she must consider rebuttal pursuant to Section 727.203(b)(4).

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until February, 1976. However, the government records cited by employer are not a part of the record, whereas Dr. Bassham's reading includes a hand-written notation that Dr. Bassham is a B-reader, *see* Director's Exhibit 21. In addition, contrary to employer's contention, the record does indicate, as the administrative law judge noted, that Dr. Eryilmaz is a board-certified radiologist, *see* Employer's Exhibit 8. Finally, although employer correctly notes that the administrative law judge erred in considering an opinion from Dr. Make regarding his review of a positive reading of a 1974 x-ray by another physician to be an x-ray reading from Dr. Make, *see* Director's Exhibit 16; *see also Tackett, supra*, any error by the administrative law judge in this regard was harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the administrative law judge gave more weight to the x-rays taken after 1974.

[4]Although employer contends that the administrative law judge erred in finding complicated pneumoconiosis established by the x-ray evidence in her Second Supplemental Decision and Order On Remand as well, *see* Second Supplemental Decision and Order at 11, the administrative law judge ultimately rescinded her finding of complicated pneumoconiosis on reconsideration, *see* Order Granting Motion for Reconsideration at 5.

Next, in considering the relevant pulmonary function study evidence under Section 727.203(a)(2), the administrative law judge considered Dr. Sargent's opinion that the impairment indicated on claimant's pulmonary function study was due to smoking and not pneumoconiosis, because pneumoconiosis causes a mixed obstructive and restrictive impairment, whereas claimant did not have any restrictive impairment, *see* Director's Exhibit 124. Inasmuch as Dr. Sargent's opinion may be relevant under Section 727.203(b)(4), if reached, we address employer's contention that the administrative law judge erred in discrediting Dr. Sargent's opinion. Because Dr. Sargent subsequently stated in a 1990 report that claimant "has a restrictive impairment," *see* Director's Exhibit 132, the administrative law judge found Dr. Sargent's opinion that claimant's impairment was not due to pneumoconiosis lacked credibility, *see* Second Supplemental Decision and Order at 15-16.

However, Dr. Sargent subsequently testified at a deposition that his 1990 report stating that claimant "has a restrictive impairment," *see* Director's Exhibit 132, was a typographical error and should have stated that claimant does not have a restrictive impairment, *see* Employer's Exhibit 4 at 59. In her Order Granting Motion for Reconsideration, the administrative law judge issued an "erratum" correcting her characterization of Dr. Sargent's opinion, *see* Order Granting Motion for Reconsideration at 8 n. 8 and at 23. Nevertheless, the administrative law judge found that "[n]o evidence or argument has been presented which would mandate a revision of [her] credibility resolutions" regarding Dr. Sargent's opinion on the cause of claimant's impairment, *see* Order Granting Motion for Reconsideration at 8. As employer contends, because the administrative law judge based her finding regarding the credibility of Dr. Sargent's opinion as to the cause of claimant's impairment on the erroneous belief that Dr. Sargent had diagnosed a restrictive impairment, the administrative law judge has not provided a sufficient reason to hold that Dr. Sargent's opinion lacks credibility. Thus, we vacate the administrative law judge's credibility finding regarding Dr. Sargent's opinion.

Finally, employer contends that the administrative law judge erred in determining the date of onset of claimant's total disability due to pneumoconiosis from which benefits should be awarded. An administrative law judge must consider all relevant evidence in determining the date of onset of the miner's disability and assess its credibility, *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If an onset date is not ascertainable, then benefits commence as of the month the claim was filed, 20 C.F.R. §725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989), unless credible medical evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date, *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990)*; Gardner, supra; Lykins, supra*. Moreover, an administrative law judge must determine the date on which the miner became totally disabled due to pneumoconiosis, not just the date on which he becomes totally disabled by any cause, *see*

Carney v. Director, OWCP, 11 BLR 1-32 (1987).

Although Section 725.503 does not indicate that any special guidelines are to be applied to cases involving modification, Section 725.503(a) refers to Section 6(a) of the Longshore and Harbor Workers' Compensation Act, which states that "the compensation shall be allowed from the date of the disability," 33 U.S.C. §906(a). 20 C.F.R. §725.503(a); *see also Eifler v. Director, OWCP*, 926 F.2d 663,666, 15 BLR 2-1, 2-4 (7th Cir. 1991)(a change in condition, *i.e.*, a worsening of a claimant's pneumoconiosis to the point where it is totally disabling, entitles claimant to benefits from the date of the change, whereas the correction of a mistake in fact, *i.e.*, "showing that he had totally disabling black lung disease at the time of the original hearing," entitles claimant to benefits from the date of the total disability).

In her Order Granting Motion for Reconsideration, the administrative law judge determined that the opinion of Dr. Buddington, based on a December 20, 1979, examination of claimant which was submitted with the original record prior to claimant's request for modification, *see* Director's Exhibits 12, 35, was sufficient to establish total disability due to pneumoconiosis. Order Granting Motion for Reconsideration at 9-22. The administrative law judge concluded that the failure to rely on Dr. Buddington's report in Judge Kerr's original Decision and Order in order to establish total disability and/or invocation of the interim presumption constituted a mistake in a determination of fact under Section 725.310, thereby permitting the administrative law judge to determine that the date of onset was December, 1979, based on Dr. Buddington's opinion, *i.e.*, prior to the date of filing of claimant's request for modification. Order Granting Motion for Reconsideration at 22-23.

However, as employer contends, the administrative law judge did not consider all relevant evidence in determining the date of onset of the miner's disability and assess its credibility, *see Lykins, supra*. Judge Kerr credited the opinion of Dr. Schmidt that claimant was not totally disabled from a respiratory standpoint, Director's Exhibit 37, over Dr.

[5]Dr. Buddington diagnosed a moderate chronic respiratory impairment based on claimant's history, examination and abnormal blood gas study results, Director's Exhibit 12. Dr. Buddington believed claimant may be able to perform some heavy physical labor for brief periods with long periods of rest in between and that claimant's primary pulmonary disorder was coal workers' pneumoconiosis. After considering the exertional requirements of claimant's usual coal mine employment with Dr. Buddington's opinion, Order Granting Motion for Reconsideration at 9-20, the administrative law judge found that Dr. Buddington's opinion established that claimant was totally disabled due to pneumoconiosis at the time of his examination in December, 1979, Order Granting Motion for Reconsideration at 20-22.

Buddington's opinion under Section 727.203(b)(2) in his original Decision and Order, *see* Director's Exhibit 95. Although the Board subsequently held that Dr. Schmidt's opinion is insufficient to establish rebuttal under Section 727.203(b)(2), because Dr. Schmidt did not find that claimant was not totally disabled for whatever reason in accordance with the standard enunciated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987), *see Horn*, BRB No. 92-2039 BLA at 4 n. 4, Dr. Schmidt's opinion is nevertheless relevant as to whether claimant was totally disabled from a respiratory standpoint and, therefore, totally disabled due to pneumoconiosis, at that time, which is the focus for determining the date of onset, *see Carney, supra*. Consequently, inasmuch as the administrative law judge did not consider all relevant evidence in determining the date of onset of the miner's disability and assess its credibility, including Dr. Schmidt's opinion regarding whether claimant was totally from a respiratory standpoint at that time, *see Lykins, supra*, we vacate the administrative law judge's finding that a mistake in a determination of fact was made in determining the date of onset. Moreover, in addressing the date of onset on remand, the administrative law judge should be mindful that modification was established pursuant to Section 725.310 based on a change in conditions. Consequently, we vacate the administrative law judge's finding as to the date of onset and remand the case for reconsideration of all relevant evidence in determining the date of onset of claimant's disability pursuant to Section 725.503, *see* 20 C.F.R. §725.503; *Krecota, supra; Edmiston, supra; Gardner, supra; Lykins, supra; see also Eifler, supra*.

Accordingly, the adminstrative law judge's Second Supplemental Decision and Order On Remand Awarding Benefits and Order Granting Motion for Reconsideration In Part and Erratum are affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[6]Employer's contentions that the adminstrative law judge was, in effect, improperly considering invocation at Section 727.203(a)(4) is misplaced, as the adminstrative law judge was properly considering whether the evidence established a date on which claimant became totally disabled due to pneumoconiosis in determining the date of onset, *see Carney, supra*.

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge