BRB No. 02-0230 BLA

WILLIAM H. BROWN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	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 Upon Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

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

Helen H. Cox (Eugene Scalia, Acting 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Upon Remand (91-BLA-01389) of Administrative Law Judge Ainsworth H. Brown 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).[1] This case has been before the Board previously. The administrative law judge, in his prior Decision and Order Upon Remand, correctly observed that the instant application for benefits is a duplicate claim.[2] Decision and Order Upon Remand dated September 8, 1999 at 1-2. The administrative law judge concluded that the medical evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2000) and was therefore sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (1999). Decision and Order Upon Remand dated September 8, 1999 at 2-5. The administrative law judge found that the record evidence was also sufficient to establish that claimant suffered from a totally disabling respiratory impairment and that claimant's total disability was due to his pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Decision and Order dated September 8, 1999 at 5-7. Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for a complete consideration and evaluation of the record evidence in light of recently issued decisions by the United States Court of Appeals for the Fourth Circuit.[3] *Brown v. Eastern Associated Coal Corp.*, BRB No. 00-0228 BLA (May 18, 2001)(unpublished).

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[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Brown v. Eastern Associated Coal Corp.*, BRB No. 00-0228 BLA (May 18, 2001)(unpublished), which is incorporated herein by reference.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

On remand, the administrative law judge considered the x-ray evidence and medical opinions of record and concluded that the preponderance of the evidence was sufficient to establish the existence of pneumoconiosis and that the miner's disability was due to pneumoconiosis. Decision and Order Upon Remand at 4-14. Accordingly, benefits were awarded. In this instant appeal, employer contends that the administrative law judge erred in several respects: in failing to follow the Board's remand instructions, in weighing the medical opinion evidence pursuant to Section 718.202(a)(4), in finding that the miner's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204 and in making his onset of disability determination. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not respond to the merits of this appeal but asserts that the amended regulations are valid. Employer filed a response brief reasserting its position.

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 filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, 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; *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). 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*).

After consideration of the administrative law judge's Decision and Order Upon Remand, the arguments raised on appeal and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Employer initially contends that the administrative law judge erred in failing to follow the remand instructions of the Board in reconsidering the medical opinion evidence. In particular, employer contends that the administrative law judge rendered the same credibility determinations that had been previously vacated by the Board. Employer's Brief at 15. We disagree. Contrary to employer's contention, the administrative law judge did not fail to apply the Board's remand instructions in his consideration of the medical evidence. The administrative law judge properly set forth the specifics of the Board's holdings, *i.e.*, that he should reconsider the existence of pneumoconiosis pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), reconsider the medical opinion

evidence in light of the physician's qualifications and the underlying documentation, and reconsider the onset date of total disability. Decision and Order Upon Remand at 2-3. The administrative law judge made specific credibility determinations and reconsidered the evidence within the parameters of the remand instructions. *See* discussion, *infra*; Decision and Order Upon Remand at 4-14.

Additionally, employer's contention, that it right to due process was violated as the administrative law judge failed to follow the Board's remand order, is without merit. Employer's Brief at 16. The United States Court of Appeals for the Fourth Circuit has held that the right to due process is violated when a party is deprived of a fair opportunity to mount a meaningful defense. *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). In the instant case, employer was timely notified of its potential liability for benefits in the instant claim and was given the opportunity to fully present its case and to introduce supporting documentary evidence at the hearing before the administrative law judge. Additionally, it is noted that on remand, the administrative law judge did not reopen the record for submission of additional evidence by claimant nor was there any change in the law which required additional briefing by the parties. Rather, the administrative law judge reconsidered the submitted evidence of record pursuant to the Board's remand instructions. Because employer has demonstrated no violation of due process, we reject employer's contention based on the circumstances of this case. *Lockhart, supra*.

Employer further contends that revised Section 718.201(c) is impermissibly retroactive. Employer's Brief at 26-28. Revised Section 718.201(c) recognizes pneumoconiosis "as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has specifically recognized the progressive nature of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The United States Supreme Court has also recognized the progressive nature of pneumoconiosis. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). In addition, the United States Court of Appeals for the District of Columbia recently held that revised Section 718.201(c) is not impermissibly retroactive. *See Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, BLR 2- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F.Supp. 2d 47, BLR 2- (D.D.C. 2001). Consequently, we reject employer's contention that revised Section 718.201(c) is impermissibly retroactive.

Moreover, employer's assertion that the instant case must be remanded yet again as the administrative law judge failed to consider whether claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b),

lacks merit. Employer's Brief at 17. The administrative law judge clearly made a total disability determination based upon the evidence of record. *See* Decision and Order Upon Remand at 4. As employer makes no other specific challenge to the administrative law judge's total disability finding upon remand, we affirm the administrative law judge's finding that the evidence of record is sufficient to establish that claimant is totally disabled pursuant to Section 718.204(b). *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that his total disability was due to pneumoconiosis pursuant to Section 718.204(c) as he failed to properly weigh the evidence of record. Employer's Brief at 17-35. Specifically, employer contends that the administrative law judge impermissibly accorded less weight to the opinions of Drs. Zaldivar, Morgan, Tuteur and Lapp and greater weight to the opinions supportive of claimant's position. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

Initially, we disagree with employer's contention that in rejecting the medical opinions of Drs. Zaldivar, Morgan, Tuteur and Lapp at Sections 718.202(a)(4) and 718.204(c), the administrative law judge violated 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).[4] The administrative law judge discussed the relevant evidence of record and articulated a rational reason for his credibility determinations therefrom.[5] *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order Upon Remand at 4-13.

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[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or bases therefore, on all material issues of fact, law or discretion presented on the record...." 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).

[5]Employer asserts that the administrative law judge erred in failing to consider the qualifications of the physicians. Although an administrative law judge may accord more weight to a physician's opinion based on his qualifications, the administrative law judge must address the credibility of the evidence prior to assigning it appropriate weight. *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); *Trumbo v. Reading Anthracite*

Contrary to employer's assertion, the administrative law judge rationally reviewed the relevant evidence of record and acted within his discretion, as fact-finder, in finding the opinions of Drs. Daniel, Honrado and Floresca to be sufficient to establish entitlement as their opinions are well reasoned and documented. *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); *Collins, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Mabe, supra*; *Gee, supra*; *Perry, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); Decision and Order Upon Remand at 4-6, 8, 12-13; Director's Exhibits 9, 24, 25. While the administrative law judge again found that the medical opinions that failed to diagnose pneumoconiosis were less credible, he nonetheless properly considered these medical opinions in their entirety and in accordance with the instructions of the Board.

Co., 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988).

The administrative law judge permissibly determined that the opinions by Drs. Lane and Tuteur lacked clarity, were equivocal, and were, therefore, entitled to diminished weight. The record reflects that Dr. Lane concluded that "there is no consensus regarding the existence of pneumoconiosis," without rendering his own opinion and Dr. Tuteur failed to adequately explain his statement that claimant did not have "clinically-significant, or physiologically-significant coal workers' pneumoconiosis." *See Compton, supra*; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145 (1984); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1984); Decision and Order Upon Remand at 8-9, 11-12; Director's Exhibit 29; Employer's Exhibit 6. Moreover, the administrative law judge rationally accorded little weight to the opinions of Drs. Zaldivar, Morgan and Lapp, as the physicians offered opinions that inadequately addressed the contribution of claimant's thirty-seven years of coal dust exposure. *See Compton, supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Kuchwara, supra*; Decision and Order Upon Remand at 7; Director's Exhibit 29; Employer's Exhibits 1, 4, 5. The administrative law judge permissibly accorded little weight to the opinions of Drs. Lapp and Zaldivar as these physicians relied upon an inaccurate smoking history.[6] *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Clark, supra; Stark v. Director, OWCP*, 9 BLR 1-136 (1986); *Moore v. Dixie Pine Coal Co.*, 8 BLR 1-334 (1985); *Hutchens, supra*; *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Kuchwara, supra;* Decision and Order Upon Remand at 6-7, 10-11; Employer's Exhibits 1, 4, 5.

[6]We reject employer's assertion that the case should be remanded because the administrative law judge improperly accorded little or no weight to the opinions of Drs. Zaldivar and Lapp, with respect to disability causation. Employer specifically states that the Fourth Circuit's holding in *DeHue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), prohibits the administrative law judge's rejection of opinions that do not include diagnoses of pneumoconiosis. In *Ballard*, the court held that even though an administrative law judge has found that a miner suffers from pneumoconiosis, a physician's disability causation opinion which is premised upon an understanding that the miner does not have pneumoconiosis may still have probative value when the opinion acknowledges the miner's pulmonary or respiratory impairment. *See Ballard, supra*. In this instance, however, the administrative law judge properly found that the physicians' opinions with respect to disability causation were specifically premised upon their determination that pneumoconiosis is not present, thus lessening their probative value. Decision and Order Upon Remand at 7, 11; Employer's Exhibits 4, 5. Moreover, the administrative law judge has provided a reasonable alternative rationale for according these opinions less weight as both Drs. Lapp and Zaldivar relied upon inaccurate smoking histories. *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-376 (1983); Decision and Order Upon Remand at 6-7, 10-13.

Contrary to employer's specific arguments with respect to whether the administrative law judge improperly treated the opinions of Drs. Zaldivar and Morgan as hostile to the Act, Employer's Brief at 22-25, an administrative law judge may accord diminished weight to opinions, such as those of Drs. Zaldivar and Morgan, that pneumoconiosis does not progress absent further coal dust exposure. *Compton, supra*; *Hutchens, supra*. Employer's assertion that the opinions of Drs. Zaldivar and Morgan do not foreclose all possibility of progression, lacks merit in this case. The physicians clearly stated their belief that pneumoconiosis does not progress once coal dust exposure ceases. Director's Exhibit 29; Employer's Exhibit 5. These views conflict with the regulations, which explicitly recognize the latent and progressive nature of pneumoconiosis. *See* 20 C.F.R. §718.201(c); *Adkins, supra*; *Mullins, supra*. As the administrative law judge properly found, the record clearly indicates that Drs. Zaldivar and Morgan believe that pneumoconiosis does not develop or progress after coal dust exposure ceases. Decision and Order Upon Remand at 7, 9; Director's Exhibit 29; Employer's Exhibit 5. The administrative law judge, therefore, did not mechanically reject the opinions, but rather considered their reliability in light of the reasoning offered by the physicians in this instance. *See Hicks, supra*; *Akers, supra*; *Collins, supra, Trumbo, supra*; *Mabe, supra*. Thus, the administrative law judge acted within his discretion as fact-finder in according less weight to the opinions of Drs. Zaldivar and Morgan as the physicians offered opinions that were contrary to the progressive nature of pneumoconiosis. *See Mullins, supra*; *Compton, supra*; *Richardson v. Director, OWCP*, 94 F.3d 164, 21 BLR 2-373 (4th Cir. 1996); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *Hutchens, supra*; *Kuchwara, supra*; Decision and Order Upon Remand at 6-7, 9-10; Director's Exhibit 29; Employer's Exhibit 5. Contrary to employer's assertion, an administrative law judge may, within a reasonable exercise of his discretion, accord less weight to a medical opinion when it fails to adequately address the possibility of coal dust exposure contributing to claimant's respiratory disability. *See Compton, supra*; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Kuchwara, supra*; Decision and Order Upon Remand at 6-7, 9, 12-13. Finally, we reject employer's assertion that the administrative law judge's application of the revised regulation has changed the law as the revised regulation is not impermissibly retroactive but merely codifies and clarifies existing case law. *See Nat'l Mining Ass'n, supra*; *Adkins, supra*; *Mullins, supra*. We therefore affirm the administrative law judge's credibility determinations.[7] *See Kuchwara, supra*.

[7]The administrative law judge properly determined that Dr. Rasmussen did not offer an opinion regarding the presence or absence of pneumoconiosis or regarding the cause of claimant's total disability. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); Decision and Order Upon Remand at 4, 12-13.

Finally, employer contends that the administrative law judge erred in determining that the evidence of record did not support a finding of a specific date of onset of total disability due to pneumoconiosis. Employer also asserts that the regulation pertaining to the identification of the date from which benefits commence is invalid, as it creates an irrebuttable presumption in favor of claimants. Employer's contentions are without merit. Pursuant to 20 C.F.R. §725.503(b), benefits are payable from the month of onset of total disability due to pneumoconiosis. Thus, an administrative law judge is required to consider all relevant evidence of record and identify the pertinent date. If the evidence of record does not establish when the miner became totally disabled due to pneumoconiosis, then benefits commence as of the miner's filing date, unless credible uncontradicted medical evidence indicates that the miner was not totally disabled at some point subsequent to his filing date. *See Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

In this case, the administrative law judge considered the medical reports of record and rationally acted within his discretion in finding that the evidence did not demonstrate a specific date of onset of total disability due to pneumoconiosis. Decision and Order Upon Remand at 13-14; *Edmiston*, *supra*. Accordingly, the administrative law judge properly utilized March 1, 1984 - the first date of the month in the instant claim was filed - as the date on which entitlement to benefits commenced. Director's Exhibit 1; *Green, supra*; *Edmiston, supra*; *Owens v. Jewell Smokeless Coal Corp.,* 14 BLR 1-47 (1990).

Lastly, we find no merit in employer's argument regarding the validity of 20 C.F.R. §725.503(b). Contrary to employer's assertion, Section 725.503(b) does not create an irrebuttable presumption mandating selection of the date of filing as the date from which benefits are payable. If the record contains credible evidence affirmatively establishing that the miner was not totally disabled subsequent to his filing date, the date from which entitlement to benefits commences cannot be fixed any earlier than the date of such evidence. *See Lykins*, *supra*. In the present case, contrary to employer's assertion, the administrative law judge rationally determined that Dr. Zaldivar's opinion lacked credibility and thus it is insufficient to affirmatively establish a date upon which claimant was not totally disabled at some point subsequent to his filing the instant claim. We hold, therefore, that substantial evidence supports the administrative law judge's designation of March 1, 1984 as the date from which claimant's entitlement to benefits commences. *See Green*, *supra*; *Edmiston*, *supra*; *Owens*, *supra*.

The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray, supra*, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson, supra*;

Worley v. Blue Diamond Coal Co., 12 BLR 1-20 (1988). Consequently, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence and is in accordance with law.

Accordingly, the administrative law judge's Decision and Order Upon 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