BRB No. 02-0123 BLA

GEORGE M. MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARTINKA 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 On Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order On Remand - Awarding Benefits (99-BLA-199) of Administrative Law Judge Daniel L. Leland 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] Based on the date of filing, the

[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

administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. This case is on appeal to the Board for the third time. Pursuant to employer's prior appeal, the Board vacated the award of benefits and remanded the case to the administrative law judge to weigh together the evidence relevant to the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-166 (4th Cir. 2000), to reweigh the medical opinion evidence pursuant to *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), to weigh the pulmonary function studies, blood gas studies, and medical opinions together to determine whether the evidence established total disability, to weigh the medical opinion evidence to determine whether pneumoconiosis was a substantially contributing cause of total disability, and to make specific findings regarding the onset date of the miner's total disability. *Miller v. Martinka Coal Co.*, BRB No. 00-0582 BLA (Apr. 27, 2001)(unpub.). On remand, the administrative law judge concluded that the evidence was sufficient to establish the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. Accordingly, benefits were awarded. The administrative law judge further found that since it was not clear from the record precisely when claimant became totally disabled, benefits would commence from May 1995 the month in which the claim was filed.

On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. Employer also contends that the administrative law judge erred in his determination of the onset date. Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs (the Director), responds, taking no position on the merits of employer's arguments, but contending the revised regulations are valid.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis,

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the amended regulations.

that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first contends that the administrative law judge erred in according greater weight to the opinions of Drs. Jaworski and Horan, than to the opinions of Drs. Renn, Zaldivar and Fino, in finding the existence of pneumoconiosis established at Section 718.202(a)(4). Specifically, employer contends that the administrative law judge erred in crediting Dr. Jaworski's opinion as Dr. Jaworski relied on a finding that claimant had over ten years of coal mine employment as the sole support for his finding of "legal" pneumoconiosis and failed to provide an adequate rationale for attributing claimant's respiratory impairment to coal mine employment, rather than cigarette smoking or asthma.

In crediting Dr. Jaworski's opinion, the administrative law judge found that Dr. Jaworski rendered a well-reasoned opinion, acknowledging claimant's asthma as a risk factor and accounting for claimant's light smoking history, but nonetheless, concluding that claimant's chronic obstructive pulmonary disease was "in part" industrial bronchitis arising out of coal mine dust exposure. The administrative law judge further noted that, contrary to employer's contention, Dr. Jaworski could logically consider the length of claimant's coal mine employment in determining whether the miner's pulmonary impairment was occupationally related. We agree. Accordingly, we again affirm the administrative law judge's crediting of Dr. Jaworski's opinion as establishing the existence of pneumoconiosis as defined by the Act. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *but see Hicks*, *supra*; *Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).[2]

Employer also contends that the administrative law judge mischaracterized Dr. Horan's opinion as relying on "physical examinations, objective tests, chest x-rays and smoking and employment histories" to diagnose the existence of pneumoconiosis when Dr. Horan did not indicate the number of physical

[2] The Board previously found that the administrative law judge's finding that Dr. Jaworski's opinion was reasoned was supported by substantial evidence. *Miller* at 6 at n.4; *see Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 16 BLR 1-988 (1984).

examinations nor the objective tests she relied on, and her letter report did not contain any treatment notes or refer to objective tests. Employer also contends that the administrative law judge misstated Dr. Horan's opinion because the report failed to take into consideration the negative x-ray readings of record nor claimant's history of asthma. Employer's Exhibit 7. Additionally, employer contends that the administrative law judge erred in relying on Dr. Horan's opinion solely because she was claimant's treating physician.

Contrary to employer's argument, the administrative law judge declined to give Dr. Horan's opinion greater weight based on her treating physician status; he concluded that Dr. Horan's opinion was reasoned because it was based on examinations, objective tests, x-rays and smoking and employment histories. Contrary to employer's argument, Dr. Horan's opinion specifically refers to claimant's coal mine employment and smoking histories, the results of her physical examination of claimant, the results of the pulmonary function study, and the results of claimant's x-ray which was examined by Dr. Horan, herself. Claimant's Exhibit 3; *Clark*, *supra*; *Fields*, *supra*. The administrative law judge, therefore, rationally found Dr. Horan's opinion that claimant's pulmonary disease was partly due to coal mine employment supported Dr. Jaworski's opinion and that both opinions were sufficient to support a finding of pneumoconiosis at Section 718.202(a)(4); *see Hicks*, *supra*; *Akers*, *supra*.

Employer also contends that the administrative law judge misstated and mischaracterized the opinions of Drs. Renn, Zaldivar and Fino. Dr Renn diagnosed asthma, asthmatic bronchitis, pulmonary emphysema, but not pneumoconiosis and found that claimant's pulmonary impairment did not arise out of coal mine employment. Similarly, Drs. Fino and Zaldivar maintained that claimant's pulmonary condition was unrelated to pneumoconiosis.

Contrary to employer's contention, the administrative law judge permissibly found that Dr. Renn's opinion was not well reasoned as the physician failed to provide a rationale for his conclusions. *Clark*, *supra*; *Fields*, *supra*. Further, the administrative law judge accorded little weight to the conclusions of Drs. Fino and Zaldivar, finding that claimant's chronic bronchitis was not related to his coal mine work, because their assertions that the condition could not be present many months after coal mine ceases is contrary to the long held view that pneumoconiosis is a progressive disease which can progress after coal dust exposure ends. Contrary to employer's contention, this was proper. 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); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-

76 (3d Cir. 1995); *see Richardson v. Director, OWCP*, 94 F.3d 164, 167-168, 21 BLR 2-373 (4th Cir. 1996). Thus, the administrative law judge's finding that the medical opinion evidence of record was sufficient to establish the existence of pneumoconiosis is affirmed. Further, as instructed by the Board, the administrative law judge weighed together all the evidence relevant to the existence of pneumoconiosis pursuant to *Compton*, *supra*, and properly noted that although the chest x-rays were predominantly negative, the existence of pneumoconiosis was nevertheless established by the medical opinion evidence. *Richardson*, *supra*; *Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995). Accordingly, we affirm the administrative law judge's findings that the existence of pneumoconiosis was established pursuant to Section 718.202(a) as it is supported by substantial evidence and in accordance with law.

Employer next contends that the administrative law judge erred in his weighing of the pulmonary function and blood gas studies of record. Nine out of the twelve pulmonary function studied produced qualifying values. Director's Exhibits 14, 42, 45, 69; Employer's Exhibit 1; Claimant's Exhibit 3. The postbronchodilator values of the May 29, 1996 study produced non-qualifying values and both the pre and postbronchodilator values of January 13, 1999, the most recent study, produced non-qualifying values. All five of the blood gas studies of record produced non-qualifying values.[3] Director's Exhibits 17, 42, 45, 69, 71; Employer's Exhibit 1. The administrative law judge, however, found that the non-qualifying blood gas studies did not negate the qualifying pulmonary function studies as they measured different aspects of the pulmonary system. This was rational. *See Sheranko v. Jones and Laughlin Steel Corp.*, 6 BLR 1-797 (1984). Further, the administrative law judge was not required to accord greater weight to the most recent evidence. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). Thus, the administrative law judge properly found that when the evidence is weighed together, including the medical opinions which had already been found to have established the presence of a totally disabling respiratory impairment, it established total disability. This was rational. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. *en banc* 9 BLR 1-236 (1987).

Employer also contends that the administrative law judge erred in finding

[3] A "qualifying" pulmonary function study and blood gas study yield values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2)(2000), now 20 C.F.R. §718.204(b)(2)(i), (ii).

disability causation established. The administrative law judge, however, properly found that the causation opinions of Drs. Renn, Zaldivar and Fino were entitled to little weight because they did not take into account the latent and progressive nature of pneumoconiosis inasmuch as they indicated that claimant's respiratory impairment could not be caused by coal mine employment which ended in 1994. *See* 20 C.F.R. §718.201(c); *Mullins*, *supra*; *Swarrow*, *supra*; *Richardson*, *supra*; *Clark*, *supra*. The administrative law judge, therefore, permissibly accorded greater weight to the opinions of Drs. Jaworski and Horan who found that coal dust exposure contributed to claimant's disability, Claimant's Exhibit 3, and "who did not rule out coal dust exposure as a substantial contributing cause of claimant's disability because he was no longer a coal miner." Decision and Order at 6. Therefore, the administrative law judge's disability causation finding is rational and is affirmed. 20 C.F.R. §718.204(c).

Finally, the administrative law judge, as instructed by the Board, addressed the evidence relevant to the determination of the onset date. While the administrative law judge found that the qualifying pulmonary function studies of July 13, 1995 and Dr. Jaworski's finding of severe respiratory impairment following his examination of claimant on July 13, 1995, were the earliest indications that claimant was totally disabled, the administrative law judge also properly found that the date of the first medical evidence of total disability did not establish the onset date, but merely indicated that claimant became totally disabled at some point prior to when the medical tests revealed disability. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-108-109 (1985); *Henning v. Peabody Coal Co.*, 7 BLR 1-753, 1-757 (1985); *Tobrey v. Director, OWCP*, 7 BLR 1-407, 1-409 (1984). Thus, the administrative law judge rationally found the record was unclear as to precisely when claimant became totally disabled and properly used the filing date of the claim, *i.e.*, May 1995, as the date for when claimant became totally disabled and from which to award benefits. 20 C.F.R. §725.503(b); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986). Employer cites no evidence which shows that claimant was not totally disabled after May, 1995. Consequently, we affirm the administrative law judge's onset date determination.

Accordingly, the administrative law judge's Decision and Order On Remand - Awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge