BRB No. 02-0243 BLA

MARGARET SHULL (Widow of LAWSON SHULL) Claimant-Respondent v. ZEIGLER COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Joseph J. Reiswerg, Indianapolis, Indiana, for claimant.

Mark E. Solomons and 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (96-BLA-1418) of Administrative Law Judge Rudolf L. Jansen (the administrative law judge) awarding benefits

on a duplicate claim[1] 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).[2] This case is before the Board for the third time. In the original Decision and Order, the administrative law judge credited the miner with nineteen and one-half years of coal mine employment and adjudicated this duplicate claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4) (2000). Consequently, the administrative law judge found the evidence sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[3] The administrative law judge also found the evidence sufficient to establish that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). Further, the administrative law judge found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000).[4] Accordingly, the administrative law judge awarded benefits to commence as of October 1, 1992, the beginning of the month in which the instant claim was filed. In response to employer's appeal, the Board affirmed the administrative law judge's unchallenged length of coal mine employment finding. The Board also affirmed the

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[1]The miner filed his initial claim on September 13, 1978. Director's Exhibit 27. The Department of Labor denied this claim on June 27, 1980 because the miner failed to establish any element of entitlement. *Id*. Because the miner did not pursue this claim any further, the denial became final. The miner filed another claim on June 6, 1984. *Id*. On March 3, 1988, Administrative Law Judge Bernard J. Gilday, Jr. issued a Decision and Order denying benefits. *Id*. Judge Gilday's denial was based upon the miner's failure to establish the existence of pneumoconiosis. *Id*. The denial became final because the miner did not pursue this claim any further. The miner filed his most recent claim on October 21, 1992. Director's Exhibit 1.

[2]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.

[3]The revisions to the regulations at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001.

[4]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).

administrative law judge's findings at 20 C.F.R. §§718.202(a)(1) (2000),[5] 718.203(b) (2000) and 725.309 (2000).[6] However, the Board vacated the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c)(4) (2000), and remanded the case for further consideration of the evidence. Further, the Board vacated the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). The Board instructed the administrative law judge to reconsider whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000), if he found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000). *Shull v. Zeigler Coal Co.*, BRB No. 98-0203 BLA (Dec. 16, 1998)(unpub.).

[5]In view of its affirmance of the administrative law judge's finding that the newly submitted evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) (2000), the Board declined to address employer's allegations of error with regard to 20 C.F.R. §718.202(a)(4) (2000).

[6]In its 1998 Decision and Order, the Board held that "[t]he [United States Court of Appeals for the] Seventh Circuit's decision in *Spese*...does not mandate dismissal of a duplicate claim in the absence of further coal dust exposure." *Shull v. Zeigler Coal Co.*, BRB No. 98-0203 BLA, slip op. at 4 (Dec. 16, 1998)(unpub.).

On first remand, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge again awarded benefits to commence as of October 1, 1992. In disposing of employer's second appeal, the Board rejected employer's contentions with respect to the administrative law judge's refusal to grant employer's request to submit new evidence in support of its prior challenge to the administrative law judge's findings that the evidence had established the existence of pneumoconiosis and a material change in conditions. Specifically, the Board rejected employer's contention that the administrative law judge erred in refusing to grant its request to reopen the record on remand to allow employer to submit evidence on the issue of whether pneumoconiosis is a progressive disease in light of a "change in law" by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, in *Spese*.[7] The Board also rejected employer's contention that the administrative law judge's denial of its right to respond to this "change in law" violated employer's due process rights and, therefore, requires that liability should transfer to the Black Lung Disability Trust Fund. Further, the Board rejected employer's contention that the case should be remanded to allow the administrative law judge to consider the fact that the public record, via the comments submitted in response to the new proposed regulations at 20 C.F.R. §725.309, now establish that pneumoconiosis is not a progressive disease. The Board declared that its previous holding stands as the law of the case on this issue, and no exception to that doctrine has been demonstrated by employer. However, the Board vacated the administrative law judge's findings that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000) and that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000). The Board instructed the administrative law judge to reconsider whether total disability due to pneumoconiosis is established at 20 C.F.R. §718.204(b) (2000) if he finds that total disability is established at 20 C.F.R. §718.204(c) (2000). The Board also vacated the administrative law judge's award of benefits from the date of filing, October 1992, and remanded the case for reconsideration of all relevant evidence in determining the date of onset of disability at 20 C.F.R. §725.503 (2000), if necessary. *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA (Dec. 27, 2000)(unpub.).

On the most recent remand, the administrative law judge found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b). Further, the administrative law judge

[7]The Board noted employer's assertion that "the Seventh's Circuit's holding in *Spese*, issued after the close of the record in this case, constitutes a 'change in law' because employer asserts that it now holds that employer bears the 'burden of refuting' the regulatory 'presumption' that pneumoconiosis is progressive, thereby entitling employer to the opportunity to respond with new evidence." *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 4 (Dec. 27, 2000)(unpub.).

found the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge again awarded benefits to commence as of October 1, 1992, the beginning of the month that the claim was filed.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Further, employer challenges the administrative law judge's finding that claimant is entitled to benefits beginning in October 1992, the month in which the claim was filed. Lastly, employer contends that the administrative law judge should have applied the doctrine of collateral estoppel to the issue of the existence of pneumoconiosis since Administrative Law Judge Robert L. Hillyard found the evidence insufficient to establish the existence of pneumoconiosis in the survivor's claim. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's challenge to the validity of the regulations at 20 C.F.R. §§718.201(c), 718.204(a) and 725.503(b). The Director also urges the Board to reject employer's contention that the administrative law judge should have applied the doctrine of collateral estoppel to the issue of the existence of pneumoconiosis in this case.[8] Claimant[9] responds by letter, concurring with the arguments advanced by the Director and requesting their incorporation as the "Miner's Response" by reference.

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,

[8]Employer filed a brief in reply to the response brief by the Director, Office of Workers' Compensation Programs, reiterating its prior contentions.

[9]Claimant is pursuing the miner's claim filed by her deceased husband, Lawson Shull. Claimant filed a survivor's claim on February 15, 2000. On October 31, 2001, Administrative Law Judge Robert L. Hillyard issued a Decision and Order denying benefits in the survivor's claim. The record does not indicate that claimant pursued the survivor's claim any further.

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).

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. §718.204(b). Specifically, employer argues that the administrative law judge again failed to comply with the Board's remand instructions. In its 2000 Decision and Order, the Board vacated the administrative law judge's prior finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(c) (2000) because the administrative law judge did not weigh all of the relevant contrary evidence and erred in his weighing of the opinions of Drs. Dwyer and Lenyo. The Board thus remanded the case for reconsideration.[10] *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 10 (Dec. 27, 2000)(unpub.). In his decision on remand, the administrative law judge considered the opinions of Drs. Drummy, Dwyer, Pangan, Paul, Lenyo, Myers and Theertham.[11] Whereas Drs. Dwyer, Lenyo and Theertham opined that the

[10]The Board stated that "the administrative law judge again erred in giving greater weight to Dr. Dwyer's opinion in light of his status as [the miner's] treating physician without adequately explaining how Dr. Dwyer's treatment of [the miner] over time was essential to understanding [the miner's] pulmonary condition and without specifically considering and/or explaining Dr. Dwyer's expertise, if any, as to pulmonary disease." *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 7 (Dec. 27, 2000)(unpub.). The Board also stated that "the administrative law judge again did not adequately explain how Dr. Dwyer's examination, x-ray and blood gas study results, with the absence of pulmonary function study results, supported his subsequent summary conclusion that [the miner] was totally disabled due to his coal mine employment." *Id*. (footnote omitted). The Board additionally stated that "the administrative law judge again erred in finding Dr. Lenyo's opinion sufficient to establish total disability without comparing Dr. Lenyo's finding of, apparently, a moderately severe respiratory impairment to the exertional requirements of [the miner's] usual coal mine employment." *Id*. Lastly, the Board stated that "the administrative law judge erred in giving greater weight to Dr. Lenyo's opinion in light of his status as [the miner's] treating physician without adequately explaining how Dr. Lenyo's treatment of [the miner] from 1978 to 1980 and his 1986 medical report was essential to understanding [the miner's] pulmonary condition and without specifically considering and/or explaining [Dr. Lenyo's] expertise, if any, as to pulmonary disease." *Id*.

[11]On November 29, 2002, the Board issued an order requesting the parties to provide it with a copy of Director's Exhibit 27. In its response to the Board's order, employer requested that the Board either dismiss it as the responsible operator because the Department of Labor has failed to safeguard the record or order the district director to reimburse it for the

miner suffered from a disabling respiratory impairment, Director's Exhibits 8, 27, 29, 37, Dr. Paul opined that the miner did not suffer from a disabling respiratory impairment, Director's Exhibit 27. Dr. Pangan opined that the miner did not suffer from ventilatory problems. *Id*. Dr. Drummy opined that the miner suffered from a "mild to moderate respiratory disability but seems to have other problems associated with obesity and possible angina pectoris and inactivity." *Id*. Dr. Drummy also opined that "[the miner] could not walk, climb, lift or do any other strenuous physical work it would seem under these circumstances but is actually working now in Murdock, Ill. in a coal company but not as an active miner apparently." *Id*. Dr. Myers opined that the miner suffered from a moderate or mild respiratory impairment.[12] Director's Exhibit 29. The administrative law judge permissibly discredited the opinions of Drs. Drummy, Lenyo,[13] Pangan and Paul because they are chronologically remote.[14] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *see generally Thomas v. Director, OWCP*, 9 BLR 1-239 (1987); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

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cost of providing the other parties with Director's Exhibit 27. The Board denies employer's requests.

[12]The administrative law judge stated, "[i]n my original decision, I noted that Dr. Myers declined to opine as to the degree of impairment caused by pneumoconiosis, entitling her opinion to little weight on the issue." 2001 Decision and Order at 5.

[13]Employer argues that the administrative law judge did not comply with the Board's remand order or the case law when he held that Dr. Lenyo's diagnosis of a moderately severe respiratory incapacity amounted to a finding of total respiratory disability. Specifically, employer asserts that Dr. Lenyo did not provide an assessment of the miner's limitations, and it is inappropriate for the administrative law judge to infer that the opinion amounted to a finding of total disability. Employer also argues that the administrative law judge's inference amounted to an impermissible substitution of his opinion for that of Dr. Lenyo. Nonetheless, since the administrative law judge permissibly discredited Dr. Lenyo's opinion because it is chronologically remote, we decline to address employer's assertions with regard to Dr. Lenyo's opinion. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *see generally Thomas v. Director, OWCP*, 9 BLR 1-239 (1987); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982).

[14]The report of Dr. Drummy is dated 1979 and the report of Dr. Pangan is dated 1984. Director's Exhibit 27. Additionally, the reports of Drs. Lenyo and Paul are dated 1986. *Id*. As to evidence of disability, the crucial inquiry is the miner's condition at the time of the hearing. *See Cooley, supra*. In the instant case, the hearing was held on November 19, 1996.

Employer asserts that the administrative law judge erroneously relied on Dr. Dwyer's opinion because Dr. Dwyer was the miner's treating physician. Contrary to employer's assertion, the administrative law judge relied on Dr. Dwyer's opinion because he found it to be documented and reasoned based upon Dr. Dwyer's familiarity with the miner's physical condition and coal mine employment requirements. *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); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). The administrative law judge stated that "[t]he firsthand knowledge of [the miner's] condition, employment, and limitations, combined with the quality and quantity of medical evidence reviewed demonstrates a level of documentation and reasoning entitled to full weight." 2001 Decision and Order on Remand at 4. The administrative law judge also stated, "[w]hile I find [Dr. Dwyer's] opinion well documented and reasoned, I accord it no greater weight based upon his status as treating physician as this status is not essential to understanding [the miner's] respiratory disease." *Id*. Thus, we reject employer's assertion that the administrative law judge erroneously relied upon Dr. Dwyer's opinion because Dr. Dwyer was the miner's treating physician.

We also reject employer's assertion that the administrative law judge violated the Board's remand order when he found that Dr. Dwyer relied on pulmonary function studies to support his decision. In its 2000 Decision and Order, the Board stated that "the administrative law judge again did not adequately explain how Dr. Dwyer's examination, x-ray and blood gas study results, *with the absence of* pulmonary function study results, supported his subsequent summary conclusion that [the miner] was totally disabled due to his coal mine employment." *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 7 (Dec. 27, 2000)(unpub.)(emphasis added)(footnote omitted). However, in fact, the record indicates that Dr. Dwyer relied on the November 13, 1992 pulmonary function study. Director's Exhibits 7, 8. The administrative law judge therefore properly found that "[c]ontrary to the Board's assertion,...Dr. Dwyer reviewed a pulmonary function study dated November 13, 1992." 2001 Decision and Order on Remand at 4. The administrative law judge correctly stated that "[o]n page 3 of Director's Exhibit 8, Dr. Dwyer noted his review of the November 13, 1992 study, stating, 'in Vincennes, I do have the report.'"[15] *Id*.

[15]We reject employer's assertion that the pulmonary function studies do not support a finding of pulmonary disability because they showed only a mild obstructive defect. The Board has held that test results that are not presumptive of total disability may be relevant to the overall evaluation of the miner's condition where they have reduced values which are indicative of abnormal pulmonary function, even though they do not satisfy the regulatory criteria. *See Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). In the instant case, the administrative law judge stated that the November 13, 1992 pulmonary function study "demonstrated a mild obstructive defect." 2001 Decision and Order on Remand at 4.

Employer additionally argues that the administrative law judge misstated Dr. Dwyer's opinion when he claimed that Dr. Dwyer diagnosed severe dyspnea based on his examination of the miner, while Dr. Dwyer simply listed this as one of the miner's complaints. In the "other complaints" section of the January 20, 1993 report, Dr. Dwyer noted that the miner could not climb or lift due to dyspnea. Director's Exhibit 8. Dr. Dwyer also noted that the miner could walk 1/2 to 1 mile before moderate dyspnea. *Id*. However, in the "impairment" section of the same report, Dr. Dwyer opined that the miner suffered from severe dyspnea with exertion. Whereas the "other complaints" section of the report provides for the patient's description of any limitations in physical activities, the "impairment" section of the report provides for the physician's medical assessment of the degree of severity of the impairment and the extent to which a cardiopulmonary diagnosis contributes to the impairment. Thus, we reject employer's assertion that the administrative law judge misstated Dr. Dwyer's opinion when he claimed that Dr. Dwyer diagnosed severe dyspnea based on his examination of the miner. Moreover, we reject employer's assertion that Dr. Dwyer was not aware of the exertional requirements of the miner's last work. Dr. Dwyer indicated that the miner held positions at his last coal mine employment as a shooter, shuttle-car operator and belt-man which required him to shovel and lift. Director's Exhibit 8.

Further, employer asserts that Dr. Theertham's opinion is not credible because Dr. Theertham overstated the miner's exertional requirements. Dr. Theertham, in a report dated December 6, 1995, noted that the miner's last coal mine employment required him to lift 50 to 100 pounds a day. Director's Exhibit 37. In contrast, during a hearing, the miner testified that his last coal mine employment required him to lift 40 to 50 pounds a day. Hearing Transcript at 32. In its 2000 Decision and Order, the Board rejected employer's contention that the opinion of Dr. Theertham was not credible because Dr. Theertham's characterization of the miner's last coal mine employment duties was not consistent with the miner's testimony concerning his last coal mine employment duties. *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 9 (Dec. 27, 2000)(unpub.). The Board noted that the administrative law judge has broad discretion to assess the evidence and draw his own conclusions and inferences from the evidence. *Id*. The Board also noted that "the administrative law judge considered the apparent conflict between Dr. Theertham's opinion and [the miner's] testimony and, nevertheless, found [that] Dr. Theertham's opinion was adequately documented and reasoned."[16] *Id*. The Board's prior disposition of the conflict

[16]In his prior Decision and Order, the administrative law judge stated, "I conclude that Dr. Theertham's report should not be discredited only because [the miner's] testimony is not precisely the same as the doctor's description of the amount of weight [the miner] was required to lift." 1999 Decision and Order at 8. The administrative law judge found that "[i]n both [the miner's] testimony and Dr. Theertham's report, it is shown that [the miner] was required to lift at least 50 pounds of weight on a consistent basis." *Id*. The

between Dr. Theertham's characterization of the miner's last coal mine employment duties and the miner's testimony with respect to his last coal mine employment duties constitutes the law of the case, since employer has advanced no new argument in support of altering the Board's previous holding, and no intervening case law has contradicted the Board's prior resolution of this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, we reject employer's assertion that Dr. Theertham's opinion is not credible because Dr. Theertham overstated the miner's exertional requirements.

In addition, employer argues that the administrative law judge erred in failing to explain why he credited the medical opinions of Drs. Dwyer and Theertham over the contrary objective proof. Contrary to employer's assertion, the administrative law judge provided a valid basis for finding that the preponderance of the evidence establishes total disability at 20 C.F.R. §718.204(b). *See Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). The administrative law judge properly weighed together the pulmonary function studies, the arterial blood gas studies and the medical opinions. Based upon his weighing of this conflicting evidence, the administrative law judge stated, "I find the well reasoned and documented opinions of Drs. Dwyer and Theertham to be most persuasive." 2001 Decision and Order on Remand at 5. The administrative law judge noted that "[u]pon considering the objective data, physical examination, employment history, and exertional requirements, these physicians opined that [the miner] was totally disabled from performing his previous coal mine work." *Id.*

Employer also asserts that the Board's prior decision is internally inconsistent because it ordered the administrative law judge to explain what evidence supports Dr. Dwyer's summary conclusion even though Dr. Theertham's opinion is no more explained than Dr. Dwyer's opinion. Employer's assertion is based upon the premise that Dr. Theertham's opinion is not reasoned. In its prior Decision and Order, the Board affirmed the administrative law judge's finding that Dr. Theertham's opinion was adequately documented and reasoned. *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 10 (Dec. 27, 2000)(unpub.). Dr. Theertham, in a report dated December 6, 1995, noted that "[the miner]

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administrative law judge therefore stated, "I assign significant probative weight to Dr. Theertham's opinion, as it reflects [the miner's] own description of his usual coal mine duties, because it is the most recent examination report of record, and because it is also well-documented and reasoned." *Id*.

has evidence of obstructive lung disease evident on testing of 12/5/95 manifested by decrease of FVC and FEV-1 which also suggest (sic) early restrictive disease." Director's Exhibit 37. Dr. Theertham also noted that "[the miner's] significant exposure to coal mine work is a contributing factor of his respiratory disease and respiratory symptomatology." *Id*. Hence, Dr. Theertham concluded that "[t]he pulmonary impairment in [the miner] is severe enough to preclude his last coal mine employment." *Id*. The Board's prior disposition of this issue with respect to Dr. Theertham's opinion constitutes the law of the case since employer has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's prior resolution of this issue. *See Coleman, supra*. Thus, we are not persuaded that there is reason to revisit the Board's prior consideration of this issue. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability at 20 C.F.R. §718.204(b).

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The Seventh Circuit has held that in order to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) (2000), a claimant must prove by a preponderance of the evidence that his pneumoconiosis is a contributing cause of his total disability, such that his pneumoconiosis must be a necessary, but need not be a sufficient condition of his total disability. *See Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). The Seventh Circuit further stated that its decision in "*Hawkins* explicitly declined to heighten a miner's burden further by requiring that he prove that pneumoconiosis was a 'substantially' or 'primary' cause of total disability."[17] *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 480, 15 BLR 2-79, 2-83 (7th Cir. 1991). The pertinent revised regulation provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
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> (i) Has a material adverse effect on the miner's respiratory or

[17]The Seventh Circuit stated that "[w]hen a physician asserts that pneumoconiosis contributes to a miner's disability, ALJs should not be required to make a medical assessment [of] whether pneumoconiosis *substantially* contributes to a miner's total disability." *Compton v. Inland Steel Coal Co.*, 933 F.2d 477, 482, 15 BLR 2-79, 2-85 (7th Cir. 1991). Further, the Seventh Circuit noted that claimants must prove a simple "but for" nexus to be entitled to benefits. *Compton*, 933 F.2d at 480, 15 BLR at 2-83.

pulmonary condition; or

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). Although the administrative law judge noted that "Dr. Myers declined to opine upon the degree of contribution that pneumoconiosis had on [the miner's] impairment," the administrative law judge also noted that "Dr. Dwyer attributes [the miner's] respiratory condition and total disability primarily to his coal dust exposure [and] Dr. Theertham found coal dust exposure to be 'significantly contributory' to his pulmonary impairment and disability." 2001 Decision and Order on Remand at 6; Director's Exhibits 8, 29, 37. In contrast, Dr. Paul opined that the miner did not suffer from a pulmonary or respiratory impairment caused by, significantly related to or substantially aggravated by the inhalation of coal mine dust. Director's Exhibit 27. Drs. Drummy, Lenyo and Pangan did not render an opinion with respect to the issue of whether pneumoconiosis caused a disabling respiratory impairment. *Id*. The administrative law judge permissibly discredited the opinions of Drs. Drummy, Lenyo, Pangan and Paul because they are chronologically remote. *See Cooley, supra*; *see generally Thomas, supra*; *Coffey, supra.*

We reject employer's assertion that the administrative law judge did not comply with the Board's order to explain how Dr. Dwyer's summary conclusion that the miner was totally disabled due to pneumoconiosis was documented and reasoned. As previously noted, the administrative law judge properly found that the opinion of Dr. Dwyer is documented and reasoned based upon Dr. Dwyer's familiarity with the miner's physical condition and coal mine employment requirements. *See Clark, supra*; *Fields, supra*; *Lucostic, supra*.

Employer further asserts that the Board's prior holding, that Dr. Theertham's finding of disability causation is substantial evidence to support a finding of disability causation, conflicts with its ruling regarding Dr. Dwyer's report, since Dr. Theertham's report is no more explained than Dr. Dwyer's report. As previously noted, the Board's prior disposition of this issue constitutes the law of the case. *See Coleman, supra*. Thus, we are not persuaded that there is reason to revisit the Board's prior consideration of this issue.

Employer additionally asserts that the revised regulation at 20 C.F.R. §718.204(a), which overrules *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), cannot be applied to this case. The pertinent revised regulation provides that "any nonpulmonary or nonrespiratory condition or disease, which causes an independent disability unrelated to the miner's pulmonary or respiratory disability, shall not be considered in determining whether a miner is or was totally disabled due to

pneumoconiosis." 20 C.F.R. §718.204(a). In a recent decision, the United States Court of Appeals for the District of Columbia held that the revised regulation at 20 C.F.R. §718.204(a) is impermissibly retroactive as applied to pending cases. *National Mining Association v. Department of Labor*, 2002 WL 1300007 (D.C. Cir. June 14, 2002). Thus, as employer asserts, the revised regulation at 20 C.F.R. §718.204(a) is not applicable to the instant case.

Citing *Foster* and *Vigna*, employer argues that the administrative law judge and the Board misapplied the standard for determining whether pneumoconiosis caused the miner's disability. Employer's assertion is based upon the premise that the miner was previously disabled because of back problems. In its prior decision dated December 16, 1998, the Board rejected employer's assertion that the Seventh Circuit's decisions in *Foster* and *Vigna* prevented the miner from establishing total disability due to pneumoconiosis. *Shull v. Zeigler Coal Co.*, BRB No. 98-0203, slip op. at 8 (Dec. 16, 1998)(unpub.). The Board stated that "the record is devoid of medical evidence indicating that [the miner] was totally disabled at any time due to back and neck injuries." *Id.* Employer has advanced no new argument in support of altering the Board's previous holding with respect to the administrative law judge's weighing of the medical opinions in light of the Seventh Circuit's decisions in *Foster* and *Vigna* and no intervening case law has contradicted the Board's prior disposition of this issue. Therefore, the Board's prior resolution of this issue constitutes the law of the case. *See Coleman, supra*. Thus, we reject employer's assertion that the decisions of the Seventh Circuit in *Foster* and *Vigna* preclude a finding of total disability due to pneumoconiosis in the instant miner's claim.

Employer also asserts that the failure of Drs. Theertham and Dwyer to address the miner's smoking history precludes their opinions from establishing disability causation, or at least undermines their conclusions. Contrary to employer's assertion, Drs. Dwyer and Theertham considered the miner's smoking history in rendering their opinions with respect to the issue of total disability due to pneumoconiosis. In a report dated January 20, 1993, Dr. Dwyer noted that the miner started smoking as a teenager and continued to smoke one-half of a pack of cigarettes a day. Director's Exhibit 8. In a report dated December 6, 1995, Dr. Theertham noted that the miner smoked three quarters of a pack of cigarettes a day for fifty-one years but quit smoking in June 1994. Director's Exhibit 37.

In light of the aforementioned, the administrative law judge properly relied upon the disability causation opinions of Drs. Dwyer and Theertham. Since the opinions of Drs. Dwyer and Theertham satisfy both the disability causation standard of the Seventh Circuit in *Shelton* and *Hawkins*, and the disability causation standard of the pertinent revised regulation at 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the evidence is sufficient to establish total disability due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Shelton, supra*; *Hawkins, supra*.

Additionally, employer contends that the administrative law judge erred in finding the date from which benefits commence to be October 1992, the month the claim was filed. Specifically, employer contends that the administrative law judge's finding on this issue does not comply with the Board's remand instructions or the case law. In its prior Decision and Order, the Board instructed the administrative law judge to reconsider all relevant evidence in determining the date from which benefits commence. *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 11 (Dec. 27, 2000)(unpub.). Based upon a review of the record on remand, the administrative law judge found that the date that the miner became totally disabled due to pneumoconiosis could not be determined. Hence, the administrative law judge concluded that benefits commence as of October 1992, the month that the miner filed his claim. An administrative law judge must determine the date on which the miner became totally disabled due to pneumoconiosis, not just the date on which he becomes totally disabled by any cause. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987). However, if a date for the onset of disability due to pneumoconiosis is not ascertainable from the evidence of record, then benefits commence as of the month the claim was filed unless credible evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date.[18] *See* 20 C.F.R. §725.503(b); *Amax Coal Co. v. Director, OWCP* [*Chubb*], F.3d , 2002 WL 31730841 (7th Cir. Dec. 6, 2002); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Edmiston, supra*; *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).[19] Since the administrative law judge

[18]The administrative law judge relied upon the opinions of Drs. Dwyer and Theertham to establish total disability at 20 C.F.R. §718.204(b) and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither Dr. Dwyer nor Dr. Theertham indicated that the miner was not totally disabled due to pneumoconiosis at some point subsequent to October 1992, the miner's filing date.

[19]The pertinent regulations provide that "[w]here the evidence does not establish the month of onset, benefits shall be payable to such miner beginning with the month during which the claim was filed." 20 C.F.R. §725.503(b).

provided an adequate explanation for finding that the date from which benefits commence to be October 1992, we reject employer's assertion that the administrative law judge's finding does not comply with the Board's remand instructions or the case law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Citing *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), employer asserts that the provision of 20 C.F.R. §725.503(b) that authorizes an administrative law judge to award benefits to commence as of the date a claim is filed violates 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). The regulations generally provide that "[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). Further, the APA provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof." 5 U.S.C. §556(d). Since 20 C.F.R. §725.503(b) specifically provides that benefits are payable from the date that the claim is filed when the record does not contain evidence which can establish the onset date of disability, 20 C.F.R. §725.503(b), the APA is inapplicable to 20 C.F.R. §725.503(b), 5 U.S.C. §556(d). Therefore, we reject employer's assertion that the provision of 20 C.F.R. §725.503(b) that authorizes an administrative law judge to award benefits to commence as of the date a claim is filed violates the APA.

Finally, employer contends that the case must be remanded to the administrative law judge to reassess his finding of pneumoconiosis in light of Judge Hillyard's finding that pneumoconiosis was not established in the survivor's claim. Specifically, employer argues that the doctrine of collateral estoppel requires a reassessment of the administrative law judge's finding of pneumoconiosis. As previously noted, in the original Decision and Order dated October 1, 1997, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1) and (4) (2000) in the miner's claim, which the Board affirmed. *Shull v. Zeigler Coal Co.*, BRB No. 98-0203 BLA, slip op. at 5 (Dec. 16, 1998)(unpub.). In contrast, Judge Hillyard found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(4) in the survivor's claim. The doctrine of collateral estoppel refers to the effect of a judgment in foreclosing relitigation in a subsequent action of an issue of law or fact that has been actually litigated and decided in the initial action. *See Freeman v. United Coal Mining Co. v. Director, OWCP* [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994). To successfully invoke the doctrine of collateral estoppel, the party asserting it must establish the following criteria:

(1) the precise issue raised in the present case must have been raised and actually litigated in the *prior* proceeding;

(2) determination of the issue must have been necessary to the outcome of the *prior* determination;
(3) the *prior* proceeding must have resulted in a final judgment on the merits; and
(4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the *prior* proceeding.

See N.A.A.C.P., Detroit Branch v. Detroit Police Officers Association, 821 F.2d 328 (6th Cir. 1989); *Virginia Hospital Association v. Baliles*, 830 F.2d 1308 (4th Cir. 1987), *appeal after remand* 868 F.2d 653, *reh'g denied, certiorari granted in part* 110 S.Ct. 49 (1989) *aff'd Wilder v. Virginia Hospital Association*, 110 S.Ct. 49 (1990); *Forsythe, supra*; *see also Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). As the Director asserts, Judge Hillyard's finding in the survivor's claim that the miner did not suffer from pneumoconiosis was not rendered *in a prior proceeding*. To the contrary, Judge Hillyard rendered his finding that the evidence is insufficient to establish the existence of pneumoconiosis on November 3, 2001, while the administrative law judge rendered his finding that the evidence is sufficient to establish the existence of pneumoconiosis on October 1, 1997. Thus, we reject employer's assertion that the doctrine of collateral estoppel requires a reassessment of the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis in the instant miner's claim.

We also reject employer's assertion that the administrative law judge should reconsider his prior finding that the evidence is sufficient to establish the existence of pneumoconiosis since he did not consider the more recent evidence that Judge Hillyard considered in rendering a finding on this issue in the survivor's claim. The administrative law judge, as trier-of-fact, is charged with evaluating the quality of *the evidence of record* and according it appropriate weight. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In the instant case, the evidence in the survivor's claim was not in the record before the administrative law judge. Thus, as employer has advanced no new argument in support of altering the Board's previous affirmance of the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis and no intervening case law has contradicted the Board's resolution of this issue, the Board's prior disposition with respect to this issue constitutes the law of the case. *See Coleman, supra*. Thus, we are not persuaded that there is reason for us to revisit the Board's prior consideration of the administrative law judge's findings at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000).

Employer further asserts that the Board should remand the case to the administrative law judge to reevaluate the evidence regarding the existence of pneumoconiosis and a material change in conditions because the Board impermissibly relied on the revised regulations to support the administrative law judge's decision and to deny employer's motion to reopen the record. In its 2000 Decision and Order, the Board rejected employer's

contention that it should remand the case to the administrative law judge in light of comments submitted in response to the new proposed regulations which, employer argued, establish that pneumoconiosis is not a progressive disease absent further coal dust exposure. *Shull v. Zeigler Coal Co.*, BRB No. 00-0378 BLA, slip op. at 4 (Dec. 27, 2000)(unpub.). The Board stated that the comments to the new proposed regulations "are not uncontradicted against the position that pneumoconiosis is a progressive disease...and, nevertheless, are irrelevant to this case arising under the current regulations." *Id*. Thus, contrary to employer's assertion, the Board properly relied upon the regulations in effect at the time it considered the administrative law judge's decision and denied employer's motion to reopen the record. Subsequent to the Board's decision, however, the revised regulations became effective on January 19, 2001. Nonetheless, since no substantive changes were made to the revised regulations at 20 C.F.R. §718.202(a)(1) and (a)(4), we decline to remand the case to the administrative law judge to reconsider his findings at 20 C.F.R. §718.202(a)(1) and (a)(4) (2000) under the revised regulations.

In addition, employer asserts that the Board may not rely on the revised regulations to establish that pneumoconiosis is progressive because the APA and United States Supreme Court prohibit the retroactive application of new regulations when they change the legal landscape. The pertinent revised regulation provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal dust exposure." 20 C.F.R. §718.201(c). The United States Court of Appeals for the District of Columbia held that the revised regulation at 20 C.F.R. §718.201(c) is not impermissibly retroactive as applied to pending cases. *National Mining Association v. Department of Labor*, 2002 WL 1300007 (D.C. Cir. June 14, 2002). Thus, we reject employer's assertion that the Board may not rely on the revised regulations to establish that pneumoconiosis is progressive in the instant case.

Since we affirm the administrative law judge's findings that total disability is established at 20 C.F.R. §718.204(b) and that total disability due to pneumoconiosis is established at 20 C.F.R. §718.204(c), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge