U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB Nos. 17-0130 BLA
and 17-0130 BLA-A

DONALD RAY MARCUM	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
EXCEL MINING, INCORPORATED	)	
	)	
and	)	
	)	
MAPCO, INCORPORATED	)	DATE ISSUED: 11/30/2017
	)	
Employer/Carrier-	)	
Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones and Denise Hall Scarberry (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

Barry H. Joyner (Nicholas C. Geale, Acting Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order Awarding Benefits (2012-BLA-06170) of Administrative Law Judge Joseph E. Kane, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim[1] filed on December 22, 2011. Director's Exhibit 2.

The administrative law judge credited claimant with twenty-two years of underground coal mine employment[2] and determined that employer is the responsible operator. The administrative law judge found that the x-ray, biopsy, and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c). Therefore, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).[3] The administrative law judge further found that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Finally, the administrative law judge found that the biopsy evidence established that claimant was first diagnosed with complicated pneumoconiosis

[1] Claimant's initial claim, filed on October 2, 2002, was denied as abandoned on June 13, 2003. Director's Exhibit 1. A denial by reason of abandonment is "deemed a finding that the claimant has not established any applicable condition of entitlement." 20 C.F.R. §725.409(c).

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Because claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

on December 23, 2010. Accordingly, the administrative law judge awarded benefits commencing as of December 2010.

On appeal, employer contends that the administrative law judge erred in identifying it as the responsible operator. Employer further asserts that the administrative law judge erred in his analysis of the x-ray evidence when he found that it supported a finding of the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a). Additionally, employer contends that if claimant has established complicated pneumoconiosis, Section 411(c)(3) is unconstitutional because it deprives employer of its Due Process rights. Employer argues further that the administrative law judge erred in awarding benefits prior to the month in which claimant filed this claim. Finally, employer contends that the administrative law judge erred in failing to address its argument that claimant's benefits should be offset by the amount of a settlement that claimant received in a civil action against the manufacturer of dust masks he wore while working in the coal mines.[4]

Claimant responds, urging affirmance of the award of benefits and the administrative law judge's finding regarding the benefits commencement date.[5] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging affirmance of the determination that employer is the responsible operator, and urging the Board to reject employer's arguments that Section 411(c)(3) is unconstitutional and that employer is entitled to an offset.

Additionally, claimant has filed a cross-appeal in which he contends that the administrative law judge erred in excluding the deposition testimony of Dr. Cohen as exceeding the evidentiary limitations applicable to claimant under 20 C.F.R. §725.414. Employer responds, urging affirmance of the administrative law judge's evidentiary ruling.

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[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had twenty-two years of underground coal mine employment, that the biopsy and medical opinion evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),(c), and that the complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Claimant additionally responds that he agrees with employer that the administrative law judge erred in finding employer to be the responsible operator, but argues that if employer is the responsible operator, it is not entitled to an offset against claimant's award of benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

I. RESPONSIBLE OPERATOR

The responsible operator is the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e).[6] Once a potentially liable operator has been properly identified by the Director, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that another operator more recently employed the miner for at least one year and that operator is financially capable of assuming liability for benefits. *See* 20 C.F.R. §725.495(c).

The district director designated employer as the responsible operator based on the conclusion that employer was the potentially liable operator that most recently employed claimant for a cumulative period of one year. The evidence before the district director included two CM-911a Employment History Forms, filed by claimant in his 2002 claim and in the current claim, respectively. Director's Exhibits 1 at 125-28; 4. In both forms, claimant indicated that after he worked for employer from 1998 to 2001, he was employed by Sidney Coal Company (Sidney Coal) from September 2001 until March 2002. *Id*. Claimant also testified in a deposition taken during his 2002 claim that he stopped working for Sidney Coal in March of 2002 because of a workplace injury.[7]

[6] In order for a coal mine operator to meet the regulatory definition of a "potentially liable operator," the miner's disability or death must have arisen out of employment with the operator, the operator must have been in business after June 30, 1973, the operator must have employed the miner for a cumulative period of not less than one year, the employment must have occurred after December 31, 1969, and the operator must be financially capable of assuming liability for the payment of benefits, either through its own assets or through insurance. 20 C.F.R. §725.494(a)-(e).

[7] Claimant testified that he worked for Sidney Coal Company (Sidney Coal) from "the 3rd or 4th of October" 2001 to March 18, 2002. Director's Exhibit 1 at 40-41. Claimant further testified that he was employed with Sidney Coal for six months. *Id*. at 55. In the current claim, claimant responded to interrogatories from employer, and stated that he worked for Sidney Coal from October 15, 2001 to March 2, 2002, and that he left the job because of a back injury. Director's Exhibit 18 at 3.

Director's Exhibit 1 at 33, 40-43. As a result of that injury, he began drawing Kentucky state workers' compensation benefits. *Id*. In addition, paystubs from Sidney Coal indicated that claimant was on "Excused Absence" from March 25, 2002, until April 5, 2002. Director's Exhibit 6. The paystubs further indicated that, from April 22, 2002 until May 31, 2002, claimant was classified as "[o]ff injured." *Id*.

Based on the documentary evidence of record, the district director determined that claimant did not work for at least one year with Sidney Coal. Director's Exhibit 25. The district director therefore identified employer as the last operator to employ claimant for at least one year. Director's Exhibits 25, 26, 32.

Before the administrative law judge, however, employer argued that evidence that was submitted or developed after this case was forwarded to the Office of Administrative Law Judges (OALJ) established that claimant's employment relationship with Sidney Coal lasted for more than one year. Specifically, employer argued that a September 11, 2003 workers' compensation settlement agreement, submitted by claimant to the administrative law judge, along with claimant's November 19, 2015 hearing testimony in this claim, established an employment relationship with Sidney Coal that lasted until September 2003.[8] Decision and Order at 4-5.

The administrative law judge, however, found that the evidence established that claimant's employment relationship with Sidney Coal lasted only from October 3 or 4, 2001 until, at the latest, April 22, 2002.[9] Decision and Order at 5-6. The administrative

[8] Specifically, claimant submitted a September 11, 2003 settlement agreement from his Kentucky state workers' compensation claim, which arose out of his March 2002 injury with Sidney Coal. Claimant's Exhibit 15. The settlement agreement reflected that claimant was paid temporary total disability benefits for forty-nine weeks of disability after his March 2002 injury. *Id*. In addition, at the November 19, 2015 hearing, claimant testified that he received six months of short-term disability benefits after his March 2002 injury, and then received temporary total disability benefits for some time thereafter. Hearing Transcript at 23-24. Claimant testified further that after his March 2002 injury, he visited Dr. Lafferty, his family physician, for five months, and then Dr. Pyle, a neurosurgeon, for sixth months. *Id*. at 24-25. Claimant stated that, eleven months after his injury, he was released from treatment by Dr. Pyle. *Id*. According to claimant, Dr. Lafferty then advised him not to return to coal mining, at which point Sidney Coal terminated claimant. *Id*. Claimant testified that he intended to return to work at Sidney Coal until Dr. Lafferty advised him not to do so. *Id*. at 32.

[9] The administrative law judge first noted that the parties agreed that claimant worked for Sidney Coal for 166 days, from October 3 or 4, 2001 to March 18, 2002,

law judge determined that after April 22, 2002, claimant was on disability status, or "[o]ff injured." *Id*. at 6. During the time that claimant was on disability, the administrative law judge found that claimant no longer had an employment relationship with Sidney Coal. *Id*. at 6. In making this finding, the administrative law judge concluded that, although claimant may have intended to return to work with Sidney Coal had he been able to do so, the September 11, 2003 settlement agreement and claimant's hearing testimony did not establish that an employment relationship continued between claimant and Sidney Coal beyond April 22, 2002. *Id*. Therefore, the administrative law judge found that employer did not meet its burden to establish that Sidney Coal employed claimant for at least one year.[10] *Id*. at 4-7.

Employer argues that the administrative law judge erred in finding that claimant was not employed by Sidney Coal for at least one year.[11] Employer's Brief at 8-11. Employer argues that the administrative law judge did not properly analyze the

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when he suffered his workplace injury. Decision and Order at 5. The administrative law judge next found that claimant's paystubs established that from March 25, 2002 to April 22, 2002, claimant was in "Excused Absence" status. *Id*. at 6. The administrative law judge noted that, pursuant to 20 C.F.R §725.101(32), "any day for which the miner received pay while on an approved absence, such as vacation or sick leave, may be counted as part of the calendar year and as partial periods totaling one year." *Id*. Finding that the "Excused Absence" designation constituted sick leave, the administrative law judge determined that claimant worked for Sidney Coal for an additional 35 days, for a total of 201 days. *Id*.

[10] The administrative law judge also found that employer failed to establish that Sidney Coal was financially capable of assuming liability for the payment of benefits. Decision and Order at 7. The Director notes that because the record lacks a statement from the district director that the Office of Workers' Compensation Programs searched its records and found no evidence that Sidney Coal was insured or qualified as a self-insurer, it is presumed that Sidney Coal is financially capable of assuming liability. Director's Brief at 2 n.2, *citing* 20 C.F.R. §725.495(d). The Director argues that any error by the administrative law judge on that issue is harmless, because the administrative law judge's determination that employer did not establish that Sidney Coal employed claimant for at least one year is correct. Director's Brief at 4 n.6.

[11] Employer does not dispute the administrative law judge's finding that it meets the criteria of a potentially liable operator pursuant to 20 C.F.R. §725.494. Therefore, this finding is affirmed. *See Skrack*, 6 BLR at 1-711.

September 11, 2003 settlement agreement and claimant's November 19, 2015 hearing testimony, which employer argues credibly establish an employment relationship between claimant and Sidney Coal that continued after he suffered his March 2002 workplace injury, to include the time he was receiving disability benefits, and therefore, that the relationship lasted for more than one year. *Id*.

The Director disagrees, arguing that the 2003 settlement agreement and claimant's hearing testimony are inadmissible on the issue of liability, and thus should not have been considered by the administrative law judge. Specifically, the Director argues that the settlement agreement was not submitted by any party, nor was claimant designated as a liability witness, while this case was before the district director. Director's Brief at 4-5. Therefore, the Director asserts that the regulations precluded the administrative law judge from considering this evidence, absent a showing of extraordinary circumstances. *Id*. The Director argues that there is no admissible evidence to support employer's position that Sidney Coal employed claimant for at least one year.[12] *Id*. We agree.

Because the identification of the responsible operator or carrier must be finally resolved by the district director before a case is referred to the OALJ, the regulations require that, absent extraordinary circumstances, all liability evidence must be submitted to the district director. 20 C.F.R. §§725.407(d), 725.414(d), 725.456(b)(1); 65 Fed. Reg. 79,920, 79,989 (Dec. 20, 2000). Thus, "no documentary evidence pertaining to liability may be admitted in any further proceeding conducted with respect to a claim unless it is submitted to the district director . . . ." 20 C.F.R. §725.414(d). Unless this documentary evidence pertaining to the identification of a responsible operator is submitted to the district director, such evidence "shall not be admitted into the hearing record in the absence of extraordinary circumstances." 20 C.F.R. §725.456(b)(1).

In addition, while the claim is before the district director, "all parties must notify the district director of the name and current address of any potential witness whose testimony pertains to the liability of a potentially liable operator or the designated responsible operator." 20 C.F.R. §725.414(c). In the absence of such notice, "the testimony of a witness relevant to the liability of a potentially liable operator or the designated responsible operator will not be admitted in any hearing conducted with respect to the claim unless the administrative law judge finds that the lack of notice should be excused due to extraordinary circumstances." 20 C.F.R. §725.414(c). The

[12] The Director also argues that, even if the evidence were admissible, the administrative law judge reasonably found that the settlement agreement and claimant's testimony did not establish that claimant remained in an employment relationship with Sidney Coal following his back injury. Director's Brief at 5.

administrative law judge is obligated to enforce these limitations even if no party objects to the evidence or testimony. *See Smith v. Martin Cnty. Coal Corp.*, 23 BLR 1-69, 1-74 (2004) (holding that the evidentiary limitations set forth in the regulations are mandatory and, as such, are not subject to waiver).

The record reflects that on April 6, 2012, the district director issued a Schedule for the Submission of Additional Evidence, identifying employer as the responsible operator in this claim. Director's Exhibit 26. The district director informed the parties that they could submit additional documentary evidence relevant to liability, and could identify witnesses relevant to liability that the designated responsible operator intended to call if the case was referred to the OALJ, pursuant to 20 C.F.R. §725.414(b), (c). *Id*. at 4. Moreover, the district director stated that "[a]bsent a showing of extraordinary circumstances, no documentary evidence relevant to liability, or testimony of a witness not identified at this stage of the proceedings, may be admitted into the record once a case is referred to the [OALJ]." *Id*., *citing* 20 C.F.R. §725.456(b)(1). Although employer responded to the Schedule for the Submission for Additional Evidence and disputed its status as the responsible operator, employer submitted no additional documentary evidence, nor did employer designate claimant as a liability witness. Director's Exhibit 27. Additionally, the record reflects that the 2003 settlement agreement was first submitted by claimant when this claim was before the OALJ. Claimant's Exhibit 15.

In sum, the record reflects that no party identified claimant as a potential hearing witness relevant to liability, or submitted the 2003 settlement agreement, while this claim was pending before the district director.[13] Therefore, this evidence could be considered only if the administrative law judge found "extraordinary circumstances" to justify its admission into the record. *See Weis v. Marfork Coal Co.*, 23 BLR 1-182, 1-191-92 (2006) (en banc) (McGranery & Boggs, JJ., dissenting). Neither claimant nor employer argued before the administrative law judge that their failure to comply with the regulation should be excused due to extraordinary circumstances, nor do they so argue before the Board. Thus, the 2003 settlement agreement and claimant's hearing testimony relevant to

[13] The district director sets a schedule for the parties to follow regarding the submission of additional evidence relevant either to claimant's eligibility for benefits or to the liability of the designated responsible operator. *See* 20 C.F.R. §725.410. All documentary evidence regarding a more recent employer's potential liability must be submitted pursuant to this schedule, *see* 20 C.F.R. §725.414, but the time for submission of additional evidence set forth in the schedule "may be extended, for good cause shown, by filing a request for an extension with the district director prior to the expiration of the time period." 20 C.F.R. §725.423. No party requested an extension in this claim to submit evidence relevant to the responsible operator issue before the district director.

the responsible operator issue were inadmissible. *See* 20 C.F.R. §§725.414(c), (d), 725.456(b)(1).

Claimant's paystubs indicate only that he was on either "Excused Absence," or "[o]ff injured" status, with Sidney Coal until May 31, 2002. Director's Exhibit 6. A review of the record reveals no other admissible evidence that claimant was employed with Sidney Coal beyond the period of October 2001 through May 31, 2002. Therefore, we affirm the administrative law judge's finding that employer failed to establish that Sidney Coal is a potentially liable operator, and affirm the administrative law judge's determination that employer is the responsible operator.[14]

II. COMPLICATED PNEUMOCONIOSIS

Under Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields one or more opacities greater than one centimeter in diameter that would be classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, would be a condition that could reasonably be expected to yield a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether claimant has invoked the irrebuttable presumption. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (en banc).

As noted, *supra* n.4, employer does not dispute that the biopsy evidence and medical opinion evidence established that claimant has complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b),(c).[15] Employer argues only that the administrative

[14] Therefore, we need not address employer's argument that the administrative law judge erred in his analysis of the 2003 settlement agreement and claimant's hearing testimony when he found that they did not establish an employment relationship with Sidney Coal for at least one year. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1277 (1984).

[15] The administrative law judge found that the biopsy evidence diagnosing claimant with complicated pneumoconiosis is uncontradicted, and that the physicians of

law judge erred in finding that six readings of two x-rays dated February 1, 2012 and March 1, 2012, which the administrative law judge considered in light of the readers' radiological qualifications, established the existence of "Category A" large opacities of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a).[16] Decision and Order at 18-19.

Specifically, employer contends that the only negative x-ray readings of record, both of which were by Dr. Wheeler, should have received greater weight than the administrative law judge accorded them, because Dr. Wheeler is dually-qualified as a Board-certified radiologist and B reader. Employer's Brief at 11-12. This contention lacks merit. The administrative law judge found that Dr. Wheeler's negative readings of both x-rays were "speculative" and "less persuasive" than the positive readings from the other Board-certified radiologists and B readers. Decision and Order at 19. Specifically the administrative law judge permissibly found that, although Dr. Wheeler identified alternative etiologies for the large masses present on claimant's x-rays, "claimant's treatment records rule out all of these [conditions] as a cause of the abnormalities." Decision and Order at 19; *see Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287, 24

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record agree that claimant has complicated pneumoconiosis. Decision and Order at 19-20.

[16] The administrative law judge assigned greater weight to the readings by physicians who were dually-qualified as Board-certified radiologists and B readers. Decision and Order at 18. Because Drs. Alexander and Miller, both dually-qualified radiologists, and Dr. Rasmussen, a B reader, read the February 1, 2012 x-ray as positive for complicated pneumoconiosis, and only Dr. Wheeler, also a dually-qualified radiologist, read this x-ray as negative for complicated pneumoconiosis, the administrative law judge found that the February 1, 2012 x-ray was positive for complicated pneumoconiosis. *Id.* Because Dr. Miller read the March 1, 2012 x-ray as positive for complicated pneumoconiosis, and Dr. Wheeler read this x-ray as negative for complicated pneumoconiosis, the administrative law judge found that the March 1, 2012 x-ray was in equipoise as to the existence of complicated pneumoconiosis. *Id*. at 19. Weighing all the x-ray evidence together, however, the administrative law judge discounted Dr. Wheeler's negative readings, because he found no support in the record for Dr. Wheeler's suggestion that the large masses present on claimant's x-rays could be various inflammatory diseases, such as histoplasmosis or tuberculosis. *Id*. The administrative law judge therefore found that the chest x-ray evidence considered overall "supports a finding of complicated pneumoconiosis." *Id*.

BLR 2-269, 2-287 (4th Cir. 2010). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304(a).[17]

As we have affirmed the administrative law judge's findings that the evidence established complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), we affirm the administrative law judge's determinations that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis, established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and established his entitlement to benefits.[18] In view of our affirmance of the award of benefits, we need not address claimant's cross-appeal alleging that the administrative law judge erred in excluding Dr. Cohen's deposition testimony. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

III. BENEFITS COMMENCEMENT DATE

Once entitlement to benefits is established, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In a case where a miner is found entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, the fact-finder must consider whether the evidence of record establishes the onset date of claimant's complicated pneumoconiosis. In this case, that would be the date that the miner's simple pneumoconiosis progressed to complicated pneumoconiosis. *See Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If the evidence does not reflect that date, the date for the commencement of benefits is the month in which the claim was filed, unless the evidence affirmatively establishes that claimant had only simple pneumoconiosis for any period subsequent to the date of filing. In that case, the date for the commencement of benefits follows the period of simple pneumoconiosis. *Williams*, 13 BLR at 1-30; 20

[17] Moreover, employer has not challenged the administrative law judge's additional determination to "credit [the] pathology evidence over conflicting chest x-ray evidence, as a biopsy analysis such as the one in this case involves a review of actual lung tissue." Decision and Order at 20. That determination is, therefore, affirmed. *See Skrack*, 6 BLR at 1-711.

[18] Employer's argument that Section 411(c)(3) of the Act is unconstitutional because it irrebuttably presumes entitlement even where there is no evidence of a totally disabling respiratory impairment was rejected by the United States Supreme Court in *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 22-28, 3 BLR 2-36, 2-47-51 (1976). For the reasons set forth in *Usery*, we reject employer's argument.

C.F.R. §725.503(b). In a subsequent claim, the date for the commencement of benefits is determined as provided under 20 C.F.R. §725.503, with the additional rule that no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

The administrative law judge found that, because a December 23, 2010 biopsy was found to be positive for complicated pneumoconiosis, and the biopsy evidence established the existence of complicated pneumoconiosis, claimant first developed complicated pneumoconiosis in December 2010. Decision and Order at 22. Therefore, the administrative law judge awarded benefits with a commencement date of December 2010. *Id*.

Employer generally argues that the administrative law judge should have found that benefits commence in this claim as of the month in which the claim was filed, December 2011. Employer, however, cites no authority for its argument, nor has it alleged any specific error in the administrative law judge's finding that claimant was first diagnosed with complicated pneumoconiosis in December 2010. *See Cox v. Benefits Review Board*, 791 F.2d 445, 446, 9 BLR 2-46, 2-47-48 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 120-21 (1987). We therefore affirm the administrative law judge determination that claimant is entitled to benefits commencing as of December 2010.[19] 20 C.F.R. §725.503(b); *Williams*, 13 BLR at 1-30.

[19] Employer is not entitled to an offset against claimant's award for the amount of a settlement that it says claimant received as the result of a civil action against the manufacturer of dust masks. Employer's Brief at 15-16. Therefore, the administrative law judge did not err in declining to address employer's argument. The offset provisions of the Act contemplate a reduction or offset of Federal black lung benefits by any other State or Federal award made on the basis of the miner's "death or partial or total disability due to pneumoconiosis." 20 C.F.R. §725.533(a)(1), (2). The regulations define the term, "State or Federal benefit," as "a payment to an individual on account of total or partial disability or death due to pneumoconiosis only under State or Federal laws relating to workers' compensation." 20 C.F.R. §725.535(a). As the Director argues, a review of the record reveals no evidence of a civil action settlement related to "State or Federal benefits" for a workers' compensation claim related to "total or partial disability or death due to pneumoconiosis." Director's Brief at 7. Employer's argument is therefore rejected.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge