BRB No. 03-0795 BLA

DONALD L. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 08/25/2004
	)	
Employer/Carrier-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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

James M. Haviland (Crandall, Pyles, Haviland & Turner), Charleston, West Virginia, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1506) of Administrative Law Judge Thomas M. Burke denying benefits with respect to 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.* This case is before the Board for the fourth time.[1] In its most recent prior Decision and Order, the Board affirmed the award of benefits, but remanded the case to the administrative law judge for reconsideration of his determination that claimant was entitled to benefits from May 1, 1994, the first day of the month in which he filed his claim. On remand, the administrative law judge found that there was no evidence indicating the precise date of onset of total disability due to pneumoconiosis and no evidence clearly establishing that claimant was not totally disabled due to pneumoconiosis subsequent to the date of filing of his application for benefits. Accordingly, the administrative law judge again designated May 1, 1994 as the date from which claimant was entitled to benefits.

Employer argues on appeal that the Board must reconsider its affirmance of the award of benefits on numerous grounds. Employer also alleges that the administrative law judge erred in determining the date from which claimant became eligible for benefits. Claimant has responded and urges affirmance of the Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has also responded and urges

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[1]Claimant filed his application for benefits on May 16,1994, which was initially granted by the district director with interim benefits paid by the Black Lung Disability Trust Fund. Director's Exhibit 1. In a Decision and Order issued on January 31, 1997, Administrative Law Judge Thomas M. Burke (the administrative law judge) found the evidence sufficient to establish the existence of pneumoconiosis and that claimant was totally disabled due to pneumoconiosis. Accordingly, benefits were awarded. Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits. *Williams v. Peabody Coal Co.*, BRB No. 97-0796 BLA (Feb. 26, 1998)(unpub.). On remand, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis and disability causation and, thus, reaffirmed his prior Decision and Order awarding benefits. The Board vacated the administrative law judge's Decision and Order on May 17, 2001, and remanded the case to the administrative law judge for reconsideration of the medical opinion evidence of record. *Williams v. Peabody Coal Co.*, BRB No. 00-0236 BLA (May 17, 2001)(unpub.). The administrative law judge determined on remand that the medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded. Employer's appeal followed.

the Board to reject employer's arguments concerning the administrative law judge's findings on the merits and with respect to the date of onset.

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 initially raises numerous allegations of error regarding the Board's affirmance of the award of benefits in its prior Decision and Order. Employer argues that claimant's pre-existing disability due to vasculitis precludes an award of benefits in this case under the decision issued by the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) and case law in which the United States Court of Appeals for the Fourth Circuit adopted the holding in *Vigna*.[2] This contention is without merit. We rejected employer's argument in our most recent Decision and Order and employer has not advanced any compelling rationale for altering our holding. *See Coleman v. Ramey Coal Co.,* 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Furthermore, in *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255 (2003), the Board rejected the assertion that the Fourth Circuit has adopted the holding of the Seventh Circuit in *Vigna*, that a claimant is prohibited from establishing entitlement to benefits, even if he is able to establish total disability due to pulmonary problems, if he suffers from a pre-existing nonrespiratory disability.

Employer has also asked the Board to revisit its affirmance of the administrative law judge's decision to accord greatest weight to the opinion in which Dr. Rasmussen stated that claimant is totally disabled due to a pulmonary impairment caused by coal dust exposure and cigarette smoking. Employer maintains that the administrative law judge impermissibly relied upon Dr. Rasmussen's status as treating physician and a presumption regarding the progressivity of pneumoconiosis to find that Dr. Rasmussen's opinion was entitled to more weight than the opinions of employer's physicians. Employer also identifies numerous flaws in Dr. Rasmussen's diagnosis of total disability due to legal pneumoconiosis that allegedly mandate reconsideration of the award of benefits.

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[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last year of qualifying coal mine employment took place in the State of West Virginia. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

We reject these arguments, as employer raised the same allegations of error in the most recent prior appeal and has not advanced any meritorious arguments in favor of altering the Board's prior holdings. *See Coleman,* 18 BLR 1-9; *Brinkley,* 14 BLR 1-147; *Bridges*, 6 BLR 1-988. Moreover, with respect to employer's assertion that the Secretary of Labor's alleged concession, in *National Mining Association v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff'g in part and rev'g in part National Mining Association v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001) , that pneumoconiosis is latent and progressive only in rare cases requires remand, we decline to alter our affirmance of the administrative law judge's weighing of Dr. Rasmussen's opinion, as the administrative law judge provided valid, alternative grounds for finding that Dr. Rasmussen's opinion was entitled to greater weight than the contrary opinions of record, *e.g.*, Dr. Rasmussen's qualifications and the fact that his opinion was well reasoned and was well supported by the objective evidence of record including claimant's lung capacity tests. 2001 Decision and Order on Remand Awarding Benefits at 7; *see Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); *see also Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Regarding the administrative law judge's designation of the first day of the month in which claimant filed benefits as the onset date, employer maintains that the administrative law judge erred in shifting the burden of proof to employer and did not properly weigh the relevant evidence of record. There is no merit in employer's argument regarding the shifting of the burden of proof. We rejected employer's assertion in our prior Decision and Order and employer has not advanced any compelling argument in favor of altering our prior holding. *See Coleman,* 18 BLR 1-9; *Brinkley,* 14 BLR 1-147; *Bridges*, 6 BLR 1-988.

Employer further contends that the administrative law judge did not properly weigh the evidence relevant to the date of onset of total disability due to pneumoconiosis. We hold that because the administrative law judge properly found that the evidence of record does not establish when the miner became totally disabled due to pneumoconiosis and there is no credible uncontradicted medical evidence indicating that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date, the administrative law judge's designation of May 1, 1994 as the date from which employer is liable for the payment of benefit is rational and supported by substantial evidence. The administrative law judge acted within his discretion as finder-of-fact in determining that the treatment notes from Drs. Espiritu and Istfan primarily concerned treatment of claimant's vasculitis and were, therefore, of limited probative value as to the issue of total disability due to pneumoconiosis. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In addition, in light of the administrative law judge's rational determination that Dr. Rasmussen's opinion, which was based upon a review of medical evidence dating from 1994, was entitled to greatest weight, substantial evidence

supports the administrative law judge's finding that Dr. Zaldivar's November 9, 1994 report does not definitively establish that claimant was not totally disabled due to pneumoconiosis as of May 1, 1994. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge