

BRB No. 90-1739 BLA

VIVIAN L. RICE)
(Widow of THOMAS E. RICE))

)
Claimant-Respondent)

)
v.) DATE ISSUED:

)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

)
Petitioner) DECISION and ORDER

Appeal of the Decision and Order of Aaron Silverman, Administrative Law Judge, United States Department of Labor.

Jeffrey S. Goldberg (David S. Fortney, Deputy Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

Michael F. Niggemeyer (District 29, U.M.W.A.), Beckley, West Virginia, for respondent.

Before: BROWN and MCGRANERY, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director) appeals the Decision and Order on Remand (85-BLA-5994) of Administrative Law Judge Aaron Silverman awarding benefits 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). Neither party challenges claimant's entitlement to benefits. The Director, however, challenges the administrative law judge's determination of the

onset date of total disability.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Supp. V 1987).

In his first Decision and Order in this case, the administrative law judge found invocation established pursuant to 20 C.F.R. §727.203(a)(3) and rebuttal established under 20 C.F.R. §727.203(b)(3). Accordingly, benefits were denied. On appeal, the Board remanded the case for the administrative law judge to reconsider the rebuttal provisions at 20 C.F.R. §727.203(b) and 20 C.F.R. §410.490. On remand, the administrative law judge found that autopsy evidence established the presence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i). The administrative law judge then determined that the presumption of total disability cannot be rebutted under the provisions provided in 20 C.F.R. §410.490(c) and found that claimant established entitlement to benefits under Section 410.490. See Decision and Order at 5. The administrative law judge then determined the date of onset of the miner's total disability based on the date the claim was filed because the evidence was not clear as to when the miner's total disability began. See Decision and Order at 6. On appeal, the Director argues that the administrative law judge erred in finding September 1, 1979 to be the date of onset, as the evidence fails to support such a finding and because the administrative law judge failed to fully consider all of the evidence on this issue.¹ Claimant responds, urging affirmance.²

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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).

The Board has held that if medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his

¹The miner's claim for benefits was filed on September 20, 1979. Director's Exhibit 1.

²The Director concedes that the evidence is insufficient to establish rebuttal under either Section 727.203(b) or Section 410.490(c). Accordingly, the finding of the administrative law judge that claimant is entitled to benefits is affirmed as unchallenged on appeal. Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

filing date, unless credited medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. See Lykins v. Director, OWCP, 12 BLR 1-181 (1989).

In determining the onset date in this case the administrative law judge failed to discuss the April 16, 1980 medical report of Dr. Munoz, in which Dr. Daniel states that there is no x-ray evidence of pneumoconiosis and no evidence of pulmonary dysfunction. See Director's Exhibit 10 at 4. As this medical evidence could establish that claimant was not totally disabled at some point subsequent to his filing date, the Decision and Order awarding benefits is vacated and remanded for the administrative law judge to fully consider and discuss all of the evidence pertaining to the onset date of the miner's total disability.

Further, although the Director does not challenge the administrative law judge's application of 20 C.F.R. §410.490 to this claim, the Board vacates the administrative law judge's findings pursuant to Section 410.490 in light of the holding of the Supreme Court in Pauley v. Bethenergy Mines, Inc., 111 S.Ct. 2524, 15 BLR 2-155 (1991), that claims properly considered under 20 C.F.R. Part 727 are not subject to adjudication pursuant to Section 410.490. See also Whiteman v. Boyle Land and Fuel Co., 15 BLR 1-11 (1991).

Accordingly, the Decision and Order on Remand is affirmed in part, vacated in part, and the case remanded for reconsideration of the evidence relevant to the onset date of the miner's total disability.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge

