

BRB No. 02-0161 BLA

CALVIN DUNFORD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SEA "B" MINING COAL COMPANY)	DATE ISSUED:
)	
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 Awarding Benefits on Modification of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Vincent D. Carroll, Richlands, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Timothy S. Williams (Eugene Scalia, 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 Awarding Benefits on Modification (00-BLA-0589) of Administrative Law Judge Alice M. Craft 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 Claimant initially filed a claim for benefits on August 10, 1979, which was denied by Administrative Law Judge Nicodemo DeGregorio on October 13, 1981, because claimant failed to establish that the evidence invoked the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §7727.203(a). Director's Exhibit 52. Subsequent to claimant's appeal, the Board affirmed the denial of benefits in *Dunford v. Jewell Ridge Coal Corp.*, BRB No. 81-2205 BLA (Sep.28, 1984)(unpub.). Director's Exhibit 67. On April 30, 1985, claimant filed a new claim which was treated as a request for modification. Director's Exhibit 68. On January 24, 1990, Administrative Law Judge John S. Patton issued a Decision and Order again denying benefits, because while claimant had established invocation of the presumption pursuant to Section 727.203(a)(2), employer had established rebuttal of the presumption pursuant to Section 727.203(b)(3), (4). Director's Exhibit 130. Claimant appealed and the Board affirmed the denial of benefits in *Dunford v. Jewell Ridge Coal Corp.*, BRB No. 90-645 BLA (Jan. 28, 1992)(unpub.). Director's Exhibit 138. The Board denied claimant's request for reconsideration in *Dunford v. Jewell Ridge Coal Corp.*, BRB No. 90-645 BLA, (Order)(July 13, 1992)(unpub.). Director's Exhibit 141. Claimant sought review by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the claim arises. The Fourth Circuit affirmed the Board's denial of benefits. *Dunford v. Jewell Ridge Coal Corp.*, No. 92-2071 (4th Cir.) (Sept. 3, 1993)(unpub.). Claimant subsequently sought modification and on May 6, 1996, Judge DeGregorio issued a Decision and Order denying benefits on modification, because claimant had failed to establish a change in conditions. Director's Exhibits 185, 147. The Board vacated the Judge DeGregorio's Decision and Order denying modification and remanded the claim for further consideration in *Dunford v. Jewell Ridge/See [sic] "B" Mining Co.*, BRB No. 96-1085 BLA (May 16, 1997)(unpub.), because Judge DeGregorio had failed to discuss whether a mistake in a determination of fact had been made and he had failed to apply the adjudicatory criteria at 20 C.F.R. Part 727 to the claim. Director's Exhibit 190. On remand, Administrative Law Judge Ann B. Torkington found rebuttal of the presumption established pursuant to Section 727.203(b)(3) and (4), and that claimant failed to establish either a change in conditions or a mistake in a determination of fact and denied benefits. The Board affirmed the denial of benefits in *Dunford v. Jewell Ridge/Sea "B" Mining Co.*, BRB No. 98-0704 BLA (Feb. 18, 1999)(unpub.). Director's Exhibit 201. Claimant sought modification of that denial. Claimant's case was assigned to Administrative Law Judge Craft (administrative law judge), who found that because employer did not challenge the previous administrative law judge's determination that the interim presumption was invoked pursuant

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 29 C.F.R. Parts 718, 722, 725 and 726 (2001) The regulations at 20 C.F.R. §727.203(2000), however, were not affected by the revised regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

to 20 C.F.R. §727.203(a)(2) based on qualifying pulmonary function studies,² the sole issue before her was whether there was a mistake in a determination of fact in the prior finding that employer established rebuttal of the presumption at Section 727.203(b)(3) and (4) or whether there has been a change in the claimant's medical condition which now precludes rebuttal under these subsections. After considering the relevant evidence, the administrative law judge concluded that claimant's petition for modification should be granted because of a mistake in a determination of fact in the prior denial of the claim. That is, after reviewing the evidence of record, the administrative law judge found that employer had not successfully rebutted the interim presumption at Section 727.203(b)(3) and (4). Claimant's request for modification was, accordingly, granted and benefits were awarded as of June 1, 1987, the first day of the month in which evidence established that claimant was totally disabled.

On appeal, employer contends that the administrative law judge erred in concluding that claimant established a mistake in a determination of fact because the administrative law judge failed to explain why she discredited physicians' opinions which had been relied upon by the previous administrative law judge to support a finding of rebuttal. Employer also contends that the administrative law judge erred in failing to address all the evidence relevant to determining whether a mistake in a determination of fact had been made and erred in determining the onset date of disability. Claimant responds, urging affirmance of the Decision and Order awarding benefits. The Director, Officer of Workers' Compensation Programs (the Director), has filed a brief for the limited purpose of challenging employer's assertions regarding the regulatory definition of pneumoconiosis as a latent and progressive disease, and takes no position on the merits of entitlement.

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 contends that the administrative law judge erred in finding that a mistake in the prior determination of fact was established based on her belief that the opinion of Dr. Ugolini was entitled to greater weight than the opinion of Dr. Fino. Instead, employer

² We note that the administrative law judge could have reconsidered the issue of invocation even though it was unchallenged. See *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

contends that the prior administrative law judge did not rely solely on Dr. Fino's opinion to find rebuttal established pursuant to subsections (b)(3) and (4), but also relied on the opinions of Drs. Sargent, Endres-Bercher, and Hippensteel. Thus, employer contends that the administrative law judge's decision must be vacated and the case remanded for proper consideration of the evidence because the administrative law judge did not adequately explain why she found that the prior administrative law judge was mistaken in relying on these opinions in addition to the opinion of Dr. Fino.

Contrary to employer's argument, however, the administrative law judge acknowledged that, in addition to assigning greater weight to Dr. Fino's opinion than Dr. Ugolini's opinion, Judge Torkington had also assigned greater weight to the opinions of Drs. Sargent, Hippensteel, and Endres-Bercher, over those of Drs. Strader, Chithanko, and Caday, because she thought the opinions of the former to be better reasoned and documented and because their qualifications were superior. Decision and Order at 17. In concluding that the denial of this claim was based on a mistake of fact, however, the administrative law judge stated that she had difficulty reconciling the various opinions offered by employer's experts because Dr. Hippensteel found a mild pulmonary impairment, Drs. Endres-Bercher and Fino found no disability, and Dr. Sargent found no total disability from a pulmonary standpoint, despite qualifying pulmonary function studies and having previously found a totally disabling respiratory. Decision and Order at 19. This was rational. *See Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-587, 2-606 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-346 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-732 (1985); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683, 1-686 (1985).

Employer next contends that the administrative law judge's rejection of Dr. Fino's opinion of no impairment constitutes an impermissible substitution of her expertise for that of a medical expert when she rejected Dr. Fino's opinion because he relied on a qualifying pulmonary function study. Pursuant to the disability standards at Part 727, applicable to this claim, the administrative law judge found that Dr. Fino was incorrect when he found that claimant's 1994 pulmonary function study did not show disability. In addition, the administrative law judge also found Dr. Fino's opinion of no impairment entitled to less weight because Dr. Fino had stated that he agreed with Dr. Hippensteel, who had examined claimant in November of 1979, shortly after he left coal mine employment, and found that claimant had no pulmonary impairment, when in fact, Dr. Hippensteel had diagnosed a mild pulmonary impairment. We cannot, therefore, say that the administrative law judge erred in finding Dr. Fino's opinion less than credible. *See Mays, supra; Anderson, supra; Worley, supra; Dixon, supra; Brown, supra; Maypray, supra.*

Employer also contends that the administrative law judge erred in glossing over Dr.

Endres-Bercher's opinion that claimant had normal pulmonary function eight years after leaving coal mine employment since such a conclusion would support Dr. Fino's opinion of no impairment. Employer's Brief at 5-6. We reject employer's argument, however. As previously discussed, the administrative law judge found that she could not resolve the various conflicting opinions of employer's experts who diagnosed alternatively a mild pulmonary impairment to no pulmonary impairment. Because of this conflict, therefore, we conclude that the administrative law judge did not err when she did not credit Dr. Endres-Bercher's opinion of no pulmonary impairment in June of 1989. *See Mays, supra; Anderson, supra; Worley, supra; Dixon, supra; Brown, supra; Maypray, supra.*

Additionally, employer contends that the administrative law judge erred when she rejected Dr. Sargent's opinion, that claimant did not have a totally disabling respiratory, because Dr. Sargent had previously found a totally disabling respiratory since Dr. Sargent was merely explaining that claimant had been disabled by a restrictive impairment as a result of his surgery for lung cancer, but was no longer disabled after recovering from that surgery. As the administrative law judge noted, however, she did not find Dr. Sargent's opinion credible because Dr. Sargent did not explain sufficiently the cause of claimant's obstructive impairment which had also been diagnosed nor did he comment on claimant's long-standing diagnosis of chronic obstructive pulmonary disease. This was rational. *See Mays, supra; Anderson, supra; Worley, supra; Dixon, supra; Brown, supra; Maypray, supra.*

Regarding Dr. Castle's opinion, the administrative law judge properly found that the most recent testimony by Dr. Castle did not affirmatively rule out the presence of coal mine dust or coal mine employment as playing a role in claimant's totally disabling respiratory impairment because Dr. Castle who had diagnosed both a restrictive impairment caused by lung surgery and an obstructive impairment caused by smoking and surgery, had never explained how the obstructive impairment was caused by the surgery. Further, the administrative law judge found that she had difficulty accepting smoking as the cause of the obstructive impairment since claimant ceased smoking fifteen years before he ceased coal mine employment. This was rational. *See Mays, supra; Anderson, supra; Worley, supra; Dixon, supra; Maypray, supra.*

Thus, in concluding that the prior finding of rebuttal pursuant to Section 727.203(b)(3) and (4) constituted a mistake in the determination of fact, the administrative law judge, contrary to employer's assertions, did address all the relevant evidence and properly concluded that, under the standard enunciated in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72, 2-80 (4th Cir. 1984), and reiterated in *Grigg v. Director, OWCP*, 28 F.3d 416, 418 18 BLR 2-299, 2-305 (4th Cir. 1994), rebuttal of the presumption was not established at subsection (b)(3) because no physician credibly ruled out coal mine employment or coal dust exposure as playing a role in claimant's totally disabling respiratory impairment. Accordingly, we affirm the administrative law judge's finding that claimant

established a mistake of fact in the prior determination that employer had established rebuttal pursuant to Section 727.203(b)(3). *See Jessee, supra; see also Massey, supra; Grigg, supra.*

Regarding the administrative law judge's finding that Judge Torkington had made a mistake in a determination of fact when she found the presumption rebutted at Section 727.203(b)(4), the administrative law judge addressed all the evidence and concluded that it failed to establish the absence of "legal pneumoconiosis," *i.e.*, pneumoconiosis as defined by the Act, *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); Decision and Order at 8, and that Judge Torkington had, therefore, made a mistake in determining that employer had established rebuttal of the presumption at subsection (b)(4). Decision and Order at 20. Focusing on the medical opinions of Drs. Fino and Ugolini, because both physicians specifically addressed the issue of "legal" pneumoconiosis, *i.e.*, any coal dust related disease arising out of coal mine employment, Decision and Order at 19; 20 C.F.R. §§727.202; 727.203(b)(4), the administrative law judge specifically concluded that Dr. Fino's Board-certification in pulmonary diseases did not entitle his opinion to any greater weight than Dr. Ugolini's because: Dr. Fino's research publications did not appear to involve pneumoconiosis while Dr. Ugolini's had; in addition to his medical degree, he had a Masters Degree in Public Health; he was at that time an Assistant Professor of Medicine, and Board-certified in Internal Medicine; at the time of his report he anticipated being Board-eligible in Occupational Medicine; he was a medical officer at the NIOSH Division of Respiratory Disease studies; and he indicated "that he was associated with NIOSH while studies of the relationship between coal dust exposure and chronic lung diseases were being conducted." Decision and Order at 20. The administrative law judge, therefore, concluded that inasmuch as the opinions of Drs. Ugolini and Fino were "equally documented with reference to the pertinent studies. At best their opinions [were] in equipoise[.]" and employer had not, therefore, submitted sufficient evidence to rebut the presumption at subsection (b)(4). This was rational. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989).

Additionally, as an alternative ground for finding that a mistake was made, the administrative law judge found justification for giving greater weight to Dr. Ugolini's opinion because Dr. Fino's opinion that claimant did not suffer from legal pneumoconiosis was hostile to the Act since Dr. Fino's statement that "[i]f a miner has no functional impairment due to coal mine dust inhalation at the time he leaves the mines, then that worker will not develop a functional impairment due to coal workers' pneumoconiosis in the absence of further coal mine dust exposure," Director's Exhibit 179, was contrary to the Act's definition of pneumoconiosis as a latent and progressive disease. *Mullins Coal Co., Inc. v. Director, OWCP*, 484 U.S. 135 (1987); *Consolidation Coal Co. v. Kramer*, F.3d , 2002 WL 31111838 (3d Cir. 2002); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Because these reasons were sufficient for the

administrative law judge to accord greater weight to Dr. Ugolini's opinion and less to Dr. Fino's opinion, we need not address whether the administrative law judge properly applied *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995) to also find Dr. Fino's opinion to be hostile to the Act. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Employer's assertions in this case are essentially requests for the Board to reweigh the evidence, a function outside the Board's scope of review. *See Anderson, supra*. Further, contrary to employer's assertions the administrative law judge permissibly concluded that Dr. Fino's opinion was hostile to the Act as it failed to recognize that pneumoconiosis was a progressive disease. *Lockhart, supra*; *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (1993). Contrary to employer's assertions, the administrative law judge did address all the relevant evidence of record and rendered permissible bases for according the opinions less weight than the opinion of Dr. Ugolini. Decision and Order at 17-19. Specifically, the administrative law judge found that the "various opinions" offered by employer's physicians, those of Drs. Endres-Bercher, Fino, Sargent and Castle, were not fully explained and failed to give a complete picture of the miner's health. Decision and Order at 19. Such determinations are within the clear discretion of the administrative law judge and constitute permissible bases for according those opinions less weight. *See Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). We conclude, therefore, that substantial evidence supports the administrative law judge's determination that the evidence of record fails to support a finding of rebuttal at Section 727.203(b)(4). *See Barber, supra*; *Dockins v. McWane Coal Co.*, 9 BLR 1-57 (1986). Accordingly, we affirm the administrative law judge's determination that claimant has established a mistake in the prior determination of fact, *see Jessee, supra*, and we affirm the award of benefits.

Finally, employer asserts that while the administrative law judge accurately described the standards for determining onset date, she completely ignored them and found an onset date which was irrational and unsupported by the evidence of record. Specifically, employer asserts that while the administrative law judge correctly found that the pulmonary function studies through June 24, 1987 were non-qualifying and that the pre-bronchodilator portion of the August 16, 1988 pulmonary function study was the first pulmonary function study with qualifying values, she erred in setting June 1, 1987 as the onset date of disability because benefits could have been awarded as of June 25, 1987. Instead, employer contends that it was just as likely that the miner did not become disabled until August 15, 1988, the date before the August 16, 1988 qualifying pulmonary function study, or at a midway point between June 24, 1987 and August 16, 1988. In addition, employer contends that because

pneumoconiosis is an irreversible disease, the administrative law judge erred in relying on the pre-bronchodilator qualifying August 16, 1988 pulmonary function study as showing that claimant was disabled at that time, since the post bronchodilator results of that test were non-qualifying, without explaining why she found the pre-bronchodilator results were indicative of pneumoconiosis. Employer further contends that the administrative law judge erred in relying on these pre-bronchodilator results because the first pulmonary function study to result in both pre and post bronchodilator results was conducted on February 23, 1989, and even a 1994 test resulted in non-qualifying values.

As a general rule, once claimant's entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled. 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). Claimant must, however, establish the date on which he became totally disabled due to pneumoconiosis and not simply the date on which he became totally disabled. *Carney v. Director, OWCP*, 11 BLR 1-32, 1-33 (1987); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983).

In this case, the administrative law judge only determined when claimant became totally disabled not when he became totally disabled due to pneumoconiosis. *See Carney, supra; Ridings, supra*. While the administrative law judge noted that claimant was diagnosed with chronic obstructive pulmonary disease as early as 1979 by Drs. Yu and Buddington, their opinions do not show that the chronic obstructive pulmonary disease was related to coal mine employment. Director's Exhibit 155. In fact, Dr. Buddington opined that while claimant's biopsy showed evidence of chronic obstructive pulmonary disease, it was not pneumoconiosis. Director's Exhibit 155. The medical opinion relied on by the administrative law judge as finding total disability due to pneumoconiosis was by Dr. Ugolini who reviewed claimant's medical record in May of 1995. In addition to diagnosing pneumoconiosis himself, Dr. Ugolini noted that Dr. Caday had diagnosed "probable coal workers' pneumoconiosis" as early as December 1993. In listing the relevant medical opinions the administrative law judge noted that Dr. Hippensteel found "questionable evidence of pneumoconiosis" as early as November of 1979, Dr. Modi diagnosed interstitial pulmonary fibrosis secondary to exposure to coal dust in March of 1987, Dr. Robinette diagnosed moderate obstructive lung disease with industrial bronchitis which was totally disabling in 1989, and Dr. Strader found pneumoconiosis and stated that claimant was probably disabled in August of 1993. The administrative law judge found the opinions of Dr. Endres-Bercher in 1987, Dr. Sargent in 1994, and Dr. Castle in 2000 that claimant did not have pneumoconiosis to be incredible. Accordingly, this case must be remanded for the administrative law judge to determine when claimant became totally disabled due to

pneumoconiosis. *Carney, supra; Ridings, supra*. Additionally, on remand, as employer asserts, the administrative law judge must fully explain her reasons for crediting pulmonary function studies which show total disability over those which do not. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Modification is affirmed as to the award of benefits, but the administrative law judge's finding on onset 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