

BRB No. 91-0333 BLA

EUGENE LITTLE)
)
 Claimant-Respondent)
)
 v.)
)
 DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Petitioner) DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Creany & Tulowitzki), Ebensburg, Pennsylvania, for claimant.

Cathryn Celeste Helm (Marshall J. Breger, 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: STAGE, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and LIPSON, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order and the Order Denying Motion for Reconsideration

(89-BLA-1661) of Administrative Law Judge Richard K. Malamphy awarding benefits on a claim filed

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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). Claimant's original Part C claim¹ was denied in a Decision and Order issued on July 31, 1986, wherein Administrative Law Judge Leland credited claimant with just under eighteen years of qualifying coal mine employment, and found invocation of the interim presumption established at 20 C.F.R. §727.203(a)(1), but rebuttal of that presumption established at 20 C.F.R. §727.203(b)(2), thus precluding entitlement pursuant to the provisions at 20 C.F.R. Part 410, Subpart D. Claimant filed another claim for benefits on July 10, 1987, which was construed as a request for modification pursuant to 20 C.F.R. §725.310. After a formal hearing, Administrative Law Judge Malamphy accepted Administrative Law Judge Leland's finding that invocation of the interim presumption was established at Section 727.203(a)(1), and found that as the evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b)(1) - (b)(4),

¹ Claimant filed a Part B claim for benefits on September 23, 1970, Director's Exhibit 1, which was denied on August 2, 1974. Director's Exhibits 34, 35. As claimant filed a Part C claim for benefits on May 5, 1975, and did not elect review of his Part B claim until April 3, 1978, Director's Exhibit 29, the Part B claim merged with the earlier Part C claim for purposes of establishing the date of filing for Reform Act review. See 30 U.S.C. §945(a)(4), 20 C.F.R. §725.309(c); Chadwick v. Island Creek Coal Co., 7 BLR 1-883 (1985), aff'd en banc, 8 BLR 1-447 (1986).

modification was appropriate. Accordingly, the administrative law judge awarded benefits, payable from January 1, 1974. On appeal, the Director challenges the administrative law judge's findings pursuant to Section 727.203(a)(1) and (b)(3), and the date from which benefits are payable pursuant to 20 C.F.R. §725.503. Claimant responds, urging affirmance.²

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).

The Director first contends that since the existence of pneumoconiosis was a controverted issue, the administrative law judge, rather than adopting Judge Leland's findings, was required to address the x-ray evidence of record and determine whether it established invocation of the interim presumption pursuant to Section 727.203(a)(1). We agree. After a finding that new evidence submitted in

² The administrative law judge's finding that the evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b)(1) and (b)(2) is affirmed as unchallenged on appeal. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

support of claimant's request for modification is sufficient to establish a change in condition pursuant to Section 725.310, the administrative law judge must weigh all of the evidence of record and determine de novo whether it is sufficient to support a finding of entitlement. See generally Dingess v. Director, OWCP, 12 BLR 1-141 (1989); Cooper v. Director, OWCP, 11 BLR 1-95 (1988). Consequently, we must vacate the administrative law judge's finding of invocation at Section 727.203(a)(1), and remand this case for the administrative law judge to determine whether the evidence of record is sufficient to establish invocation pursuant to Section 727.203(a)(1) - (a)(4).

The Director also challenges the administrative law judge's finding that the evidence of record is insufficient to establish rebuttal pursuant to Section 727.203(b)(3). As this claim lies within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit, the party opposing entitlement must establish that the miner's pneumoconiosis is not a contributing cause of total disability. Bernardo v. Director, OWCP, 790 F.2d 351, 9 BLR 2-26 (3d Cir. 1986); Carozza v. United States Steel Corp., 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); see also Kline v. Director, OWCP, 877 F.2d 1175, 12 BLR 2-346 (3d Cir. 1989). The administrative law judge articulated the proper rebuttal standard, and found that rebuttal pursuant to Section 727.203(b)(3) was not established because Drs. Klemens and Malhotra stated that the miner had pulmonary impairment resulting from coal mine employment exposure, and Dr. Pickerill noted some impairment in the FEF 25-75

percent results on pulmonary function testing. Decision and Order at 7. The Director notes, however, that Dr. Pickerill opined that the miner had no functional respiratory impairment based upon essentially normal pulmonary function study, blood gas study, and physical examination results, and the physician attributed the mild reduction in the FEF 25-75 percent results, which improved after bronchodilators, entirely to smoking. Director's Exhibit 69. As the opinion of Dr. Pickerill, if fully credited, is sufficient to establish rebuttal at Section 727.203(b)(3), we must vacate the administrative law judge's findings thereunder for reconsideration of the evidence. If, on remand, the administrative law judge finds that claimant has not established entitlement pursuant to 20 C.F.R. Part 727, he must then consider entitlement pursuant to the provisions at 20 C.F.R. Part 718, as this claim was adjudicated after March 31, 1980. Caprini v. Director, OWCP, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).

Finally, the Director challenges the administrative law judge's findings regarding the appropriate date from which benefits are payable pursuant to 20 C.F.R. §725.503. The administrative law judge designated January 1, 1974, as the appropriate date for the commencement of benefits pursuant to Section 725.503(b), based upon claimant's original filing of a Part B claim, and as he found that the evidence of record was insufficient to establish the date of onset of total disability. Decision and Order at 7. The Director contends, however, that as a matter of law, benefits can commence no earlier than May 5, 1975, the date claimant filed his Part

C claim. See Director's Exhibit 2; Rochester & Pittsburgh Coal Co. v. Krecota, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). We agree. 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 Krecota, supra; Edmiston v. F & R Coal Co., 14 BLR 1-65 (1990); Williams v. Director, OWCP, 13 BLR 1-28 (1989); and Lykins v. Director, OWCP, 12 BLR 1-181 (1989), with benefits payable no earlier than May 5, 1975.

Accordingly, the administrative law judge's Order Denying Motion for Reconsideration is vacated. 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.

BETTY J. STAGE, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

SHELDON R. LIPSON
Administrative Law Judge