

BRB No. 06-0238 BLA

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| ROBERT LEE SMITH, SR. |) | |
| |) | |
| Claimant-Respondent |) | |
| |) | |
| v. |) | DATE ISSUED: 10/30/2006 |
| |) | |
| DRUMMOND COMPANY, |) | |
| INCORPORATED |) | |
| |) | |
| 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 – Awarding Benefits on Remand of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Nathaniel Martin, Jasper, Alabama, for claimant.

Katie Loggins Vreeland (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits on Remand (2002-BLA-0242) of Administrative Law Judge Richard A. Morgan¹ on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as

¹ On remand, the case was reassigned to Administrative Law Judge Richard A. Morgan after notification to the parties that Administrative Law Judge Gerald M. Tierney was no longer with the Office of Administrative Law Judges.

amended, 30 U.S.C. §901 et seq. (the Act). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Gerald M. Tierney addressed claimant's modification request, stating that the prior claim was denied in 1999 because claimant failed to establish total respiratory disability.² Judge Tierney reviewed the medical evidence of record and found that the newly submitted evidence was sufficient to establish a mistake in a determination of fact as it supports a finding that claimant is totally disabled. He then reviewed the remainder of the elements of entitlement and found that the evidence of record was sufficient to establish the existence of pneumoconiosis and that claimant's total respiratory disability was due to pneumoconiosis. Accordingly, Judge Tierney awarded benefits, commencing as of June 1997.

Pursuant to employer's appeal, the Board affirmed in part and vacated in part Judge Tierney's award of benefits. *Smith v. Drummond Company, Inc.*, 03-0784 BLA (Sep. 29, 2004)(unpub.). In particular, the Board vacated Judge Tierney's finding that claimant established a totally disabling respiratory or pulmonary impairment, and remanded the case for Judge Tierney to more fully discuss his weighing of the relevant medical evidence and conclusions pursuant to 20 C.F.R. §718.204(b)(2). *Smith*, slip op. at 6. In addition, the Board instructed Judge Tierney to provide a more detailed explanation of his weighing of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). *Smith*, slip op. at 7-8. Lastly, Judge Tierney was instructed that if he again finds that claimant has established entitlement to benefits, he must consider and fully discuss the relevant, credible evidence to determine the date from which claimant's pneumoconiosis became totally disabling. *Smith*, slip op. at 8.

On remand, Administrative Law Judge Richard A. Morgan (the administrative law judge), noted the Board's instructions and found that the medical evidence established a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 6. In addition, he found the evidence

² Claimant filed his initial application for benefits on June 16, 1997. Director's Exhibit 1. In a Decision and Order issued on July 19, 1999, the administrative law judge denied benefits, finding that claimant established the existence of pneumoconiosis but failed to establish total respiratory disability. Director's Exhibit 41. On August 16, 2000, the Board affirmed the administrative law judge's denial of benefits. *Smith v. Drummond Company, Inc.*, BRB No. 99-1185 BLA (Aug. 16, 2000)(unpub.); Director's Exhibit 51. By Order dated March 6, 2001, the United States Court of Appeals for the Eleventh Circuit dismissed claimant's appeal as untimely filed. *Smith v. Director, OWCP and Drummond Company, Inc.*, No. 00-15592-AA (11th Cir. Mar. 6, 2001)(unpub.); Director's Exhibit 55. Claimant then filed a request for modification on June 22, 2001. Director's Exhibit 56.

sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a); and, that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Decision and Order on Remand at 8, 9. Consequently, the administrative law judge found that claimant established modification of his prior denial of benefits, as well as entitlement to benefits. Accordingly, the administrative law judge awarded benefits. Addressing the issue of the date from which benefits commence, the administrative law judge stated that he based his finding that claimant established modification of the prior denial on a mistake in a determination of fact in that decision, *i.e.*, that claimant was not totally disabled. Further, finding the evidence did not establish a specific date on which claimant's pneumoconiosis progressed to the point of being totally disabling, the administrative law judge awarded benefits as of June 1997, the month in which claimant filed his initial application for benefits in this claim.

In the current appeal, employer does not challenge the administrative law judge's award of benefits. Rather, employer contends only that the administrative law judge erred in finding the ground for modification in this case to be a mistake in a determination of fact and, thus, erred in finding the date from which benefits commence to be June 1997, the month in which claimant filed his initial application for benefits. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a brief on the merits of the claim.

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).

Pursuant to 20 C.F.R. §725.503(b), where a miner is found to be totally disabled due to pneumoconiosis under Part 718, benefits are payable from the month of onset of total disability due to pneumoconiosis. 20 C.F.R. §725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Where the record does not establish when the miner became totally disabled as a result of his pneumoconiosis, benefits are payable as of the miner's filing date for benefits, 20 C.F.R. §725.503(b); *Krecota*, 868 F.2d at 603, 12 BLR at 2-184; *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins*, 12 BLR at 1-183, unless credible medical evidence establishes that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Lykins*, 12 BLR at 1-183.

Where benefits are awarded pursuant to a request for modification, the administrative law judge must specifically identify the ground supporting modification

because this determination affects the date for commencement of benefits. *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991). Pursuant to 20 C.F.R. §725.503(d), if modification is based upon a finding of a mistake in a determination of fact, the general provisions of Section 725.503(b) are applicable, allowing for benefits to be paid from the original application date if a specific date of onset of total disability due to pneumoconiosis is not ascertainable. 20 C.F.R. §725.503(b), (d)(1); *Eifler*, 926 F.2d at 666; 15 BLR at 2- 4. If, however, the ground for granting modification is a change in conditions, claimant is entitled to benefits from the date of that change, provided that no benefits are payable for any month prior to the effective date of the most recent denial of benefits; if the date of change is not ascertainable, benefits are payable beginning with the month in which claimant requested modification. 20 C.F.R. §725.503(d)(2); *Eifler*, 926 F.2d at 666; 15 BLR at 2- 4.

Herein, the administrative law judge granted claimant's request for modification and found that claimant established entitlement to benefits, based on a determination that claimant established a totally disabling respiratory or pulmonary impairment due to pneumoconiosis which arose out of coal mine employment.³ Decision and Order on Remand at 3-9. The administrative law judge then considered the evidence of record to determine the date for commencement of benefits. Stating that the modification request was granted based on claimant's showing a mistake in a determination of fact in the prior decision, the administrative law judge awarded benefits as of June 1997, the month in which claimant filed his original application for benefits. Decision and Order on Remand at 9-10. The administrative law judge found that since the evidence of record did not prove when claimant became totally disabled due to his pneumoconiosis, benefits are payable from the month in which claimant filed his original application for benefits.

On appeal, employer contends the administrative law judge erred in granting claimant's request for medication based on a mistake in a determination of fact. Employer contends that the administrative law judge failed to adequately explain how the evidence submitted subsequent to claimant's request for modification, established a mistake in a determination of fact in the prior decision, rather than establishing a change in claimant's condition. Specifically, employer contends that the newly submitted evidence of record which proved an element of entitlement previously adjudicated against claimant, established a worsening of claimant's condition and, thus, a change in conditions. Employer's Brief at 10-11. We reject this contention.

³ We affirm the administrative law judge's award of benefits as the parties do not challenge the administrative law judge's findings that the evidence of record establishes each of requisite elements of entitlement pursuant to 20 C.F.R. Part 718. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); *see also Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Contrary to employer's contention, the administrative law judge set forth his reasoning in finding that the new evidence, submitted in support of the modification request, supports the determination that the denial of the prior claim was based on a mistake of fact. Decision and Order on Remand at 9-10. The administrative law judge determined that the results of the methacholine challenge study proved that claimant was totally disabled; he explained that this study, which had not been administered to claimant until after the prior denial, can reveal the existence of a total respiratory disability which the traditional types of pulmonary function testing, previously administered to claimant, fail to demonstrate. Decision and Order on Remand at 10. The administrative law judge therefore found that claimant's prior failure to prove the existence of a total respiratory disability did not establish that the disability had not existed, merely that claimant did not have the test to prove it. Consequently, the administrative law judge rationally exercised his discretion as trier-of-fact, in finding that the results of the methacholine challenge study undermined the factual basis of the previous denial, that claimant was not totally disabled and, therefore, as this study proves the existence of a total respiratory disability, it establishes that the prior denial was premised on a mistake in the determination of fact. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988). Moreover, as employer does not set forth specific, credible evidence that proves that claimant was not totally disabled at any time after the date of claimant's original filing, we hold that the administrative law judge rationally found benefits payable from June 1997, the month in which claimant filed for benefits. *Krecota*, 868 F.2d at 603, 12 BLR at 2-184; *Edmiston*, 14 BLR at 1- 69; *Lykins*, 12 BLR at 1-183.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge