BRB No. 08-0454 BLA

N.E. Claimant-Respondent v. ELK RUN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 01/29/2009 DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Ann B. Rembrandt and Kathy Snyder (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Decision and Order on Reconsideration (07-BLA-5414) of Administrative Law Judge Edward Terhune Miller rendered 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). This case

involves claimant's subsequent claim filed on March 15, 2006.[1] Director's Exhibit 3. The administrative law judge credited claimant with thirty-nine years of coal mine employment[2] and found that the newly submitted evidence established the existence of both simple and complicated pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.304, and thus a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). He also found that all of the evidence of record established the existence of simple and complicated pneumoconiosis, and, based on the finding of complicated pneumoconiosis, he determined that claimant was entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis set forth at 20 C.F.R. §718.304. The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). Alternatively, the administrative law judge found that claimant is totally disabled by a respiratory or pulmonary impairment that is due to his simple pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

In addressing the date for the commencement of benefits, the administrative law judge initially awarded benefits as of April 1, 2005, based upon evidence that he found established when claimant became totally disabled due to pneumoconiosis. *See* 20 C.F.R. §725.503. Thereafter, claimant timely moved for reconsideration of the administrative law judge's entitlement date finding, pointing to a March 1, 2004 x-ray that was submitted in the subsequent claim and that was read as positive for complicated pneumoconiosis. By Decision and Order issued on February 21, 2008, the administrative law judge granted claimant's motion and found claimant entitled to benefits as of March 1, 2004.

On appeal, employer contends that the administrative law judge erred in awarding benefits prior to the date upon which the order denying the prior claim became final.[3]

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[1] Claimant's initial claim, filed on October 17, 2001, was denied by Administrative Law Judge Richard A. Morgan on January 28, 2004, because claimant did not establish the existence of pneumoconiosis. Pursuant to claimant's appeal, the Board affirmed the denial of benefits on February 7, 2005. [*N.D.E.*] *v. Elk Run Coal Co.*, BRB No. 04-0402 BLA (Feb. 7, 2005)(unpub.); Director's Exhibit 1. Claimant took no further action on his 2001 claim.

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc).*

[3] The administrative law judge's award of benefits is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge erred in his onset date determination, and requesting that the case be remanded for further consideration of the onset date.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Both employer and the Director argue that the administrative law judge erred in awarding benefits as of March 1, 2004, a date prior to the date upon which the order denying claimant's prior claim became final. We agree. The applicable regulation provides that "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(5). Claimant's prior claim was denied on February 7, 2005, when the Board affirmed the denial of benefits. [*N.D.E.*] *v. Elk Run Coal Co.*, BRB No. 04-0402 BLA (Feb. 7, 2005)(unpub.); Director's Exhibit 1. Because claimant did not seek reconsideration of the Board's decision or file a petition for review with the United States Court of Appeals for the Fourth Circuit, the Board's decision became final as of February 7, 2005, the date it was filed with the Clerk of the Board.[4] *See* 20 C.F.R. §§802.403(b), 802.406, 802.407(a), 802.410(a); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-11 (2003). Thus, the administrative law judge erred in his Decision and Order on Reconsideration when he found the onset date to be March 1, 2004, a date prior to the February 7, 2005 determination that claimant was not entitled to benefits. Further, we cannot reinstate the onset determination that was made in the administrative law judge's initial decision, as the specific basis for the administrative law judge's determination is

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[4] In this respect, we disagree with employer and the Director that the date upon which the denial of claimant's prior claim became final for purposes of 20 C.F.R. §725.309(d) was April 8, 2005, or sixty days after the Board's decision. The parties' literal application of 20 C.F.R. §802.406, which marks the point after which a decision of the Board is no longer subject to judicial review, ignores that the relevant point in time here is the date upon which claimant's prior claim was rejected. The rejection of claimant's prior claim occurred as of February 7, 2005, because claimant took no action to prevent that determination from becoming final. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-11 (2003). To hold that the denial of claimant's prior claim became final as of April 8, 2005, improperly suggests that claimant's current claim, filed on March 15, 2006, constitutes a request for modification, not a subsequent claim. *See* 20 C.F.R. §725.310.

unclear in that he referenced and appeared to rely upon, at least one item of medical evidence that predated the previous denial of benefits. Decision and Order Awarding Benefits at 26. We therefore vacate the administrative law judge's findings as to the onset date, and remand this case to the administrative law judge for further consideration of this issue.

Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 2-182-83 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990). Where benefits are awarded based on the application of the irrebuttable presumption, the date upon which claimant's simple pneumoconiosis became complicated pneumoconiosis determines the onset date. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). When the evidence does not establish the date simple pneumoconiosis became complicated pneumoconiosis, the onset date is the month in which the claim was filed. *Id.*

Where a claimant is awarded benefits in a subsequent claim, the date for the commencement of benefits is determined in the same manner provided under Section 725.503(b), with the proviso that no benefits may be paid for any time period prior to the date upon which the denial of the previous claim became final. 20 C.F.R. §725.309(d)(5). In promulgating Section 725.309(d)(5), the Department of Labor explained that the purpose of the rule was to give full effect to the language of the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1360-62, 20 BLR 2-227, 2-232-34 (4th Cir. 1996)(*en banc*), *cert. denied,* 519 U.S. 1090 (1997), that a prior, final determination that the miner was not entitled to benefits at that time must be accepted as legally correct. 64 Fed. Reg. 54966, 54985 (Oct. 8, 1999). Therefore, in this case, the administrative law judge, on remand, must accept as correct the previous claim determination that the miner was not totally disabled due to pneumoconiosis as of February 7, 2005.

As the Director notes, the record in the subsequent claim contains medical evidence predating the claim's March 15, 2006 filing date. Evidence predating the date upon which the prior denial became final, namely February 7, 2005, cannot be used to establish the onset date. *See* 20 C.F.R. §725.309(d)(5). Only new evidence after February 7, 2005, if credited, can establish the onset date. Thus, on remand, the

administrative law judge is instructed to determine whether the relevant evidence establishes the date upon which claimant became totally disabled due to pneumoconiosis. If the new evidence does not establish when claimant became totally disabled due to pneumoconiosis, the administrative law judge must award benefits from the subsequent claim's filing date, or March 1, 2006, pursuant to Section 725.503(b), unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. *See Green*, 790 F.2d at 1119 n.4, 9 BLR at 2-36 n.4; *Owens*, 14 BLR at 1-50.

Finally, we reject employer's argument that the "default" onset date provision pursuant to Section 725.503(b) violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by shifting the burden of proof to the party opposing entitlement. *See Amax Coal Co. v. Director, OWCP [Chubb*], 312 F.3d 882, 892-94, 22 BLR 2-514, 2-532-34 (7th Cir. 2002); *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47, 70-71 (D.D.C. 2001).

Accordingly, the administrative law judge's onset date determination is vacated, and the case is remanded to the administrative law judge for reconsideration of that determination, consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge