BRB No. 98-0879 BLA

FLOYD E. DUNCAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	Date Issued:
	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford & Siemons), Harlan, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-BLA-0821) of Administrative

Law Judge Daniel J. Roketenetz 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). The administrative law judge initially noted that, inasmuch as the instant claim was a duplicate claim, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309(d), in accordance with the standard set forth in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.[1] The administrative law judge noted that claimant's prior claim was denied because claimant had failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4).[2] Thus, the administrative law judge considered the new evidence submitted subsequent to the denial of claimant's prior claim pursuant to Section 718.202(a)(1)-(4). The administrative law judge found the existence of pneumoconiosis established by the newly submitted medical opinion evidence pursuant to Section 718.202(a)(4), and that pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.203(b).[3] The administrative law judge also found total disability and total disability due to pneumoconiosis established by the newly submitted

[1]Claimant originally filed a claim on December 4, 1987, Director's Exhibit 32. In a Decision and Order issued on March 31, 1992, the administrative law judge found thirty-nine years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718, *id*. The administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied. Claimant appealed and the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1)-(4) and, therefore, affirmed the administrative law judge's Decision and Order denying benefits, *id. Duncan v. Dixie Fuel Co.*, BRB No. 92-1523 BLA (Apr. 26, 1994)(unpub.). Claimant took no further action on this claim. Claimant filed a second, duplicate claim on April 28, 1995, Director's Exhibits 1-5.

[2]The administrative law judge incorporated into his Decision and Order in the instant claim his prior findings of fact and conclusions of law from his Decision and Order in claimant's original claim, as affirmed by the Board. Decision and Order at 3 n. 3.

[3]The administrative law judge's findings that the existence of pneumoconiosis was not established by the newly submitted x-ray evidence pursuant to Section 718.202(a)(1) and was not established pursuant to Section 718.202(a)(2)-(3) are affirmed as unchallenged by any party on appeal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

medical opinion evidence pursuant to 20 C.F.R. §718.204(b), (c)(4).[4] Accordingly, benefits were awarded. Finally, the administrative law judge ordered benefits to commence from January 1, 1995, which the administrative law judge characterized as being the month in which claimant "filed" the instant claim.

On appeal, employer contends that the administrative law judge erred in finding a material change in conditions established pursuant to Section 725.309(d), the existence of pneumoconiosis established pursuant to Section 718.202(a)(4), total disability due to pneumoconiosis established pursuant to Section 718.204(b), (c), and an onset date of January 1, 1995. Claimant responds, urging that the Decision and Order of the administrative law judge awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs [the Director], as a party-in-interest, has not responded to this appeal.

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).

[4]In considering the newly submitted evidence pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that it was insufficient to demonstrate total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3).

In considering the newly submitted medical opinions of record pursuant to Section 718.202(a)(4),[5] the administrative law judge acknowledged that Dr. Baker had noted that his diagnosis of clinical pneumoconiosis was contrary to the preponderance of the x-ray evidence, but the administrative law judge credited Dr. Baker's opinion that claimant also suffered from respiratory disease related, at least in part, to his coal mine dust exposure, *i.e.*, pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, as it was consistent with claimant's thirty-nine year coal mine employment history and the physical examination and objective evidence of record. The administrative law judge found that Drs. Dahhan and Broudy failed to adequately explain why they attributed claimant's bronchitis and obstructive disease only to claimant's smoking, Decision and Order at 8-9. In addition, the administrative law judge found that Dr. Dahhan's conclusion that claimant had no pulmonary impairment was not credible as it was contrary to and/or outweighed by the opinions of Drs. Broudy and Baker, as well as the objective evidence of record.

Employer initially contends that the administrative law judge's finding is contrary to the Board's holding in *Flynn v. Grundy Mining Co.*, 21 BLR 1-41 (1997), as no physician assessed whether claimant's condition had worsened since the previous denial of his claim. In *Flynn, supra*, the Board held that a determination that a miner's condition has worsened is a requisite part of the duplicate claim analysis at Section 725.309(d) under *Ross, supra*, and that when it is not discernable whether the administrative law judge merely disagreed with the previous characterization of the evidence (which, in this case, was that claimant did not establish the existence of pneumoconiosis) or whether claimant demonstrated a material change in condition since the prior denial, the administrative law judge's finding under Section 725.309(d) must be vacated and the case remanded for reconsideration.

[5]Dr. Baker diagnosed clinical coal workers' pneumoconiosis based on an x-ray reading as well as a "moderate" obstructive ventilatory defect and believed, as a result, that claimant was disabled from performing his usual coal mine employment, Director's Exhibits 11-12. In addition, Dr. Baker diagnosed chronic obstructive pulmonary disease, bronchitis and hypoxemia, which he attributed to claimant's coal dust exposure and smoking. Dr. Dahhan found no objective evidence of coal workers' pneumoconiosis or pulmonary impairment and/or disability, but diagnosed chronic bronchitis due to smoking, Employer's Exhibit 2. Finally, Dr. Broudy diagnosed moderate obstructive airways disease which he attributed to smoking, but found no coal workers' pneumoconiosis and believed claimant was not disabled from a pulmonary or respiratory standpoint, Employer's Exhibit 1.

The instant case, however, is distinguishable from the factual situation in *Flynn.* In *Flynn*, it was not discernable whether the administrative law judge merely disagreed with the district director's interpretation of the earlier opinion of a physician submitted with the claimant's previously denied claim or whether the administrative law judge believed the same physician's subsequent, similar opinion submitted with the duplicate claim demonstrated a material change in condition since the prior denial. In the instant case, the same administrative law judge decided both claims and stated that, while the evidence set forth in his prior decision was not sufficient to establish the existence of pneumoconiosis, he found the newly submitted evidence to be more probative of claimant's current condition, Decision and Order at 11, and did establish the existence of pneumoconiosis. Thus, the administrative law judge determined that the newly submitted evidence established a material change in conditions based on the opinion of Dr. Baker, who examined claimant and performed objective studies in June, 1995, more than three years after claimant's prior denial. Moreover, Dr. Baker had not provided an opinion in claimant's originally denied claim.

Employer contends that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4), relying on Dr. Baker's opinion, because the administrative law judge did not apply the correct legal standard and because Dr. Baker's opinion does not meet that standard.[6] Employer is correct in asserting that the administrative law judge did not determine whether Dr. Baker's diagnoses satisfied the regulatory definition of pneumoconiosis set forth in 20 C.F.R. §718.201, including "any chronic pulmonary disease resulting in respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment," *Peabody Coal Co. v. Hill*, 123 F.3d 412, 417, 21 BLR 2-192, 2-199 (6th Cir. 1997). *See Adams v. Director, OWCP*, 886 F.2d 818, 822 n. 4, 13 BLR 2-52, 2-58 n. 4 (6th Cir. 1989); *see also Southard v. Director, OWCP*, 732 F.2d 66, 6 BLR 2-26 (6th Cir. 1984). Although the administrative law judge quoted the regulation in full, he held that Dr. Baker's opinion established the existence of pneumoconiosis because it related claimant's respiratory disease "at least in part, to coal mine dust exposure ...," Decision and Order at 8. Since the administrative law judge did not apply the correct legal standard, we must vacate the administrative law judge's finding that the

[6]Employer also contends that Dr. Baker's diagnosis of pneumoconiosis depended exclusively on a discredited positive x-ray reading, *see* Employer's Brief at 3. Contrary to employer's contention, Dr. Baker recognized that the preponderance of the x-ray readings of record were negative, *see* Director's Exhibit 12.

newly submitted medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and, therefore, that a material change in conditions was established pursuant to Section 725.309(d) and remand the case for reconsideration. On remand, the administrative law judge must provide a full, detailed opinion which complies with 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 30 U.S.C. §932(a), and which fully explains the specific bases for his decision, the weight assigned to the evidence and the relationship he finds between the evidence and his legal and factual conclusions, *see Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984). Specifically, if the administrative law judge again determines that Dr. Baker's opinion establishes the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge must explain how it is a reasoned opinion sufficient to shoulder claimant's burden. *See Hill, supra* (in which the Sixth Circuit Court discusses the kind of evidence which satisfies claimant's burden at this section).

Employer also contends that the administrative law judge erred in finding Dr. Baker's opinion sufficient to establish that claimant was totally disabled from his last coal mine employment and failed to weigh all relevant evidence together, like and unlike, under Section 718.204(c), including the pulmonary function study and blood gas study evidence the administrative law judge found insufficient to demonstrate total disability under Section 718.204(c)(1)-(2).[7]

The administrative law judge weighed the relevant medical opinion evidence and found that the opinions of Drs. Broudy and Baker that claimant had a moderate obstructive impairment were supported by objective study results, *see Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985); *Sweet v. Jeddo-Highland Coal Co.*, 7 BLR 1-659 (1985); *Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984), and outweighed Dr. Dahhan's contrary conclusion that claimant had no pulmonary impairment whatsoever, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984). Decision and Order at 10-11. The administrative law judge also relied on claimant's testimony, *see* Hearing Transcript at 10-11, in finding that claimant's last coal mine employment involved heavy manual labor. Thus, the administrative law judge, within his discretion, gave more weight to Dr. Baker's opinion that claimant was disabled from performing his usual coal mine employment due to his moderate obstructive impairment over Dr.

[7]Inasmuch as the administrative law judge's finding that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b) is unchallenged on appeal, it is affirmed, *see Skrack, supra*.

Broudy's contrary opinion that claimant was not totally disabled, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985). Thus, we affirm the administrative law judge's finding that total disability was established pursuant to Section 718.204(c), *see Hvizdzak, supra*; *see also Aleshire, supra*.

Pursuant to Section 718.204(b), the administrative law judge found that claimant established total disability due, at least in part, to his coal dust exposure and/or pneumoconiosis as more broadly defined by the Act and regulations, in accordance with the standard enunciated in *Adams, supra*, "[b]ased upon the report of Dr. Baker," Decision and Order at 11. However, as employer contends, the administrative law judge did not adequately explain how Dr. Baker's opinion established that claimant's total disability is due, at least in part, to pneumoconiosis under Section 718.204(b), *see Adams, supra; see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Consequently, the administrative law judge's finding of total disability due, at least in part, to pneumoconiosis pursuant to Section 718.204(b) is vacated and the case is remanded for reconsideration, if reached, *see Tenney, supra*.

Finally, the administrative law judge found that the record does not contain any medical evidence establishing that claimant was not totally disabled at some point subsequent to his filing date and, therefore, awarded benefits to commence from January 1, 1995, the month in which the administrative law judge stated that claimant "filed" the instant claim. S*ee* 20 C.F.R. §725.503; *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Gardner v. Consolidation Coal* Co., 12 BLR 1-184 (1989)*; Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987). Employer notes that the first evidence credited by the administrative law judge that claimant had pneumoconiosis is Dr. Baker's June, 1995, opinion and, therefore, contends that benefits, if awarded, should not commence until June, 1995. Contrary to employer's contention, the date of onset is not established by the first medical evidence indicating total disability (or total disability due to pneumoconiosis), but, rather, such medical evidence merely indicates that claimant became totally disabled at some time prior to the date of that medical evidence, *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984).

The administrative law judge erred, however, in finding that claimant filed the instant claim in January, 1995. A review of the record reveals that the instant, duplicate claim was ultimately date-stamped as filed on April 28, 1995, more than a year after the Board's affirmance of the administrative law judge's prior Decision and Order denying benefits, *see* Director's Exhibits 1-5, 32; *Duncan, supra*. Thus, we affirm the administrative law judge's finding that a date of the onset of claimant's disability is not ascertainable from the evidence of record and, consequently, his

finding that benefits, if awarded, should commence as of the month the claim was filed, *see* 20 C.F.R. §725.503; *Gardner, supra*. However, we modify the administrative law judge's order that benefits, if awarded, should commence as of the month the claim was filed to reflect that benefits, if awarded, should commence from April 1, 1995, the month in which claimant actually filed the instant claim.

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

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge