BRB No. 97-0523 BLA-A

ANTHONY PUPO	)	
	)	
Claimant-Cross-Petitioner	)	
	)	
v.	)	
	)	
STATE COAL COMPANY	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order (Upon Remand by the Benefits Review Board) of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Lynne G. Bressi (Law Offices of Charles A. Bressi, Jr.), Pottsville, Pennsylvania, for claimant.

George E. Mehalchick (Lenahan & Dempsey, P.C.), Scranton, Pennsylvania, for employer.

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

PER CURIAM:

Claimant cross-appeals the Decision and Order (Upon Remand by the Benefits Review Board) (91-BLA-1788) of Administrative Law Judge Robert D. Kaplan 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 the second time on claimant's Petition for Modification. In his original Decision and Order dated June 3, 1992, the administrative law judge, noting the 1986 Decision and Order of Administrative Law Judge Leonard N. Lawrence (Judge Lawrence) denying claimant's original application for benefits, found that claimant's Petition for Modification was filed properly, under 20 C.F.R. §725.310, within one year of the Board's 1989 affirmance of Judge Lawrence's decision and, therefore, considered this case under 20 Part 727 based on claimant's original October 1973 filing date.[2] Based on the parties' stipulation, the administrative law judge credited

[1] Employer, by motion dated January 27, 1997, withdrew its appeal of the administrative law judge's finding of entitlement to benefits. The Board granted this motion by Order dated April 14, 1997. *Pupo v. State Coal Co.*, BRB No. 97-0523 BLA (Apr. 14, 1997)(Order)(unpub.). Consequently, since the parties do not challenge the administrative law judge's award of benefits, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] In a Decision and Order dated September 9, 1986, Administrative Law Judge Leonard N. Lawrence (Judge Lawrence) denied benefits. Judge Lawrence found that while the medical evidence of record was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2), the medical evidence was also sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Judge Lawrence further found the evidence of record insufficient to establish entitlement pursuant to 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. Accordingly, he denied benefits. Director's Exhibit 40.

claimant with thirty years of coal mine employment. In weighing the medical evidence, the administrative law judge found the x-ray evidence in equipoise and, therefore, found it sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). In addition, he found the pulmonary function study evidence sufficient to establish invocation pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge further found that the medical evidence was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Consequently, the administrative law judge determined that claimant established entitlement to benefits pursuant to Part 727 and thus, that claimant established a change in conditions pursuant to 20 C.F.R. §725.310. Finally, the administrative law judge found that the medical evidence of record did not establish a specific date of onset of total disability due to pneumoconiosis and, therefore, determined that the date of the commencement of benefits was July 1989, the month in which the Board affirmed Judge Lawrence's denial of benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the x-ray evidence of record inasmuch as the administrative law judge based his finding of invocation at Section 727.203(a)(1) on his application of the true doubt rule. *Pupo v. State Coal Co.*, BRB No. 92-1897 BLA (Nov. 26, 1993)(unpub.). Additionally, the Board instructed that, if on remand, the administrative law judge did not find the x-ray evidence sufficient to establish invocation of the interim presumption under Section 727.203(a)(1), he must then reconsider whether the evidence established rebuttal pursuant to Section 727.203(b)(4). *Pupo*, slip op. at 6-7. However, the Board affirmed the administrative law judge's findings regarding claimant's length of coal mine employment, his determination of July 1, 1989 as the date of the commencement of benefits and his findings pursuant to 20 C.F.R. §§727.203(a)(2), 727.203(b)(1) and (b)(2), as none of the parties challenged these findings. *See Pupo*, slip op, at 2, n.2. Lastly, the Board affirmed the administrative law judge's determination regarding the issue of responsible operator and also held that the administrative law judge reasonably found the medical evidence of record was insufficient to establish rebuttal pursuant to Section 727.203(b)(3). *See Pupo,* slip op. at 5. By Order dated August 15, 1996, the Board denied employer's Motion for Reconsideration. *Pupo v. State Coal Co.*, BRB No. 92-1897 BLA (Aug. 15, 1996)(Order)(unpub.).

On remand, the administrative law judge initially noted the Board's affirmance of his decision to credit claimant with thirty years of coal mine employment, his finding

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The Board, in a Decision and Order dated July 27,1989, affirmed Judge Lawrence's denial of benefits as supported by substantial evidence. *Pupo v. State Coal Co.*, BRB No. 86-2565 BLA (July 27, 1989)(unpub.); Director's Exhibit 45.

that employer is the properly named responsible operator, his determination that benefits shall commence as of July 1, 1989 and his findings pursuant to 20 C.F.R. §727.203(a)(2), 727.203(b)(1)-(3), but that the case was remanded for reconsideration of the evidence pursuant to Section 727.203(a)(1) and 727.203(b)(4). In considering the evidence on remand, the administrative law judge found the x-ray evidence insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). The administrative law judge further found that the medical evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4), finding that Dr. Dittman's opinion is not a reasoned or documented medical opinion and, therefore, is insufficient to establish that claimant is not suffering from pneumoconiosis. Accordingly, the administrative law judge again awarded benefits commencing on July 1, 1989.

On appeal, claimant generally challenges the determination of the date of the commencement of benefits, contending that Judge Lawrence's 1986 Decision and Order contained a mistake of fact and, therefore, claimant is entitled to have his benefits commence as of the original filing date. In response, employer urges affirmance of the determination of the date of the commencement of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not respond in this appeal.

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

As a general rule, once claimant's entitlement to benefits has been demonstrated, the date for the commencement of benefits is determined by the date of onset of total disability due to pneumoconiosis, *i.e.*, the month in which the pneumoconiosis progressed to the stage of total disability. 20 C.F.R. §725.503; *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date that claimant became totally disabled due to pneumoconiosis, claimant is entitled to benefits as of the filing date, unless there is evidence, which the administrative law judge finds credible, establishing that claimant is not totally disabled at some point subsequent to his filing date. *Id*.; *Edmiston v. F & R Coal Co*., 14 BLR 1-710 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

In challenging the determination of the date of the commencement of benefits, claimant contends that the administrative law judge erred in failing to determine whether the 1986 Decision and Order of Judge Lawrence contained a mistake in a determination of fact with regard to the professional qualifications of Dr. Mathur. Claimant argues that because Judge Lawrence, as a result of this mistake, committed an error in denying benefits, claimant is entitled to benefits from the date of his

application for benefits, October 10, 1973. Claimant had full opportunity to challenge the administrative law judge's determination of the date from which benefits commence through a cross-appeal to the Board following the administrative law judge's 1992 Decision and Order. Claimant, however, failed to file such an appeal. Accordingly, we decline to address claimant's contentions regarding the administrative law judge's determination that he is entitled to benefits commencing July 1, 1989. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991)(Stage, J., dissenting).

Accordingly, the administrative law judge's Decision and Order (Upon Remand by the Benefits Review Board) awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge