BRB No. 98-0818 BLA

EARLENE CONNOLLY	)	
(On behalf of JOHN P. CONNOLLY,	)	
deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 9/3/99
	)	
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 Daniel F. Sutton, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (84-BLA-3250) of Administrative Law Judge Daniel F. Sutton 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] This case is before the Board for a second time. The relevant procedural history of this case is as

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[1]The claim at issue in this case was filed by a living miner on April 17, 1978. Director's Exhibit 1. Based upon the district director's initial determination of eligibility, which was contested by employer, the miner began receiving interim benefit payments and continued to receive them until the time of his death on December 13, 1984. Director's Exhibits 3, 31, 32. The miner's spouse is continuing to pursue this claim on the miner's behalf.

follows. On October 31, 1991, Administrative Law Judge Robert G. Mahony issued a Decision and Order awarding benefits. Judge Mahony concluded that the evidence established a forty-one year coal mine employment history and that invocation of the interim presumption was established pursuant to 30 C.F.R. §727.203(a)(1) and (2). After concluding that employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4), Judge Mahony awarded benefits. After an appeal by employer, the Board affirmed the award of benefits. *Connolly v. Peabody Mining Co.*, BRB No. 92-0554 BLA (Sep. 28, 1993)(unpub.). Subsequently, employer requested reconsideration and the Board issued a Decision and Order on Reconsideration granting employer's request, *Connolly v. Peabody Mining Co.*, BRB No. 92-0554 BLA (Decision and Order on Reconsideration) (Nov. 7, 1996)(unpub.), vacating the administrative law judge's finding of invocation at Section 727.203(a)(1) in light of the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). The Board thus remanded the claim for further consideration of invocation at Section 727.203(a)(1)-(4). *Id.* The Board also instructed the administrative law judge to reconsider his findings pursuant to Section 727.203(b)(2), (3) and to make findings at Section 727.203(b)(4), if reached. *Id.* Finally, the Board also instructed the administrative law judge to consider entitlement pursuant to Part 718 if, on remand, claimant was determined to be ineligible for benefits pursuant to Part 727. *Id.*

On remand, the administrative law judge found that the evidence of record established invocation of the interim presumption at Section 727.203(a)(1), (2)

and (4), but failed to establish invocation pursuant to Section 727.203(a)(3). Decision and Order on Remand at 5-10. The administrative law judge further found that employer failed to establish rebuttal pursuant to Section 727.203(b)(2) and (3), and that rebuttal at Section 727.203(b)(4) was precluded based on the finding of invocation at Section 727.203(a)(1). Decision and Order on Remand at 10-12. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1). Employer also requests the Board to instruct the administrative law judge to consider the issue of rebuttal at Section 727.203(b)(4) in light of the erroneous finding of invocation at subsection (a)(1). Employer further contends that the administrative law judge erred in failing to find rebuttal established at Section 727.203(b)(2) and (3). Lastly, employer contends that, even if benefits were properly awarded, the administrative law judge erred in determining that claimant's entitlement was to commence as of April, 1978. Claimant responds and urges that the administrative law judge's Decision and Order on Remand be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.[2]

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[2]We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(2) and (4), and failed to establish invocation of the presumption pursuant to Section 727.203(a)(3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 invocation of the interim presumption established at Section 727.203(a)(1) inasmuch as the administrative law judge erred in relying "upon a presumption of progressivity" which allowed him to ignore earlier negative readings. Employer's Brief at 10. Employer further contends that the administrative law judge erred in relying upon the 0/1 interpretation of Dr. Lehnert as positive support for a finding of the existence of pneumoconiosis at Section 727.203(a)(1). Employer also contends that the administrative law judge erred in ignoring Dr. Tuteur's medical conclusion that relying upon the most recent x-ray evidence in this case is improper inasmuch as claimant's congestive heart failure made it difficult to interpret the most recent x-rays.

In finding that claimant established invocation of the interim presumption based upon x-ray evidence of pneumoconiosis at Section 727.203(a)(1), the administrative law judge, in a permissible exercise of his discretion, accorded greatest weight to the readings by physicians with the superior credentials of B-

reader and/or board-certified radiologist.[3] *See Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.,* 8 BLR 1-32 (1985). The administrative law judge then concluded that the weight of the readings of the most recent films demonstrated that claimant's suffered from pneumoconiosis. Claimant's Exhibits 3-6. Crediting positive interpretations of the most recent x-rays of record provides an affirmable basis for determining the existence of pneumoconiosis pursuant to Section 727.203(a)(1). *See Clark v. Karst-Robbins Coal* Co., 12 BLR 1-149 (1989)(*en banc*); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985). While employer correctly notes that there is not a lengthy period between the later positive readings and the earlier negative readings, the positive readings do demonstrate evidence of the progression of the disease and accordingly provided a valid basis for the administrative law judge to determine the presence of the disease. *See Peabody Coal Co. v. Spese,* 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997); *see also Old Ben Coal Co. v. Scott,* 144 F.3d

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[3]A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology

1045, 21 BLR 2-391 (7th Cir. 1998). We further reject employer's assertion that the administrative law judge relied on an x-ray reading of 0/1 as support for his determination at Section 727.203(a)(1). Dr. Lehnert provided an x-ray interpretation of 0/1, which is not a finding of pneumoconiosis under the regulatory criteria at Section 718.202(a)(1). *See* 20 C.F.R. 718.102(b); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Canton v. Rochester & Pittsburgh Coal Co.*, 8 BLR 1-475 (1986). A review of the administrative law judge's Decision and Order on Remand demonstrates that the administrative law judge considered Dr. Lehnert's interpretation in full and found that it constituted a negative interpretation for pneumoconiosis, notwithstanding the physician's indication that the film revealed "parenchymal abnormalities" consistent with pneumoconiosis. Decision and Order on Remand at 6. In weighing the evidence, the administrative law judge found that three of the four best qualified radiologists interpreted the two most recent x-rays as positive for the existence of pneumoconiosis and the fourth, Dr. Lehnert, did not, but "found abnormalities consistent with the disease," Decision and Order on Remand at 6. Accordingly, we reject employer's assertion that the administrative law judge erroneously relied on Dr. Lehnert's interpretation as a positive x-ray interpretation at Section 727.203(a)(1).

Moreover, we reject employer's contention that Dr. Tuteur's opinion calling into question the probative value of the most recent x-ray films as evidence of pneumoconiosis constituted relevant evidence at Section 727.203(a)(1). A review of the record demonstrates that Dr. Tuteur made general comments about the difficulty of interpreting x-rays of a patient who, like claimant, suffered from congestive heart failure. Dr. Tuteur did not read the x-

rays and he is not a radiologist, much less, a dually qualified radiologist as are those physicians the administrative law judge credits as finding the existence of pneumoconiosis by x-ray. We need not now decide whether an administrative law judge may credit a doctor's comments in weighing x-ray evidence at Section 727.203(a)(1) because, in the case at bar, the administrative law judge could not rationally rely upon Dr. Tuteur's opinion to reject the opinions of three dually-qualified radiologists. *See generally Vance, supra; Aimone, supra*. Accordingly, Dr. Tuteur's commentary is not probative evidence pursuant to Section 727.203(a)(1). *See generally Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). We therefore affirm the administrative law judge's finding of invocation at Section 727.203(a)(1) and, in so doing, hold that employer is precluded from establishing rebuttal at Section 727.203(b)(4), *see Mullins*, 484 U.S. at 143, n.26, 11 BLR 2-1, 2-9 n. 26; *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

Employer next contends that the administrative law judge erred in failing to find rebuttal established at Section 727.203(b)(2) inasmuch as the administrative law judge improperly discredited the opinions of Drs. Pearson, Paul and Tuteur, all of whom concluded that claimant was not totally disabled from a pulmonary or respiratory disease, Director's Exhibits 15, 23, 20, 27, 28; Employer's Exhibits 1, 8, 19, 25. Employer also asserts that the administrative law judge improperly accorded greatest weight to the opinion of Dr. Brewer, who concluded that claimant was totally disabled, Claimant's Exhibit 1, merely based on that physician's status as claimant's treating physician. When this case was most recently before the Board, the Board instructed the administrative law judge to consider rebuttal at Section 727.203(b)(2) pursuant to the holding of the United

States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), in which the court held that whether the source of a miner's presumed total disability is traceable to coal dust exposure is a relevant inquiry under Section 727.203(b)(2). *Connolly*, BRB No. 92-0554 BLA, Decision and Order on Reconsideration at 5.

On remand, the administrative law judge concluded that the opinions of Drs. Paul, Pearson and Tuteur failed to support a finding of rebuttal under the standard established in *Foster, supra*, as the medical opinions relied upon by employer only demonstrated that claimant's respiratory or pulmonary disability was caused by smoking-related emphysema and that this was insufficient as a matter of law to support a finding of rebuttal at subsection (b)(2). Further, the administrative law judge permissibly concluded that the failure of these physicians to diagnose the presence of pneumoconiosis when the presence of the disease was established at Section 727.203(a)(1) made their opinions less credible at Section 727.203(b)(2). *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp*. 8 BLR 1-46 (1985). The administrative law judge thus properly concluded, as trier-of-fact, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), that the opinions relied upon by employer were not credible and we thus affirm his determination that employer has failed to carry his burden of establishing rebuttal at Section 727.203(b)(2). *See Foster, supra*.[4]

[4]Inasmuch as the administrative law judge has provided an affirmable

Employer also contends that the administrative law judge erred in failing to find rebuttal established at Section 727.203(b)(3) inasmuch as the administrative law judge erroneously discredited the opinions of Drs. Pearson, Paul and Tuteur in favor of claimant's treating physician, Dr. Brewer. In order to establish rebuttal of the interim presumption at Section 727.203(b)(3), the Seventh Circuit has held that the party opposing entitlement must demonstrate by a preponderance of credible evidence, that pneumoconiosis was not a contributing cause of a claimant's total disability. *See Peabody Coal Co. v. Vigna* 22 BLR F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987); *see also Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th. Cir. 1992). When this case was most recently before the Board, it instructed the administrative law judge, on remand, to consider the issue of rebuttal at Section 727.203(b)(3), and, in particular to specifically address the medical opinion of Dr. Pearson in that context.

On remand, the administrative law judge, in a permissible exercise of his discretion, again accorded less weight to the medical opinions relied upon by employer, those of Drs. Paul, Pearson and Tuteur, because these physicians failed to diagnose the presence of pneumoconiosis when the existence of the disease was found established at Section 727.203(a)(1). Accordingly, the

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basis for his conclusion at Section 727.203(b)(2) we need not address other contentions raised pursuant to this subsection. *See Kozele v. Rochester & Pittsburgh Coal Co.,* 6 BLR 1-378 (1983).

administrative law judge permissibly found these opinions less credible, *see Trujillo, supra*; *see also Clark, supra; Peskie, supra; Lucostic, supra.* Accordingly, we affirm the administrative law judge's determination that employer failed to carry his burden at Section 727.203(b)(3). *See Vigna, supra*. Accordingly, we affirm the award of miner's benefits.[5]

Finally, employer contends that the administrative law judge erred in determining that April, 1978, is the date on which the miner's entitlement to benefits commenced, as the finding is unsupported by the evidence of record. In the instant case, the administrative law judge merely awarded benefits on the miner's claim based on the filing date of April 17, 1978,

[5]We note that, in view of our affirmance of the award of benefits and pursuant to our previous Decision and Order on Reconsideration, *see Connolly,* BRB No. 92-0554 BLA, Decision and Order on Reconsideration at 7, claimant is automatically entitled to survivor's benefits on a derivative basis. *See* 30 U.S.C. §932(l); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 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). It is well established that, if the date of onset is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence 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, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corporation*, 14 BLR 1-47 (1990); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). In the instant case, as the administrative law judge specifically noted in his consideration of entitlement, that the record contains three qualifying pulmonary function studies dated subsequent to April 17, 1978, Director's Exhibits 8, 15, 27, six qualifying and seven non-qualifying blood gas studies dated subsequent to that date, Director's Exhibits 15, 23, 27; Claimant's Exhibit 2; Employer's Exhibits 2, 26, as well as medical opinion evidence which employer conceded supported a finding of invocation at Section 727.203(a)(4). Decision and Order on Remand at 6-10. The administrative law judge has failed to render any specific findings and failed to assess this evidence in the context of establishing the date of onset. *See generally* the Administrative Procedure Act, 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 U.S.C. §932(a). Accordingly, we vacate the administrative law judge's onset determination and hold that, on remand, he must address the entirety of relevant evidence and make specific findings, if possible, regarding the

date of onset.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge