

BRB No. 02-0461 BLA

WILLIAM FLANARY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY)	DATE ISSUED:
)	
and)	
)	
OLD REPUBLIC INSURANCE COMPANY)	
)	
)	
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 On Remand-Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Acting 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:

Employer appeals the Decision and Order On Remand- Awarding Benefits (98-BLA-0332) of Administrative Law Judge Joseph E. Kane (the administrative law judge) 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 Pursuant to the Board's most recent remand of this case, the administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and awarded benefits. Further, because he could not determine the date upon which claimant became totally disabled, the administrative law judge awarded benefits from March 1978, the month that the claim was filed.²

On appeal, employer does not challenge the administrative law judge's finding of entitlement, but challenges the administrative law judge's finding that benefits should commence with the March 1978 filing date of claimant's first claim. Instead, employer asserts that the record establishes that benefits should not commence until November 1996 based on a CT scan taken that month, which employer asserts is the first evidence to support claimant's entitlement to benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing, on a different basis than employer, that the administrative law judge's finding of March 1978 as the commencement date for benefits is error. The

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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations. The regulations found at 20 C.F.R. §727.203, however, were not revised. 20 C.F.R. §725.2, 725.4(a), (d), (e).

² The Board remanded the case for reconsideration at 20 C.F.R. §727.203(a)(1) and for reconsideration of the commencement date for benefits only. *Flanary v. U.S. Steel Co.*, BRB No. 00-1062 BLA (Sep. 28, 2001).

Director argues: (1) that because this case involves a request for modification, remand is necessary for the administrative law judge to determine whether the award on modification was based on a finding of a mistake in a determination of fact or a change in conditions; (2) that if the filing date is used as the commencement date for benefits, the administrative law judge should determine whether there is evidence of nondisability for any period after the claim was filed; and (3) the administrative law judge should reconsider when the evidence established total disability due to pneumoconiosis, not just entitlement to invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). Claimant has not filed a brief.³

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The sole issue before the Board is whether the administrative law judge's finding of March 1978 as the commencement date for benefits is affirmable. Employer asserts that the evidence demonstrates that as recently as September 25, 1996, the date of the prior denial of the claim, the evidence did not establish the existence of pneumoconiosis. Rather, employer asserts that it was not until the November 4, 1996 CT scan, which was read as being consistent with the existence of pneumoconiosis, Director's Exhibit 35, that the administrative law judge found the evidence sufficient to establish invocation of the interim presumption of total disability due to pneumoconiosis. Employer thus argues that the commencement date of benefits cannot be earlier than the date of the November 4, 1996 CT scan showing the existence of pneumoconiosis or, at the earliest, September 25, 1996, the date of the most recent denial of benefits.

In claims in which benefits are awarded pursuant to a request for modification, the administrative law judge must determine whether the award on modification was based upon a finding of a mistake in the determination of fact, in which case claimant may be entitled to benefits from a date preceding the initial denial of benefits. 20 C.F.R. §725.503(d); *see Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-234 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert denied*, 510 U.S. 1090 (1997). If the award on modification was based on a change in conditions, benefits cannot

³ Claimant's entitlement to benefits is not challenged on appeal. Accordingly, the finding of entitlement is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

commence prior to the initial denial of benefits because benefits can only be awarded from the date of the change in conditions which follows the denial of benefits. 20 C.F.R. §725.503(d); *see Rutter, supra*; *see also Eifler v. Peabody Coal Co.*, 926 F.2d 663, 666, 15 BLR 2-1, 2-4 (7th Cir. 1991).

In this case, benefits were denied on claimant's first claim May 30, 1980. Director's Exhibit 16. The Board held that claimant's submission of new evidence on July 18, 1980 constituted the date of claimant's request for modification of that denial. A review of the administrative law judge's decision on remand awarding benefits demonstrates that the administrative law judge did not make a specific finding regarding the grounds on which he found claimant entitled to modification. Remand of the case is thus necessary for clarification of this issue. On remand, the administrative law judge must provide his basis for determining that claimant had established modification of the prior denial of benefits, *i.e.*, either a mistake in a determination of fact or a change in conditions, and then, based on that finding he should determine the commencement date for benefits. 20 C.F.R. §725.503(d); *see Rutter, supra*; *Eifler, supra*.

Further, as the Director contends, if the administrative law judge concludes that benefits should commence as of the filing date of the claim, he cannot award benefits for any period in which claimant was not totally disabled. *See* 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986). Accordingly, on remand the administrative law judge must reconsider evidence which while addressing disability, did not find total disability, *see* Director's Exhibits 11, 17, as well as the CT scan which, while diagnosing the presence of pneumoconiosis, did not address total disability. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753 (1985); *Stumfoll v. Director, OWCP*, 7 BLR 1-566 (1984).

Lastly, contrary to employer's assertion and, as the Director contends, the fact that the administrative law judge found the interim presumption invoked based on the November 1996 CT scan does not mean that the evidence establishes the date for commencement of benefits. Rather that evidence merely indicates that claimant became totally disabled due to pneumoconiosis at some time prior to that date. *See Merashoff, supra*; *Tobrey v. Director, OWCP*, 7 BLR 1-407 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is affirmed as to the award of benefits, but the administrative law judge's finding regarding the commencement date for benefits is vacated and the case is remanded for further consideration of that issue consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge