

BRB No. 03-0692 BLA

MARY A. TUMEO (Daughter o/b/o)
DENZIL RAY TWYMAN, deceased))
)
 Claimant-Petitioner)
) DATE ISSUED: 04/16/2004
 v.)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Modification of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Mary A. Tumeo, Boca Raton, Florida, *pro se*.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant,¹ without the assistance of legal counsel, appeals the Decision and Order Denying Modification (2002-BLA-5474) of Administrative Law Judge Thomas M. Burke on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health

¹ Claimant, Mary Tumeo, is the daughter of the miner, Denzil R. Twyman, who died on December 12, 1999. Director's Exhibit 45. Claimant is pursuing this claim on behalf of the miner. No survivor's claim has been filed.

and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).² The administrative law judge determined that this case involves a request for modification of his 2002 Decision and Order awarding benefits, under 20 C.F.R. §725.310 (2000). Specifically, the administrative law judge found that claimant is seeking modification of his determination that May 1, 1997 is the date from which benefits should commence.³ Decision and Order at 1. In addressing claimant's modification request, the administrative law judge reviewed the medical evidence of record, particularly the evidence dated prior to May 1997, and found that the record does not contain a documented medical opinion concluding that the miner's respiratory impairment was totally disabling prior to Dr. Reed's May 1997 report. Decision and Order at 10. Consequently, the administrative law judge found that claimant did not meet her burden of establishing a mistake in a determination of fact in the prior Decision and Order pursuant to Section 725.310 (2000). Accordingly, the administrative law judge denied claimant's petition for modification.

On appeal, claimant generally contends that the administrative law judge erred in finding May 1997 as the date from which benefits should commence, arguing that benefits should be payable from 1980 when the miner filed his initial claim. In response, the Director, Office of Workers' Compensation Programs (the Director), has filed a

² 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

³ In his Decision and Order issued on May 23, 2002, the administrative law judge found the evidence of record sufficient to establish entitlement to benefits under 20 C.F.R. §727.203 (1999), based on his determination that the medical opinion evidence was sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis at Section 727.203(a)(4). 2002 Decision and Order at 7. In addition, the administrative law judge found that the evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(1)-(4). 2002 Decision and Order at 7-9. Accordingly, the administrative law judge awarded benefits. The administrative law judge then determined that the first probative evidence which supports a determination that the miner was totally disabled due to pneumoconiosis was Dr. Reed's May 1997 examination and report. 2002 Decision and Order at 9. Consequently, the administrative law judge found that the miner is entitled to the payment of benefits commencing as of May 1997. *Id.*

Motion to Remand, requesting that the Board vacate the administrative law judge's Decision and Order and remand the case to the administrative law judge for further consideration of the evidence relevant to the determination of the date of onset of total disability.

In an appeal filed by a claimant without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

If a miner is found to be entitled to benefits, he is entitled to benefits beginning in 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. *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3rd 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*, 12 BLR 1-181.

In his 2002 Decision and Order, the administrative law judge found that while the miner filed his application for benefits in January 1980, the first probative medical evidence that the miner was totally disabled due to pneumoconiosis was Dr. Reed's May 1997 medical report. 2002 Decision and Order at 9. Finding Dr. Reed's report well reasoned and documented, the administrative law judge determined that the date from which the miner's benefits should commence is May 1, 1997. Decision and Order at 10; *see also* 2002 Decision and Order at 9-10; Director's Exhibit 73. Pursuant to claimant's request for modification of the finding of May 1997 as the date from which benefits should commence, the administrative law judge reconsidered the medical evidence of record, specifically that evidence dated prior to May 1997. Decision and Order at 4-7. In weighing this evidence, the administrative law judge found that while the medical records show that the miner was disabled at some point prior to May 1997, there was no definite medical opinion concluding that the miner's respiratory impairment was totally disabling prior to Dr. Reed's May 1997 medical report. Decision and Order at 10. Consequently,

since he found that the evidence did not establish a specific date of total respiratory disability prior to May 1997, the administrative law judge concluded that claimant failed to establish a mistake of fact in the prior decision under Section 725.310 (2000) and, affirmed his prior finding of May 1, 1997 as the date from which benefits should commence. *Id.*

The Director, in a Motion to Remand in response to claimant's appeal, argues that the administrative law judge made a mistake in a determination of fact in finding that the May 1997 medical opinion of Dr. Reed established the month in which the miner became totally disabled due to his pneumoconiosis. Director's Motion to Remand at 1-2. Rather, the Director contends that Dr. Reed's May 1997 medical opinion, in which the physician diagnoses a totally disabling respiratory impairment, merely establishes that the miner became totally disabled at some time prior to that report and not that May 1997 was the month in which the miner's pneumoconiosis progressed to the level of being totally disabling. Director's Motion to Remand at 2. Consequently, the Director contends, the administrative law judge must reconsider the medical evidence of record and determine whether the record contains evidence establishing that the miner was not totally disabled due to pneumoconiosis at some point between the date of his filing his initial application for benefits in January 1980 and Dr. Reed's May 1997 examination and report. *Id.* We agree.

As the Director correctly contends, the administrative law judge's finding that Dr. Reed's May 1997 examination was the first probative evidence of the miner's total respiratory disability due to pneumoconiosis, is merely indicative that the miner became totally disabled at some point prior to Dr. Reed's May 1997 examination. *Green*, 790 F.2d 1118, 9 BLR 2-32; *Krecota*, 868 F.2d 600, 12 BLR 2-178; *Lykins*, 12 BLR 1-181. We therefore vacate the administrative law judge's finding of May 1997 as the month from which benefits should commence and remand the case to the administrative law judge for further consideration. On remand, the administrative law judge must reconsider the medical evidence of record in order to determine whether there is credible evidence that establishes not merely whether the miner was totally disabled due to pneumoconiosis prior to Dr. Reed's May 1997 examination and report, but also whether there is credible evidence that the miner was not totally disabled due to pneumoconiosis at some time between the filing of his 1980 application for benefits and May 1997. 20 C.F.R. §725.503(b); *Green*, 790 F.2d 1118, 9 BLR 2-32; *Krecota*, 868 F.2d 600, 12 BLR 2-178; *Lykins*, 12 BLR 1-181.

On remand, the administrative law judge must therefore reconsider the relevant medical evidence to determine if such evidence establishes the precise month in which the miner became totally disabled prior to Dr. Reed's May 1997 examination. *Id.* In

particular, the administrative law judge must reconsider the August 13, 1996 medical report of Dr. Devabhaktuni, diagnosing a mild to moderate respiratory impairment, which the administrative law judge found was insufficient to establish total disability. Decision and Order at 9; Director's Exhibit 46. However, the administrative law judge did not adequately discuss his finding that Dr. Devabhaktuni's diagnosis of a moderate impairment was insufficient to establish total disability in light of his determination that the miner's last coal mine employment as a welder involved strenuous activity. Decision and Order at 8, 9; Director's Exhibit 46; *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Gee v. W. G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*); *see also Mazgaj v. Valley Camp Coal Co.*, 9 BLR 1-201 (1986).

If, however, on remand, the administrative law judge finds that credible medical evidence of record does not establish the month of the miner's onset of total respiratory disability due to pneumoconiosis, then claimant is entitled to payment of benefits from the month in which the miner filed his application for benefits, that is January 1980, unless there is credible evidence establishing that the miner was not totally disabled during that time. 20 C.F.R. §725.503(b); *Green*, 790 F.2d 1118, 9 BLR 2-32; *Krecota*, 868 F.2d 600, 12 BLR 2-178; *Lykins*, 12 BLR 1-181; *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985).

Accordingly, the administrative law judge's Decision and Order Denying Modification is vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge