BRB Nos. 90-0931 BLA
and 90-0931 BLA-A

CHARLES S. KRAMER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
B-D MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
LACKAWANNA CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Centralia, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.
PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order (87-BLA-992) of Administrative Law Judge Robert D. Kaplan 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). The administrative law judge credited claimant with thirty-four years of qualifying coal mine employment as stipulated by the parties and supported by the

record, and found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in finding that the sanctions of 20 C.F.R. §725.414(e)(2) were applicable without affording employer an evidentiary hearing on the issue of whether employer made a good faith effort to develop its evidence. In a cross-appeal, claimant challenges the administrative law judge's findings regarding the onset date of total disability pursuant to 20 C.F.R. §725.503. Employer responds, urging affirmance of the administrative law judge's onset findings. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.[1]

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).

Employer contends that the administrative law judge erred in applying the sanctions at Section 725.414(e)(2), thereby precluding employer from having claimant examined by a physician of employer's choosing and having claimant's evidence reviewed after the case had been forwarded to the Office of Administrative Law Judges, *see generally Thomas v. Director, OWCP,* 9 BLR 1-239 (1987), and disallowing the introduction of medical evidence obtained by employer into the record, based on the determination that employer failed to make a good faith effort to develop its evidence while the case was pending before the district director. Specifically, employer maintains that the administrative law judge deprived employer of its due process right to a full and fair hearing by denying employer's request to introduce evidence of the district director's policies and procedures, and refusing to permit *de novo* litigation of the good faith issue before the administrative law judge. Employer's arguments have merit. Pursuant to 20 C.F.R. §§725.450, 725.451 and 725.455, a party has a right to a hearing before an administrative law judge on any contested issue of law or fact arising in a claim. *Krisner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(*en banc*)(Brown, J., concurring, and Smith, J., dissenting). Since the issue of whether employer made a good faith effort to develop evidence was controverted herein, *see* Decision and Order at 2, Director's Exhibit 43, we must remand this case for the administrative law judge to hold an evidentiary hearing on the good faith issue. If on remand the administrative

[1] The administrative law judge's findings with regard to the length of coal mine employment are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

law judge finds that employer demonstrated good faith, the parties will be entitled to further develop the evidence herein, and the administrative law judge must readjudicate the merits of this claim pursuant to the provisions at 20 C.F.R. Part 718. If employer's good faith is not established on remand, however, the administrative law judge's award of benefits is affirmed, as the merits were unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In his cross-appeal, claimant contends that substantial evidence does not support the administrative law judge's designation of November 1, 1988 as the appropriate date from which benefits are payable pursuant to Section 725.503. We agree. In evaluating the evidence of record relevant to the onset date of total disability, the administrative law judge properly determined that claimant's usual coal mine employment as a heavy equipment operator was essentially sedentary work which involved sitting seven and one-half hours per day and standing one-half hour per day, with no lifting or carrying. Decision and Order at 3, 8, 9. The administrative law judge accurately noted that claimant's treating physician, Dr. Kraynak, opined that claimant was totally disabled due to pneumoconiosis in his report of November 4, 1986, but did not state that claimant was unable to perform even sedentary work until his deposition on October 23, 1989. Decision and Order at 9; Claimant's Exhibits 1 and 25 at 23. The administrative law judge further found that claimant's coal mine employment terminated in May of 1984, but that claimant received $200 per week from his trade union to perform picket duty until November of 1988. Decision and Order at 3, 9. The administrative law judge concluded that claimant's picket duty was at least as strenuous as his sedentary coal mine employment, and thus found that November 1, 1988 was the appropriate date for the commencement of benefits pursuant to Section 725.503(b). Decision and Order at 9. Claimant asserts, however, that claimant's picket duty did not entail any type of sustained work activity, and inasmuch as claimant earned $10.22 per hour for coal mine employment in May of 1983, but only $200 per week for picket duty, the picket duty does not constitute comparable employment. *See Echo v. Director, OWCP,* 744 F.2d 327, 6 BLR 2-110 (3d Cir. 1984). Since the record is silent regarding the exertional requirements and scheduled hours of claimant's picket duty, substantial evidence does not support the administrative law judge's finding that claimant retained the functional capacity to perform his last coal mine employment until November of 1988. Consequently, we vacate the administrative law judge's onset findings pursuant to Section 725.503(b). If on remand the administrative law judge again finds entitlement established, he must reconsider the evidence of record relevant to the date of onset pursuant to the holdings in *Rochester & Pittsburgh Coal Co. v. Krecota,* 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989) and *Lykins v. Director, OWCP,* 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge