BRB No. 01-0714 BLA

WILLIE HENSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY)		DATE ISSUED:
	)	
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 Granting Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

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

Mary Forrest-Doyle (Eugene Scalia, 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.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (00-BLA-0915) of Administrative Law Judge Alice M. Craft 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 that employer conceded that claimant

[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

had nineteen years of coal mine employment and a totally disabling respiratory or pulmonary impairment. The administrative law judge also found that claimant established the existence of simple pneumoconiosis by x-ray evidence, and that the evidence established that pneumoconiosis was a contributing cause of his totally disabling respiratory impairment. The administrative law judge, therefore, found that claimant was entitled to benefits because he established all the elements of entitlement under 20 C.F.R. Part 718. Moreover, the administrative law judge also concluded that claimant was entitled to benefits because the x-ray evidence demonstrated the presence of complicated pneumoconiosis. Accordingly, the administrative law judge ordered benefits to commence as of July 1, 1999, the first day of the month in which the claim was filed.

On appeal, employer contends that the administrative law judge erred in applying the revised regulations at 20 C.F.R. §§718.201(c) and 718.204(a) to the instant case, erred in finding that the medical opinion evidence established disability causation, and erred in assigning the date of onset pursuant to 20 C.F.R. §725.503(b). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds and asserts that the newly amended regulations are properly applied and further asserts that 20 C.F.R. §725.503(b) is valid.[2]

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).

C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer conceded both the miner's length of coal mine employment history and the presence of a totally disabling respiratory impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We first address employer's argument on the issue of complicated pneumoconiosis since we will not need to address employer's arguments on disability causation or application of the revised regulations at Sections 718.201(c) and 718.204(a) if that finding is affirmable. Employer contends that the administrative law judge impermissibly substituted her opinion for those of medical experts when she found that the evidence of record supported a finding of complicated pneumoconiosis.

In concluding that claimant established the existence of complicated pneumoconiosis, the administrative law judge found that only two of the B-readers who interpreted claimant's x-rays classified them as showing complicated pneumoconiosis, Category A, while all of the other B-readers, although acknowledging that there was a significant opacity in claimant's right upper lung, declined to diagnose the abnormality as representing complicated pneumoconiosis, and instead offered other possible diagnoses such as cancer, tuberculosis, histoplasmosis, or other granulomatous disease. The administrative law judge found, however, that because there was no clinical correlation which established that claimant has or had any of those diseases, *i.e.*, cancer had apparently been ruled out, claimant denied ever having had tuberculosis and none of the physicians pointed to any of the claimant's symptoms as being indicative of tuberculosis, and there was no evidence of record supportive of a finding that claimant has or had histoplasmosis or other granulomatous disease, she found "it difficult to accept that the opacity can be anything but complicated pneumoconiosis." Decision and Order at 21.

Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with

acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original]. *See Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, , BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). Thus, contrary to employer's argument, the administrative law judge, in this case, did not err in finding complicated pneumoconiosis established since the administrative law judge found that there was x-ray evidence which established the existence of complicated pneumoconiosis and that the other evidence of record failed to undermine the validity of these x-ray findings. Director's Exhibits 7, 12, 27; Employer's Exhibits 1, 2, 3, 7-14; Claimant's Exhibits 5, 6, 9-12; *Scarbro*, *supra*; *Blankenship*, *supra*. Accordingly, we affirm the administrative law judge's findings that the x-ray evidence established the existence of complicated pneumoconiosis. Further, because we affirm that finding, we need not address the administrative law judge's findings regarding whether the evidence establishes disability causation and whether the revised regulations at Sections 718.201(c) and 718.204(a) were properly applied. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Lastly, employer contends that the administrative law judge erred in finding the onset date of disability to be the date the claim was filed pursuant to Section 725.503(b) because Section 725.503(b) is invalid. Employer asserts that 20 C.F.R. §725.503(b) is invalid because it violates Section 7(c) of the Administrative Procedure Act's (APA), 5 U.S.C. §557(c)(3)(A), 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), allocation of the burden of proof in federal black lung claims.

The regulations generally provide that "[e]xcept as otherwise provided by this part, all hearings shall be conducted in accordance with the provisions of 5 U.S.C. §554 *et seq.*" 20 C.F.R. §725.452(a). The APA also provides, however, 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). As the Director asserts, since 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), the APA is inapplicable to 20 C.F.R. §725.503(b). 5 U.S.C. §556(d). Therefore, we reject employer's assertion that the provision of 20 C.F.R. §725.503(b), allowing an administrative law judge to utilize the filing date of a claim to establish the onset date of disability when there is no medical proof submitted by claimant that he had complicated coal workers' pneumoconiosis or a disabling respiratory impairment caused by pneumoconiosis at the time the claim was filed, violates Section 7(c) of the APA.[3]

[3] Recently the United States Court of Appeals for the Fourth Circuit rejected

Where entitlement is established by operation of the irrebuttable presumption of total disability due to pneumoconiosis, 20 C.F.R. §718.304, the administrative law judge must determine whether the evidence establishes a specific onset date of claimant's complicated pneumoconiosis. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989). If the evidence does not establish a specific onset date of complicated pneumoconiosis, then the date for the commencement of benefits is the month during which the claim was filed, unless credited evidence establishes that claimant had only simple pneumoconiosis as of some point subsequent to the filing date. 20 C.F.R. §725.503(b); *Williamson, supra*.

In the instant case, the administrative law judge found that claimant was entitled to benefits from July 1, 1999, the beginning of the month in which he filed his claim for benefits. Employer cites *England v. Director, OWCP*, No. 95-2173 (4th Cir., July 28, 1997)(unpub.) to support its contention that Section 725.503(b) does not apply when claimant has established complicated pneumoconiosis. In *England*, claimant had filed his claim in 1981, his claim was denied in 1986, he petitioned for modification based upon a change in conditions and was awarded benefits based on a finding of complicated pneumoconiosis first diagnosed by x-ray in January, 1989. The administrative law judge followed the Board's teaching in *Williams*, *supra* and determined that the filing date could not be used in view of the prior administrative law judge's denial of benefits in 1986. The court held: "under such circumstances, since the filing date is not appropriate the regulation as written, cannot apply in this case." In contrast to *England*, there is no evidence in the instant case that subsequent to the filing date, July 30, 1999, claimant had only simple pneumoconiosis. Employer cites no evidence which would support a finding that claimant had only simple pneumoconiosis at any time after the filing date. Since employer is unable to demonstrate error, its argument requesting reconsideration of the onset date must be rejected.

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summarily the same contentions raised by the same employer in another case, *see Westmoreland Coal Co. v. Ramsey*, 28 Fed. Appx. 173, 2001 WL 1397846 (4th Cir., Nov. 9, 2001)(unpub.).

Accordingly, the administrative law judge's Decision and Order Granting Benefits from July 1, 1999, is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge