BRB No. 11-0458 BLA

BILLY J. HAMILTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SURE FIRE COAL, INCORPORATED	)	DATE ISSUED: 03/27/2012
	)	
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 – Award of Benefits of Administrative Law Judge Larry S. Merck, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (2007-BLA-5260) of Administrative Law Judge Larry S. Merck, rendered on modification of a subsequent claim filed on June 28, 2002, pursuant to the Black Lung Benefits Act, 30

U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for a second time. The relevant procedural history is as follows. Claimant filed applications for benefits on September 8, 1994 and April 24, 1997, which were denied by the district director on February 13, 1995 and August 15, 1997, respectively, for failure to establish any of the requisite elements of entitlement. Claimant's Exhibit 1. Claimant filed a third claim on June 28, 2002, which was denied by Administrative Law Judge Joseph E. Kane on June 24, 2005. Director's Exhibits 2, 65. Judge Kane found that the newly submitted evidence established total disability and, therefore, demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id*. However, in reviewing the merits of the claim, Judge Kane determined that the evidence was insufficient to establish the existence of pneumoconiosis or that claimant was totally disabled due to pneumoconiosis. *Id*.

Claimant filed a request for modification on June 22, 2006, and the case was assigned to Judge Merck (the administrative law judge). Director's Exhibit 69. In a Decision and Order dated November 4, 2008, the administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated the claim under the regulations at 20 C.F.R. Part 718. The administrative law judge reviewed all of the evidence developed since the August 15, 1997 denial, and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), total disability at 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, but failed to prove total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Therefore, the administrative law judge denied claimant's modification request and benefits on the subsequent claim.

Claimant appealed, and the Board affirmed, as unchallenged, the administrative law judge's findings that the evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), but established total disability pursuant to 20 C.F.R. §718.204(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *B.H.* [*Hamilton*] *v. Sure Fire Coal Inc.*, BRB No. 09-0234 BLA, slip op. at 2 n. 2 (Oct. 29, 2009) (unpub.). The Board, however, held that the administrative law judge "did not accurately characterize the opinions of Drs. Forehand and Baker when he determined that they relied solely upon x-rays readings and claimant's history of coal

[1] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the June 28, 2002 filing date of this claim, the amendments are not applicable.

mine employment to diagnose clinical pneumoconiosis,"[2] as these physicians cited additional factors for their opinions. *Id*. at 6. The Board further held that the evidence did not support the administrative law judge's finding that Dr. Alam based his diagnosis of clinical pneumoconiosis solely on biopsy findings of anthracotic pigmentation. *Id*. The Board agreed with claimant that the administrative law judge did not accurately characterize the opinion of Dr. Forehand, when he stated that the doctor did not diagnose legal pneumoconiosis[3] and that he did not consider the entirety of Dr. Alam's opinion, relevant to whether claimant has a respiratory condition caused by coal dust exposure. *Id*. at 7. Thus, the Board vacated the administrative law judge's findings at 20 C.F.R. §718.202(a)(4). *Id*.

To the extent that the administrative law judge's credibility determinations at 20 C.F.R. §718.202(a)(4) also affected his consideration of the evidence relevant to the issue of disability causation, the Board vacated the administrative law judge's finding that claimant failed to prove total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Hamilton*, slip op. at 7. Additionally, in consideration of employer's assertion in its response brief of an evidentiary error, the Board held that the administrative law judge improperly excluded Dr. Wiot's negative reading of the x-ray dated May 23, 2006. *Id.* at 3. Thus, the Board vacated the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), vacated the denial of benefits and remanded the case for further consideration. On remand, the Board specifically instructed the administrative law judge to address Dr. Alam's September 9, 2004 letter, which he failed to consider, and determine whether Dr. Alam provided a reasoned and documented opinion, that claimant is totally disabled due to

[2] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1).

[3] Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

pneumoconiosis, and whether his opinion was entitled to additional weight pursuant to 20 C.F.R. §718.104(d). *Id*. at 7.

In his Decision and Order on Remand issued on March 15, 2011, the administrative law judge reconsidered the x-ray evidence and found that it failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The administrative law judge, however, credited Dr. Alam's opinion, that claimant has both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and further found that his opinion established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in giving additional weight to Dr. Alam's opinion, based on his status as claimant's treating physician, and that he erred by not explaining his credibility determinations, pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c), in accordance with the Administrative Procedure Act (APA).[4] Employer further asserts that the administrative law judge erred in determining the date for commencement of benefits. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board. Employer also filed a reply brief, reiterating its argument that the administrative law judge impermissibly credited Dr. Alam's opinion.

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.[5] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that

[4] The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 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 U.S.C. §932(a).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Additionally, because this case involves a request for modification, claimant must establish a change in conditions or a mistake in a determination of fact with regard to Judge Kane's denial of the June 28, 2002 subsequent claim, pursuant to 20 C.F.R. §725.310. In considering whether claimant established a change in conditions, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence on modification, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish an element that defeated entitlement in the prior decision. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). The purpose of allowing modification, based on a mistake in a determination of fact, is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

The administrative law judge has granted modification in this case because he determined that Dr. Alam's opinion is entitled to controlling weight and is sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer asserts that the administrative law judge provided no explanation as to why "Dr. Alam's treatment was pivotal to the doctor's diagnosis" of legal pneumoconiosis or why it was entitled to more weight than the contrary opinion of Dr. Fino. Employer's Brief in Support of Petition for Review at 15. Employer further asserts that Dr. Alam's diagnosis of clinical and legal pneumoconiosis is undermined by his reliance on inconclusive or negative x-rays, his "inconsistent statements" concerning the transbronchial biopsy report," and the fact that claimant stopped working in the coal mines in 1991, but continued to smoke. *Id*. Employer maintains that the administrative law judge failed to consider "the timing or circumstances" surrounding Dr. Alam's opinion, and his desire to assist claimant in his "endeavor to get black lung benefits." *Id*. at 16. Employer further argues that the administrative law judge failed to reconcile his decision to credit Dr. Alam's opinion on remand, with his prior findings that Dr. Alam's opinion was "internally inconsistent" and insufficiently reasoned. *Id*. at 17. Employer states that "Dr. Alam's opinion did not change. The inconsistencies in his opinion did not disappear. Only the [administrative

law judge's] conclusion changed without explanation." *Id*. Employer's arguments, however, are rejected as without merit.

Contrary to employer's assertion, although the administrative law judge previously determined that Dr. Alam's opinion was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge was not bound by these prior findings on remand. *See Bartley v. L&M Coal Co.*, 901 F.2d 1311, 1313, 13 BLR 2-414, 2-417 (6th Cir. 1990); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). The Board previously held that the administrative law judge erred by not considering the entirety of Dr. Alam's opinion, most specifically his September 9, 2004 letter, wherein he explained why claimant's disabling respiratory condition is due to coal dust exposure.[6] *Hamilton*, slip op. at 7. After reviewing the September 9, 2004 letter on remand, the administrative law judge determined that Dr. Alam's opinion was "based on objective medical evidence as defined by §718.202(a)(4)," which included his review of not only claimant's x-rays and biopsy results, but also the results of his pulmonary function studies, arterial blood gas studies, claimant's occupational and smoking histories, "as well numerous physical examinations completed by Dr. Alam over the course of his treatment with [claimant]." Decision and Order on Remand at 9. Contrary to employer's argument, the administrative law judge permissibly concluded that Dr. Alam's opinion was reasoned and documented on the issues of the existence of clinical and legal pneumoconiosis. *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

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[6] In a letter dated September 9, 2004, Dr. Alam indicated that he was asked by claimant's counsel to address the basis for his opinion that claimant is totally disabled by pneumoconiosis. Director's Exhibit 44. Dr Alam advised that he diagnosed pneumoconiosis based on claimant's history of coal dust exposure and the results of the pulmonary function testing, which revealed a pattern of both obstructive and restrictive respiratory impairment, consistent with impairment caused by coal dust exposure. *Id*. In addition to noting that claimant had positive x-ray evidence for coal workers' pneumoconiosis, Dr. Alam identified the presence of pleural thickening on the chest x-rays, which he considered also to be "compatible" with coal workers' pneumoconiosis. *Id*. He further noted that claimant has persistent cough, sputum production and shortness of breath on exertion, despite the fact that he reduced his smoking habit to two cigarettes per day. *Id*. Dr. Alam stated that his "[r]easoned medical opinion favor[s] coal dust exposure to be responsible for [claimant's] disability." *Id*.

The administrative law judge also rationally assigned controlling weight to Dr. Alam's opinion, based on a review of the factors cited at 20 C.F.R. §718.104(d)(1)-(4), which include the nature, duration and frequency of Dr. Alam's treatment of claimant for his respiratory condition. 20 C.F.R. §718.104(d)(1)-(4). The administrative law judge specifically found that Dr. Alam was claimant's physician "for two years prior to giving his medical opinion," that he "regularly" treated claimant for his respiratory condition, "on average about once a month," and that Dr. Alam ordered "numerous tests" which he relied upon to diagnose clinical and legal pneumoconiosis. Decision and Order at 13. We therefore affirm, as supported by substantial evidence, the administrative law judge's conclusion that Dr. Alam's treatment of claimant rendered his opinion more credible, and the finding that Dr. Alam's opinion was entitled to greater weight than that of Dr. Fino. *Id.*; see *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003).

We consider employer's arguments with respect to Dr. Alam to be a request that the Board reweigh the evidence, which we are not empowered to do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). The administrative law judge has explained his credibility findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Because determining the credibility of the medical experts is committed to the discretion of the administrative law judge, we affirm his decision to accord the greatest weight to Dr. Alam's opinion, that claimant has clinical and legal pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002);. *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Thus, we affirm the administrative law judge's reliance of Dr. Alam's opinion to find that claimant proved the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7]

Pursuant to 20 C.F.R. §718.204(c), we affirm the administrative law judge's finding that the opinions of Drs. Fino and Dahhan are entitled to little weight, relevant to the cause of claimant's total disability, as Dr. Fino did not diagnose pneumoconiosis, and Dr. Dahhan did not diagnose total disability, contrary to the administrative law judge's findings. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); Decision and Order on Remand at 18. For the reasons discussed, *supra*, we affirm the administrative law judge's reliance on Dr. Alam's opinion to find that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-

[7] It is not necessary that we address employer's assertion that the administrative law judge erred in weighing the opinions of Drs. Baker and Forehand, since both of these physicians diagnosed pneumoconiosis and corroborated Dr. Alam's opinion.

103 *Clark*, 12 BLR at 1-155. We therefore affirm, as supported by substantial evidence, the administrative law judge's award of benefits.

III. Onset Date

Employer also argues on appeal that because the administrative law judge did not specify the basis for granting claimant's modification request, pursuant to 20 C.F.R. §725.310, he erred in determining that benefits commence as of June 2002, the month and year in which claimant filed his subsequent claim. We agree.

The basis given by an administrative law judge for granting modification affects the proper determination of the date from which benefits commence. *See* 20 C.F.R. §725.503(d). The applicable regulation provides that if a claim is awarded on modification, based on a mistake in a determination of fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or, if the evidence does not establish the month of onset, from the month in which claimant filed his claim, unless credited evidence indicates that claimant was not totally disabled as of the filing date or at some point subsequent to the date of filing of the claim. 20 C.F.R. §725.503(d)(1); *see Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). While a similar method of determining the date from which benefits are payable applies when a claim is awarded on modification, based on a change in conditions, the regulation contains the additional provision that, where the evidence establishes the month of onset of total disability due to pneumoconiosis, "no benefits shall be payable for any month prior to the effective date of the most recent denial." 20 C.F.R. §725.503(d)(2). Further, if the evidence does not establish the month of onset, benefits are payable from the month in which the claimant requested modification. *Id*.

In this case, because the administrative law judge did not state the basis for granting claimant's modification request, we are unable to affirm his finding that benefits must commence as of the date claimant filed his subsequent claim.[8] Thus, we vacate the administrative law judge's finding that benefits commence as of June 2002, and instruct the administrative law judge on remand to first clarify the basis for granting modification

[8] To the extent that the administrative law judge indicated in his 2008 Decision and Order that there was no mistake in a determination of fact with regard to the denial of claimant's subsequent claim by Judge Kane, his reliance on the date of filing of the subsequent claim for the commencement of benefits is in error. *See* 20 C.F.R. §725.503(d); 2008 Decision and Order at 27.

pursuant to 20 C.F.R. §725.310, and then apply 20 C.F.R. §725.503(d)(2) in determining the proper date for commencement of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge