BRB No. 00-0752 BLA

LONNIE W. ODOM, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 On Remand of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Lonnie W. Odom, Sr., Sturgis, Kentucky, *pro se*.

Mark E. Solomons (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand (96-BLA-1112) of Administrative Law Judge Mollie W. Neal awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This claim is before the Board for the third time.

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which both employer and the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, have responded. The Director contends that the revised regulations will not affect the outcome of this case in any material way, while employer contends that a stay is necessary as the revised regulations affect the issues of the existence of pneumoconiosis and causation. Inasmuch as claimant has not timely submitted a brief in response to the Board's order, we construe claimant's position as being that the challenged regulations will not affect the outcome of the case.

This case involves a duplicate claim filed pursuant to 20 C.F.R. §725.309 (2000), but not pursuant to the revised, and challenged, regulation at 20 C.F.R. §725.309, which is only applicable to claims filed after January 19, 2000, *see* 20 C.F.R. §725.2(c). In addition, as both the Director and employer contend, the revised regulations and/or criteria for establishing and/or defining total disability pursuant to 20 C.F.R. §718.204 have not changed in any material way to affect the outcome of the case.

In regard to establishing the existence of pneumoconiosis pursuant to the revised regulations at 20 C.F.R. §718.202, employer contends that the revised definition of pneumoconiosis under 20 C.F.R. §718.201, which has been challenged in the lawsuit, is a new legal standard that could affect the outcome of the case. Employer also contends that the revised causation standard under 20 C.F.R. §718.204(c)(1) is a new legal standard that is not consistent with the case-law of the United States Court of Appeals for the Sixth Circuit,

Previously, in a Decision and Order dated September 11, 1997, the administrative law judge found the newly submitted medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, therefore a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), in accordance with the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-17 (6th Cir. 1994), by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises.[2] The administrative law judge then considered all of the evidence of record

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within whose jurisdiction this case arises, regarding the prior causation standard at 20 C.F.R. §718.204(b)(2000) and, therefore, could affect the outcome of the case. While the revised causation standard under Section 718.204(c)(1) has not been challenged in the lawsuit, it does set forth the standard to establish that a miner is totally disabled due to pneumoconiosis "as defined in §718.201," which has been challenged in the lawsuit.

In response, the Director contends that the revised definition of pneumoconiosis under Section 718.201 will not affect the outcome of the case because it is consistent with the case-law of the Sixth Circuit and contends that the revised causation standard under Section 718.204(c)(1) will not affect the outcome of the case because it is consistent with Sixth Circuit case-law regarding the prior causation standard at 20 C.F.R. §718.204(b) (2000).

Finally, as the Director contends, the challenged revised regulation at 20 C.F.R. §725.503(b), also at issue herein, has not changed in any material way to affect the outcome of the case, but has been changed only in a minor way to refer to the individual to whom benefits are payable, *i.e.*, the miner entitled to benefits.

Having considered the briefs submitted by the parties, and reviewed the record, we hold that the disposition of this case is not impacted by the challenged regulations.

[2] Claimant originally filed a claim on October 11, 1979, and in a Decision and Order issued on May 2, 1984, Administrative Law Judge Daniel L. Leland found twenty-one years of coal mine employment established, adjudicated the claim pursuant to the interim presumption at 20 C.F.R. §727.203 and found that invocation of the interim presumption was not established pursuant to 20 C.F.R. §727.203(a)(1)-(4) and that entitlement was not established pursuant to the permanent criteria at 20 C.F.R. Part 410, Subpart D, Director's Exhibit 26. Accordingly, benefits were denied. Although claimant appealed, claimant's appeal was dismissed as untimely filed, Director's Exhibit 32; *Odom v. Peabody Coal Co.*, BRB No. 85-2514 BLA (Apr. 23, 1986)(unpub. order).

Subsequent to claimant's untimely appeal of his original claim, claimant filed the instant, duplicate claim on April 14, 1986, Director's Exhibit 1. In an order dated March 9, 1988, Administrative Law Judge W. Ralph Musgrove held that, based on the Board's holding

at that time in *Lukman v. Director, OWCP*, 10 BLR 1-56 (1987), he did not have jurisdiction to consider claimant's duplicate claim and, therefore, denied the claim, Director's Exhibit 33. However, in light of subsequent, timely requests by claimant evidencing his intent to pursue his claim, the case again was referred to the Office of Administrative Law Judges, Director's Exhibits 34-35.

In a Decision and Order issued on January 31, 1992, Administrative Law Judge Richard E. Huddleston found a material change in conditions established pursuant to 20 C.F.R. §725.309(d)(2000) in accordance with the standard enunciated by the Board at that time in *Spese v. Peabody Coal Co.*, 11 BLR 1-174 (1988), found twenty years of coal mine employment established and adjudicated the claim on the merits pursuant to 20 C.F.R. Part 718, Director's Exhibit 51. Judge Huddleston found pneumoconiosis arising out of coal mine

on the merits and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Section 718.202(a)(4) and 20 C.F.R. §718.203(b). Finally, the administrative law judge found total disability demonstrated by the relevant evidence pursuant to 20 C.F.R. §718.204(c)(1) and (4) (2000), but not pursuant to 20 C.F.R. §718.204(c)(2)-(3) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iv), and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1). Accordingly, benefits were awarded.

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employment established pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b), and total disability due to pneumoconiosis established pursuant to 20 C.F.R. §§718.204(b), (c)(2000), as revised at 20 C.F.R. §§718.204(b)(2), (c)(1). Accordingly, benefits were awarded. On appeal, the Board affirmed Judge Huddleston's Decision and Order awarding benefits, *Odom v. Peabody Coal Co.*, BRB No. 92-1122 BLA (Oct. 5, 1993)(unpub.). However, employer appealed and the Sixth Circuit reversed the Board's Decision and Order and remanded the case for the administrative law judge to determine whether a material change in conditions was established pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated by the Sixth Circuit, subsequent to issuance of the Board's Decision and Order, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 19 BLR 2-10, 2-17 (6th Cir. 1994). *Peabody Coal Co. v. Odom*, No. 93-4290 (Jan. 24, 1995)(unpub.). In addition, the Sixth Circuit directed the administrative law judge to reconsider the determination that the existence of pneumoconiosis was established by the x-ray evidence based on the "true doubt rule," which had been subsequently disapproved by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

On appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and that a material change in conditions was established pursuant to Section 725.309(d) (2000) in accordance with the standard enunciated in *Ross, supra*. *Odom v. Peabody Coal Co.*, BRB No. 97-1820 BLA (Sep. 23, 1998)(unpub.). The Board also affirmed the administrative law judge's finding that pneumoconiosis arising out of coal mine employment was established pursuant to Section 718.203(b) and that total disability was not demonstrated pursuant to Section 718.204(c)(2)-(3)(2000), as revised at 20 C.F.R. §718.204(b)(2)(ii)-(iii), as unchallenged, and affirmed the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c)(1).

However, the Board vacated the administrative law judge's finding that total disability was demonstrated by the pulmonary function study evidence pursuant to Section 718.204(c)(1) (2000), as revised at 20 C.F.R. §718.204(b)(2)(i), and by the medical opinion evidence pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), and remanded the case for reconsideration and for the administrative law judge to weigh all of the contrary probative evidence, like and unlike, to determine whether total disability was established pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2). Thus, the Board also vacated the administrative law judge's determination of the date of onset, if any, of claimant's total disability due to pneumoconiosis from which benefits should commence pursuant to 20 C.F.R. §725.503 and remanded the case for reconsideration. The Board reaffirmed its Decision and Order on reconsideration, *Odom v. Peabody Coal Co.*, BRB No. 97-1820 BLA (Mar. 11, 1999)(on recon.)(unpub.).

On remand, at issue herein, the administrative law judge found total disability demonstrated by a preponderance of the most recent, valid pulmonary function study evidence of record pursuant to Section 718.204(c)(1)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i), and found that, "after consideration of all of the relevant medical evidence, including the contrary probative evidence," total disability was demonstrated by the medical opinion evidence pursuant to Section 718.204(c)(4), as revised at 20 C.F.R. §718.204(b)(2)(iv). Accordingly, benefits were awarded. The administrative law judge incorporated her prior finding that, while there was medical opinion evidence stating that claimant was totally disabled due to pneumoconiosis as early as August, 1989, and May, 1986, the date of medical evidence showing total disability does not necessarily establish the onset date and, therefore, finding that claimant became disabled some time prior to that evidence. Thus, the administrative law judge awarded benefits from April, 1986, which is the month in which the instant claim was filed. On appeal, employer contends that the administrative law judge erred in finding total disability demonstrated by the pulmonary function study evidence pursuant to Section 718.204(c)(1)(2000), as revised at 20 C.F.R.

§718.204(b)(2)(i), and by the medical opinion evidence pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), and in finding total disability established pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2). Employer also contends that the administrative law judge erred in determining the date of onset of claimant's total disability due to pneumoconiosis from which benefits should commence. Alternatively, employer contends that the Board erred in previously affirming the administrative law judge's findings that a material change in conditions was established pursuant to Section 725.309(d) in accordance with the Court's standard enunciated in *Ross*, that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and that total disability due to pneumoconiosis was established pursuant to Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1). Claimant responds, without the assistance of counsel, urging that the administrative law judge's Decision and Order On Remand awarding benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds, urging the Board to reject employer's contention that the Board previously erred in affirming the administrative law judge's finding that a material change in conditions was established pursuant to Section 725.309(d)(2000). Employer has filed a reply brief, reiterating its contentions in regard to the administrative law judge's finding pursuant to Section 725.309(d)(2000).

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).

Initially, employer contends that all judicial precedents interpreting the standard for establishing a material change in conditions pursuant Section 725.309(d)(2000) are of questionable force and effect because Section 725.309(d)(2000) was not properly promulgated and, therefore, is an invalid regulation. Employer contends that Section 725.309(d)(2000) was issued and published without providing for any prior notice and comment regarding whether pneumoconiosis is a latent and progressive disease, which is the underlying basis for permitting the filing of duplicate claims after the denial of a prior claim. Moreover, employer contends that Section 725.309 (2000) does not contain any language resembling the one-element standard adopted by the Sixth Circuit in *Ross*, *supra*. In light of the opportunity for notice and comment provided by the publication of the Department of Labor's revised Section 725.309 regulations, however, employer contends that Section 725.309 (2000) should be interpreted in accordance with the record of comments submitted in response to the revised Section 725.309 regulations. Employer contends that the uncontradicted comments submitted in response to revised Section 725.309 regulations, when proposed, do not support the underlying basis for duplicate claims and the one-element

standard, *i.e.*, that pneumoconiosis is a latent and progressive disease. Consequently, employer contends that duplicate claims filed under Section 725.309 (2000) are invalid and, therefore, that the award of benefits in this case under Section 725.309(d)(2000) is irrational and unsupported.

Contrary to employer's contentions, the comments submitted in response to revised Section 725.309 regulations, when proposed, are not uncontradicted assertions that pneumoconiosis is not a latent and progressive disease, *see* 62 Fed. Reg. 3344 (Jan. 22, 1997); *see Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-81, 1-88-89 (2000); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315, 20 BLR 2-76, 2-88-91 (3d Cir. 1995). Moreover, the Sixth Circuit has already rejected employer's contention in this case that pneumoconiosis is not a "progressive" disease as "unsupported," noting that the Sixth Circuit, as well as the United States Supreme Court, have recognized that pneumoconiosis is progressive, *see Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 - 2-10 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Ross*, 42 F.3d at 997; 19 BLR at 2-17. Director's Exhibit 51; *Peabody Coal Co. v. Odom*, No. 93-4290 (Jan. 24, 1995)(unpub.). The Sixth Circuit's previous holding stands as the law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).[3] Moreover, the one-element standard enunciated in *Ross* does not change employer's evidentiary burden or the type of evidence relevant to the issue, *see Stewart*, 22 BLR at 1-89; *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-20 - 1-21 (1999). Consequently, we reject employer's contentions.

Employer also again raises the same contentions that it advanced in its previous appeals, which were already addressed by the Board in its prior Decision and Orders, regarding the administrative law judge's findings on the merits under Sections 718.202(a)(4) and 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1). *See Odom*, BRB No. 97-1820 BLA. Inasmuch as the Board's previous holdings stand as the law of the case on these issues, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley*, *supra*; *Williams*, *supra*, we reject employer's contentions in this regard.

[3] The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter, such that it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Brinkley, supra; Williams, supra*.

Next, employer contends that the administrative law judge erred in finding total disability demonstrated by the pulmonary function study evidence pursuant to Section 718.204(c)(1)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i). The administrative law judge found that four of the nine most recent pulmonary function studies of record, dated October, 1992, Director's Exhibit 51, October, 1993, Claimant's Exhibit 3, July, 1995, and January, 1996, Director's Exhibit 51, were valid and qualifying, one dated May, 1989, Director's Exhibit 31, was non-qualifying and the other four were either nonconforming or found invalid.[4] Decision and Order On Remand at 2-7. The date of the hearing is the date upon which the extent of disability is assessed by the administrative law judge in a living miner's case, *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988).[5] Thus, contrary to employer's contention, that the administrative law judge did not explain why the four valid and qualifying pulmonary function studies outweighed the other five pulmonary function studies, the administrative law judge clearly stated that the preponderance of the most recent, valid pulmonary function studies administered since October, 1991, demonstrated total disability, Decision and Order On Remand at 7.

Employer also contends that the opinions of Drs. Tuteur, Employer's Exhibit 2, and Fino, Employer's Exhibit 3, that the qualifying October, 1992, and/or October, 1993, pulmonary function studies administered by Dr. Simpao were invalid, were uncontradicted. However, the administrative law judge, within her discretion, gave no weight to the opinions

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[4] Contrary to the administrative law judge's characterization, Decision and Order On Remand at 6 n. 12, the post-bronchodilator results of Dr. Simpao's October, 1986, pulmonary function study are also qualifying. For pulmonary function studies developed and/or conducted prior to January 19, 2001, *see* 20 C.F.R. §718.101(b), a "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718 (2000), Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1)(2000). The administrative law judge, within her discretion, made a factual determination that claimant's height was 72 inches, Decision and Order On Remand at 4, which she used to determine whether the relevant pulmonary function study results were qualifying, *see Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983). Thus, as claimant was age 57 at the time of Dr. Simpao's October, 1986, pulmonary function study, it yielded a qualifying post-bronchodilator FEV1 result of 2.23 and a qualifying MVV result of 74, *i.e.*, less than the qualifying 2.26 FEV1 and 91 MVV values listed at Part 718 (2000), Table B1 of Appendix B. *See* Director's Exhibit 51.

[5] The original hearing on claimant's duplicate claim was held by Judge Huddleston in May, 1991, Director's Exhibit 51, and the administrative law judge held a subsequent hearing on remand in January, 1997.

of Drs. Tuteur and Fino that the qualifying October, 1992, and/or October, 1993, pulmonary function studies administered by Dr. Simpao, who noted claimant's good cooperation and effort, were invalid, inasmuch as they provided no reasons or explanation for their opinions, Decision and Order On Remand at 6. It is for the administrative law judge, as the trier-of-fact, to determine whether an opinion is documented and reasoned, *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), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge when her findings are supported by substantial evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Employer also contends that the administrative law judge inconsistently discounted a March, 1988, pulmonary function study for lacking the requisite tracings, while crediting the qualifying January, 1996, pulmonary function study, which also lacked the requisite tracings. However, even if the results of the January, 1996, pulmonary function study were discounted, the administrative law judge's finding that the preponderance of the most recent, valid pulmonary function study evidence of record demonstrated total disability, *see Cooley*, *supra*, is nevertheless supported by substantial evidence, *see Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986); *Sheckler v. Director, OWCP*, 7 BLR 1-128 (1984); *see also Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994) *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).[6]

[6] In any event, the quality standards at 20 C.F.R. §718.103 (2000), applicable to pulmonary function study evidence developed prior to January 19, 2001, *see* 20 C.F.R. §718.101, are not mandatory and pulmonary function studies which fail to conform to those standards may not be precluded from consideration by the administrative law judge under Section 718.204(c)(1), as revised at 20 C.F.R. §718.204(b)(2)(i), on this basis alone, *see Orek v. Director, OWCP*, 10 BLR 1-51 (1987)(Levin, J., concurring); *see also Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-

Thus, any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, inasmuch as the administrative law judge's finding that total disability was demonstrated by the preponderance of the most recent pulmonary function study evidence is supported by substantial evidence, it is affirmed.

Employer also contends that the administrative law judge erred in finding total disability demonstrated by the medical opinion evidence pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge found the opinion of Dr. Houser particularly probative, as a highly qualified pulmonary specialist, *i.e.*, a board-certified physician in internal medicine and pulmonary disease, as well as in critical care, *see* Claimant's Exhibit 4, and as claimant's treating physician. Decision and Order On Remand at 8-9. In an August, 1989, opinion, Dr. Houser found that claimant suffered from moderately severe obstructive pulmonary disease and that claimant would be unable to return to his prior coal mine employment due to claimant's chronic bronchitis and chronic pulmonary disease, since the exertional requirements of claimant's coal mine employment were usually those of heavy manual labor, Director's Exhibit 39. Dr. Houser subsequently reviewed five pulmonary function studies dating from 1980 through 1996, which he found indicated moderately severe obstruction and a progression in claimant's chronic obstructive pulmonary disease and/or a decrease in claimant's pulmonary function and indicated in treatment records dating from 1990 through 1995 that claimant had a moderately severe obstruction, Director's Exhibit 51.

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47 (1990); *DeFore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988), and the party challenging an objective study because it does not conform to the quality standards must demonstrate how this defect or omission renders the study unreliable, *see Orek*, *supra*.

After reviewing the evidence and claimant's testimony regarding the exertional requirements of claimant's usual coal mine employment, the administrative law judge found that claimant's usual coal mine employment involved "heavy physical demands," consistent with Dr. Houser's opinion, Decision and Order On Remand at 7, 8 n. 13. Thus, the administrative law judge inferred from Dr. Houser's findings that claimant had a moderately severe obstruction and a progression in his chronic obstructive pulmonary disease, which were based upon his review of claimant's pulmonary function studies and treatment records from the 1990's, that claimant would be unable to perform the heavy physical demands of his last coal mine job, Decision and Order On Remand at 9.[7]

The administrative law judge also found that Dr. Houser's opinion was supported by the opinions of Dr. Tuteur, who reviewed the evidence on behalf of employer, and Dr. Selby, who examined claimant on behalf of employer. Decision and Order On Remand at 9-10. In a 1996 opinion, Dr. Tuteur found that since 1984, claimant's impairment in pulmonary function had worsened to severe and would prevent claimant from performing his last coal mine work as described in claimant's testimony at the hearing, Employer's Exhibit 2. In a 1996 opinion, Dr. Selby found that claimant's obstructive lung disease had worsened to severe and that if not for claimant's severe obstructive lung disease, which he attributed to asthma and smoking, claimant would have the respiratory or pulmonary capacity to perform all of his previous coal mine employment duties, including the duties of his last coal mine job as a pumper, Employer's Exhibit 1. In addition, the administrative law judge found well documented the May, 1986, opinion of Dr. Simpao, that claimant suffered from a moderate respiratory impairment and would not have the respiratory capacity to perform the work of a coal miner, Director's Exhibit 8. Decision and Order On Remand at 7, 10. Finally, the administrative law judge found that Dr. Fino, who reviewed the evidence of record on behalf of employer, was the "only" physician of record who found no evidence of a respiratory impairment, Employer's Exhibit 3. The administrative law judge stated this opinion was based, in part, on unreasoned invalidation of four pulmonary function studies, Decision and Order On Remand at 6, 10, *see Clark, supra*; *Fields, supra*; *Lucostic, supra*; *see also Anderson, supra*; *Worley, supra*.

Employer contends that none of the physicians considered the functional demands of claimant's usual coal mine employment or opined as to claimant's functional abilities.

[7] The administrative law judge also noted that Dr. Bell, another treating physician of claimant's, found that claimant's coal workers' pneumoconiosis rendered him totally disabled, Director's Exhibits 17, 34. Decision and Order On Remand at 7.

Contrary to employer's characterization of the evidence, Dr. Houser specifically noted, consistent with the administrative law judge's finding, the heavy exertional requirements of claimant's usual coal mine employment and found that claimant would be unable to perform his prior coal mine employment due to his moderately severe chronic pulmonary disease, Director's Exhibit 39. Similarly, Dr. Tuteur found that claimant's pulmonary impairment would prevent claimant from performing his last coal mine work as described in claimant's testimony, Employer's Exhibit 2, and Dr. Selby found that claimant did not have the respiratory or pulmonary capacity to perform the duties of his last coal mine job, as a pumper, due to his severe obstructive lung disease, Employer's Exhibit 1.

Moreover, the administrative law judge, within her discretion, inferred from Dr. Houser's findings that claimant had a moderately severe obstruction and a progression in his chronic obstructive pulmonary disease, that claimant would be unable to perform the heavy physical demands of his last coal mine job, Decision and Order On Remand at 9. Where the record contains an opinion providing an assessment of physical limitations due to pulmonary disease or an assessment of a miner's impairment, as well as evidence of the exertional requirements of the miner's usual coal mine employment, the information may be sufficient to allow the administrative law judge to draw a conclusion on the issue of total disability, by comparing the physician's opinion as to the miner's physical limitations or extent of impairment to the exertional requirements of the miner's usual coal mine employment, *see McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Parson v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Aleshire v. Central Coal Corp.*, 8 BLR 1-70 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 BLR 1-1157 (1987); *Ridings v. C & C Coal Co.*, 6 BLR 1-227 (1983). The ultimate finding regarding total disability is a legal determination to be made by the administrative law judge, not the physician, through consideration of the exertional requirements of the miner's usual coal mine employment in conjunction with the physician's opinion regarding the miner's physical abilities, *see Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Aleshire*, *supra*.

Employer also contends that the medical opinion evidence does not establish that claimant was totally disabled from a respiratory or pulmonary impairment by itself, but only in combination with other nonoccupational and/or non-respiratory or non-pulmonary problems. Contrary to employer's characterization of the evidence, Drs. Houser, Director's Exhibit 39,Selby, Employer's Exhibit 1, Tuteur, Employer's Exhibit 2, and Simpao, Director's Exhibit 8, all found that claimant was totally disabled from his respiratory or pulmonary impairment in and of itself. The administrative law judge, within her discretion, reasonably found Dr. Houser's opinion entitled to additional weight in view of his status as claimant's treating physician, along with his qualifications as a pulmonary specialist board-certified in pulmonary disease and the corroboration provided by other medical opinion evidence, *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1038, 1042, 17 BLR 2-16-17, 2-24 (6th Cir. 1993). Consequently, inasmuch as the administrative law judge's finding that

the preponderance of the medical opinion evidence of record demonstrated total disability is supported by substantial evidence, *see Snorton, supra*; *Sheckler, supra*; *see also Ondecko, supra*, the administrative law judge's finding pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), is affirmed.

Employer further contends that the administrative law judge failed to consider the blood gas study evidence of record, all of which was non-qualifying, when finding total disability established pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2). Pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Tussey, supra*; *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). The Board previously affirmed the administrative law judge's finding that the blood gas study evidence did not demonstrate total disability pursuant to Section 718.204(c)(2)(2000), as revised at 20 C.F.R. §718.204(b)(2)(ii). *See Odom*, 97-1820 BLA, Decision and Order at 9 n. 6.

However, since all relevant evidence must be weighed, the mere existence of contrary, probative evidence in the record does not preclude a finding that the evidence is sufficient to establish total disability, *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge credited, in part, the opinions of Drs. Simpao, Director's Exhibits 8-9, and Selby, Employer's Exhibit 1, who both administered non-qualifying blood gas studies, and the opinion of Dr. Tuteur, Employer's Exhibit 2, who reviewed the non-qualifying blood gas study evidence, yet all three physicians found that claimant was totally disabled from his respiratory and/or pulmonary impairment. Finally, the administrative law judge found that "after consideration of all of the relevant medical evidence, including the contrary probative evidence," total disability was established pursuant to Section 718.204(c), as revised at 20 C.F.R. §718.204(b)(2). Moreover, while the blood gas study is probative, the Sixth Circuit has held that, inasmuch as pulmonary function studies and blood gas studies measure different type of impairments, non-qualifying blood gas study results cannot be seen as being a direct offset or "contrary" to qualifying pulmonary function study findings, which the administrative law judge found demonstrated total disability in this case, *see Tussey, supra*. Consequently, we affirm the administrative law judge's finding that total disability was established by the preponderance of the relevant evidence of record under Section 718.204(c), *see Snorton, supra*; *Sheckler, supra*; *see also Ondecko, supra*, as supported by substantial evidence, *see Tussey, supra*; *Budash, supra*; *Fields, supra*; *Rafferty, supra*; *Shedlock, supra*.

Finally, employer contends that the administrative law judge ignored "much evidence" that claimant was not totally disabled during the "1980's" and, therefore, contends that, in

awarding benefits from the date of filing, the administrative law judge's determination violates the holding in *Ondecko, supra*, as it gives claimant the benefit of doubt in the absence of proof. The administrative law judge incorporated her prior finding, Decision and Order On Remand at 11; 1997 Decision and Order at 24, that there was medical opinion evidence finding that claimant was totally disabled due to pneumoconiosis as early as August, 1989, from Dr. Houser, Director's Exhibit 39, and from May, 1986, from Dr. Simpao, Director's Exhibit 8. However, the administrative law judge found that the date of medical evidence showing total disability does not necessarily establish the onset date and, therefore, found that claimant became disabled some time prior to that evidence. Thus, the administrative law judge awarded benefits from April, 1986, which is the month in which the instant claim was filed.

If a date of the onset of the miner's disability is not ascertainable from the evidence of record, then benefits commence as of the month the claim was filed, *see* 20 C.F.R. §725.503; *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-84 (1989), unless credited medical evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date, *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Gardner, supra; Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). As we previously held, the administrative law judge permissibly credited the August, 1989, opinion of Dr. Houser in finding claimant entitled to benefits and employer's contention that there is "much evidence" in the record that claimant was not totally disabled during the "1980's" does not sufficiently identify any alleged error by the administrative law judge with specificity in order to provide any basis for review of the administrative law judge's finding, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g Cox v. Director, OWCP*, 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Moreover, inasmuch as 20 C.F.R. §725.503(b) specifically provides that the onset date of disability is to be determined by 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), *see generally* 5 U.S.C. §556(d), and the Sixth Circuit, within whose jurisdiction this case arises, has not enunciated any standard other than, if a date of the onset of the miner's disability is not ascertainable from the evidence of record, that benefits commence as of the month the claim was filed pursuant to Section 725.503, we also reject employer's contention that the administrative law judge's determination violates the holding in *Ondecko, supra*.

As the administrative law judge determined, the date of onset is not established by the first medical evidence indicating total disability due to pneumoconiosis, but, rather, such medical evidence merely indicates that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that medical evidence, *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Thus, we affirm the administrative law judge's finding that the medical evidence of

record does not establish a date of onset of claimant's total disability due to pneumoconiosis, *see Green, supra*; *Gardner, supra*, as rational and supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits as of the date of filing of the instant claim in April, 1986, pursuant to Section 725.503(b), *see Green, supra*; *Gardner, supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge