BRB No. 98-0495 BLA

CLINT COLLINS, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY PRINCE MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
THE FIRE AND CASUALTY COMPANY OF CONNECTICUT	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

Deborah H. McCarthy (McCarthy Law Office), Hindman, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen Chartered), Washington D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-0637) of Administrative Law Judge J. Michael O'Neill 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). This case is on appeal to the Board for the second time. In his initial Decision and Order, the administrative law judge credited claimant with twenty-four and one-half years of coal mine employment, and based on the filing date, adjudicated this claim pursuant to the provisions of 20 C.F.R. Part 718. The administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(2) and 718.203(b) and a totally disabling respiratory impairment due to pneumoconiosis at 20 C.F.R. §718.204(c), (b). Accordingly, benefits were awarded. On appeal, the Board affirmed the findings of the administrative law judge at 20 C.F.R. §§718.202(a)(2), 718.203(b) as unchallenged on appeal. *See Skrack v. Island Creek Coal Company*, 6 BLR 1-710 (1983). At 20 C.F.R. §718.204(c), the Board affirmed the administrative law judge's determination to accord determinative weight to the medical opinions of Drs. Wicker, Earle, and Anderson, which reflect a diagnosis of a totally disabling respiratory impairment and to accord little weight to the medical opinions of Drs. Lane and Fino, which do not indicate the presence of a totally disabling respiratory impairment. The Board also affirmed, in part, the administrative law judge's weighing of the medical report of Dr. Broudy. The Board, however, vacated the administrative law judge's findings regarding the medical opinions of Drs. Dineen, Kahn and Vuskovich as well as the administrative law judge's weighing of Dr. Broudy's opinion and remanded this case for the administrative law judge to reconsider this evidence. The Board also directed the administrative law judge to reconsider causation pursuant to 20 C.F.R. §718.204(b) and the date of onset. *Collins v. Kentucky Prince Mining Company*, BRB No. 96-0627 BLA (Apr. 28, 1997)(unpub.).

On remand, the administrative law judge again found the medical opinion evidence sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis. Accordingly, benefits were awarded as of June 1991, the month in which claimant filed this claim. In the instant appeal, employer challenges the administrative law judge's findings at Sections 718.204(c) and 718.204(b) as well as the date of onset. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.[1] The Director, Office of Workers' Compensation

[1] In his response brief, claimant argues that the issue of complicated pneumoconiosis is ripe for appeal. Claimant's Brief at 6. In the prior appeal, claimant did not challenge the administrative law judge's determination that the evidence was insufficient to establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304. As claimant did not raise this argument on remand to the administrative law judge, we decline to address it in the current appeal. *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395 (1982).

Programs (the Director), has filed a letter indicating that he will not respond in this appeal.[2]

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).

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, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 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*).

After consideration of the administrative law judge's Decision and Order on 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. At Section 718.204(c), claimant bears the burden of proving the presence of a totally disabling respiratory impairment. *See Trent, supra*. In finding the evidence of record sufficient to meet claimant's burden of proof, the administrative law judge acted within his discretion when he accorded little weight to the medical opinion of Dr. Dineen as he rationally concluded that the physician did not explain the impact of claimant's symptoms of shortness of breath on minimal exertion and a cough with sputum in relation to his conclusion that claimant could perform his usual coal mine employment nor did the physician explain how claimant could do his coal mine work in light of his analysis of the non-qualifying or invalidated pulmonary function study results which indicated reduced FEV1 values and the physician opined that claimant retained the respiratory capacity to do coal mine employment. *See* Decision and Order at 9-10; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal* Company, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corporation*, 8 BLR 1-46 (1985). Further, the administrative law judge permissibly accorded little weight to the medical opinion of Dr. Vuskovich because he did not examine the specific job requirements

[2] We affirm the findings of the administrative law judge at 20 C.F.R. §718.204(c)(1), (2) and (3) as unchallenged on appeal. *See Skrack v. Island Creek Coal Company*, 7 BLR 1-710 (1983).

of claimant's usual coal mine employment nor did he explain how his examination findings, including symptoms and clinical findings, impacted on his conclusion that the claimant is able to perform his coal mine work. *Id.*; *McCune v. Central Appalachian Coal Company*, 6 BLR 1-996 (1984).

Contrary to employer's assertion, the administrative law judge did not selectively analyze the evidence in Dr. Broudy's report; rather the administrative law judge permissibly found this report poorly reasoned on the issue of the presence of a totally disabling respiratory impairment because Dr. Broudy's specific change in his opinion concerning the presence of complicated pneumoconiosis showed a lack of confidence by Dr. Broudy in his opinion and because his reports reflect difficulty in determining the source of claimant's chest pain and making a firm determination of respiratory impairment. *See* Decision and Order at 9; *Fields, supra*; *Hess v. Clinchfield Coal Company*, 7 BLR 1-295 (1984); *Wright v. Director, OWCP*, 7 BLR 1-475(1984). The administrative law judge also properly accorded little weight to Dr. Broudy's conclusion in 1991 that claimant's pulmonary ability enabled claimant to continue his usual coal mine employment as it was based on a non-qualifying pulmonary function study performed in 1989 before any physician diagnosed a pulmonary impairment.[3] *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Bates v. Director OWCP*, 7 BLR 1-113 (1984). Furthermore, the administrative law judge acted within his discretion when he concluded that Dr. Broudy was not a treating physician because claimant did not mention the physician as a treating physician nor was there evidence that the physician saw claimant over a period of time or frequently during a period of time. Rather, the administrative law judge concluded that the evidence of record indicated that Dr. Broudy saw claimant at isolated points in time and that he based his conclusions on these isolated visits and information supplied by employer.[4] *See Onderko v. Director, OWCP*, 14 BLR 1-2

[3] The administrative law judge also correctly noted that in its prior Decision and Order, the Board affirmed his conclusion that Dr. Broudy's opinion that claimant was not totally disabled was not fully explained. *See Collins v. Kentucky Prince Mining Company*, BRB No. 96-0627 BLA (Apr. 28, 1997)(unpub.) at 6.

[4] The record reveals that Dr. Broudy saw claimant once in 1989 and once in 1991. Director's Exhibit 53. Dr. Broudy submitted two additional reports to employer

(1989); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Gomola v. Manor Mining and Contracting Corporation*, 2 BLR 1-130 (1979).

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in 1991 and 1992. *Id*.

In finding the report of Dr. Kahn, which diagnosed a significant pulmonary impairment, entitled to some weight and thus, supportive of claimant's burden of proof, the administrative law judge properly found that claimant's last work as a continuous miner involved heavy physical labor based on the statement of Kennard Morris, claimant's foreman, who described claimant's duties and stated that the duties involved heavy physical labor. *See Clark, supra*; Director's Exhibit 11. In light of this finding, the administrative law judge properly concluded that a significant pulmonary disability would preclude claimant from performing his usual coal mine employment and constitutes a finding of total disability. *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986), *aff'd on recon.* 9 BLR 1-104 (1986). Therefore, the administrative law judge did not err when he accorded some weight to this opinion. *See Trent, supra*. Finally, contrary to employer's contention, the administrative law judge conducted a proper weighing of the probative and contrary probative evidence before finding the evidence of record sufficient to demonstrate the presence of a totally disabling respiratory impairment. *See Fields, supra*; *Shedlock v. Bethlehem Mines Corporation*, 9 BLR 1-195 (1986), *on recon.* 9 BLR 1-236 (1987)(*en banc*); Decision and Order at 11. We, therefore, affirm the determination of the administrative law judge that the evidence of record was sufficient to meet claimant's burden of proof at Section 718.204(c) as it is supported by substantial evidence and is in accordance with law.[5]

At Section 718.204(b), the administrative law judge correctly articulated the proper standard necessary for claimant to sustain his burden of proof on the issue of causation. Citing to the decision of the United States Court of Appeals for the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-25 (6th Cir. 1989), the administrative law judge stated that claimant must show that his pneumoconiosis contributed to his pulmonary disability, at least in part. *See also Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 21, 20 BLR 2-360 (6th Cir. 1996); *Peabody Coal Company v. Smith*, 127 F.3d 504, 21 BLR 2-181 (6th Cir. 1997). The administrative law judge determined that the only medical opinions relevant to the issues of causation were those of Drs. Wicker, Earle, Kahn, Anderson and Broudy. *See* Decision and Order at 11. Notwithstanding his determination that the evidence was

[5] Employer also raised the same contentions concerning the reliability of the reports of Drs. Earle and Wicker as it raised in the prior appeal. Since we addressed these issues in the prior appeal, we decline to address employer's arguments as our prior decision constitutes law of the case. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

insufficient to establish the presence of complicated pneumoconiosis, the administrative law judge acted within his discretion when he concluded that the reports of Drs. Wicker and Earle, which relate claimant's pulmonary disability to their diagnosis of complicated pneumoconiosis, were reasoned and documented. *See Fields, supra.* The administrative law judge properly relied on these medical opinions as he accurately concluded that these physicians explicitly attributed claimant's totally disabling respiratory impairment to pneumoconiosis and that the opinions were consistent with the fact that claimant had pneumoconiosis and a totally disabling pulmonary condition as well as sufficient years of coal mine employment. *Adams, supra*; *Ward, supra*; *Smith, supra*. In the exercise of his discretionary powers, the administrative law judge permissibly accorded a small amount of weight to Dr. Kahn's opinion that claimant's coal workers' pneumoconiosis and pulmonary silicosis contributed to his significant pulmonary disability because the physician relied on limited evidence and did not examine claimant. *Id.* The administrative law judge also rationally found the report of Dr. Anderson, as it related to the issue of causation, poorly reasoned because the physician failed to explain why claimant's pneumoconiosis did not contribute in any part to claimant's pulmonary disability, and thus, entitled to little weight. *See Fields, supra*; *Clark, supra*. Finally, the administrative law judge permissibly accorded determinative weight to the opinions of Drs. Wicker and Earle on the basis of their status as treating physicians. *See Clark, supra*. We, therefore, affirm the findings of the administrative law judge that the evidence of record was sufficient to establish pneumoconiosis as a contributing cause of claimant's totally disabling respiratory impairment at Section 718.204(b). The administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Consequently, as the administrative law judge properly found the relevant evidence sufficient to meet claimant's burden of proof, we affirm the award of benefits as it is supported by substantial evidence and is in accordance with law.

Lastly, the administrative law judge appropriately stated that where the medical evidence establishes the month of onset of total disability due to pneumoconiosis, benefits are payable from that month, but when the medical evidence fails to establish a particular date on onset, benefits are payable from the month in which the claim for benefits was filed. *See* 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Corporation,* 14 BLR 1-47 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). The administrative law judge also correctly stated that a claimant does not become totally disabled on the precise date a physician diagnoses total disability, but rather such evidence indicates that claimant became disabled at some point prior to that date. *Id*. In deciding that benefits would commence as of June 1991, the month in which this claim was filed, the administrative law judge properly concluded that the physicians differed on the disabililty dates and that claimant was first diagnosed with a totally disabling respiratory impairment due to pneumoconiosis in July

1991. *Id.* The administrative law judge properly concluded in light of this determiniation that he could not ascertain the month in which claimant became totally disabled due to his pneumoconiosis, and thus, properly awarded benefits commencing June 1991. *Id.* We, therefore, affirm the administrative law judge's findings on the date of onset as it is supported by substantial evidence and is in accordance with law.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge