U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0262 BLA

MAC A. COLEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CHRISTIN COLEMAN TRUCKING	)	
	)	
and	)	
	)	
KENTUCKY EMPLOYERS MUTUAL INSURANCE	)	DATE ISSUED: 02/22/2018
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, Order Granting Reconsideration, and Errata of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center), Whitesburg, Kentucky, for claimant.

Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for employer/carrier.

Jeffrey S. Goldberg (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits, Order Granting Reconsideration, and Errata (2014-BLA-05241) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim[1] filed on August 7, 2012, pursuant to provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with twenty-three years of aboveground coal mine employment,[2] as stipulated by employer, in conditions substantially similar to those in an underground mine, and found that the new evidence established that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis, set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[3] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The

[1] Claimant's initial claim for benefits, filed on January 14, 2008, was denied by the district director on September 30, 2008, for failure to establish that claimant had pneumoconiosis, or that his totally disabling respiratory or pulmonary impairment was due to pneumoconiosis. Director's Exhibit 1 at 3-11.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibits 4, 8-10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

administrative law judge further found that employer failed to rebut the presumption. Accordingly, she awarded benefits. Upon a motion for reconsideration from the Director, Office of Workers' Compensation Programs (the Director), the administrative law judge issued an Errata correcting the month from which benefits commenced, from September 2009 to November 2008.

On appeal, employer argues that the administrative law judge erred in determining that it is the responsible operator. Employer also contends that the administrative law judge erred in finding that claimant has enough qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. In addition, employer argues that the administrative law judge erred in awarding benefits from November 2008. Claimant responds in support of the administrative law judge's award of benefits, and requests that the Board modify the date from which benefits commence to October 2008. The Director responds in support of the administrative law judge's designation of employer as the responsible operator, and in support of her finding that claimant had sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.[4]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

Responsible Operator

The responsible operator is the "potentially liable operator" that most recently employed the miner for at least one year.[5] *See* 20 C.F.R. §§725.494, 725.495(a)(1).

[4] We affirm the administrative law judge's unchallenged findings that claimant has twenty-three years of coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4, 25.

[5] An employer must meet five criteria to be considered a potentially liable operator: The miner must have worked for the operator for a cumulative period of at least one year; the miner's employment must have included at least one working day after December 31, 1969; the miner's disability or death must have arisen out of his or her employment with the operator; the operator must have been an operator after June 30,

Once the Director has designated a responsible operator, that operator may be relieved of liability only if it proves either that it is financially incapable of assuming liability for benefits, or that it is not the potentially liable operator that most recently employed the miner. 20 C.F.R. §725.495(c)(1), (2). Such proof must include evidence that the miner was employed as a miner after he stopped working for the designated responsible operator. 20 C.F.R. §725.495(c)(2).

In this case, after working for employer, claimant worked as a security guard for Appalachian Security, Inc. Director's Exhibit 9 at 6; Director's Exhibit 20 at 11. The administrative law judge determined that claimant's work there was not the work of a miner and did not last for at least one year. Decision and Order at 5. As a result, she found that employer failed to establish that it is not the potentially liable operator that most recently employed the miner, see 20 C.F.R. §725.495(c)(2), and that employer is the responsible operator. *Id*. at 5-6. Employer contends that claimant did the work of a miner at Appalachian Security, Inc., for over a year, and that the administrative law judge therefore erred in designating it as the responsible operator. Employer's Brief at 6-8.

Under the Act, a "miner" is "any individual who works or has worked in or around a coal mine or coal preparation facility in the extraction or preparation of coal." 30 U.S.C. §902(d); *see* 20 C.F.R. §§725.101(a)(19), 725.202(a). The definition of "miner" comprises a "situs" requirement (i.e., that the claimant worked in or around a coal mine or coal preparation facility) and a "function" requirement (i.e., that the claimant worked in the extraction or preparation of coal). *Navistar, Inc. v. Forester*, 767 F.3d 638, 641, 25 BLR 2-659, 2-663-64 (6th Cir. 2014); *Director, OWCP v. Consolidation Coal Co.* [*Petracca*], 884 F.2d 926, 929-30, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). To satisfy the function requirement, the miner's work must be integral or necessary to the extraction or preparation of coal, not merely incidental or ancillary. *See Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989).

Employer argues that a security guard is "absolutely integral" to coal production because a mine cannot operate if equipment is stolen or damaged. Employer's Brief at 7-8. In *Clemons*, however, the United States Court of Appeals for the Sixth Circuit held that a claimant did not perform the work of a miner when he worked at a mine as a night watchman. The Sixth Circuit reasoned that although a night watchman may have been "convenient or helpful" to the mine's operations, his work did not satisfy the function requirement because "he was not necessary to procure coal," and thus did not qualify as

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1973; and the operator must be capable of assuming liability for the payment of benefits, through its own assets or insurance. 20 C.F.R. §725.494(a)-(e).

the work of a miner. *Clemons*, 873 F.2d at 923, 12 BLR at 2-281. Moreover, in this case, the nature of claimant's work for Appalachian Security, Inc., undermines employer's argument. Although claimant testified that as a security guard he sat in his vehicle at a surface mine and guarded mining equipment to prevent it from being stolen or vandalized, he also said he performed no other job duties, and that the mine he guarded was no longer producing coal and had been shut down. Hearing Transcript at 28-30.

The administrative law judge rationally applied *Clemons* to this case and determined, based on claimant's testimony, that claimant was not a miner when he worked as a security guard for Appalachian Security, Inc., because his work was not integral to the extraction or preparation of coal.[6] *See* 20 C.F.R. §§725.101(a)(19), 725.202(a); Decision and Order at 5 & n.14. Consequently, employer cannot establish that Appalachian Security, Inc., was the potentially liable operator that most recently employed claimant. *See* 20 C.F.R. §725.495(c)(2). We therefore affirm the administrative law judge's finding that employer is the properly designated responsible operator.[7] *Id*. at 5-6.

Invocation of the Section 411(c)(4) Presumption

Employer next argues that the administrative law judge erred in finding that all twenty-three years of claimant's coal mine employment occurred in conditions substantially similar to those in underground mines, and that claimant therefore had

[6] We do not hold that a security guard can never work as a miner. The facts of this case distinguish it from cases in which security guards have been found to be miners. *See, e.g., Sammons v. EAS Coal Co.*, 980 F.2d 731 (Table), 1992 WL 348976 (6th Cir. Nov. 24, 1992) (unpub.) (holding that a night watchman worked as a miner because part of his shift included safety checks, repairs and replacements that kept the mine "operational, safe, and in repair" and thus were essential to production and extraction of coal); *Wackenhut Corp. v. Hansen*, 560 F. App'x 747 (10th Cir. 2014) (unpub.) (holding that security guard who patrolled mines and inspected equipment to eliminate fire and safety hazards was integral to operation of mine and coal extraction, and noting that guard's security duties of patrolling for trespassers and checking in employees at gate "do not negate [claimant's] essential work in insuring the safe operation of the mine").

[7] Because we have affirmed the administrative law judge's finding that claimant did not work as a miner for Appalachian Security, Inc., we need not address employer's argument that the administrative law judge erred in finding that it failed to establish that claimant worked there for one year. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983); Decision and Order at 5-6; Employer's Brief at 6-7.

sufficient qualifying coal mine employment to invoke the Section 411(c)(4) presumption.[8] Employer's Brief at 8-10; Decision and Order at 4-5, 25. To invoke the presumption, claimant must establish that he worked for at least fifteen years at underground coal mines, or at surface mines in conditions "substantially similar" to those in an underground mine. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(b)(1)(i). Conditions at a surface mine "will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there." 20 C.F.R. §718.305(b)(2).

Claimant testified that he hauled coal, loading and driving a truck, for about fifteen years. Hearing Transcript at 20. Employer contends that claimant failed to establish that those years of coal mine employment occurred in conditions substantially similar to those in an underground mine. Employer's Brief at 9-10. Specifically, employer contends that claimant drove trucks with enclosed cabs and heating and air conditioning, and that his working conditions therefore could not have been equivalent to conditions in an underground mine, where miners "are exposed to coal dust continuously throughout their shifts and in a more severe manner." *Id*. Employer also asserts that claimant is not a credible witness, because he testified that surface dust conditions are worse than dust conditions in an underground mine. *Id*. at 9-10.

Employer's arguments lack merit. As an initial matter, claimant did not need to establish that the dust conditions in his job were "equivalent" to conditions at an underground mine, or that he was exposed to coal dust "continuously." Instead, he needed only to show that the conditions were "substantially similar" to those at an underground mine, and could do so by demonstrating simply that he was "regularly" exposed to coal mine dust as a truck driver. *See* 20 C.F.R. §718.305(b)(2); *Cent. Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 490, 25 BLR 2-633, 2-643-44 (6th Cir. 2014); *see also Spring Creek Coal Co. v. McLean*, F.3d , No. 17-9515, 2018 WL 704587 at *5-8 (10th Cir. Feb. 5, 2018). We also reject employer's contention that claimant's testimony cannot be considered credible. Assessing the credibility of witness testimony is for the administrative law judge as fact-finder, and the Board will not disturb her findings unless they are inherently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (en banc).

[8] The administrative law judge noted that claimant testified that some of his employment occurred at underground coal mines, but she determined that the record was "unclear" as to how many years claimant worked at underground mines. Decision and Order at 4.

In this case, substantial evidence supports the administrative law judge's finding that claimant worked in conditions substantially similar to those in an underground mine. Claimant testified that he was exposed to coal dust when loading coal onto his truck:

> Yeah. When you have a truck like that, hauling from the mines, well, the mines has got stockpiles. That means the belt is coming out of — the stacker belt is coming out of the mine, bringing the coal. And that belt, stockpile belt, may be 40, 50 foot high. All right, when that coal drops off that belt and hits the ground, poof, dust flies everywhere.
>
> Here you are in a end-loader. You have to take the end-loader to your pile of coal before you can load your truck. So, if the dust is boiling, you was right in the dust with it, you know. I mean, ain't no way of getting around it. You had to get out there where the coal dumped, where you load the truck.

Hearing Transcript at 13. Although employer asserts that claimant was not continuously exposed to coal dust because he was in an enclosed, air-conditioned cab, claimant testified that dust covered him when he operated an end-loader and when he was in his truck. *Id*. at 14, 25. Claimant also testified that his wife would have to mop the bathroom floor at their home if he threw his clothes there, because the floor would be covered with coal dust. *Id*. at 15. Claimant added that he had to use a washcloth daily to wipe coal dust away from his eyebrows and out of his nose, and that coal dust also got in his eyes, mouth and throat. *Id*. at 15, 25.

The administrative law judge permissibly credited claimant's testimony and found it sufficient to establish that claimant was regularly exposed to coal mine dust while working aboveground. *See Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 664, 25 BLR 2-725, 2-735-36 (6th Cir. 2015); *Sterling*, 762 F.3d at 490, 25 BLR at 2-643-44. We thus affirm the administrative law judge's finding that claimant had twenty-three years of qualifying coal mine employment sufficient to invoke the Section 411(c)(4) presumption. In light of our earlier affirmance of the administrative law judge's finding that claimant has a totally disabling respiratory or pulmonary impairment, we also affirm her findings that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and therefore established a change in an applicable condition of entitlement. 30 U.S.C. §921(c)(4); 20 C.F.R. §§718.305, 725.309(c); Decision and Order at 6, 26.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor

clinical pneumoconiosis,[9] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i)-(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[10] Employer's Brief at 10-12. The administrative law judge discredited the medical opinions of Drs. Dahhan and Jarboe, the only two physicians to conclude that claimant does not have legal pneumoconiosis. Decision and Order at 28-31; Director's Exhibits 14, 16; Employer's Exhibits 1-7, 9-10. Dr. Dahhan opined that claimant has a totally disabling, partially-reversible obstructive impairment consistent with chronic bronchitis due to smoking and possibly bronchial asthma, unrelated to coal mine dust exposure. Director's Exhibit 14; Employer's Exhibits 1, 3, 5, 7, 10. Similarly, Dr. Jarboe diagnosed claimant with a totally disabling airflow obstruction from bronchial asthma and chronic bronchitis due to smoking, unrelated to coal mine dust exposure. Director's Exhibit 16; Employer's Exhibits 2, 4, 6, 9. The administrative law judge discounted both opinions for failing to explain why coal mine dust exposure did not contribute to claimant's obstructive impairment, finding them to be not well-reasoned. Decision and Order at 30-31.

Employer's only substantive argument on appeal is that the administrative law judge erred in weighing Dr. Dahhan's opinion because she overlooked Dr. Dahhan's explanation, based on medical studies, that the decrease in claimant's FEV1 measurement is far greater than a decrease caused by coal mine dust exposure would be. Employer's Brief at 11. This argument lacks merit. The administrative law judge observed that, contrary to employer's contention, the Department of Labor (DOL) has accepted the view that coal mine dust and smoking have additive effects on an obstructive impairment, *see* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Sterling*, 762 F.3d at 491-92, 25 BLR at 2-

[9] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[10] Based on the weight of the x-ray evidence, the administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 28.

644-45; *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 30-31. Therefore, the administrative law judge reasonably discounted the opinions of Drs. Dahhan and Jarboe for failing to credibly explain why they excluded coal dust as a contributing factor in claimant's obstructive impairment.[11] *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 29-31.

Employer also contends generally that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Jarboe, both of which employer argues are well-reasoned and should be given full weight. Employer's Brief at 11-12. Employer essentially requests that we reweigh the evidence, which we may not do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because the administrative law judge permissibly discredited the opinions of Drs. Dahhan and Jarboe, we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R. §718.305(d)(1)(i). *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1069-70, 25 BLR 2-431, 2-443-44 (6th Cir. 2013).

Finally, because Drs. Dahhan and Jarboe did not diagnose legal pneumoconiosis, contrary to her finding that employer failed to disprove its existence, the administrative law judge permissibly discounted their opinions on the cause of claimant's totally disabling respiratory or pulmonary impairment. *See Ogle*, 737 F.3d at 1074, 25 BLR at

[11] The administrative law judge provided other valid reasons for discrediting the opinions of Drs. Dahhan and Jarboe. Both physicians excluded a contribution from coal mine dust exposure because claimant's impairment responded to bronchodilators, but the administrative law judge noted that the obstruction was only partially reversible with bronchodilators, and discredited the physicians' opinions for not addressing the effect of coal mine dust on the irreversible portion of claimant's impairment. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-152-53 (6th Cir. 2012); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 30-31; Director's Exhibits 14, 16; Employer's Exhibits 1-7, 9, 10. The administrative law judge also permissibly found that Drs. Dahhan and Jarboe failed to explain why coal mine dust exposure did not contribute to, or aggravate, claimant's asthma, when such contribution or aggravation would bring the asthma within the definition of legal pneumoconiosis. *See* 20 C.F.R. §718.201(a)(2), (b); Decision and Order at 30-31; Director's Exhibits 14, 16; Employer's Exhibits 1-7, 9, 10. We affirm these findings, which employer has not challenged. *See Skrack*, 6 BLR at 1-711.

2-452; Decision and Order at 32. We therefore affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that "no part" of claimant's totally disabling respiratory impairment was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). Decision and Order at 32.

Claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption. Therefore, we affirm the award of benefits.

Commencement Date for Benefits

Employer challenges the administrative law judge's finding that claimant is entitled to benefits commencing in November 2008. Employer's Brief at 13-14; Employer's Supplemental Brief at 4-6 (unpaginated). In a miner's claim, benefits are payable beginning with the month in which the miner became totally disabled due to pneumoconiosis, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603, 12 BLR 2-178, 2-184 (3d Cir. 1989); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). If evidence does not establish the onset date of total disability due to pneumoconiosis, benefits commence from the month in which the claim was filed. 20 C.F.R. §725.503(b); *Krecota*, 868 F.2d at 603, 12 BLR at 2-184; *Owens*, 14 BLR at 1-50. In a subsequent claim, benefits may not be paid for any period before the date upon which the order denying the prior claim became final. 20 C.F.R. §725.309(c)(6).

Claimant's prior claim, filed in January 2008, was denied by the district director on September 30, 2008. Director's Exhibit 1 at 3-11. The administrative law judge initially awarded benefits in this subsequent claim from September 2009, one year after claimant's prior claim was denied. Decision and Order at 33. In doing so, she found that claimant established his total disability "since at least March 2008 when he was first examined by Dr. Forehand in connection with the prior claim," and that "his disability has always been due to legal pneumoconiosis." *Id*.

The Director filed a motion for reconsideration requesting that the administrative law judge correct the commencement date of benefits to November 1, 2008, because the district director's Proposed Decision and Order denying claimant's first claim became final thirty days, rather than one year, after it was issued. *See* 20 C.F.R. §725.419(a), (d); Director's Motion for Reconsideration at 1. In an Order Granting Reconsideration and an Errata, the administrative law judge corrected the date from which benefits commence to November 1, 2008.

Employer argues that the administrative law judge erred by relying on Dr. Forehand's opinion from the prior claim to determine the onset date of claimant's total disability due to pneumoconiosis, and contends that she should have awarded benefits either from April 2013, when employer contends claimant was first diagnosed in this claim with a totally disabling respiratory or pulmonary impairment,[12] or no earlier than August 2012, when claimant filed this claim. Employer's Brief at 13-14; Employer's Supplemental Brief at 4-6 (unpaginated).

Employer's argument has merit. The district director determined in the prior claim that claimant had a totally disabling respiratory or pulmonary impairment but did not have pneumoconiosis, and therefore was not totally disabled due to pneumoconiosis. Director's Exhibit 1 at 7-8. In this claim, however, the administrative law judge reconsidered the medical opinion evidence submitted in the prior claim and determined, contrary to the district director's original finding, that claimant has been totally disabled due to pneumoconiosis since March 2008. That finding was improper. The district director's decision in the prior claim, and its underlying findings, must be given effect as final and correct.[13] *See* 20 C.F.R. §725.309(c)(6); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 484-86, 25 BLR 2-135, 2-145-47 (6th Cir. 2012); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361-63, 20 BLR 2-227, 2-232-37 (4th Cir. 1996) (en banc).

[12] Claimant points out that Dr. Forehand diagnosed claimant as totally disabled due to pneumoconiosis in October 2012. Claimant's Brief at 37; Director's Exhibit 13 at 22-23.

[13] Although the administrative law judge cited *Dalton v. OWCP*, 738 F.3d 779, 25 BLR 2-477 (7th Cir. 2013), when she reconsidered evidence in the prior claim and found that claimant's disability "has always been due to legal pneumoconiosis," that case does not provide authority to support her reconsideration of old evidence and ensuing finding. Decision and Order at 33. *Dalton* dealt with an initial claim filed in 1999, and held that an administrative law judge permissibly found, based on medical evidence, that the onset date of the miner's total disability due to pneumoconiosis was in 1991. *Dalton*, 738 F.3d at 784-85, 25 BLR at 2-488-91. Because *Dalton* did not involve a subsequent claim, there were no prior decisions and findings to prevent the administrative law judge from making such a finding, as there are in this case. *See Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 484-86, 25 BLR 2-135, 2-145-47 (6th Cir. 2012); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1361-63, 20 BLR 2-227, 2-232-37 (4th Cir. 1996) (en banc).

The administrative law judge cited no other evidence to establish that claimant became totally disabled due to pneumoconiosis at any point between the denial of the prior claim and the filing date of this claim. Decision and Order at 33. Nor has claimant pointed to any such evidence.[14] On the other hand, contrary to employer's argument regarding Dr. Forehand's opinion in this claim, a medical opinion diagnosing total disability due to pneumoconiosis does not establish an onset date, but establishes only that claimant became disabled due to pneumoconiosis at some point before the opinion

[14] Claimant urges the Board to modify the date from which benefits commence from November 2008 to October 2008. Claimant's Brief at 36 n.14. Claimant notes that benefits are payable "beginning with *the month* of onset of total disability due to pneumoconiosis," 20 C.F.R. §725.503(b), and argues that because the district director's denial of the prior claim became final on October 30, 2008, thirty days after it was issued, claimant became eligible for benefits on October 31, 2008. *Id*. Because claimant's argument is based on the administrative law judge's erroneous determination of the commencement date, it necessarily fails. Moreover, 20 C.F.R. §725.309(c)(6), which prohibits payment of benefits in a subsequent claim "for any period prior to the date upon which the order denying the prior claim became final," would foreclose such an argument. *See Richards v. Union Carbide Corp.*, 25 BLR 1-31, 1-39 (2012) (awarding benefits in subsequent claim the month after the month in which the denial of the prior claim became final).

was provided. *See Owens*, 14 BLR at 1-50. Because the evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, we modify the administrative law judge's decision to reflect that benefits are payable from August 2012, the month in which claimant filed his subsequent claim. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Order Granting Reconsideration, and Errata are affirmed, as modified to reflect that claimant's benefits commence in August 2012.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge