BRB No. 03-0256 BLA

CHARLES M. AMICK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 01/21/2004
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James M. Talbert and Matthew Smith Kennedy (Legal Practice Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order-Awarding Benefits (01-BLA-0443) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the

provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The administrative law judge found a material change in conditions established in this duplicate claim because the newly submitted evidence established total disability due to pneumoconiosis, the element of entitlement previously adjudicated against claimant. Decision and Order at 20.[2] The administrative law judge further found, on consideration of all of the evidence of record, that claimant established a coal mine employment history of thirty-three years, the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment, total disability, and that total disability was due to pneumoconiosis. Decision and Order at 20. Benefits were, accordingly, awarded.

On appeal, employer contends that the administrative law judge erred in several respects: in failing to determine whether claimant's duplicate claim was timely filed; in failing to consider whether claimant's condition had worsened when he found a material change in conditions established; in failing to consider all of the evidence of record when finding entitlement established; in failing to properly evaluate the medical opinion evidence relevant to total disability and causation; in applying the amended regulations retroactively to find the existence of pneumoconiosis and disability due to pneumoconiosis established; and in finding the month the claim was filed to be the onset date of disability. Claimant responds, urging that the administrative law judge's award of benefits be affirmed. The Director, Office of Workers' Compensation Programs, (the Director), challenges employer's assertions regarding the timeliness of the claim, the retroactive application of the new regulations, and the onset date,[3] but he takes no position on the merits of entitlement.

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant initially filed a claim on December 17, 1980, which was denied by the district director on July 21, 1981 because claimant failed to establish total disability due to pneumoconiosis. Director's Exhibit 36. Claimant filed a second claim on April 15, 1983. On June 27, 1991 Administrative Law Judge George P. Morin denied that claim because claimant failed to appear at the hearing and failed to respond to an Order to Show Cause. Director's Exhibit 37. Claimant filed the instant claim on March 29, 2000. Director's Exhibit 1. Initially, the claim was denied by the district director, Director's Exhibit 16, but subsequently the district director found claimant entitled to benefits, Director's Exhibit 31. Employer sought a hearing which was held on June 12, 2002. On November 26, 2002 the administrative law judge issued the Decision and Order awarding benefits from which employer now appeals.

[3] We affirm, as unchallenged on appeal, the administrative law judge's length of coal

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge erred in failing to determine whether the instant, duplicate claim constitutes a timely application for benefits under 20 C.F.R. §725.308. Employer contends that since claimant received his first diagnosis of totally disabling pneumoconiosis in 1996, and the present claimant was not filed until March 29, 2000, more than three years after that date, the claim was untimely filed, citing the Sixth Circuit's decision in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) and the Board's decision in *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216 (2002), applying *Kirk* to a case arising in the Sixth Circuit. Employer further argues claimant testified at the June 12, 2002 hearing that Dr. Salvadore told him four years ago that he was totally disabled due to pneumoconiosis, and that Dr. Klamath told him directly and by letter that he was totally disabled due to black lung. Employer also contends that 1996 medical records from the Rainelle Medical Center, diagnosed the existence of coal workers' pneumoconiosis. Employer's Exhibit 6; Claimant's Exhibit 3. Employer, therefore, argues that this duplicate claim is time barred by the terms of Section 725.308, which require that a claim be filed within three years of a medical determination of disability. Employer's Brief at 5-7.

We note that *Kirk* is not controlling in this case which arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director OWCP*, 12 BLR 1-200 (1989). The Board has held that the time limitation set forth in Section 422(f) of the Act, 30 U.S.C. §932(f), as implemented by 20 C.F.R. §725.308 does not bar the filing of a duplicate claim. *Furgerson*, 22 BLR at 1-220, 1-221; *see Andryka v. Rochester & Pittsburgh Coal Co.*, 14 BLR 1-34 (1990). Moreover, as the Director correctly argues, even if *Kirk* were applicable, this claim would not be time-barred because a review of the record before us fails to demonstrate that claimant received a written diagnosis of totally disabling pneumoconiosis. Dr. Salvador's "diagnosis" was, as claimant testified, given verbally. Further, there is no written evidence in the record of Dr. Klamath's diagnosis of totally disabling pneumoconiosis. Moreover, while the 1996 records from Rainelle Medical Center are written, the diagnosis contained therein is limited to one concerning the existence of pneumoconiosis and does not address whether claimant is totally disabled by

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mine employment determination, and the determination that claimant has established a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, the record supports a finding that claimant's pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). *See* 20 C.F.R. §718.203(b).

pneumoconiosis. Accordingly, we hold that employer has not rebutted the presumption that the instant, duplicate claim was timely filed. 20 C.F.R. §725.308(c); *see Adkins v. Donaldson Mine Co.*, 19 BLR 1-34 (1993); *Daugherty v. Johns Creek Elkhorn Coal Corp.*, 18 BLR 1-95 (1993). Employer's argument is, accordingly, rejected.

Employer next argues that the administrative law judge erred in failing to consider whether a material change in conditions was established under the proper standard. Employer contends that the administrative law judge must determine whether claimant has shown that his condition has worsened in order to establish a material change in conditions, citing *Kirk* and *Furgerson*. In finding that claimant established a material change in conditions, however, the administrative law judge stated that claimant had established the element of entitlement previously adjudicated against him. Decision and Order at 20. This was proper under the standard set forth by the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-234 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 510 U.S. 1090 (1997). Employer's argument is, therefore, rejected.

Employer also argues that the administrative law judge erred in not considering all the evidence of record, both old and new, when determining whether claimant was entitled to benefits. Contrary to employer's argument, a review of the administrative law judge's Decision and Order supports his finding that he considered all the evidence of record in finding that claimant established entitlement. Decision and Order at 14. Accordingly, we hold that the administrative law judge sufficiently considered all the evidence of record on entitlement. Moreover, while generally alleging that the administrative law judge failed to consider all the evidence of record, employer has not argued that the previously submitted evidence of record would have supported findings contrary to those reached by the administrative law judge. We conclude, therefore, that we have no substantial issue to review in this regard. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986).

Additionally, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis and disability causation. Employer makes several arguments in support of this contention. Specifically, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar, Stewart, Castle, Daniel, and Spagnolo when he erroneously concluded that these physicians failed to address whether coal mine dust exposure contributed to the miner's chronic obstructive pulmonary disease. Employer's Brief at 11. Employer offers two assertions in support of this argument.

First, employer contends that the administrative law judge applied an incorrect legal standard in considering the medical opinion evidence of legal pneumoconiosis and disability

causation because he effectively required the physicians to "rule out coal mine dust exposure as a cause of claimant's totally disabling respiratory impairment." Employer's Brief at 12. We disagree. Review of the administrative law judge's Decision and Order demonstrates that the administrative law judge rejected the opinions of Drs. Zaldivar, Stewart, Castle, Daniel and Spagnolo, Decision and Order at 16-18, 19-21, not because they failed to affirmatively rule out the presence of legal pneumoconiosis or disability causation, but because they offered flawed opinions which he determined were not as credible as the contrary opinions. This was permissible. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Second, employer argues that the administrative law judge committed factual errors in his analysis of the opinions of Drs. Zaldivar, Stewart, Castle, Daniel and Spagnolo regarding the existence of legal pneumoconiosis. Employer contends that, contrary to the administrative law judge's finding, Dr. Zaldivar, who is board certified in internal medicine and pulmonary diseases, explained why he believed that claimant's obstructive ventilatory impairment was due to emphysema caused by cigarette smoking, and unrelated to coal mine employment. Specifically, employer asserts that Dr. Zaldivar noted that the degree of reversibility seen with the administration of a bronchodilator was not consistent with a coal mine dust induced lung disease, but was more indicative of an asthmatic condition, and the doctor cited medical literature which explained how an obstructive ventilatory defect of claimant's magnitude would not be caused by coal mine employment. Employer's Exhibit 25. Employer also contends that Dr. Daniel, a board-certified internist, agreed that claimant's moderately severe chronic obstructive lung disease was due to cigarette smoking, in light of claimant's carboxyhemoglobin studies revealing that claimant was smoking as recently as 1991. Likewise, employer contends that Dr. Daniel's opinion supports a conclusion that claimant's chronic obstructive pulmonary disease was due to smoking and not pneumoconiosis as the physician, upon reviewing the medical evidence, indicated that both Drs. Zaldivar and Rasmussen found a degree of improvement following the administration of a bronchodilator. *See* Employer's Exhibit 8. Additionally, employer asserts that Dr. Stewart, while recognizing that coal workers' pneumoconiosis and coal dust exposure can cause chronic obstructive pulmonary disease, nonetheless, concluded that those diseases do not cause the degree of obstructive impairment seen in claimant. Employer's Exhibit 23. Further, employer notes that Dr. Castle, a board-certified internist and pulmonologist, also concluded that objective studies did not support a finding of chronic obstructive pulmonary disease caused by coal mine dust exposure. Employer's Exhibits 9, 20, 24. Lastly, employer notes that Dr. Spagnolo, a board-certified internist and pulmonologist, also found that the objective studies do not support a finding of coal mine induced lung disease, but rather were indicative of claimant's forty year smoking history. Employer's Exhibit 17. Thus, employer argues that contrary to the administrative law judge's finding, these physicians did, in fact, discuss whether claimant's chronic obstructive pulmonary disease was related to coal mine employment and the administrative law judge erred, therefore, when he rejected their opinions because they did not address whether

claimant's chronic obstructive pulmonary disease arose out of coal mine employment.

In discussing these opinions, the administrative law judge concluded that all the doctors who found that claimant's pulmonary disability was due to smoking also concluded that pneumoconiosis was not present, while the doctors who concluded that pneumoconiosis was present (either legal or medical) attributed claimant's pulmonary disability to both coal dust exposure and cigarette smoking. The administrative law judge further noted that several physicians, including Drs. Zaldivar, Stewart, and Castle, concluded that claimant's disability was due to cigarette smoking and that their opinions would not change even if simple pneumoconiosis were present on x-ray, while Dr. Daniel's finding of no pneumoconiosis was based solely on a negative x-ray. The administrative law judge concluded, however, that these doctors did not discuss Dr. Koenig's finding that chronic obstructive pulmonary disease was due, in part, to coal mine employment and that these doctors also failed to discuss, whether claimant's chronic obstructive pulmonary disease was related to coal mine employment and was therefore a pulmonary disease encompassed within the definition of pneumoconiosis, citing *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The administrative law judge found, therefore, that their opinions did not outweigh Dr. Koenig's thorough and complete discussion of claimant's pulmonary condition, which was supported by the opinions of Drs. Cohen and Rasmussen. Decision and Order at 18.

Further review of the administrative law judge's Decision and Order, however, shows that he was aware that these doctors discussed the cause of claimant's chronic obstructive pulmonary disease and that he fully set forth his reasons for finding that their conclusions that chronic obstructive pulmonary disease was due to smoking, not coal mine employment, were unreasoned. Decision and Order, 7-13. Specifically, the administrative law judge noted that Dr. Spagnolo relied on the fact that claimant's chronic obstructive pulmonary disease did not develop until after claimant left coal mine employment to find that it was due to cigarette smoking not coal mine employment. Decision and Order at 17. Additionally, the administrative law judge noted that several other physicians, who found that the changes seen in claimant were consistent with long-term cigarette smoking, not coal mine employment, failed to consider the extensive medical literature cited by Dr. Koenig as supportive of a finding that obstructive impairments are related to coal mine employment. The administrative law judge noted that the physicians who opined that the changes they saw were due to cigarette smoking, not coal mine employment, were, in fact, referring to the presence of clinical pneumoconiosis as seen on x-ray, not legal pneumoconiosis, *e.g.*, Dr. Zaldivar. Decision and Order at 8-10. Likewise, the administrative law judge implicitly found that several of these physicians, *e.g.*, Drs. Spagnolo, Zaldivar, Castle, erroneously based their opinions that claimant's chronic obstructive pulmonary disease was due to cigarette smoking, not coal mine employment, on the fact that claimant continued to smoke long after he had ceased his coal mine employment; the administrative law judge rejected their analysis as inconsistent with the definition of pneumoconiosis as a latent and

progressive disease which may become detectable only after the cessation of coal mine dust exposure. 20 C.F.R. §718.201(c); *Rutter*, 86 F.3d 1358, 20 BLR 2-227; Decision and Order at 8-10. Thus, the administrative law judge found that the opinions of Drs. Zaldivar, Stewart, Castle, Daniel and Spagnolo did not sufficiently counter Dr. Koenig's finding that claimant's chronic obstructive pulmonary disease was due, at least in part, to coal mine employment. This was rational. *See* 20 C.F.R. §718.201.

