BRB Nos. 01-0757 BLA
and 01-0757 BLA-A

IVON D. MILLER	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
ROCKVILLE MINING COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Robert Weinberger (West Virginia Coal Workers' Pneumoconiosis Fund), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals and claimant cross-appeals the Decision and Order (00-BLA-1023) of

Administrative Law Judge Daniel L. Leland awarding benefits on a duplicate 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] In this duplicate claim, the administrative law judge found the newly submitted evidence sufficient to establish the existence of pneumoconiosis and total disability, and thus, a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Based on the parties stipulation at the hearing the administrative law judge credited claimant with forty-three years of coal mine employment and found, on considering both the new evidence and the evidence submitted in the prior claim, that the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis were established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), 718.204(2)(ii), (iv), (c). Accordingly, benefits were awarded.

On appeal, carrier contends that the administrative law judge erred in finding the existence of pneumoconiosis and disability causation established. Claimant responds, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence. On cross-appeal, claimant challenges the administrative law judge's finding regarding the onset date of benefits. Carrier has not responded to claimant's cross-appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that he will not participate in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's

[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.

[2] We affirm the findings of the administrative law judge on the length of coal mine employment, on the designation of employer as the responsible operator, and at 20 C.F.R. §§718.202(a)(1)-(3), 718.203(b), 718.204(b)(2)(i), (iii), and 725.309(d) (2000) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 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, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2001). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), carrier contends that because the qualifications of medical experts are an important indicator of the reliability of their opinions, the administrative law judge erred in crediting the opinions of physicians with less experience as pulmonary specialists over the opinion of Dr. Renn, who had more experience, since Dr. Renn has been Board-certified in pulmonary diseases longer than the other physicians. Noting that Drs. Jaworski, Kanj and Koenig, who found that claimant's pulmonary impairment was caused by coal mine employment, were board-certified in pulmonary diseases, and that Dr. Renn, who found that claimant's respiratory impairment was due to smoking, not coal mine employment, was also board-certified in pulmonary diseases, the administrative law judge accorded less weight to Dr. Renn's opinion because Dr. Renn failed to explain how cigarette smoking exposure worsened claimant's emphysema decades after claimant quit smoking, when coal dust exposure did not.[3] This was reasonable. *See* 718.201(c); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Oggero v. Director, OWCP*, 7 BLR 1-860, 1-865 (1985). Moreover, inasmuch as the qualifications of the physicians are only one factor to be considered in weighing the credibility of their opinions, the administrative law judge's accordance of less weight to Dr. Renn's opinion because it was not fully explained is proper, *Clark, supra*; *Stark, supra*; *Oggero, supra*, and we will not further address employer's contention, *see Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 380 n.4 (1983). We, therefore, affirm the finding of the administrative law judge that claimant established the existence of pneumoconiosis as defined in the Act as employer does not challenge the administrative law judge's findings regarding the medical opinions of Drs. Koenig, Kanj and Rasmussen which relate claimant's pulmonary impairment to his coal mine employment. *Id.*; *see* 20 C.F.R. §§718.202(a)(4), 718.201. Likewise, as employer does

[3] The administrative law judge found that claimant smoked until 1969 or 1970; while he continued to be employed in the coal mines until 1992. Decision and Order at 3.

not contest the administrative law judge's weighing of all the evidence relevant to the existence of pneumoconiosis, we affirm the finding of the administrative law judge that claimant established the existence of pneumoconiosis as it is supported by substantial evidence. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Citing *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), employer next argues that the administrative law judge erred in not crediting Dr. Renn's opinion on disability causation inasmuch as Dr. Renn specifically assumed hypothetically that the claimant had pneumoconiosis in making his causation finding. Thus, employer contends that Dr. Renn's opinion should be credited because it was not premised on an erroneous finding contrary to the administrative law judge's conclusion that claimant suffered from pneumoconiosis. Employer also contends that the administrative law judge erred in according more weight to Dr. Rasmussen's opinion based on his belief that Dr. Rasmussen was a board-certified pulmonologist, like Dr. Renn. We reject employer's argument that this constitutes reversible error, however, because the administrative law judge properly relied on the opinion of Dr. Koenig, who was board-certified in pulmonary diseases, and because the administrative law judge properly discredited the opinion of Dr. Renn, the only physician who found that claimant's disability was not due to coal mine employment, because he did not consider whether pneumoconiosis as defined by the Act was a cause of disability. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In considering the medical opinion evidence on disability causation, the administrative law judge acknowledged that even though Dr. Renn did not diagnose the existence of pneumoconiosis, he nonetheless found that, as employer contends, even if claimant had pneumoconiosis claimant would not be impaired due to pneumoconiosis. The administrative law judge went on, however, to find that the reason Dr. Renn gave for finding that pneumoconiosis, if it existed, would not be totally disabling was that the pneumoconiosis would be "subradiographic." Decision and Order at 11; Employer's Exhibit 1. Thus, based on this statement, the administrative law judge found that Dr. Renn's opinion on causation could not be credited because it was based on evidence that was probative for diagnosing only clinical pneumoconiosis. This was reasonable. *See* 20 C.F.R. §718.201; *Compton, supra*; *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995); *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988); *see also Cornett v. Benham Coal Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Accordingly, we affirm the administrative law judge's findings that the medical opinion evidence established the existence of pneumoconiosis and disability causation.

On cross-appeal, claimant argues that the administrative law judge erred in awarding benefits from June 1, 1999 the beginning of the month in which claimant filed his claim for benefits inasmuch as there is evidence in the record showing that claimant was totally

disabled due to pneumoconiosis at least as early as February 1999, which the administrative law judge did not consider. The regulation at 20 C.F.R. §725.503(b) provides that benefits are payable in a miner's claim beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §725.503(b). Where the evidence of record does not establish the month of onset, benefits shall be payable beginning with the month during which the claim was filed unless credited evidence establishes that claimant was not totally disabled due to pneumoconiosis at some point subsequent to the filing date. *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). As claimant correctly asserts, the February 23, 1999 blood gas study, which resulted in qualifying values, indicates the presence of a totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(b)(2)(ii), Appendix C; Director's Exhibit 25. For claimant to meet his burden of proof on onset, however, claimant must provide credible medical evidence establishing the date that he became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b). Thus, while the qualifying blood gas study evidence indicates the presence of a disabling respiratory impairment as early as February 23, 1999, it does not identify the cause of claimant's disabling respiratory impairment, *see Carney v. Director, OWCP*, 11 BLR 1-32 (1987). As the medical opinion evidence of record does not affirmatively show that claimant became totally disabled by his pneumoconiosis prior to June 1, 1999, the administrative law judge properly awarded benefits as of June 1, 1999, the month in which claimant filed this application for benefits. *Id.* We, therefore, affirm the administrative law judge's finding regarding the onset date of benefits as well as the award of benefits on the merits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits from June 1, 1999 is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge