BRB No. 01-0864 BLA

BOBBY R. COOK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits on Remand from the Benefits Review Board, of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Kathy L. Snyder (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: SMITH, HALL and GABAUER, Administrative Appeals Judges.

SMITH, J.:

Employer appeals the Decision and Order - Award of Benefits on Remand from the Benefits Review Board (87-BLA-3681) of Administrative Law Judge Paul H. Teitler (the

administrative law judge) 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 fifth time. Most recently, the Board, in *Cook v. Westmoreland Coal Co.*, BRB No. 99-0891 BLA (June 22, 2000)(unpublished), held that the administrative law judge's prior finding of a material change in conditions under 20 C.F.R. §725.309 (2000) constitutes the law of the case and declined to address further employer's allegation of error. The Board also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) (2000), 718.204(c)(4) (2000) and 718.204(b) (2000),[2] and instructed the administrative law judge to weigh the medical opinions of record on remand and determine whether they are reasoned. The Board further instructed the administrative law judge to determine the issue of the existence of pneumoconiosis pursuant to the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[3] The Board, in light of its remand of the case for the administrative law judge to determine the credibility of the medical opinion evidence under 20 C.F.R. §718.204(c)(4) (2000), vacated the administrative law judge's finding that the evidence is sufficient to establish a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(c) (2000). Similarly, the Board, in light of its decision to vacate the administrative law judge's finding of the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4)(2000), vacated the administrative law judge's determination that claimant's total disability is due to pneumoconiosis under 20 C.F.R. §718.204(b) (2000). The Board thus instructed the administrative law judge to make findings on remand under 20 C.F.R. §§718.202 (2000), 718.203 (2000), and 718.204 (2000). The Board further rejected employer's contention that the regulation at 20 C.F.R. §725.503(b) (2000) is invalid under Section 7(c) of the Administrative Procedure Act (APA), 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), inasmuch as this regulation allows for the payment of benefits from a certain date without claimant having affirmatively established entitlement as of that date and also because, in effect, the regulation improperly shifts the burden of proof to employer to establish the date

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

[3]The Board previously affirmed the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3) (2000). *Cook v. Director, OWCP*, BRB No. 95-1453 BLA (Apr. 30, 1996)(unpublished).

of onset. The Board held, however, that in light of its holding which vacates the administrative law judge's award of benefits, the administrative law judge's onset determination was premature and thus was vacated. The Board instructed the administrative law judge to determine the onset issue on remand if reached.

The administrative law judge applied the revised regulations in his Decision and Order on Remand dated July 26, 2001, and awarded benefits. He found that claimant established the existence of pneumoconiosis based on the medical opinions under 20 C.F.R. §718.202(a)(4) and considering all the relevant evidence under 20 C.F.R. §718.202 pursuant to *Compton*. The administrative law judge further found that claimant established total respiratory or pulmonary disability based on the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv) and considering all the relevant evidence under 20 C.F.R. §718.204(b). The administrative law judge also found that claimant established that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that the disease was a substantially contributing cause of his disability under 20 C.F.R. §718.204(c). Based on his finding that the medical evidence does not establish a definitive date as to when claimant became totally disabled due to pneumoconiosis, the administrative law judge determined that benefits are payable as of May 1, 1986, the month in which claimant filed the instant claim. On appeal, employer contends that the administrative law judge committed reversible error in weighing the medical opinion evidence in finding the existence of pneumoconiosis and that claimant is totally disabled due to the disease. Employer argues that the administrative law judge erred in crediting the opinions of Drs. Walker, Rasmussen, Diaz and Aguilar and erred in discrediting the opinions of Drs. Zaldivar, Fino and Hippensteel. Employer also contends that the administrative law judge arbitrarily set the onset date as the month in which the claim was filed, and erred by retroactively applying the revised regulations to the instant claim.[4] The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, limited to addressing employer's

[4]In a footnote, employer indicates:

> For appellate purposes, Westmoreland Coal Company continues to contest the finding of a material change in condition and several other findings the Board has previously affirmed. *See previously filed Petitions for Review and supporting briefs.* Employer's Brief at 2-3 n.2.

arguments with regard to the issue of onset and the administrative law judge's application of the revised regulations. The claimant has not filed a brief in the 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the reasons given by the administrative law judge for finding Dr. Walker's opinion to be reasoned are irrational. The administrative law judge found Dr. Walker's opinion, which includes a diagnosis of pneumoconiosis, *see* Claimant's Exhibit 1, to be reasoned because it was based upon, and adequately supported by, (1) Dr. Walker's actual observations upon examination of claimant's lungs when he performed a thoracotomy in 1996; (2) Dr. Walker's review of claimant's medical records and work history; (3) Dr. Walker's assessment of claimant's condition in connection with claimant's state disability claim; and (4) the opinions of claimant's other treating physicians. Decision and Order on Remand at 4-5. The administrative law judge added:

> The determination to accord the opinion of Dr. Walker greater weight was made after a thorough review of all the medical opinion evidence of record, taking into account the credentials of the various physicians, whether the physician actually had the opportunity to personally examine the Claimant and whether the physician was a treating physician. The fact that Dr. Walker had the opportunity to actually examine the Claimant's lung was also determined to be a significant factor.

Decision and Order on Remand at 5. Employer argues that, pursuant to *Peabody Coal Co. v. McCandless*, 255 F.3d 465, BLR (7th Cir. 2001)(administrative law judge erred in crediting the autopsy prosector's diagnosis of pneumoconiosis merely because the prosector performed the autopsy, where there was no apparent basis in the record for concluding that the prosector's gross examination made his opinion any more reliable than those of the competing physicians who reviewed the tissue slides and detected no pneumoconiosis.),[5] the administrative law judge's finding that Dr. Walker's opinion is reasoned because he observed

[5]The decision of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. McCandless*, 255 F.3d 465, BLR (7th Cir. 2001) was issued on June 29, 2001, approximately one month prior to the issuance of the administrative law judge's Decision and Order on Remand dated July 26, 2001. This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

claimant's lung has no basis in science or fact. Employer also argues that the administrative law judge substituted his opinion for that of the medical experts in crediting Dr. Walker's diagnosis of pneumoconiosis because he performed a gross examination of claimant's lungs whereas "the diagnosis of coal workers' pneumoconiosis" is a microscopic finding and is *not* diagnosed grossly." Employer's Brief at 7. Employer thus asserts that Dr. Walker's opinion cannot be mechanically accorded deference over those of examining or reviewing physicians.

Employer's contentions lack merit. The administrative law judge provided valid reasons for his determination that Dr. Walker's opinion, that claimant has pneumoconiosis, is reasoned and entitled to greater weight. As the noted Board in *Cook* (2000) and as the administrative law judge discussed on remand, the relevant evidence of record includes Dr. Zaldivar's statement that "[t]he report given by Dr. Walker that at the time of thoracotomy the lungs appeared black and there were palpable nodules may indicate that coal workers' pneumoconiosis might be present that is not seen radiographically," Employer's Exhibit 6. Board's June 22, 2000 Decision and Order at 8; Administrative Law Judge's Decision and Order on Remand at 5; *cf. McCandless, supra*. Further, given Dr. Zaldivar's medical opinion, we reject employer's argument that the administrative law judge substituted his opinion for that of the medical experts by crediting Dr. Walker's diagnosis of pneumoconiosis based on the physician's gross examination of claimant's lungs.

Employer further contends that the administrative law judge did not explain his finding that Dr. Walker's opinion is reasoned because "of the opinions of the Claimant's other treating physicians." Decision and Order at 5. Employer's contention lacks merit. The administrative law judge, concluding that Dr. Walker's opinion was "worthy of great weight," *see* Decision and Order on Remand at 4, explained:

> While the record does not contain a curriculum vitae for Dr. Walker, the record does reveal that Dr. Walker was Chairman of the Occupational Pneumoconiosis Board in West Virginia in 1975. The record also reveals that Dr. Walker reviewed the record in the Claimant's application for disability benefits at the state level, including pulmonary function studies from Beckley Appalachian Regional Hospital performed in March and April of 1974, and x-ray records. Dr. Walker was also the Claimant's treating physician in 1986, performing a thoracotomy on him, which gave him the opportunity to observe the Claimant's lung. I find that his qualifications, as a treating physician, as well as his credential as Chairman of the State Occupational Pneumoconiosis Board, coupled with the fact that Dr. Walker has reviewed the Claimant's medical records and has personally treated him, renders his opinion worthy of great weight. In so concluding, I find that his opinion is not only documented, but it is well-reasoned and it is supported by the opinions of the Claimant's other treating physicians, namely Drs. Rasmussen, Aguilar and Diaz.

Id. The administrative law judge thereby properly determined that Dr. Walker's opinion was reasoned as it was supported by the medical studies and records upon which it was based. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Further, the administrative law judge rationally determined that Dr. Walker's opinion that claimant has pneumoconiosis is buttressed by the opinions of Drs. Rasmussen, Aguilar and Diaz who also diagnosed the disease. 20 C.F.R. §718.202(a)(4); *see generally 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).

Employer next argues that the administrative law judge's finding that Dr. Walker's opinion is reasoned because the physician was aware of the miner's medical and work histories is valid, but does not go far enough. Employer asserts that a history of exposure to coal mine dust does not, by itself, conclusively confirm that claimant has pneumoconiosis or is disabled by that condition. Employer asserts that, similarly, Dr. Walker's knowledge of claimant's medical history does not mean that he gave a well-reasoned opinion. Employer's arguments lack merit. The administrative law judge did not offer either of these reasons as being determinative of the issue of whether Dr. Walker's opinion was reasoned. Rather, he provided valid reasons for according determinative weight to Dr. Walker's opinion. *See* discussion, *supra*. Moreover, it is within the discretion of the administrative law judge to determine the weight and credibility of the medical opinion evidence, *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988), and insofar as employer seeks a re-weighing of the evidence, its arguments are rejected. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Employer contends that Dr. Walker's opinion is unreasoned because neither the x-ray nor the CT scan referenced in Dr. Walker's discharge summary supports a diagnosis of pneumoconiosis. Dr. Walker's Discharge Summary dated August 25, 1986 details his findings in performing a thoracotomy and includes the diagnoses of right parasternal hernia and pneumoconiosis. He indicated, in pertinent part:

> The patient was seen in the office because of a mass at the right cardiophrenic angle. This was not present on a film taken 3-4 years earlier. Outside CT scan of the chest was interpreted as showing findings suggestive of possible neoplasm. Chest x-ray and additional CT scan at this hospital with comparison of the outside CT scan revealed the density at the right cardiophrenic angle. The impression was a soft tissue mass in the right lung base. A neoplasm must be considered.

Claimant's Exhibit 1. In his Operative Record, Dr. Walker indicated, in pertinent part:

> The patient had a normal chest x-ray 3-4 years ago. Recently, chest x-rays

> revealed a mass in the right cardiophrenic angle. This has been described on one x-ray as a pericardial fat pad or pericardial cyst. A CT scan of the chest has probable atelectasis and tumor and a second x-ray report of the chest utilizing the old films was tumor suspect.
>
> FINDINGS: At thoracotomy, the right lung was black. There were small, palpable nodules throughout. The right lung - the fissures were approximately 50% fused. The lung was emphysematous. There was a mass present at the right cardiophrenic angle. The mass was enlarged fat pad. As it was excised, it was seen to come out of the abdominal cavity.

Id. The administrative law judge found that the fact that Dr. Walker's finding of pneumoconiosis on gross examination of the lungs "runs contrary to the x-ray evidence does not render his opinion unreasoned. Rather it renders his opinion worthy of great weight on this issue because he had a more accurate means of assessing the existence of the disease." Decision and Order on Remand at 4.

We find no merit in employer's contention that the administrative law judge erred in finding Dr. Walker's diagnosis of pneumoconiosis supported by objective evidence. The regulation at 20 C.F.R. §718.202(a)(4) provides that a determination of the existence of pneumoconiosis may be made, *notwithstanding a negative x-ray,* if a physician exercising sound medical judgment finds that the miner suffers or suffered from pneumoconiosis as defined in 20 C.F.R. §718.201. The finding of the existence of pneumoconiosis must be based on objective medical evidence and supported by a reasoned medical opinion. 20 C.F.R. §718.202(a)(4). Dr. Walker's opinion contains a description of his findings on gross examination of claimant's lungs. *See* Claimant's Exhibit 1. The fact that Dr. Walker did not also rely on a positive CT scan or x-ray does not render unreasoned his diagnosis of pneumoconiosis based on this gross examination of claimant's lungs. 20 C.F.R. §718.202(a)(4).

Employer next contends that the administrative law judge mechanically credited Dr. Walker's opinion based on his status as a treating physician without proper explanation or foundation. Employer's contention is contrary to the record. The administrative law judge recognized that Dr. Walker was a treating physician, but did not mechanically credit his opinion on this basis. Rather, the administrative law judge properly found that Dr. Walker's opinion was reasoned and documented, and provided valid reasons for according it determinative weight. *See* Decision and Order on Remand at 3-7; *see also* discussion, *supra*.

Employer argues that the administrative law judge relied on the opinions of Drs. Rasmussen, Diaz and Aguilar to find that claimant has pneumoconiosis and is totally disabled by the disease, without determining whether their opinions were reasoned.

Employer thus asserts that the administrative law judge failed to follow the Board's instruction to weigh the medical opinions on remand and determine whether they are reasoned. *See* Board's June 22, 2000 Decision and Order at 9. Employer further asserts that these physicians' opinions are not well-reasoned. On remand, the administrative law judge found that for the reasons previously stated in prior decisions, to the extent not vacated by the Board, as well as for the reasons cited in his Decision and Order on remand, he found the medical opinions of, *inter alia*, Drs. Walker, Diaz, Rasmussen and Aguilar to be reasoned and documented and sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 6. In finding disability causation established at 20 C.F.R. §718.204(c), the administrative law judge relied on the "well-reasoned and well-supported" opinions of Drs. Rasmussen, Diaz and Aguilar. Decision and Order on Remand at 8. Thus, employer correctly argues that the administrative law judge did not explain, in finding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) or total disability causation under 20 C.F.R. §718.204(c), how he concluded that the reports of Drs. Rasmussen, Diaz and Aguilar are reasoned. The administrative law judge did, however, perform a thorough and critical evaluation of the evidence underlying these reports in determining the issue of total disability pursuant to 20 C.F.R. §718.204(b). *See* Decision and Order on Remand at 7. Given the totality of the administrative law judge's findings on remand, we hold harmless this error, as the administrative law judge ultimately complied with the Board's remand order. We decline to address further employer's contention that the opinions of Drs. Rasmussen, Diaz and Aguilar are unreasoned, as this argument amounts to a request to reweigh the evidence. *See Anderson, supra*.

Employer next contends that the administrative law judge failed to explain why he discredited the opinions of Drs. Zaldivar, Fino and Hippensteel. Under 20 C.F.R. §718.202(a)(4), the administrative law judge found Dr. Walker's opinion entitled to greater weight than those of Drs. Hippensteel, Zaldivar and Fino because these latter three reports did not include "discussions in detail (and in some cases they did not discuss at all) of Dr. Walker's findings on surgery." Decision and Order on Remand at 4. He did not find that the opinions of Drs. Hippensteel, Fino or Zaldivar were sufficient to outweigh those of Drs. Walker, Diaz, Aguilar and Rasmussen. Rather, he found:

> While the qualifications of the former physicians may be superior to those of the latter, that is but one element to be considered. Also to be considered are the facts that (1) Dr. Zaldivar concedes that Dr. Walker's finding that the lungs of the Claimant appear black with palpable nodules "may indicate that coal workers' pneumoconiosis might be present that is not seen radiographically" (EX 6); and (2) Drs. Fino and Hippensteel do not appear to have reviewed the discharge summary of Dr. Walker performed in August 1986, an important piece of medical evidence.

Decision and Order on Remand at 5. The administrative law judge, weighing the opinions of Drs. Zaldivar, Fino and Hippensteel under 20 C.F.R. §718.204(b), indicated, in pertinent part:

> Dr. Zaldivar found mild airway obstruction which, in his opinion, was of no clinical significance. (EX 6). Dr. Fino also found a mild obstructive ventilatory defect, which was nondisabling. (EX 7). Dr. Hippensteel finds that the Claimant has no pulmonary disability, finding no more than minimal changes in function upon ventilatory function testing. I find, however, that the medical opinions of Drs. Aguilar, Diaz, and Rasmussen regarding the Claimant's ability to return to his usual coal mine employment or comparable, gainful employment to be the more persuasive on this issue. The Claimant's work involved heavy manual labor. Taking this into account, I find the physical limitations noted by Drs. Aguilar, Rasmussen and Diaz, as well as the findings upon pulmonary function testing, sufficient to support their opinion that the Claimant is totally disabled.

Decision and Order on Remand at 7. Employer argues that the administrative law judge mischaracterized "as a concession" Dr. Zaldivar's statement, in his 1990 report, that "[t]he report given by Dr. Walker that at the time of thoracotomy the lungs appeared black and there were palpable nodules may indicate that coal workers' pneumoconiosis might be present that is not seen radiographically," *see* Employer's Exhibit 6. Employer's Brief at 17. Employer also asserts that the administrative law judge's findings are "wrong" because (1) the opinions of Drs. Fino and Hippensteel, that claimant has neither an occupationally acquired lung disease nor a disabling respiratory impairment, are credible, and (2) because the administrative law judge's findings are based on his mistaken finding that Drs. Fino and Hippensteel did not review Dr. Walker's findings from the thoracotomy he performed in 1986. Employer thus argues that the administrative law judge's decision does not comply with the requirements of the APA.

Employer's contentions lack merit. While the administrative law judge accorded less weight to the reports of Drs. Zaldivar, Fino and Hippensteel, he did not find them to be not credible. Dr. Zaldivar, in his report dated June 29, 1988, found no radiographic evidence of pneumoconiosis and opined that claimant does not have coal workers' pneumoconiosis. Employer's Exhibit 1. Upon his review of additional evidence, including Dr. Walker's finding of pneumoconiosis in connection with claimant's 1986 thoracotomy, Dr. Zaldivar stated, in his opinion dated October 13, 1990:

> After reviewing this information, my opinion remains the same as given to you on 6/29/88. The report given by Dr. Walker that at the time of the thoracotomy the lungs appeared black and there were palpable nodules may indicate that coal workers' pneumoconiosis might be present that is not seen

> radiographically. I would like to state that even if there were radiographic pneumoconiosis present, the amount of impairment which I stated in my report is the same, meaning that he has mild airway obstruction which is of no clinical significance.

Employer's Exhibit 6. Given Dr. Zaldivar's findings, it was not error for the administrative law judge to find that "Dr. Zaldivar concedes that Dr. Walker's finding that the lungs of the Claimant appear black with palpable nodules 'may indicate that coal workers' pneumoconiosis might be present that is not seen radiographically.'" Decision and Order on Remand at 5. Further, the record supports the administrative law judge's finding that Drs. Hippensteel and Fino did not review Dr. Walker's Discharge Summary in which he diagnosed pneumoconiosis in connection with claimant's 1986 thoracotomy. Specifically, Dr. Hippensteel's report contains only a reference to the fact that claimant reported to Dr. Zaldivar that he had parts of his right lung removed for a non-cancerous lesion in 1986. Employer's Exhibit 4. Dr. Fino likewise did not address Dr. Walker's diagnosis of pneumoconiosis contained in his Discharge Summary, but discussed some of the objective test results reported by Dr. Walker and concluded, in pertinent part, "There was no microscopic evidence of pneumoconiosis based on this thoracotomy." Employer's Exhibit 7. Ultimately, the administrative law judge permissibly found that the opinions of Drs. Zaldivar, Fino and Hippensteel were outweighed by the contrary opinions of Drs. Aguilar, Diaz and Rasmussen. *See Fuller v. Gibraltar Coal Co.*, 6 BLR 1-1291 (1984); *see generally King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985).

Based on the forgoing, we affirm the administrative law judge's findings under 20 C.F.R. §718.202(a)(4) and 20 C.F.R. §718.204(c) and the award of benefits in this case.

Employer next contends that the administrative law judge arbitrarily set the onset date of benefits as the month in which claimant filed his claim. In remanding this case, the Board in *Cook* (2000) instructed that if, on remand, the administrative law judge found the evidence sufficient to again award benefits, he must then consider the relevant, credible evidence to determine the date from which claimant's pneumoconiosis progressed to the point of being totally disabling. Board's June 22, 2000 Decision and Order at 11. The Board continued that if the administrative law judge determined, after weighing the medical evidence, that it is insufficient to establish a specific date that claimant's pneumoconiosis became totally disabling, 20 C.F.R. §725.503(b) (2000)[6] provides that benefits are properly awardable as of the month during which claimant filed his application for benefits. *Id*. The Board then

[6]The regulation at 20 C.F.R. §725.503 was revised. These revisions, however, only apply to modification requests and are not implicated in this case. *See* 20 C.F.R. §725.503(d).

considered employer's argument that the regulation at 20 C.F.R. §725.503(b) (2000) violates Section 7(c) of the APA because it allows for the payment of benefits as of a certain date without claimant having affirmatively established entitlement as of that date and because, in effect, the regulation improperly shifts the burden to employer to establish the date of onset of disability. The Board held that employer's contention lacked merit because Section 7(c) of the APA, which provides that, except as otherwise provided by statute, the proponent of a rule or order has the burden of proof, is not applicable because the regulations at 20 C.F.R. §725.503(b) (2000) and 20 C.F.R. §727.302 specify a party's burden to establish the date from which benefits are to commence. On remand, the administrative law judge indicated that while he determined previously that Dr. Rasmussen's opinion was a sufficient basis upon which to establish the onset of claimant's disability due to pneumoconiosis, "upon further reflection it is determined that the medical evidence in this case does not establish a definitive date of onset. Accordingly, benefits are payable as of May 1, 1986, the month in which the Claimant filed the instant claim." Decision and Order on Remand at 9. Employer argues that the administrative law judge failed to provide any reason for his finding in violation of the APA. Employer also asserts that although the administrative law judge did not cite to 20 C.F.R. §725.503(b),[7] he erred in relying on it as this regulation is invalid under Section 7(c) of the APA insofar as it allows claimant to receive benefits from the date of filing even where there is no medical proof submitted by claimant showing that he was totally disabled due to pneumoconiosis at that time.[8] The Director responds, and argues that

[7]The administrative law judge actually cited to 20 C.F.R. §725.503(b) in determining the onset issue on remand. Decision and Order on Remand at 8.

[8]Employer indicates, in its Brief dated September 17, 2001, that the issue of whether 20 C.F.R. §725.503(b) (2000) violates Section 7(c) of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), was then pending before the United States Court of Appeals for the Fourth Circuit in *Westmoreland Coal Co. v. Ramsey*, No. 99-2049 (4th Cir. Nov. 9, 2001)(unpub.).

employer's argument is wholly without merit and should be rejected. The Director, in his brief dated October 17, 2001, notes that the same argument was raised by the National Mining Association and rejected by District Court Judge Emmet G. Sullivan in his 2001 decision upholding the validity of the revised regulations. *See Nat'l Mining Ass'n v. United States Dep't of Labor*, F.3d , 2002 WL 1300007 (D.C. Cir. June 14, 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

The employer in *Ramsey* argued that the administrative law judge erred in setting the date of onset of disability as the date the claim was filed. The Fourth Circuit found no error of fact or law in, *inter alia*, the administrative law judge's onset determination and affirmed the Board's affirmance of the administrative law judge's award of benefits.

We hold that the administrative law judge did not provide adequate explanation for his finding that the medical evidence in this case does not establish a definitive date of onset of total disability due to pneumoconiosis . *See* APA, *supra*. The administrative law judge's ultimate decision to set May 1, 1986 as the date from which benefits commence, however, was not arbitrary as employer alleges. Rather, the record shows that the administrative law judge fully addressed the evidence relevant to the issue of when claimant became totally disabled due to pneumoconiosis, when he considered the issue of total respiratory or pulmonary disability. Specifically, the administrative law judge found the medical opinion evidence sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). He properly credited the opinions of Drs. Aguilar,[9] Diaz [10] and Rasmussen[11] that claimant was totally disabled due to pneumoconiosis. Decision and Order on Remand at 7. The administrative law judge further found that the opinions of Drs. Diaz, Rasmussen and Aguilar outweigh the contrary probative evidence and establish total disability under 20 C.F.R. §718.204(b). *Id.* at 7, 8. The earliest of these credited medical opinions, namely the May of 1986 opinions of Drs. Rasmussen and Aguilar, establish that claimant became

[9]Dr. Aguilar examined claimant in May of 1986 and diagnosed, *inter alia*, pneumoconiosis. He opined that claimant would be restricted to sedentary work or at least no more than very light physical work. Claimant's Exhibit 1.

[10]In 1974, Dr. Diaz diagnosed coal workers' pneumoconiosis and indicated that he agreed with Dr. Rasmussen that claimant was partially disabled due to black lung disease. Claimant's Exhibit 1. In a questionnaire dated September 9, 1987, Dr. Diaz, subsequent to his examination of claimant on August 4, 1987, indicated that he reviewed the report of Dr. Aguilar and agreed that claimant is totally and permanently disabled. *Id.* On May 11, 1988, Dr. Diaz indicated that he agreed with Dr. Faheem that claimant is completely and totally disabled and could not perform any sedentary work. *Id.*

[11]Dr. Rasmussen first examined claimant on April 12, 1974. Relevant to the total disability issue, he found minimal ventilatory insufficiency, moderate impairment in oxygen transfer and abnormal ventilatory response with exercise. He estimated claimant's overall loss of functional capacity "in the neighborhood of 50-60%, and opined that claimant would appear to be incapable of performing steady work beyond strictly light work levels. Director's Exhibit 33. Dr. Rasmussen then examined claimant on May 4, 1979. Dr. Rasmussen found minimal ventilatory insufficiency, moderate impairment oxygen transfer, an abnormal ventilatory response with exercise and an abnormal cardiovascular response with exercise. He estimated claimant's overall loss of functional capacity was "in the neighborhood of 65%" and opined that claimant would appear to be incapable of performing steady work beyond strictly light work levels. *Id.* Dr. Rasmussen again examined claimant on May 27, 1986. He found coal workers' pneumoconiosis with moderate pulmonary impairment in respiratory functional capacity. Claimant's Exhibit 1.

disabled "at some time prior to" May of 1986. *See Merashoff v. Conslidation Coal Co.*, 8 BLR 1-105 (1985). This medical evidence, therefore, relied upon by the administrative law judge to determine the total disability issue, constitutes substantial evidence supporting the administrative law judge's ultimate decision to set May 1, 1986 as the date from which benefits commence. Notwithstanding the fact that the administrative law judge relied on the date the claim was filed to resolve the onset issue, we decline to disturb the administrative law judge's ultimate finding that May 1, 1986 is the appropriate date from which benefits commence, as this finding is consistent with his credibility determinations regarding the total disability issue.[12]

Lastly, employer contends that the administrative law judge erred by retroactively applying the amended regulations to this claim. Employer specifically challenges retroactive application of only one revised regulation, namely the revised regulation at 20 C.F.R. §718.201 regarding the definition of pneumoconiosis. Employer's Brief at 26-27. The Director argues that employer's argument is without merit as the revised regulation at 20 C.F.R. §718.201 is applicable to pending claims, and no amendment to the definition of "pneumoconiosis" codified in the revised regulation at 20 C.F.R. §718.201 is implicated in this case.

We agree with the Director and hold that employer's contention lacks merit. No amendment to the revised regulation at 20 C.F.R. §718.201 is at issue in the case *sub judice*. The revisions to the terms "clinical pneumoconiosis" and "legal pneumoconiosis" are not at issue; the revision clarifying that coal mine dust exposure may cause both restrictive as well as obstructive lung conditions is not at issue, and the revision recognizing that pneumoconiosis may be latent and progressive is likewise not at issue. *See* 20 C.F.R. §718.201. Further, these amendments are consistent with existing Fourth Circuit case law. *See e.g. Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-571 (4th Cir. 1999).

Based on the foregoing, we affirm the administrative law judge's finding that claimant is entitled to benefits in the instant case and further affirm his award of benefits, with benefits commencing as of May 1, 1986.

Accordingly, the administrative law judge's Decision and Order - Award of Benefits

[12]Further, the Board, in *Cook v. Westmoreland Coal Co.*, BRB No. 99-0891 BLA (June 22, 2000)(unpublished) at 10-13, previously addressed and rejected employer's argument that 20 C.F.R. §725.503(b) (2000) violates Section 7(c) of the APA.

on Remand from the Benefits Review Board is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

GABAUER, J., concurring and dissenting:

I concur with the majority that the administrative law judge properly determined that claimant is entitled to benefits and properly awarded benefits in this case. I respectfully dissent from the majority opinion on the issue of onset only. When the Board remanded the case, in its Decision and Order in *Cook v. Westmoreland Coal Co.*, BRB No. 99-0891 BLA (June 22, 2000)(unpub.), it instructed the administrative law judge to consider, if reached, the relevant, credible evidence to determine the date from which claimant's pneumoconiosis progressed to the point of being totally disabling. Board's June 22, 2000 Decision and Order at 11. The Board continued that if the administrative law judge determined, after weighing the medical evidence, that it is insufficient to establish a specific date that claimant's pneumoconiosis became totally disabling, the regulation at 20 C.F.R. §725.503(b) provides that benefits are properly awardable as of the month in which claimant filed his application for benefits. *Id.* On remand, the administrative law judge simply stated, "While previously, it was determined that the medical opinion of Dr. Rasmussen was sufficient to establish a date of onset, upon further reflection it is determined that the medical evidence in this case does not establish a definitive date of onset. Accordingly, benefits are payable as of May 1, 1986, the month in which the Claimant filed the instant claim." Decision and Order on Remand at 9. Because the administrative law judge, on remand, did not address the relevant, credible medical evidence to resolve the onset issue, his findings on the onset issue do not comport with the mandate of the Board in *Cook. Hall v. Director, OWCP*, 12 BLR 1-80 (1988). I would, therefore, vacate the administrative law judge's onset determination and remand the case for the administrative law judge to determine this issue in a manner

consistent with the Board's previous instructions in *Cook*.[13]

PETER A. GABAUER, Jr.
Administrative Appeals Judge

[13]Since I would vacate the administrative law judge's onset finding under 20 C.F.R. §725.503(b) (2000) based on his failure to follow the Board's remand instructions, *Hall v. Director, OWCP*, 12 BLR 1-80 (1988), I decline to reach employer's argument that the administrative law judge's finding must be vacated because the regulation at 20 C.F.R. §725.503(b) violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).