Likewise, employer, contends that the administrative law judge erred when he rejected Dr. Morgan's opinion as hostile to the Act because Dr. Morgan never opined that coal mine employment could never cause an obstructive impairment, only that it did not in this case. Instead, employer contends that Dr. Morgan's opinion that claimant's obstructive impairment was caused by cigarette smoking, not coal mine employment, was based on his consideration of multiple factors, and, therefore, constitutes a reasoned opinion which should have been credited. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (6th Cir. 2002) and *Warth*, 60 F.3d 173, 19 BLR 2-265.

Dr. Morgan challenged the findings of Dr. Koenig and opined that the evidence was not sufficient to support a finding of pneumoconiosis. Employer's Exhibit 22. Dr. Morgan found claimant's severe respiratory impairment to be attributable solely to a long history of cigarette smoking and indicated that, in the absence of x-ray evidence of pneumoconiosis, there is little presence of dust in a miner's lungs. He stated that he would not, therefore, diagnose a coal mine employment related condition. Dr. Morgan further noted that the medical literature he relied on argued against emphysema and obstruction as resulting from coal mine employment. Employer's Exhibit 22.

The administrative law judge stated that he rejected the opinion of Dr. Morgan as "contradictory to the Act and regulations which clearly allow for findings of obstructive impairments due to coal mine employment." Decision and Order at 18. Our dissenting colleague correctly notes that Dr. Morgan did not state that an obstructive impairment could not arise out of coal mine employment. *See Stiltner*, 86 F.3d 337, 20 BLR 2-246. The administrative law judge also discredited Dr. Morgan's opinion, however, because the administrative law judge determined that the doctor's opinion appeared to be based on the fact that claimant had no radiographic evidence of coal workers' pneumoconiosis and because Dr. Morgan believed that it was not realistic to conclude that the progressive worsening of claimant's pulmonary condition was due to coal mine employment, but was instead due to smoking, based on the fact that claimant continued to smoke for five years after he ceased coal mine employment, despite the fact that claimant had worked in the mines for thirty-three years. Decision and Order at 13. This was a permissible. 20 C.F.R. §718.201; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Anderson*, 12 BLR at 1-113. Because the administrative law judge provided valid reasons for discounting Dr. Morgan's opinion, we reject employer's contention that the case must be remanded for reconsideration of that opinion together with the other medical opinion

evidence of record. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Further, employer alleges the administrative law judge erred in according greatest weight to the opinions of Drs. Koenig, Cohen and Rasmussen without providing sufficient explanation. Employer argues that the administrative law judge merely found that Dr. Koenig's opinion was supported by the opinions of Drs. Rasmussen and Cohen and that it outweighed the opinions of the other physicians. Employer asserts that such a conclusion is inadequate as a matter of law for crediting a physician's opinion. Employer further argues that the administrative law judge failed to resolve the conflicts in the medical evidence, specifically Dr. Morgan's critique of the opinions Drs. Koenig and Cohen and the differing smoking histories provided by Dr. Rasmussen and Dr. Zaldivar. Employer also asserts that since the opinions of Drs. Cohen and Rasmussen were predicated on positive x-ray findings, and the x-ray evidence did not support a finding of pneumoconiosis, their conclusions regarding the existence of pneumoconiosis are suspect. Finally, employer argues that the administrative law judge failed to give appropriate consideration to the credentials of the various physicians when weighing the medical opinion evidence: he erred in crediting the opinion of Dr. Rasmussen who is board-certified only in internal medicine over the opinions of Drs. Zaldivar, Castle, Spagnolo, Stewart and Morgan who are not only board-certified in internal medicine, but also board-certified in pulmonary medicine or its British equivalent. Likewise, employer argues that the administrative law judge cannot credit the consultative opinions of Drs. Cohen and Koenig, non-examining physicians, without first determining whether the opinion of Dr. Rasmussen, an examining physician, which they corroborate, was reasoned.

In finding that Dr. Koenig's opinion provided the most thorough, complete, and well-supported discussion of claimant's pulmonary condition, the administrative law judge credited it as supported by the medical literature it referenced and by the opinions of Drs. Cohen and Rasmussen, Director's Exhibit 11, Employer's Exhibit 6, diagnosing a pulmonary condition due to coal mine dust exposure. Decision and Order at 18. Contrary to employer's argument, the administrative law judge fully discussed all the opinions of record and acknowledged the credentials of the physicians. He was not required to accord less weight to the opinions of non-examining physicians, where they opined on the same matters addressed by examining physicians. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998). Further, contrary to employer's argument, the opinions of Drs. Cohen and Rasmussen finding the existence of legal pneumoconiosis were not based solely on positive x-rays. As the administrative law judge noted, while both doctors found the existence of clinical pneumoconiosis by x-ray, they also found that claimant had legal pneumoconiosis, *i.e.*, a chronic obstructive respiratory disease related, in part, to coal mine employment, based on factors other than x-ray. Further, as the administrative law judge stated, although Dr. Koenig found that claimant did not have clinical pneumoconiosis, the doctor found claimant did have pneumoconiosis as defined by the Act. The administrative

law judge observed that although the x-ray evidence was not sufficient to support a finding of pneumoconiosis, it was also not sufficient to establish the absence of pneumoconiosis, as the positive and negative x-ray readings were evenly balanced. The administrative law judge concluded, therefore, that Dr. Koenig's opinion of legal pneumoconiosis was not outweighed by the contrary opinions, for the reasons discussed above, and was not inconsistent with the equivocal x-ray readings. This was rational and accorded with the Fourth Circuit's holding in *Compton*, 211 F.3d at 211, 22 BLR at 2-174 (4th Cir. 2000). Moreover, contrary employer's assertion, the administrative law judge was not required to make a specific determination that Dr. Rasmussen's opinion was reasoned and documented. Implicit in an administrative law judge=s reliance upon a particular physician's opinion is a finding that the opinion is reasoned. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *see also Freeman United Coal Mining Co. v. Cooper*, 965 F.2d 443, 448, 16 BLR 2-74, 2-79 (7th Cir. 1992). Accordingly, employer's arguments are rejected, and we affirm the administrative law judge's finding that the existence of legal pneumoconiosis and disability causation were established in this case. *See* 20 C.F.R. §718.201; *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002); *Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175; *Hicks*, 138 F.3d 524, 21 BLR 2-323, *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood*, 105 F.3d 946, 21 BLR 2-23; *Clark v. Karst-Robbins Coal Co.*, 12 BLR at 1-155 (1989)(*en banc*); *Anderson*, 12 BLR at 1-113.

Employer also asserts that the administrative law judge erred in applying the amended regulations to this claim which was filed prior to their effective date. Employer contends that the regulations, as amended, drastically change the definition of pneumoconiosis and the standard on causation and therefore impermissibly impose new burdens on employer. In response, the Director contends that the amended regulations are not impermissibly retroactive and their application does not deny employer due process as they merely codify and clarify existing case law. Contrary to employer's argument, the amended regulation has not drastically changed the definition of pneumoconiosis because it was already defined by the statute as a chronic dust disease of the lung and its sequalae, including respiratory and pulmonary impairments arising out of coal mine employment. 30 U.S.C. §902(b); *see Gulf & Western Industries v. Ling*, 176 F.3d 226, 231-232, 21 BLR 2-571, 2-580 (4th Cir. 1999); *Richardson v. Director, OWCP*, 94 F.3d 164, 166 n.2, 21 BLR 2-373, 2-377 n.2 (4th Cir. 1996); *see also National Mining Ass=n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, BLR (D.D.C. 2001). Likewise, contrary to employer's argument, the administrative law judge's finding that the evidence has established disability causation pursuant to Section 718.204(c) in this case also establishes disability causation pursuant to the law of the Fourth Circuit. *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *National Mining Ass'n.*, 292 F.3d 849, BLR . Accordingly, we reject employer's assertion that the administrative law judge improperly applied the amended regulations to the instant case.

Finally, employer contends that the administrative law judge erred in finding the date from which benefits commence to be March 2000, the month the claim was filed. 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 Section 725.503(b) which authorizes the administrative law judge to award benefits to commence as of the date a claim is filed violates Section 7(c) of 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 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).[4] *Ondecko*, however made plain that the designation "burden of proof" in Section 7(c) referred only to the "burden of persuasion," and not to "the burden of production" or the burden of going forward with the evidence. Section 725.503 "shift[s] the burden of production, rather than the burden of proof," as it is merely a "rebuttable evidentiary presumption [] enacted to ease the burden on claimants in black lung claims adjudications." *Nat'l Mining*, 160 F. Supp. 2d 47, 70-71; *Amax Coal Co. v. Director, OWCP [Chubb]*, 312 F.3d 882 (7th Cir. 2002).

Likewise, the Fourth Circuit has stated that other similar rebuttable presumptions concerning the burden of production and not the burden of proof are permitted by *Ondecko*, *e.g.*, the *Doris Coal* presumption providing that once a miner has proven total disability due to pneumoconiosis, medical expenses incurred by the miner for the treatment of any pulmonary disorder will be presumed necessary for the treatment of pneumoconiosis. *See Ling*, 176 F.3d 226, 21 BLR 2-571. Similarly, the presumption set forth at Section 725.503(b)(which provides that once a miner has established totally disabling pneumoconiosis and the evidence is unclear as to the actual date of onset, it is presumed that the miner was disabled when he filed for benefits), shifts only the burden of production, not the burden of proof, and is permissible under *Ondecko* and Section 7(c) of the APA. *See* 33 U.S.C.§906(a), as incorporated by 20 C.F.R. §725.503(b); *Nat'l Mining*, 292 F.3d 849, BLR ; *Chubb*, 312 F.3d 882.

Further, based on a review of the record, we hold that the administrative law judge correctly found that the date that claimant became totally disabled due to pneumoconiosis could not be determined, and, therefore, properly concluded that benefits should commence as of March 2000, the month that claimant filed his claim. Contrary to employer's argument, claimant has not been awarded benefits for any time during which there was credible evidence showing that he was not disabled. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65

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[4] The pertinent regulation provides 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).

(1990); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987); *see* 20 C.F.R. §725.503(b); *Chubb*, 312 F.3d 882; *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). Since the administrative law judge provided an adequate explanation for finding that the date from which benefits commence should be March 2000, we reject employer's argument and affirm the administrative law judge's determination on onset date. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Accordingly, the administrative law judge's Decision and Order-Awarding Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

I respectfully dissent from my colleagues decision affirming the administrative law judge's Decision and Order awarding benefits. Regarding the opinion of Dr. Morgan, I agree with employer that the administrative law judge erred in rejecting Dr. Morgan's opinion because Dr. Morgan relied on medical authorities and literature which indicate that emphysema and airway obstruction are not related to coal mine employment. As employer contends, Dr. Morgan relied on multiple factors to find that claimant did not have pneumoconiosis and that his disability was not due to coal mine employment. Moreover, Dr. Morgan did not state that an obstructive impairment could never be due to coal mine employment. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Likewise, for the same reason I conclude that the administrative law judge did not provide sufficient reasons for rejecting the opinions of Drs. Zaldivar, Stewart, Castle and Spagnolo. *Stiltner*, 86 F.3d 337, 20 BLR 2-246.

Further, the administrative law judge rejected these other opinions, in part, because

they did not address Dr. Koenig's findings. This was not necessary, however. If these physicians provided reasoned opinions based on their evaluation of the evidence, they are not required to also address the conclusions of other physicians. *See generally Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Accordingly, I would vacate the administrative law judge's award of benefits and remand the case for reconsideration of the medical opinion evidence on the issues of pneumoconiosis and disability causation.

Additionally, although the administrative law judge thoroughly discussed the new evidence relevant to establishing a material change in condition. *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1364, 20 BLR 2-227, 2-234 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), *cert. denied*, 510 U.S. 1090 (1997), the administrative law judge's consideration of the evidence on the merits is referenced by a single sentence, "[O]n consideration of all of the evidence of record, [C]laimant has proven that he has pneumoconiosis and that his total disability is due to pneumoconiosis and has established entitlement to benefits under the Act." Administrative Law Judge's Decision and Order at 20. On remand, the administrative law judge must sufficiently discuss all the evidence, both old and new, in determining whether the evidence of record establishes entitlement. *Rutter*, 86 F.3d 1358, 20 BLR 2-227.

Finally, I agree with my colleagues that inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the holding of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) on the issue of timeliness is not applicable. Unlike my colleagues, however, I go no further in determining whether this claim was timely filed.

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ROY P. SMITH
Administrative Appeals Judge