BRB No. 01-0271 BLA

JAMES C. WITTEN, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TRIPLE W FUELS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
UNITED STATES FIDELITY & GUARANTY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Paul D. Deaton, Paintsville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (99-BLA-0739) of Administrative Law Judge Daniel J. Roketenetz 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).[1] Claimant filed a claim for benefits on July 29, 1980. In a Decision and Order dated October 20, 1987, Administrative Law Judge Julius A. Johnson, after crediting claimant with fourteen and three quarter years of coal mine employment, found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000). Judge Johnson also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)(2000). Judge Johnson further found that the evidence was sufficient to establish that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204 (2000). Accordingly, Judge Johnson awarded benefits. Employer filed an appeal with the Board, challenging Judge Johnson's weighing of the medical evidence under 20 C.F.R. §718.204 (2000) and his determination regarding the onset date of benefits. By Decision and Order dated October 31, 1989, the Board affirmed Judge Johnson's finding that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Witten v. Triple W Fuels, Inc.*, BRB No. 87-3440 BLA (Oct. 31, 1989) (unpublished). The Board, however, vacated Judge Johnson's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000) and remanded the case for further consideration. *Id.* The Board also agreed with employer that Judge Johnson failed to provide a rationale for his

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

determination regarding the date of onset of benefits. *Id.* Thus, in the event that Judge Johnson awarded benefits on remand, the Board instructed Judge Johnson to provide a thorough explanation of his findings and conclusions regarding the date of onset of benefits. *Id.* The Board summarily denied employer's motion for reconsideration. *Witten v. Triple W Fuels, Inc.*, BRB No. 87-3440 BLA (June 15, 1990) (Order) (unpublished).

On remand, Judge Johnson found that the evidence was sufficient to establish that claimant's pneumoconiosis rendered him totally disabled from returning to his former coal mine employment. Accordingly, Judge Johnson awarded benefits. Judge Johnson found that claimant's date of entitlement to benefits was July 1, 1980. By Decision and Order dated April 26, 1993, the Board noted that it had previously affirmed Judge Johnson's finding of total disability pursuant to 20 C.F.R. §718.204(c) (2000). *Witten v. Triple W Fuels, Inc.*, BRB No. 91-1443 BLA (Apr. 26, 1993) (unpublished). The Board further affirmed Judge Johnson's finding that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Id.* The Board, however, vacated Judge Johnson's finding regarding the date of claimant's entitlement to benefits and remanded the case for further consideration. *Id.* The Board summarily denied employer's motion for reconsideration. *Witten v. Triple W Fuels, Inc.*, BRB No. 91-1443 BLA (Sept. 2, 1994) (Order) (unpublished).

Employer filed a second motion for reconsideration with the Board on September 13, 1994. However, employer subsequently filed a "Motion to Remand for Modification." By Order dated April 15, 1997, the Board granted employer's motion. *Witten v. Triple W Fuels, Inc.*, BRB No. 91-1443 BLA (April 15, 1997) (Order) (unpublished). Having granted employer's motion, the Board noted that it lacked jurisdiction to consider the issues raised by employer's second motion for reconsideration. *Id.* The Board, therefore, dismissed the case without prejudice and remanded the case to the district director for modification proceedings.[2] *Id.*

[2]The Board informed employer that the case would be reinstated only if employer requested reinstatement. *Witten v. Triple W Fuels, Inc.*, BRB No. 91-1443 BLA (April 15, 1997) (Order) (unpublished). The Board further informed employer that its request for reinstatement had to be filed with the Board within thirty days from the date the decision on modification was issued and had to be identified by the Board's docket number, BRB No. 91-1443 BLA. *Id.* If reinstatement was requested, the Board noted that it would consider only the issues raised in employer's second motion for reconsideration.

By Order dated June 20, 1997, the Board upheld an earlier order in which the Board awarded claimant's counsel attorney fees. *Witten v. Triple W Fuels, Inc.*, BRB Nos. 87-3440 and 91-1443 BLA (June 20, 1997) (Order) (unpublished). The Board also noted that:

in our prior decision the Board affirmed the findings of [Judge Johnson], and

> the award of benefits, vacated the onset findings, and remanded the case to the Office of Administrative Law Judges for further consideration of that issue. If this case is not resolved at the [d]istrict [d]irector level, the administrative law judge must resolve the issue of onset date, in addition to ruling on the modification issues.

Witten v. Triple W Fuels, Inc., BRB Nos. 87-3440 and 91-1443 BLA (June 20, 1997) (Order) (unpublished).

The district director denied employer's motion for modification on August 11, 1997, September 9, 1997 and October 28, 1997. By Order dated February 19, 1998, Administrative Law Judge J. Michael O'Neill granted employer's request to compel claimant to submit to a medical examination by a physician of employer's choosing and to respond to all reasonable discovery requests made by employer. Judge O'Neill remanded the case to the district director for further action consistent with his Order. Judge O'Neill denied claimant's subsequent motion for reconsideration.

In a Proposed Decision and Order dated March 26, 1998, the district director found no basis for the development of medical evidence by employer and denied employer's motion for modification. However, by Order of Remand dated September 17, 1998, Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) remanded the case to the district director with directions to comply with Judge O'Neill's February 19, 1998 Order. The administrative law judge specifically ordered claimant to submit to a physical examination as well as "to comply with any other discovery requests that the [e]mployer is legally allowed to pursue."

In a Proposed Decision and Order dated February 5, 1999, the district director denied employer's motion for modification. The district director found, *inter alia*, that employer had no right to force claimant to undergo "a new medical examination in aid of its allegation that there was a mistake of fact in the earlier proceeding wherein [claimant] was awarded benefits." The district director also stated that the Office of Administrative Law Judges lacked the authority to order the district director to compel claimant to undergo such an examination.

In a Decision and Order dated May 13, 1999, the administrative law judge dismissed claimant's claim based upon claimant's failure to comply with Judge O'Neill's February 19, 1998 Order and his own September 17, 1998 Order. The Director, Office of Workers' Compensation Programs (the Director), subsequently filed a motion for reconsideration. The Director argued that 20 C.F.R. §725.465(d) (2000) prohibits an administrative law judge from dismissing a claim in which interim benefits have been paid by the Black Lung Disability Trust Fund (Trust Fund) on behalf of the employer except upon the motion or written agreement of the Director. Noting that interim benefits had been paid by the Trust Fund and that the Director had neither filed a motion for dismissal of the claim nor entered into a written agreement for the claim's dismissal, the administrative law judge, in an Order dated September 16, 1999, granted the Director's motion and vacated his May 13, 1999 Order dismissing claimant's action.

In his September 16, 1999 Order, the administrative law judge also reconsidered employer's motion to compel claimant to undergo a physical examination in light of the Board's decision in *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999) (*en*

banc). The administrative law judge found that it was not in the interest of justice to compel claimant to submit to a physical examination simply because employer submitted evidence "which could have been submitted years earlier." The administrative law judge, therefore, denied employer's motion to compel claimant to undergo a physical examination. The administrative law judge denied employer's subsequent motion for reconsideration.

The administrative law judge held a hearing regarding employer's request for modification on February 2, 2000.

In a Decision and Order dated October 16, 2000, the administrative law judge declined to order claimant to undergo a medical examination as requested by employer. Finding that employer failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge denied employer's request for modification. The administrative law judge determined that claimant was entitled to benefits as of July 1, 1980, the month in which claimant filed his claim for benefits.[3] On appeal, employer argues that the instant claim should have been dismissed in light of claimant's failure to obey the lawful orders of two administrative law judges. Employer also contends that it has a right to obtain an examination of claimant under 20 C.F.R. §725.310 (2000). Employer also argues that the administrative law judge erred by failing to properly weigh the new evidence with the prior evidence in a *de novo* fashion. Employer finally contends that the administrative law judge erred in finding the date from which benefits commence. Claimant responds in support of the administrative law judge's award of benefits. The Director responds, *inter alia*, in support of the administrative law judge's reversal of his dismissal of the instant claim. The Director also notes his disagreement with employer's contention that it has an absolute right to have claimant undergo a physical examination.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer initially contends that the administrative law judge erred in reversing his earlier decision to dismiss the instant claim. We disagree. The regulations specifically

[3]By Order dated November 14, 2000, the administrative law judge granted the Director's motion for reconsideration. The administrative law judge ordered employer to pay to the Trust Fund all benefits previously paid by the Trust Fund to claimant as well as any appropriate penalties and interest. The administrative law judge ordered that all other aspects of his October 16, 2000 Decision and Order remain in full force.

provide that a claim in which a claimant has been paid interim benefits from the Trust Fund cannot be dismissed absent the Director's motion or written agreement. *See* 20 C.F.R. §725.465(d) (2000); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62 (1992). In the instant case, claimant received interim benefits from the Trust Fund. Because the Director did not file a motion requesting dismissal of the claim or provide his written consent for such a dismissal, the administrative law judge properly reversed his earlier Order dismissing the claim.[4]

We also reject employer's contention that the administrative law judge's refusal to compel claimant to undergo a physical examination violates the law of the case doctrine. Employer argues that the administrative law judge cannot overrule Judge O'Neill's Order compelling claimant to submit to a physical examination. The administrative law judge had jurisdiction to consider the instant case and was not bound by any of Judge O'Neill's prior determinations. Moreover, the law of the case doctrine is discretionary, *see Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), and is not applied when the initial decision was clearly erroneous and to let it stand would produce a manifest injustice. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989).

[4]Employer argues that Section 725.465(d) violates the Administrative Procedure Act (APA), 5 U.S.C. §554, as incorporated by 30 U.S.C. §932(a) and 33 U.S.C. §919(d), which provides that an administrative law judge shall not "be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency." Employer argues that Section 725.465(d) allows the Director to interfere with the independent judgment of the administrative law judge and, therefore, violates the APA. The Board has rejected this argument. *See Boggs v. Falcon Coal Co.*, 17 BLR 1-62 (1992).

Employer next contends that the administrative law judge erred in denying its request to have claimant submit to a physical examination. An employer's right to have a claimant re-examined or to compel a claimant to respond to discovery requests pursuant to a request for modification is not absolute, and the determination of whether an employer is entitled to such examination or discovery rests within the discretion of the administrative law judge. *Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37, 1-40-42 (2000) (*en banc*); *Selak, supra*.[5] More specifically, the issue is whether employer "has raised a credible issue pertaining to the validity of the original adjudication...so that an order compelling claimant to submit to examinations or tests would be in the interest of justice." *Selak*, 21 BLR at 1-179. The same standard applies to an employer's motion to compel claimant to respond to discovery. *See Stiltner, supra*. When a claimant declines a re-examination, employer bears the burden of demonstrating that the refusal is unreasonable. *Id.*

In the instant case, the administrative law judge's basis for rejecting employer's request to compel claimant to submit to an examination, *i.e.*, that employer had ample opportunity to develop its evidence and failed to raise a credible issue pertaining to the validity of the original adjudication of total disability, constitutes a permissible exercise of his discretion.[6] *See Stiltner, supra*; Decision and Order at 8-9.

Employer contends that the administrative law judge erred in failing to find a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).[7] In reviewing the record as

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[5]The Board's decisions in *Selak* and *Stiltner* were based on 20 C.F.R. §718.404(b)(2000), providing for a claimant who has been finally adjudged entitled to benefits to submit to examination and provide other medical information, if requested, for the purpose of determining whether claimant continues to be totally disabled due to pneumoconiosis. The language of the former 20 C.F.R. §718.404(b)(2000) now appears, in substantially the same form, at revised 20 C.F.R. §725.203(d), which is applicable to the instant claim. *See* 20 C.F.R. §725.2(c). Upon review of 20 C.F.R. §725.203(d), the legal standard set forth in *Selak* and *Stiltner* appears applicable to this case.

[6]Employer contends that the revisions to Section 725.310 support its position that employer is entitled to obtain an examination during modification proceedings. Although Section 725.310 has been revised, these revisions only apply to claims filed after January 19, 2001.

[7]Employer has not attempted to show a change in conditions by demonstrating that claimant's total disability has ceased. Inasmuch as no party has challenged the administrative law judge's finding that the evidence is insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-291 (6th Cir. 1994).

The Supreme Court, federal circuit and district courts, and the Board, however, have held that an administrative law judge's assessment of a request for modification involves a balancing of the interest in maintaining the finality of decisions against the interest in rendering justice under the Act. *See O'Keeffe, supra*; *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968); *General Dynamics Corp. v. Director, OWCP*, 673 F.2d 23, 14 BRBS 636 (1st Cir. 1982)(*per curiam*); *McCord v. Cephas*, 532 F.2d 1377, 1381, 3 BRBS 371, 377 (D.C. Cir. 1976); *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999); *Branham v. Bethenergy Mines, Inc.*, 21 BLR 1-79 (1998).

In the instant case, employer argues that its newly submitted evidence, when considered in conjunction with the previously submitted evidence and weighed *de novo*, establishes that there was a mistake in a determination of fact.[8] In the instant case, in regard

[8]Employer also raises numerous contentions of error in regard to Judge Johnson's previous findings. However, employer had an adequate opportunity to raise its contentions of error regarding Judge Johnson's award of benefits when it appealed Judge Johnson's previous decisions to the Board. Employer presently attempts to raise contentions of error that it could have raised or previously raised in its prior appeals to the Board. Section 22 is not intended to provide a back-door route to retrying a case, or to protect litigants from their counsel's litigation mistakes. *See General Dynamics Corp. v. Director, OWCP*, 14 BRBS 636 (1st Cir. 1982). There has not been a change in the underlying factual situation; there has not been any intervening controlling authority which demonstrates

to whether the evidence was sufficient to establish a mistake in a determination of fact, the administrative law judge stated:

> Turning to the newly submitted medical evidence, as just noted, I do not find it sufficient to establish a change in condition or that a mistake in a determination of fact was made. The newly submitted medical evidence consists of physicians' records who treated the Claimant for conditions unrelated to pneumoconiosis. There are also medical reviews submitted by Drs. Dahhan and Castle which were limited to evidence that was available at the time of the Claimant's prior adjudication. Nothing prevented the Employer from submitting these reports at that time. The newly submitted x-ray evidence was negative for the disease. However, I find that the reports of Drs. Ameji, Mayo, Belhasen [sic] and Sutherland, as previously discussed in the opinions of Judge Johnson, continue to be sufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Finally, while Dr. Branscomb also reviews the medical evidence and finds the disease and total disability thereto to be absent, he never personally examined the Claimant and I do not find his report sufficient to outweigh those of the physicians who did. *See Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984).
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> In sum, upon reviewing the newly submitted medical evidence in conjunction with that reviewed in the prior decisions, I do not find it sufficient to establish that a mistake was made or that there has been a change in condition. Accordingly, the Employer's request for modification must be denied.

Decision and Order at 9-10.

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that the Board's initial decision was erroneous; and there has not been any evidence that the Board's first decision was clearly erroneous such that to let it stand would produce a manifest injustice. Consequently, we decline to address employer's contentions of error regarding Judge Johnson's previous findings. *See generally Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989).

Employer argues that the administrative law judge erred in his consideration of the x-ray evidence. In his initial Decision and Order, Judge Johnson found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000).[9] Director's Exhibit 41. In support of its motion for modification, employer has submitted negative interpretations of x-rays taken on March 14, 1994 and February 27, 1998. Director's Exhibit 107; Employer's Exhibits 4, 5. Because the most recent x-ray evidence is uniformly negative for pneumoconiosis, employer contends that Judge Johnson's prior reliance upon the most recent evidence rule to find pneumoconiosis under Section 718.202(a)(1) can no longer stand.

The administrative law judge erred in not addressing whether there was a mistake in a determination of fact in regard to Judge Johnson's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis. We note that Judge Johnson did not even address whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000).[10]

Employer has also submitted new evidence relevant to the issue of total disability

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[9]Employer, despite an opportunity to do so, failed to challenge Judge Johnson's finding that the x-ray evidence was sufficient to establish the existence of pneumoconiosis in its two previous appeals to the Board.

[10]In the instant case, the administrative law judge's analysis of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) (2000) does not comport with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

pursuant to 20 C.F.R. §718.204(c) (2000). The Board previously held that Judge Johnson permissibly accorded greater weight to Dr. Ameji's medical reports because Judge Johnson concluded that the medical reports were thorough and well-reasoned and because Dr. Ameji's report was the most recent report of record. *Witten v. Triple W Fuels, Inc.*, BRB No. 87-3440 BLA (Oct. 31, 1989) (unpublished). The Board, therefore, affirmed Judge Johnson's finding that claimant established total disability pursuant to Section 718.204(c) (2000) as rational and supported by substantial evidence. *Id.* When employer attempted to challenge Judge Johnson's finding pursuant to 20 C.F.R. §718.204(c)(4) (2000) in its second appeal to the Board, the Board held that its previous holding constituted the law of the case. *Witten v. Triple W Fuels, Inc.*, BRB No. 91-1443 BLA (Apr. 26, 1993) (unpublished).

Employer's new evidence includes a pulmonary function study conducted on December 9, 1998, Employer's Exhibit 1, and Dr. Branscomb's October 25, 1999 medical report.[11] Employer's Exhibit 7. Employer argues that the administrative law judge erred in discrediting Dr. Branscomb's opinion solely because he is a non-examining physician. The Board has held that an administrative law judge cannot discredit the report of a physician solely because the physician did not examine the miner. *See Worthington v. United States Steel Corp.*, 7 BLR 1-522 (1984). In determining the weight to be accorded a physician's opinion, an administrative law judge may, however, properly take into consideration the fact that the physician had not personally examined the miner. *See Wilson v. United States Steel Corp.*, 6 BLR 1-1055 (1984). The United States Court of Appeals for the Sixth Circuit, with whose jurisdiction the instant case arises, has indicated that a treating physician's opinion may be entitled to more weight than the report of a non-treating or non-examining physician. *See Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Tussey v. Island Creek Coal Co*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The administrative law judge found that Dr. Branscomb's opinion that claimant was not totally disabled was insufficient to outweigh the contrary opinions of the physicians who examined claimant. Decision and Order at 10. However, because the administrative law judge did not identify these latter physicians, the administrative law judge's analysis does not comport with the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

[11]Employer also submitted reports prepared by Drs. Dahhan and Castle. The administrative law judge, however, found that these physicians limited their medical reviews to evidence that was available at the time of the prior adjudication of this case. Decision and Order at 9.

In light of the above-referenced errors, we vacate the administrative law judge's finding that there was not a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000) and remand the case for further consideration. On remand, should the administrative law judge find a mistake in a determination of fact, he must ultimately determine whether reopening the claim will render justice under the Act. *O'Keeffe, supra*; *Kinlaw, supra*.[12]

Employer finally argues that the administrative law judge erred in finding the date from which benefits commence. If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. *See* 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins*, *supra*.

When the instant case was previously before the Board on appeal, the Board held that:

> In this case, Dr. Mayo's report indicated respiratory disability in 1980 and 1981, while Dr. Wright noted in the same years that claimant's complaints

[12]In *Kinlaw v. Stevens Shipping and Terminal Co.*, 33 BRBS 68 (1999), a case arising under the Longshore and Harbor Workers' Compensation Act, the Board held that "while [an] administrative law judge has the authority to reopen a case based on any mistake in fact, [an] administrative law judge's exercise of that authority is discretionary, and requires consideration of competing equities in order to determine whether reopening the case will indeed render justice." *Kinlaw*, 33 BRBS at 72 (citing *Washington Society for the Blind v. Allison*, 919 F.2d 763, 769 (D.C. Cir. 1991)).

> were primarily related to smoking and that he was not disabled. Dr. Belhasen found claimant disabled in 1981 but not because of pulmonary disease and Dr. Cornish found claimant not disabled in 1980-81. Dr. Ameji, whose report [Judge Johnson] credited, found claimant totally disabled due to pneumoconiosis in 1984. Noting that a medical report finding total disability does not establish the date of onset of total disability but merely indicates that the miner became disabled at some time prior to that date, [Judge Johnson] concluded that because Dr. Ameji's report does not establish the onset of claimant's disability, benefits would begin in 1980. Decision and Order After Remand at 4.
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> The Board held in *Lykins*, *supra*, that benefits may not be awarded for periods of time after the miner filed his claim in which he is not totally disabled due to pneumoconiosis, citing the rationale of *Krecota*, *supra*, in which there was uncontradicted evidence that claimant was not disabled for several years after his claim was filed. Here, while [Judge Johnson] found that Dr. Ameji's 1984 report represents "the earliest significant finding of total disability," he did not discuss the other earlier evidence of non-disability.

Witten v. Triple W Fuels, Inc., BRB No. 91-1443 BLA (Apr. 26, 1993) (unpublished), slip op. at 5 (Exhibit numbers omitted).

The Board, therefore, vacated Judge Johnson's finding regarding the date of onset of claimant's total disability due to pneumoconiosis and remanded the case for further consideration.

In his October 16, 2000 Decision and Order, the administrative law judge found, without explanation, that:

> The record in this case does not contain any compelling medical evidence establishing that the Claimant was not totally disabled at some point subsequent to his filing date. Thus, I fail to find the absence of a medical report finding total disability in 1980 sufficient to establish that the Claimant was not disabled as of that date. I do not find the medical evidence such as to constitute uncontradicted evidence that the Claimant was not disabled at the time of filing. Therefore, payment of benefits is established as of July 1, 1980, the month in which the Claimant filed the instant claim for benefits.

Decision and Order at 10.

Like Judge Johnson before him, the administrative law judge failed to address the

relevance of the earlier evidence of non-disability and failed to explain why this evidence did not establish that claimant was not totally disabled after the date that he filed his claim for benefits. We, therefore, vacate the administrative law judge's finding regarding the onset date of claimant's total disability due to pneumoconiosis and remand the case for further consideration.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge