BRB No. 98-0778 BLA

DEBBY ANN JUSTICE JONES (o/b/o JESSIE D. JUSTICE) Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	Date Issued: 9/10/99___

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Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order (Upon Second Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Hazel A. Straub, Charleston, West Virginia, for claimant.

Mark O. Solomons (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (Upon Second Remand by the Benefits Review Board) (88-BLA-2598) of Administrative Law Judge Robert D. Kaplan awarding benefits as of the date of filing of the miner's 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.[1] Originally, a Decision and Order was issued on

[1]The miner, Jessie D. Justice, originally filed a living miner's claim on September 7, 1976, Director's Exhibit 1. The miner subsequently died on January 19, 1983, Director's Exhibit 26. The miner's surviving daughter, Debby

January 31, 1990, by Administrative Law Judge Thomas W. Murrett, who found eight years of coal mine employment established and adjudicated the claim pursuant to the interim presumption at 20 C.F.R. §410.490. Administrative Law Judge Murrett found that claimant established the existence of pneumoconiosis and, therefore, invocation of the interim presumption pursuant to 20 C.F.R. §410.490(b)(1)(I) and further found that rebuttal of the interim presumption was not established pursuant to 20 C.F.R. §410.490(c). Accordingly, benefits were awarded. Administrative Law Judge Murrett also found that, inasmuch as the evidence of record did not establish the month of onset of the miner's disability, claimant was entitled to benefits as of the date of filing of the miner's claim.[2]

Employer appealed, and the Board initially affirmed Administrative Law Judge Murrett's findings as to the length of the miner's coal mine employment and his findings under Section 410.490(b), (c). *Jones v. Eastern Associated Coal Corp.*, BRB No. 90-0728 BLA (Jan. 29, 1993)(unpub.). The Board further noted, however, that pursuant to the United States Supreme Court decisions in

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Ann Justice Jones, then filed a claim as a child of the deceased miner on March 1, 1984, pursuing benefits on behalf of the deceased miner and his dependent children, Director's Exhibit 2.

[2]Administrative Law Judge Murrett also found that Debby Ann Justice Jones, the miner's surviving daughter, was not an eligible survivor of the miner. Administrative Law Judge Murrett ultimately awarded benefits in the deceased miner's claim from the date of filing to the month before the miner's death, augmented by the miner's other surviving, dependent children.

Pittston Coal Group v. Sebben, 488 U.S. 105, 12 BLR 2-89 (1988) and *Pauley v. BethEnergy Mines, Inc.,* 501 U.S. 680, 15 BLR 2-155 (1991), the Board, in *Phipps v. Director, OWCP*, 17 BLR 1-39 (1992)(*en banc*)(Smith, J., concurring; McGranery, J., concurring and dissenting), had determined, *inter alia*, that in claims filed by short-term miners who have established less than ten years of coal mine employment and filed claims on or before March 31, 1980, the party opposing entitlement may establish rebuttal of the presumption of total disability or death due to pneumoconiosis pursuant to the criteria at 20 C.F.R. §410.490(b) by any one of the available methods contained at 20 C.F.R. §727.203(b). Consequently, inasmuch as Administrative Law Judge Murrett considered only the two methods of rebuttal provided under Section 410.490(c), the Board remanded the case for further consideration of rebuttal under Section 727.203(b)(3) pursuant to *Phipps, supra*.[3]

The Board also vacated Administrative Law Judge Murrett's finding as to the date of entitlement, inasmuch as the Administrative Law Judge Murrett failed to consider all of the relevant medical evidence, including the medical opinion of Dr. Lesaca dating from October, 1976, Director's Exhibit 32, who diagnosed

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[3]The Board also noted that, inasmuch as Administrative Law Judge Murrett found that invocation of the interim presumption was established pursuant to Section 410.490(b)(1)(I), based on the x-ray and autopsy evidence of record, rebuttal pursuant to Section 727.203(b)(4) was precluded, *see Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

pulmonary emphysema arising out of the miner's coal mine employment and found a minimal impairment, *see* 20 C.F.R. §725.503(b). Thus, the Board instructed the administrative law judge to reconsider this issue, if reached.[4]

Due to Administrative Law Judge Murrett's death, Administrative Law Judge Robert D. Kaplan (hereinafter, the administrative law judge) considered the case on remand. In a Decision and Order Upon Remand issued on December 20, 1993, the administrative law judge found that employer failed to establish rebuttal pursuant to Section 727.203(b)(3). Accordingly, benefits were awarded. The administrative law judge further found that the evidence of record failed to establish the date of onset of the miner's disability and therefore awarded benefits as of the date of filing of the miner's claim. Employer appealed and the Board affirmed the administrative law judge's finding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and, therefore, affirmed the administrative law judge's award of benefits. *Jones v. Eastern Associated Coal Corp.*, BRB No. 94-0640 BLA (Feb. 28, 1995)(unpub.). In regard to the administrative law judge's finding as to the date of entitlement, however, the Board vacated the administrative law judge's determination that the evidence of record was insufficient to determine whether the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date and, therefore, remanded the case for the administrative law judge to reconsider the relevant evidence as to this issue,

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[4]The Board also affirmed Administrative Law Judge Murrett's finding that Debby Ann Justice Jones, the miner's surviving daughter, was not an eligible survivor of the miner.

including Dr. Lesaca's opinion. Subsequently, the Board denied employer's motion for reconsideration. *Jones v. Eastern Associated Coal Corp.*, BRB No. 94-0640 BLA (Aug. 14, 1995)(unpub. order).

On remand, the administrative law judge found that the medical evidence of record does not establish a date of onset of claimant's total disability due to pneumoconiosis or that the miner was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of the miner's claim and, therefore, awarded benefits as of the date of filing of the miner's claim pursuant to 20 C.F.R. §725.503(b). On appeal, herein, employer contends that the administrative law judge erred in awarding benefits as of the date of filing of the miner's claim and, alternatively, contends that the Board erred in affirming the administrative law judge's previous finding that rebuttal of the interim presumption was not established pursuant to Section 727.203(b)(3) in its prior Decision and Order. Claimant responds, urging that the administrative law judge's Decision and Order (Upon Second Remand by the Benefits Review Board) should be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, has not responded to this appeal. Employer filed a reply brief, reiterating its contentions.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer again raises the same contentions that it advanced in its previous appeal and were already addressed by the Board in its prior Decision and Order regarding the administrative law judge's previous weighing of the evidence at Section 727.203(b)(3). Inasmuch as the Board's previous holdings stand as "law of the case" on these issues, and, contrary to employer's contention, no exception to that doctrine has been demonstrated by employer herein, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting), we reject employer's contentions in this regard.[5]

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[5]The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter, such that it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Brinkley, supra; Williams, supra*.

Employer cites two recent opinions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, apparently as intervening case law issued since the administrative law judge's findings were made pursuant to Section 727.203(b)(3) on the merits. We reject employer's contentions. Employer cites *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), but this case is relevant to a claimant's burden for establishing entitlement under 20 C.F.R. Part 718 and not to, as employer contends, employer's burden to establish rebuttal under Section 727.203(b)(3) by ruling out the causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Employer also cites *Lane Hollow Coal Co. v. Director,*

Next, employer contends that the administrative law judge erred in awarding benefits as of the date of filing of the miner's claim pursuant to Section 725.503(b).[6] 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 a date of the onset of the miner's disability is not ascertainable from the evidence of record, then benefits

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OWCP [Lockhart], F.3d , 21 BLR 2-302 (4th Cir. 1998), apparently as a change in law under Section 727.203(b)(3). Contrary to employer's contention, the standard enunciated by the Fourth Circuit Court for establishing rebuttal under Section 727.203(b)(3) in *Massey, supra,* in effect at the time employer submitted its evidence, was relied on and not changed by the Fourth Circuit Court in *Lockhart*.

Moreover, intervening law, by itself, does not mandate remand. Rather, to necessitate remand, the application of intervening law must have the effect of materially altering the result below; or, stated differently, a remand must be had when the application of intervening case law is necessary to correct a "manifest injustice." *See Riley v. Director, OWCP*, 7 BLR 1-139 (1984), *citing Hormel v. Helvering*, 312 U.S. 552 (1941); *see also Tackett, supra; Lynn, supra*. Thus, the application of *Hicks* and *Lockhart* to the instant case would not alter the administrative law judge's decision below under Section 727.203(b)(3).

[6]We reject employer's contentions pursuant to Section 725.503 which it has reiterated from its prior appeal and which were previously rejected by the Board, *see Brinkley, supra; Williams, supra*.

commence as of the month the claim was filed, *see* 20 C.F.R. §725.503; *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-84 (1989), unless credited medical evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date, *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *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).

Initially, the administrative law judge reiterated his prior findings regarding the medical opinion evidence which were previously affirmed by the Board. In addition, the administrative law judge reconsidered the opinion of Dr. Lesaca, Director's Exhibit 29, 32, and concluded that no inference could be drawn from Dr. Lesaca's opinion and the pulmonary function study he administered that the miner was not totally disabled from performing his last coal mining job as a bulldozer operator at that time. Decision and Order at 5-6. Thus, the administrative law judge again found the evidence of record failed to establish that the miner was not totally disabled due to pneumoconiosis at any time after the date on which the miner's claim was filed and, therefore, awarded benefits commencing as of the date of filing of the miner's claim in September, 1976, to be augmented by reason of the miner's dependent children.

Employer contends that in determining the date of onset of total disability due to pneumoconiosis pursuant to Section 725.503(b), claimant bears the

burden of establishing the date of onset or, in the alternative, that the medical evidence does not establish such a date, thereby entitling him to benefits from the date of filing, in light of the holding in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). However, as the administrative law judge found, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has not enunciated any standard other than, if a date of the onset of the miner's disability is not ascertainable from the evidence of record, that benefits commence as of the month the claim was filed pursuant to Section 725.503, *see Green, supra. See* Decision and Order at 2-3. Thus, we reject employer's contention.

Moreover, in regard to the administrative law judge's finding that Dr. Lesaca's October, 1976, opinion is insufficient to establish that the miner was not totally disabled from performing his last coal mining job as a bulldozer operator at that time, the administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record, draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.,* 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's findings that the medical evidence of record does not establish a date of onset of claimant's total disability due to pneumoconiosis, *see Green, supra*; *Gardner, supra*, and does not establish whether the miner was not

totally disabled due to pneumoconiosis at the time of Dr. Lesaca's October, 1976, opinion, subsequent to the filing date of the miner's claim, *see Gardner, supra; Lykins, supra*, as rational and supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits as of the date of filing of the miner's claim in September, 1976, pursuant to Section 725.503(b), *see Green, supra; Gardner, supra*.

Accordingly, the Decision and Order (Upon Second Remand by the Benefits Review Board) of the administrative law judge's awarding benefits as of the date of filing of the miner's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge