BRB No 00-0582 BLA

GEORGE M. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
MARTINKA COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest		

Appeal of the Decision and Order-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

Helen H. Cox (Judith E. Kramer, Acting 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.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (99-BLA-0199) of Administrative Law Judge Daniel L. Leland rendered 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 filed his application for benefits on May 30, 1995. Director's Exhibit 1. His claim is now before the Board for the second time.

Initially, the administrative law judge accepted the parties' stipulation to twenty-seven and one-half years of coal mine employment and found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2000). Accordingly, the administrative law judge denied benefits. Director's Exhibit 50. Upon consideration of claimant's appeal, the Board determined that the Director, Office of Workers' Compensation Programs (the Director), had not fulfilled his statutory duty to provide claimant with a complete pulmonary evaluation sufficient to constitute an opportunity to substantiate his claim. *Miller v. Martinka Coal Co.*, BRB No. 97-1282 BLA (Apr. 28, 1998)(unpub.); Director's Exhibit 59. Consequently, the Board vacated the denial of benefits and remanded the case to the district director for a complete and credible medical evaluation to be provided.

On remand, claimant was provided with another examination and both claimant and employer submitted additional medical evidence. After the district director denied benefits, claimant requested a hearing, which the administrative law judge held on November 22, 1999.

In his Decision and Order, the administrative law judge first considered the x-ray evidence, which consisted of thirty-three readings of eight chest x-rays. Only two readings were positive for pneumoconiosis. The administrative law judge found that "the overwhelming weight of the x-ray reports" did not establish the existence of pneumoconiosis. Decision and Order at 8.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a citation to the regulations is followed by "(2000)," the reference is to the old regulations.

The administrative law judge then considered the conflicting reports of six physicians. Dr. Andrzej Jaworski, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant in July 1995 and diagnosed chronic obstructive pulmonary disease (COPD) and bronchial asthma "with possible contribution of coal dust exposure."[2] Director's Exhibit 16 at 9. Dr. Donald Rasmussen, who is Board-certified in Internal Medicine, examined claimant in May 1996 and concluded that he had coal workers' pneumoconiosis and asthma. Director's Exhibit 45. Dr. Rasmussen identified smoking, asthma, and coal dust exposure as contributing factors to claimant's obstructive ventilatory impairment, and added that claimant's asthma was not caused by coal dust exposure but could have been aggravated by it. Director's Exhibit 46 at 14.

Dr. Renn, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant in September 1996 and concluded that he did not have pneumoconiosis but rather had chronic bronchitis with an asthmatic component and pulmonary emphysema caused by tobacco smoking. Director's Exhibits 39, 42. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, concluded after reviewing claimant's medical records that claimant did not have pneumoconiosis but did have a respiratory impairment related to smoking. Director's Exhibit 40.

Dr. Jaworski again examined claimant on behalf of the Department of Labor in July 1998 and diagnosed severe COPD which was a combination of "bronchial asthma (industrial bronchitis) due to coal dust exposure and COPD with cigarette smoking." Director's Exhibit 70 at 4. Dr. Jaworski concluded that claimant's light smoking history contributed only to a minor extent. *Id*. When deposed in December 1998, Dr. Jaworski stated that claimant did not have coal workers' pneumoconiosis, but had pneumoconiosis in the form of chronic bronchitis with airway obstruction due to coal dust exposure. Claimant's Exhibit 1 at 25-30, 39. Dr. Jaworski indicated that claimant's bronchial asthma was not caused by coal dust exposure, but could have been aggravated by it. Claimant's Exhibit 1 at 36. Dr. Jaworski emphasized that he was not claimant's treating physician, but would be following claimant's health in the future. Claimant's Exhibit 1 at 22. Subsequently, claimant submitted into the record treatment notes from Dr. Jaworski recording eight office visits from November 13, 1998 to October 5, 1999. Claimant's Exhibit 2.

Claimant also submitted a December 1997 letter from Dr. Charlene Horan, whose credentials are not in the record but who identified herself as claimant's "primary care physician for the last year." Claimant's Exhibit 3. Dr. Horan stated that claimant's physical examination, pulmonary function studies, and chest x-ray

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[2] It was this wording which led the administrative law judge to discount Dr. Jaworski's opinion as equivocal, and the Board to hold that Dr. Jaworski's report was not a complete and credible pulmonary evaluation.

were consistent with pneumoconiosis, and she diagnosed severe chronic lung disease to which "coal workers' pneumoconiosis" contributed. *Id*.

Dr. Zaldivar, who is Board-certified in Internal Medicine and Pulmonary Disease, examined claimant in February 1999 and reviewed his medical records. Employer's Exhibit 1. Dr. Zaldivar concluded that claimant did not have pneumoconiosis but had emphysema due to smoking, and asthma, a disease of the general public. Employer's Exhibit 5. Dr. Renn reviewed claimant's medical records and concluded that he did not have pneumoconiosis but had asthma, asthmatic bronchitis, and pulmonary emphysema unrelated to coal dust exposure. Employer's Exhibit 7. Dr. Renn attributed claimant's emphysema to smoking. *Id*. Dr. Fino again reviewed claimant's medical records, and diagnosed asthma. Employer's Exhibit 7. Dr. Fino stated that claimant does not have chronic bronchitis or industrial bronchitis, but has asthmatic bronchitis due to asthma. Dr. Fino added that asthma is neither caused nor aggravated by coal dust exposure. Employer's Exhibit 7 at 12, 15-16.

The administrative law judge accorded "great weight" to the opinions of Drs. Jaworski and Horan as treating physicians, "because of their familiarity with claimant's pulmonary condition. . . ." Decision and Order at 9. The administrative law judge accorded less weight to the opinions of Drs. Renn, Fino, and Zaldivar,[3] and concluded that claimant established the existence of pneumoconiosis by physician opinion evidence. The administrative law judge further found that the medical opinions of Drs. Jaworski, Rasmussen, and Fino established that claimant is totally disabled from performing his usual coal mine employment as a heavy equipment operator. Finally, the administrative law judge accorded great weight to Dr. Jaworski as a treating physician to find that claimant's total disability is due to pneumoconiosis, while discounting the opinions of Drs. Fino, Renn, and Zaldivar because they did not diagnose pneumoconiosis. Decision and Order at 10. Accordingly, the administrative law judge awarded benefits. The administrative law judge ordered benefits to commence as of May 1, 1995, the month during which claimant filed his claim.

On appeal, employer contends that the administrative law judge made several errors in finding that claimant has pneumoconiosis, that he is totally disabled by a respiratory impairment, and that pneumoconiosis is a contributing cause of claimant's total disability. Employer further asserts that the administrative law judge erred in automatically selecting the month in which claimant filed his claim as the onset date for the payment of benefits. Claimant responds, urging affirmance, and the Director has declined to participate in this appeal. Employer filed a reply brief, to

[3] The administrative law judge also discounted Dr. Rasmussen's opinion as equivocal and based on an inflated coal mine employment history. Decision and Order at 9.

which claimant responded. Employer submitted a supplemental reply brief, which the Board hereby accepts.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States Court of Appeals for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which all parties have responded. Claimant and the Director state that none of the regulations at issue in the lawsuit affects the outcome of this case. Employer, however, contends that two challenged regulations, 20 C.F.R. §718.201(c)(defining pneumoconiosis as a latent and progressive disease), and 20 C.F.R. §725.503(specifying the method for determining the date from which benefits are payable), affect the outcome of this case.

Based upon the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. The administrative law judge in this case weighed the evidence based in part on the principle that pneumoconiosis is progressive. However, this aspect of the case is the same under both the existing law recognizing the progressive nature of pneumoconiosis, *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996), and 20 C.F.R. §718.201(c), which codifies existing law. 65 Fed. Reg. 79937, 79971-72. Further review indicates that the applicable method for determining the onset date for benefits set forth at amended 20 C.F.R. §725.503(b) is the same as that set forth in the former 20 C.F.R. §725.503(b)(2000). Additionally, based on our review, we conclude that none of the other challenged regulations affects the outcome of this case. Therefore, we will proceed with the adjudication of 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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989);

Trent v. Director, OWCP, 11 BLR 1-26, 1-27 (1987).

In this case, the administrative law judge concluded that the x-ray evidence did not support a finding of the existence of pneumoconiosis, and found the existence of pneumoconiosis established based solely on the physician opinion evidence pursuant to Section 718.202(a)(4). Subsequent to the issuance of the administrative law judge's decision, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that the administrative law judge must weigh all evidence relevant to the existence of pneumoconiosis together, rather than merely within discrete subsections of Section 718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208, BLR (4th Cir. 2000). Because the administrative law judge did not weigh the x-ray and medical opinion evidence together, we must vacate the administrative law judge's finding that the existence of pneumoconiosis was established and remand this case for him to reweigh the evidence under Section 718.202(a), consistently with *Compton*.

Employer contends that the administrative law judge mechanically accorded great weight to the opinions of Drs. Jaworski and Horan as treating physicians. Employer's Brief at 16-17. This contention has merit. The rationale for affording special consideration to a treating physician's opinion is that the physician may base his or her diagnosis upon an understanding of claimant's pulmonary condition gained over the course of observation and treatment. *See Onderko v. Director, OWCP*, 14 BLR 1-2, 1-6 (1989); *Schultz v. Youghiogheny and Ohio Coal Co*., 1 BLR 1-660, 1-665-66 (1978). Here, Dr. Jaworski disavowed being claimant's treating physician. Claimant's Exhibit 1 at 22. Moreover, at the time he rendered his opinion, Dr. Jaworski testified that he had examined claimant twice for the Department of Labor and had seen him only once in his office upon referral from Dr. Horan. Only after Dr. Jaworski rendered his opinion did he begin to treat claimant regularly. Claimant's Exhibit 2. However, no follow-up report or testimony from Dr. Jaworski was submitted. Under these circumstances, substantial evidence does not support the administrative law judge's finding that Dr. Jaworski's opinion was entitled to great weight based upon "familiarity with claimant's pulmonary condition" gained through treatment. Decision and Order at 9. Accordingly, on remand the administrative law judge should reweigh Dr. Jaworski's opinion against those of Drs.

Renn, Fino, and Zaldivar.[4]

In contrast to Dr. Jaworski, Dr. Horan did state that she was claimant's treating physician. Thus, there may be a basis for affording her opinion special consideration, but the administrative law judge did not determine whether Dr. Horan's opinion was documented and reasoned. *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). Accordingly, on remand the administrative law judge should reweigh and fully analyze Dr. Horan's opinion consistently with *Hicks* and *Akers*.

[4] Nevertheless, we reject employer's contention that Dr. Jaworski's diagnosis of chronic bronchitis due in part to coal dust exposure is unreasoned. As noted by the administrative law judge, Dr. Jaworski based his opinion upon physical examinations, smoking and coal mine employment histories, objective testing, and chest x-rays. The administrative law judge appropriately considered Dr. Jaworski's credentials and found Dr. Jaworski's opinion well-reasoned. Substantial evidence supports that conclusion. *See Compton*, 211 F.3d at 211, BLR at (totality of physician's report indicated that he reached a reasoned medical opinion).

Employer further alleges that the administrative law judge shifted the burden of proof to employer when he discounted the opinions of Drs. Fino and Zaldivar because "they did not convincingly rule out that claimant's asthma was substantially aggravated by his twenty-seven and one-half years of coal mine employment which would bring it under the definition of pneumoconiosis in §718.201." Decision and Order at 9; Employer's Brief at 22-24. This contention appears to have merit, but the lack of a specific finding at Section 718.202(a)(4) makes it difficult to assess the exact meaning of the administrative law judge's statement. There was evidence in the record that claimant's asthma may have been aggravated by his coal dust exposure, Director's Exhibit 46; Claimant's Exhibit 1, but the administrative law judge did not make a finding as to whether claimant's asthma was pneumoconiosis as defined in the Act. On remand, the administrative law judge should make a more specific finding at subsection (a)(4) specifying which, if any, of claimant's several pulmonary impairments he has found to be pneumoconiosis under the Act.[5] *See* 20 C.F.R. §718.201.

Employer next contends that the administrative law judge erred in finding that claimant is totally disabled based upon the medical opinion evidence. Employer's Brief at 25. As the administrative law judge found, Drs. Jaworski, Rasmussen, and Fino agreed that claimant's obstructive ventilatory impairment prevented him from performing his usual coal mine employment as a heavy equipment operator because it left him unable to clean the bulldozer's tracks with a spade, a daily requirement of the job.[6] Director's Exhibits 16, 45, 70; Claimant's Exhibit 1; Employer's Exhibit 7. Thus, although the administrative law judge inappropriately accorded great weight to Dr. Jaworski as a treating physician, substantial evidence nevertheless supports the administrative law judge's finding of total disability based upon the physician opinion evidence. *See Larioni v. Director, OWCP,* 6 BLR 1-1276, 1-1278 (1984)(harmless error). Employer does not otherwise challenge the administrative law judge's

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[5] Contrary to employer's contention, on remand the administrative law judge may continue to be guided by the principle that pneumoconiosis is a progressive disease. *See* 20 C.F.R. §718.201(c); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Richardson v. Director, OWCP*, 94 F.3d 164, 167-68, 21 BLR 2-373, 2-379 (4th Cir. 1996). However, as noted above, the administrative law judge must make specific findings as to which respiratory impairments are caused by pneumoconiosis. Further, as the physicians in this record used several different diagnostic terms, in assessing the physicians' reasoning the administrative law judge should approach their opinions "with an ear sensitive to conflicting meanings ascribed to the same words by . . . doctors, as well as to . . . differences in phraseology among doctors themselves." *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 761, 21 BLR 2-587, 2-601 (4th Cir. 1999).

[6] Contrary to employer's assertion, Dr. Fino stated clearly that "[a]s [claimant's] last job was described, I don't believe he would be able to perform that job." Employer's Exhibit 7 at 15.

conclusion that the opinions of Drs. Zaldivar and Renn did not outweigh those of Drs. Fino, Rasmussen, and Jaworski. Accordingly, we affirm the administrative law judge's finding. On remand, however, the administrative law judge should complete the disability analysis by weighing together the pulmonary function studies, blood gas studies, and medical opinions to determine whether the weight of the evidence supports a finding of total disability.[7] *See Beatty v. Danri Corporation and Triangle Enterprises,* 16 BLR 1-11, 1-14 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Employer challenges the administrative law judge's determination to accord little weight to the disability causation opinions of Drs. Fino, Renn, and Zaldivar because they did not diagnose pneumoconiosis. Employer's Brief at 26-29. As noted above, the administrative law judge's finding that the existence of pneumoconiosis was established is not in accordance with law. Additionally, where a physician acknowledges that a claimant has a respiratory or pulmonary impairment, but explains that an ailment other than pneumoconiosis caused the impairment, the physician's opinion is relevant to disability causation and should not be discounted merely because the physician did not diagnose pneumoconiosis. *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1193-94, 19 BLR 2-304, 2-315-16 (4th Cir. 1995). Here, Drs. Renn, Fino and Zaldivar concluded that claimant has a respiratory impairment, and explained why they believe that claimant's impairment is unrelated to pneumoconiosis, but is instead due to smoking and to asthma unrelated to coal mine employment. In view of the erroneous reason the administrative law judge provided for according these opinions little weight, and because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we vacate the administrative law judge's disability causation finding and remand the case for him to reweigh the medical opinions in light of *Ballard*, and also *Hicks* and *Akers*, to determine whether pneumoconiosis is "a substantially contributing cause of [claimant's] totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1).

Finally, employer contends that the administrative law judge erred in determining that May 1, 1995 is the date on which the miner's entitlement to benefits commenced, as the administrative law judge automatically selected the month of filing.

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); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset is not

[7] The methods of establishing total disability are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv). Disability causation is now defined at 20 C.F.R. §718.204(c)(1).

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); *Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47, 1-50 (1990). Here, the administrative law judge did not attempt to ascertain when claimant became totally disabled due to pneumoconiosis but merely stated that the date of onset was "not clear from the record," Decision and Order at 10, without assessing the medical evidence or making specific findings. *See* Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). Accordingly, we vacate the administrative law judge's onset determination and hold that if benefits are awarded on remand, the administrative law judge must address the relevant evidence and make specific findings, if possible, regarding the date of onset. 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. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed in part and 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