BRB No. 02-0293 BLA

DONALD L. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order Awarding Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Crandall, Pyles, Haviland & Turner), Charleston, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (1995-BLA-1506) of Administrative Law Judge Thomas M. Burke 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 case is before the Board for the third time.[2] In its prior Decision and Order, issued on May 17, 2001, the Board vacated the administrative law judge's award of benefits and

[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 filed his application for benefits on May 16, 1994, which was initially awarded by the district director with interim benefits paid by the Black Lung Disability Trust Fund. Director's Exhibit 1. In a Decision and Order issued on January 31, 1997, Administrative Law Judge Thomas M. Burke (the administrative law judge) credited claimant with forty-four years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis and that claimant was totally disabled due to pneumoconiosis. Accordingly, benefits were awarded.

Pursuant to employer's appeal, the Board vacated the administrative law judge's award of benefits. Initially, the Board affirmed the administrative law judge's findings that claimant's pneumoconiosis arose out of his coal mine employment and that he suffers from a totally disabling respiratory or pulmonary impairment. The Board, however, found that the administrative law judge erred in admitting claimant's post-hearing submission of the medical report of Dr. Istfan without a good cause determination and, thus, vacated the administrative law judge's findings regarding the existence of pneumoconiosis and disability causation. On remand, the administrative law judge was instructed to determine whether to admit Dr. Istfan's report and if so, to reopen the record to allow employer the opportunity to respond to this report. *Williams v. Peabody Coal Co.*, BRB No. 97-0796 BLA (Feb. 26, 1998)(unpub.).

On remand, the administrative law judge admitted the medical report of Dr. Istfan, as well as the medical reports of Drs. Branscomb, Tuteur and Zaldivar, submitted in response to Dr. Istfan's report. Weighing the medical opinion evidence, the administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis and disability causation and, thus, reaffirmed his prior Decision and Order awarding benefits.

remanded the case for further consideration of the medical evidence of record. *Williams v. Peabody Coal Co.*, BRB No. 00-0236 BLA (May 17, 2001)(unpub.). In particular, the Board vacated the administrative law judge's weighing of the medical opinion evidence pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) (2000), holding that the administrative law judge did not properly consider the relative qualifications of the medical experts, pursuant to the holding in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The Board, therefore, instructed the administrative law judge to "reassess the credibility of the medical opinion evidence in determining whether claimant has met his burden to establish the existence of pneumoconiosis, 20 C.F.R. §718.202, and the cause of his totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(c)." *Williams*, slip op. at 5. With regard to Section 718.204(c),[3] the Board held that the administrative law judge failed to apply a specific standard in weighing the evidence relevant to disability causation. On remand, the Board instructed the administrative law judge to determine the legal sufficiency of the evidence he finds credible in determining whether claimant has met his burden under Section 718.204(c). *Id*., slip op. at 7. Lastly, the Board instructed the administrative law judge to discuss the evidence relevant to a determination of the date of onset of total disability due to pneumoconiosis pursuant to 20 C.F.R. §725.503. *Id*., slip op at 8.

On remand, the administrative law judge initially found the professional credentials of Dr. Rasmussen to be superior to the credentials of the other physicians of record. In weighing the medical evidence, the administrative law judge found that the relevant evidence was sufficient to establish the existence of pneumoconiosis and that claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability pursuant to Sections 718.202(a) and 718.204(c). Accordingly, the administrative law judge awarded benefits commencing as of May 1994.

On appeal, employer challenges the administrative law judge's Decision and Order awarding benefits, arguing that the administrative law judge erred in his weighing of the medical evidence of record. In addition, employer contends that the administrative law judge failed to follow the remand instructions contained in the Board's previous Decision and Order and erred in his determination of May 1994 as the month in which benefits commence. Claimant has not responded to this appeal. The Director, Office of Workers'

[3] The provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

Compensation Programs (the Director), has submitted a limited response, contending that the regulations set forth at 20 C.F.R. §§718.201, 718.204(a) and 725.503(b) are valid and support the administrative law judge's findings. In response to the Director's brief, employer has submitted a reply brief arguing that Sections 718.201 and 718.204(a) are impermissibly retroactive and, therefore, may not be applied to this case. Additionally, employer argues that Section 725.503 is not valid because it impermissibly shifts the burden of proof to employer in determining the date from which benefits commence.

By Order dated January 24, 2003, the Board requested supplemental briefing. *Williams v. Peabody Coal Co.*, BRB No. 02-0293 BLA (Jan. 24, 2003)(Order)(unpub.).

All the parties have responded to the Board's Order. These issues will be addressed in the discussion on the merits of entitlement.[4] *See* discussion, *infra*.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in failing to follow the remand instructions of the Board in reconsidering the medical opinion evidence. In particular, employer contends that the administrative law judge rendered the same credibility determinations that had been previously vacated by the Board, as he failed to consider the evidence *de novo*. Employer's Brief at 16. We disagree. Contrary to employer's contention, the administrative law judge did not fail to apply the Board's remand instructions in his consideration of the medical evidence. The administrative law judge properly set forth the specifics of the Board's holdings, including that he should reconsider the medical opinion evidence in light of the physicians' qualifications and the underlying documentation pursuant to *Hicks*, and reconsider the onset date of total disability. Decision and Order at 1. The administrative law judge made specific credibility determinations and reconsidered the evidence within the parameters of the remand instructions. Decision and Order at 2-10.

[4] Employer, in conjunction with its response to the Board's order for supplemental briefing, has submitted a request that the Board hold oral argument on these issues. Based on the parties' responses and the current case law of the United States Court of Appeals for the Fourth Circuit, we hold that the issues herein do not involve novel interpretations of the regulations and, therefore, we decline employer's request for oral argument.

In considering the relative qualifications of the physicians providing opinions on the record in this case, the administrative law judge found that Drs. Rasmussen, Branscomb, Tuteur and Zaldivar are each Board-certified in Internal Medicine as well as certified B readers. Decision and Order at 1-2; Director's Exhibit 23; Claimant's Exhibit 2; Employer's Exhibits 6, 7. In addition, he stated that Drs. Branscomb, Tuteur and Zaldivar are also Board-certified in Pulmonary Diseases. *Id*. However, the administrative law judge found that Dr. Rasmussen's *curriculum vitae* "reveals more significant experience and background with, specifically, coal workers' pneumoconiosis."[5] Decision and Order at 2; Claimant's Exhibit 2. In comparison, the administrative law judge found that the *curricula vitae* of Drs. Branscomb, Tuteur and Zaldivar do not "reveal the same in-depth involvement in black lung." *Id*. As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984). Because the administrative law judge considered the relative qualifications of the physicians, we hold that it was not inherently unreasonable for the administrative law judge to accord more weight to the qualifications of Dr. Rasmussen based on his concentration in treating black lung over the more general pulmonary specialties of the other physicians. *Lafferty, supra; Kuchwara, supra*; *see also Cordero v. Triple A Machine Shop*, 580 F.2d 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

Employer also contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c) because the administrative law judge failed to properly weigh the evidence of record. Employer's Brief at 19-29. Specifically, employer contends that the administrative law judge impermissibly accorded less weight to the opinions of Drs. Zaldivar, Tutuer and Branscomb and greater weight to the opinion of Dr. Rasmussen. We do not find merit in employer's argument. Employer's contention constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp*

[5] The administrative law judge set forth Dr. Rasmussen's appointment to several Department of Labor committees related directly to diagnosing coal workers' pneumoconiosis as well as his receipt of a Presidential Award from the American Health Association for his participation in the area of black lung. Decision and Order at 2; Claimant's Exhibit 2.

of Utah, Inc., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Rather, it is the duty of the administrative law judge, as the trier-of-fact, to determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *see also Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988).

In finding the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge found Dr. Rasmussen's opinion to be the most persuasive based on its documentation and reasoning and also based on Dr. Rasmussen's superior qualifications in the area of black lung medicine. Decision and Order at 7. The administrative law judge found that Dr. Rasmussen's diagnosis of a respiratory impairment related to coal dust exposure and smoking is well-reasoned and documented because it is based on a physical examination of claimant, his work and social histories, testing and a review of other medical evidence of record. Decision and Order at 7; Claimant's Exhibits 1, 2; *Hicks, supra*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge further found that Dr. Rasmussen's opinion is consistent with the progressively worsening and irreversible pulmonary function test results.[6] *Id*. The administrative law judge rationally accorded Dr. Rasmussen's opinion greater weight than the contrary opinions of Drs. Branscomb, Tuteur and Zaldivar, which he found were not persuasive on the issue of legal pneumoconiosis. Decision and Order at 6-7. In particular, the administrative law judge found the bases provided by Drs. Branscomb, Tuteur and Zaldivar were not persuasive in establishing that claimant was not suffering from either clinical or

[6] Employer also challenges the validity of 20 C.F.R. §718.201(c), which recognizes pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine employment," arguing that this regulation is impermissibly retroactive. We need not address the merits of employer's argument, however, inasmuch as employer correctly contends that the administrative law judge did not rely on Section 718.201(c) in rendering his finding in this case. Employer's Reply Brief at 2. Rather, the administrative law judge relied upon the case law of the Fourth Circuit in effect at the time of his decision, which specifically recognizes the progressive nature of pneumoconiosis. *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

legal pneumoconiosis. Decision and Order at 6-7; *Hicks, supra*; *Collins, supra*; *Kuchwara, supra*.

Because the administrative law judge considered all of the medical evidence of record, including the negative x-ray evidence, we affirm his finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), as within a reasonable exercise of his discretion as trier-of-fact. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *see also Lafferty, supra*; *Kuchwara, supra*.

Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability. In addition, employer argues that the administrative law judge erred in failing to account for claimant's vasculitis, a totally disabling non-pulmonary condition, which it contends would preclude an award of benefits pursuant to the holdings of the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115

S.Ct. 1399 (1995) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).[7]

Initially, we reject employer's contention that the administrative law judge erred in failing to consider claimant's vasculitis, which caused a non-pulmonary totally disabling impairment, as the Fourth Circuit has not adopted the holdings of the Seventh Circuit in *Foster* and *Vigna*. Rather, the Fourth Circuit has consistently held that the predominant inquiry is whether claimant has established a totally disabling respiratory or pulmonary impairment without regard to other possible non-pulmonary disabilities, except to the extent that these non-pulmonary impairments impact claimant's respiratory or pulmonary disability. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *see also Hicks, supra*; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Consequently, we reject employer's assertion that if claimant suffers from a pre-existing nonrespiratory disability, he is prohibited from establishing entitlement to benefits, even if he is able to establish total disability due to pulmonary problems. *Id*.

Moreover, we affirm the administrative law judge's finding that the evidence is sufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of the miner's total respiratory disability as within a reasonable exercise of his discretion as trier-of-fact. In determining that the evidence was sufficient to establish that claimant's pneumoconiosis was a substantially contributing cause of his total respiratory disability, the administrative law judge credited the opinion of Dr. Rasmussen, reasonably finding that it was most persuasive on the issue of the cause of claimant's total respiratory disability as the physician took all possible conditions into consideration in his diagnosis. Decision and Order at 10; *see Hicks, supra; Akers, supra*; *see also Salyers v. Director, OWCP*, 12 BLR 1-193 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In addition, the administrative law judge also reasonably accorded greater weight to Dr. Rasmussen, based on his

[7] Employer also contends that the revised regulation at 20 C.F.R. §718.204(a) is contrary to the Act and cannot be applied retroactively to this case because it changes existing Fourth Circuit case law. The Director, in its response to the Board's order for supplemental briefing, concedes that Section 718.204(a) is not applicable to claims such as this claim which were filed prior to January 21, 2001. Director's Brief in Response to the Board's Order for Supplemental Briefing at 2. Consequently, we need not address the merits of employer's arguments regarding this issue.

superior qualifications. Decision and Order at 10; *see Hicks, supra; Collins, supra*.

The administrative law judge is empowered to weigh the medical evidence and draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *Anderson, supra; Worley, supra*. Consequently, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence and is in accordance with law.

Finally, employer contends that the administrative law judge erred in determining that the evidence of record did not support a finding of a specific date of onset of total disability due to pneumoconiosis and, thus, awarded benefits as of May 1994, the month in which claimant filed his application for benefits. Specifically, employer contends that the administrative law judge erred in failing to consider Dr. Zaldivar's November 1994 opinion, that claimant was not totally disabled due to pneumoconiosis, as well as claimant's treatment notes which also showed that claimant was not totally disabled prior to Dr. Rasmussen's February 1996 medical report and "impermissibly shifted the burden of proof" to employer. Employer's Brief at 29-30; Employer's Reply Brief at 12.

Initially, we reject employer's contention that Section 725.503(b) improperly shifts the burden of establishing the onset date of total disability due to pneumoconiosis to the party opposing entitlement. Pursuant to Section 725.503(b), benefits are payable from the month of onset of total disability due to pneumoconiosis. Thus, an administrative law judge is required to consider all relevant evidence of record and identify the pertinent date. If the evidence of record does not establish when the miner became totally disabled due to pneumoconiosis, then benefits commence as of the miner's filing date, unless credible uncontradicted medical evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date. 20 C.F.R. §725.503(b); *see Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-710 (1990); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

In this case, the administrative law judge found that claimant filed his application for benefits in May 1994 and that in July 1994 Dr. Walker diagnosed coal workers' pneumoconiosis and that the miner was totally disabled due to a non-pulmonary condition. However, the administrative law judge noted that the pulmonary function studies accompanying Dr. Walker's report yielded qualifying results. Decision and Order at 11; *see* Director's Exhibit 11. The administrative

law judge then found that Dr. Rasmussen's February 1996 report was the first medical opinion of total disability due to pneumoconiosis. Decision and Order at 11; Claimant's Exhibit 1. Finding that there was no evidence dated between 1994 and 1996 which would establish that the miner was not suffering from coal workers' pneumoconiosis, the administrative law judge determined that claimant became totally disabled at some point prior to Dr. Rasmussen's 1996 medical opinion. *Id*. Therefore, the administrative law judge found that the precise date of onset of total disability due to pneumoconiosis cannot be determined based on the medical evidence of record and awarded benefits as of claimant's May 1994 filing date. *Id*. However, as employer correctly contends, the administrative law judge did not discuss specifically the November 1994 medical report by Dr. Zaldivar or the treatment notes dated between 1994 and 1996. Consequently, we vacate the administrative law judge's determination of May 1994 as the date from which benefits commence and remand the case to the administrative law judge to fully discuss all of the relevant evidence. 20 C.F.R. §725.503; *see Green, supra; Lykins, supra*.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed on the merits of entitlement. However, the case is remanded for the administrative law judge to reconsider the relevant evidence regarding the issue of onset date as set forth in this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL Administrative Appeals Judge