

BRB No. 06-0533 BLA

ESTATE OF LEOTHA B. LOWE	)	
(o/b/o CLAUDE W. LOWE (Deceased))	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HOBBS BROTHERS COAL COMPANY	)	DATE ISSUED: 03/26/2007
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

Employer appeals the Decision and Order on Second Remand (04-BLA-0018) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a miner's claim filed on October 6, 1975, 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).<sup>1</sup> This case

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became

is before the Board on modification for the third time.<sup>2</sup> On the last appeal by employer,<sup>3</sup> the Board affirmed the administrative law judge's findings that employer did not establish rebuttal of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3), (4)(2000). The Board, therefore, affirmed the administrative law judge's award of benefits. *Lowe v. Hobbs Bros. Coal Co.*, BRB No. 04-0845 BLA (July 29, 2005)(unpub.). However, the Board vacated the administrative law judge's finding that benefits commence as of October 1, 1975, the beginning of the month that the initial claim was filed, and remanded the case for her to render explicit evidentiary findings, if possible, regarding the date from which benefits commence in accordance with the applicable regulations at 20 C.F.R. §725.503. *Lowe*, BRB No. 04-0845 BLA, slip op. at 8-9. The Board alternatively instructed the administrative law judge that if such analysis does not establish the month of onset, then benefits will be payable beginning with the month during which the claim was filed, unless credible evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. *Lowe*, BRB No. 04-0845 BLA, slip op. at 9.

On the most recent remand, the administrative law judge considered the conflicting evidence and found that the miner suffered from a totally disabling pulmonary or respiratory impairment beginning in February, 1977. Consequently, the administrative law judge ordered benefits to commence as of February 1, 1977, the beginning of the month in which the miner became totally disabled due to pneumoconiosis.

On appeal, employer notes its challenge to the administrative law judge's findings that employer did not establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3), (4)(2000). Employer also challenges the administrative law judge's determination that benefits commence as of February 1, 1977. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's suggestion to revisit its prior decision on the merits and arguing that the administrative law judge reasonably determined the onset date for the commencement of

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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.

<sup>2</sup> This is the fourth request for modification pursuant to 20 C.F.R. §725.310 (2000) in this case, which is being pursued by the Estate of the deceased miner's widow. The miner died on February 8, 1996.

<sup>3</sup> The full procedural history of this case is set forth in the Board's decisions: *Lowe v. Hobbs Bros. Coal Co.*, BRB No. 99-0843 BLA (Sept. 15, 2000)(unpub.), and *Lowe v. Hobbs Bros. Coal Co.*, BRB No. 04-0845 BLA (July 29, 2005)(unpub.).

benefits. In a reply brief, employer reiterates its prior contentions.

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

Employer initially contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3), (4)(2000). In a Decision and Order, dated July 16, 2004, the administrative law judge considered claimant's request for modification and found, contrary to the determination in the prior denial of benefits, that employer did not establish rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3), (4)(2000). 2004 Decision and Order on Remand at 21, 25. Consequently, the administrative law judge found the evidence established a mistake in a determination of fact at 20 C.F.R. §725.310 (2000).<sup>4</sup> *Id.* at 18. In its July 29, 2005 Decision and Order, the Board affirmed the administrative law judge's findings of no rebuttal of the interim presumption at 20 C.F.R. §§727.203(b)(3), (4)(2000). *Lowe*, BRB No. 04-0845 BLA, slip op. at 6-7. The Board's previous disposition of these issues constitutes the law of the case, and we decline to revisit them because there is no persuasive evidence that the law of the case doctrine is inapplicable, or that an exception has been demonstrated. *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Employer next contends that the administrative law judge erred in ordering benefits to commence on February 1, 1977. Citing *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), employer argues that the administrative law judge erred in shifting the burden of proof from claimant to employer to establish when the miner became totally disabled due to pneumoconiosis. Specifically,

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<sup>4</sup> The administrative law judge found that the autopsy evidence established the existence of pneumoconiosis and invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(2), and that employer did not establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(4). The administrative law judge further found that employer failed to rule out the causal connection between the miner's total disability and his coal mine employment and, thus, did not rebut the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). 2004 Decision and Order on Remand at 18, 21.

employer asserts that the administrative law judge's onset date of disability determination does not comply with the Administrative Procedure Act (APA), 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), because she failed to explain how pneumoconiosis caused the miner's total disability prior to his death. Employer maintains that the onset date should be the date of the miner's death, because the existence of pneumoconiosis was established by newly submitted autopsy evidence on modification. Employer further argues that the administrative law judge erred in relying on Dr. Buddington's opinion to establish the onset date of total disability due to pneumoconiosis, because Dr. Buddington opined that the miner's total disability was due to smoking, and not pneumoconiosis. In addition, employer argues that Dr. Buddington's opinion is not supported by the underlying tests. We hold that employer's assertions are without merit.

In her March 21, 2006 Decision and Order on Second Remand, the administrative law judge ordered benefits to commence as of February 1, 1977, based on her finding that the evidence established that the miner suffered from a totally disabling pulmonary or respiratory impairment beginning in February 1977. 2006 Decision and Order on Second Remand at 8.

The regulations provide that if a miner's claim is awarded pursuant to 20 C.F.R. §725.310 (2000) based upon a mistake in fact, then the provisions of 20 C.F.R. §725.503(b) govern the determination of the date from which benefits are payable. 20 C.F.R. §725.503(d)(1). Further, 20 C.F.R. §725.503(b) provides that benefits are payable to a miner who is entitled beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §725.503(b). The pertinent regulation also provides that where the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed. *Id.*

In this case, the administrative law judge considered the conflicting medical evidence in determining the onset date of total disability due to pneumoconiosis. Based on a February, 1977 pulmonary function study administered by Dr. Buddington and his contemporaneous opinion, the administrative law judge found that the miner suffered from a totally disabling pulmonary or respiratory impairment beginning in February 1, 1977. The administrative law judge specifically stated:

Looking at all of this evidence, I find that I do not need to throw up my hands and say that there is no indication when the [m]iner became totally disabled due to pneumoconiosis. The preponderance of the evidence supports a finding of total disability as of February 1, 1977, based upon Dr. Buddington's examination with pulmonary function testing on that date. The pulmonary function testing conducted after that date produced

consistently qualifying values. In contrast, the October 15, 1975 test was found by Judge McElroy to be invalid. As Dr. Claustro's opinion was based upon that test, it is entitled to no weight. The April 16, 1976 examination produced nonqualifying values post bronchodilator, and Dr. Abernathy did not find the [m]iner to be totally disabled at that time (although he did not specifically address the issue). Thus, while the [m]iner may have had some respiratory impairment in 1976, he was not totally disabled under the pertinent criteria.

2006 Decision and Order on Second Remand at 8.

In view of the foregoing, we hold that the administrative law judge reasonably found that benefits in this case commence as of February 1, 1977, based on a qualifying February 1, 1977 pulmonary function study administered by Dr. Buddington, as well as Dr. Buddington's contemporaneous opinion. The award of benefits in this case was based on the invocation of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(a)(2)(2000). Consequently, as argued by the Director, the miner's disabling impairment is presumed to be due to coal workers' pneumoconiosis. 20 C.F.R. §727.203(a)(2)(2000). Thus, we reject employer's assertion that the administrative law judge's onset date of disability determination does not comply with the APA because she failed to explain how pneumoconiosis caused the miner's total disability prior to his death. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that benefits in this case commence as of February 1, 1977, the beginning of the month in which the evidence established total disability pursuant to 20 C.F.R. §725.503(b). *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the administrative law judge's Decision and Order on Second Remand is affirmed.

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