BRB No. 04-0790 BLA

NATHAN TAPLEY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BETHENERGY MINES, INCORPORATED	)	
	)	DATE ISSUED: 05/26/2005
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 - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Anthony J. Cicconi and Bernard R. Cochran (Shaffer & Shaffer PLLC), Charleston, West Virginia, for claimant.

Douglas A. Smoot and Dorothea J. Clark (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, 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 - Awarding Benefits (03-BLA-5114) of Administrative Law Judge Gerald M. Tierney rendered on a subsequent claim[1] 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).

In the Decision and Order - Awarding Benefits, the administrative law judge credited claimant with thirty-five years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). He therefore concluded that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004); *see also Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*)(holding under former provision that claimant must establish at least one element of entitlement previously adjudicated against him). Reviewing the merits of the claim, the administrative law judge found that the record established the existence of pneumoconiosis arising out of coal mine employment, that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b),(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding certain exhibits proffered by employer. Employer argues further that the administrative law judge erred in his analysis of the medical evidence and ignored relevant evidence when he found that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Additionally, employer alleges that the administrative law judge erred in finding the date for the commencement of benefits to be April, 2001, the month in which claimant filed his subsequent claim. Claimant responds, urging affirmance of

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[1] Claimant's initial application for benefits filed on November 14, 1994 was denied because claimant did not establish the existence of pneumoconiosis. Director's Exhibit 1. The Board affirmed the denial of benefits. *Tapley v. BethEnergy Mines, Inc.*, BRB No. 97-1175 BLA (Mar. 26, 1998)(unpub.). On April 18, 2001, claimant filed his current application for benefits, which is considered a subsequent claim because it was filed more than one year after the final denial of the previous claim. 20 C.F.R. §725.309(d); Director's Exhibit 3.

[2] The record indicates that claimant's coal mine employment occurred in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

the administrative law judge's evidentiary rulings and of his award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge properly excluded a doctor's deposition testimony and several CT-scan readings submitted by employer.[3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge abused his discretion in excluding the deposition testimony of Dr. Wiot as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414.[4] The administrative law judge excluded Dr. Wiot's testimony because employer had already submitted its limit of two medical reports in support of its affirmative case. Evidentiary Order at 2 (Oct. 29, 2003).

The administrative law judge properly excluded Dr. Wiot's deposition testimony. The revised regulation governing witness testimony provides that "[n]o person shall be permitted to testify as a witness at the hearing, or pursuant to deposition . . . unless that person meets the requirements of § 725.414(c)." 20 C.F.R. §725.457(c). Revised Section 725.414(c) provides that "[a] physician who prepared a medical report admitted under this section may testify with respect to the claim . . . by deposition." 20 C.F.R.

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has thirty-five years of coal mine employment and has established the existence of pneumoconiosis arising out of coal mine employment, a change in an applicable condition of entitlement, and that he is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), 718.204(b)(2), and 725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Revised 20 C.F.R. §725.414 applies to this claim because the claim was filed on April 18, 2001, after the effective date of the revised regulations. 20 C.F.R. §725.2(c).

§725.414(c). Dr. Wiot did not prepare a medical report; he read claimant's chest x-rays.[5] However, Dr. Wiot's deposition testimony could still be admitted "in lieu of" a medical report if employer "submitted fewer than two medical reports as part of [its] affirmative case . . . ." *Id*. In that case, Dr. Wiot's testimony would "be considered a medical report for purposes of the limitations provided by this section." *Id*. Employer, however, had already submitted its limit of two affirmative case medical reports by Drs. Crisalli and Zaldivar. 20 C.F.R. §725.414(a)(3)(i); Director's Exhibit 27; Employer's Exhibit 1. Accordingly, the administrative law judge properly excluded Dr. Wiot's deposition testimony pursuant to Section 725.414(c).[6]

Additionally, based on the foregoing discussion, we reject employer's assertion that Section 725.414 is facially invalid because it prohibits a party from submitting the testimony of a radiologist. *See Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*)(rejecting the argument that Section 725.414 imposes arbitrary limits on evidence). By its terms, the regulation permits a party to submit the testimony of a physician who did not prepare a medical report. 20 C.F.R. §725.414(c).

Employer argues that the administrative law judge abused his discretion in excluding CT-scans proffered by employer. The administrative law judge excluded the CT-scans because employer did not prove that they were medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits. Evidentiary Order at 2 (Oct. 29, 2003). Employer asserts that it bore no such burden. The Director responds that employer had to prove these facts for its proffered CT-scans to be admitted into evidence.

The administrative law judge did not abuse his discretion in excluding the CT-scans. As the Director explains, CT-scans are not covered by any Department of Labor quality standards, and are therefore treated as "other medical evidence" potentially admissible under 20 C.F.R. §718.107. Director's Brief at 2; 20 C.F.R. §718.107(a); *Dempsey*, 23 BLR at 1-59. Accordingly, Section 718.107 provides for the submission of

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[5] A "medical report" is "a physician's written assessment of the miner's respiratory or pulmonary condition." 20 C.F.R. §725.414(a). By contrast, "[a] physician's written assessment of a single objective test, such as a chest X-ray . . . shall not be considered a medical report for purposes of this section." *Id*.

[6] The administrative law judge also found that employer did not establish "good cause" for exceeding the limits of 20 C.F.R. §725.414 with additional evidence. *See* 20 C.F.R. §725.456(b)(1). Order Ruling on Rebuttal Evidence at 2-3 (Dec. 30, 2003). On appeal, employer raises no specific argument that the administrative law judge abused his discretion in this regard.

"[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis," its "sequela," or "a respiratory or pulmonary impairment . . . ." 20 C.F.R. §718.107(a). However, "[t]he party submitting the test or procedure . . . bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b). Consequently, in the case at bar, employer incorrectly argues that it did not bear the burden of proving these facts.[7]

Employer's alternative argument, that it met its burden under Section 718.107(b) with the deposition testimony of Drs. Wiot and Zaldivar, demonstrates no abuse of discretion in the administrative law judge's exclusion of the CT-scans. First, review of the record does not disclose that employer ever asked the administrative law judge to consider admitting Dr. Wiot's deposition testimony for purposes of Section 718.107(b). Second, a review of Dr. Zaldivar's testimony cited by employer reveals no discussion of the relevance of CT-scans to determining the cause of claimant's total disability now at issue. *See* 20 C.F.R. §718.107(b); Employer's Exhibit 10 at 8-9. Therefore, the administrative law judge did not abuse his discretion in excluding employer's proffered CT-scan readings pursuant to Section 718.107(b).

On the merits of entitlement, employer contends that the administrative law judge erred in considering Dr. Ranavaya's physical examination report a reasoned medical opinion that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) because, employer asserts, Dr. Ranavaya did not explain his determination that pneumoconiosis is a factor in claimant's total disability. We disagree. The administrative law judge specifically considered Dr. Ranavaya's reasoning that it was "scientifically impossible to accurately apportion the extent to which" pneumoconiosis and emphysema contributed to claimant's "severe pulmonary impairment." Director's Exhibit 15 at 4. Dr. Ranavaya indicated further that "in my reasoned medical opinion the 35 year long exposure to dust in coal mining and 50 plus pack a year history of cigarette smoking are two equally important risk factor[s] for [claimant's] pulmonary impairment." *Id*. Although employer argues that this was an insufficient explanation, the administrative law judge permissibly relied on it as a reasoned medical opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000)(explaining that "the totality of [the] report" may reflect a reasoned medical judgment, even if the doctor's analysis is not detailed).

[7] The record reflects that when employer proffered its CT-scan readings, claimant specifically objected that employer provided "no expert medical testimony stating that CT-scans are medically accepted tests or procedures for determining the presence or absence of pneumoconiosis." Claimant's Objections at 2 (Oct. 13, 2003).

Employer next contends that even if Dr. Ranavaya's opinion was reasoned, the administrative law judge offered no explanation for finding that Dr. Ranavaya's opinion was legally sufficient to establish that pneumoconiosis is "a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. §718.204(c)(1). Employer's contention lacks merit. A miner is totally disabled due to pneumoconiosis if pneumoconiosis:

> is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). The administrative law judge applied Section 718.204(c)(1) in his decision. Decision and Order at 7-8.

The administrative law judge properly found Dr. Ranavaya's opinion sufficient to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability. From Dr. Ranavaya's statement that coal mine dust exposure and smoking were "two equally important risk factor[s] for" claimant's impairment, Director's Exhibit 15 at 4, the administrative law judge inferred that Dr. Ranavaya "considered pneumoconiosis as having a material adverse effect on [c]laimant's respiratory or pulmonary condition." Decision and Order at 8, citing 20 C.F.R. §718.204(c)(1)(i). The administrative law judge was within his discretion to weigh Dr. Ranavaya's medical opinion and "draw his own conclusions." *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Substantial evidence supports his finding, which is in accordance with law. *See Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004)(upholding an administrative law judge's finding that an opinion that pneumoconiosis "was one of the two causes" of the miner's total disability met the "substantially contributing cause" standard). We therefore hold that the administrative law judge properly found Dr. Ranavaya's opinion sufficient to establish that pneumoconiosis is a "substantially contributing cause" of claimant's total disability pursuant to Section 718.204(c)(1).

Employer next argues that the administrative law judge misapplied *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), when he discounted the opinions of Drs. Crisalli and Zaldivar attributing claimant's total disability to smoking because the

doctors did not diagnose pneumoconiosis. Employer notes that Drs. Crisalli and Zaldivar stated that they would have reached the same conclusion even assuming that claimant were diagnosed with pneumoconiosis.

The administrative law judge correctly applied *Scott* and *Toler*. Where an administrative law judge has found the existence of pneumoconiosis arising out of coal mine employment established, and a physician opines that the miner has neither clinical nor legal pneumoconiosis, the administrative law judge "may not credit a medical opinion" that pneumoconiosis did not cause the miner's disability "unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Even then, such an opinion "could carry little weight, at the most." *Scott*, 289 F.3d at 269, 22 BLR at 2-384. Here, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established. By contrast, Drs. Crisalli and Zaldivar opined that claimant has neither clinical nor legal pneumoconiosis and they did not diagnose any symptoms related to coal mine dust exposure. Director's Exhibit 27; Employer's Exhibits 1, 10. Thus, the administrative law judge properly gave their opinions as to disability causation "little weight." Decision and Order at 8; *Scott*, 289 F.3d at 269, 22 BLR 2-384. The fact that Drs. Crisalli and Zaldivar assumed the existence of pneumoconiosis for part of their causation opinions does not alter the analysis. *See Scott*, 289 F.3d at 267, 22 BLR 2-379-80 (noting that the physicians stated that their opinions would not change even assuming a diagnosis of pneumoconiosis). Therefore, we reject employer's contention.

Employer alleges that the administrative law judge erred in failing "to consider the disability causation assessment offered by Dr. Stephen T. Bush." Employer's Brief at 17. Claimant responds that the administrative law judge properly considered Dr. Bush's biopsy report in the specific context that it was proffered and admitted into evidence under Section 725.414(a)(3)(i)--as an assessment of claimant's lung biopsy tissue for the existence of pneumoconiosis. Claimant argues that the administrative law judge properly did not consider Dr. Bush's biopsy report at Section 718.204(c)(1).

On the particular facts of this case, employer demonstrates no abuse of discretion in the administrative law judge's handling of Dr. Bush's report. Employer submitted two medical reports in support of its affirmative case by Drs. Crisalli and Zaldivar. Employer proffered Dr. Bush's report as a biopsy report in response to claimant's biopsy evidence of complicated pneumoconiosis. Hearing Tr. at 18; Employer's Post-Hearing Brief at 11 (Aug. 27, 2003). The administrative law judge admitted Dr. Bush's report as a biopsy report and considered it at 20 C.F.R. §718.202(a)(2) when he found the existence of simple pneumoconiosis established. Evidentiary Order at 2 (Oct. 29, 2003); Decision and Order at 3, 6. Thus, employer designated Dr. Bush's report a biopsy report and the

administrative law judge considered it as such. Additionally, the administrative law judge admitted Dr. Bush's biopsy report only to the extent that Dr. Bush did not refer to inadmissible evidence. Evidentiary Order at 2, 3 (Oct. 29, 2003); *see* 20 C.F.R. §725.414(a)(3)(i). Review of Dr. Bush's report reflects that he cited a range of medical information, some of it admitted and some excluded, in reaching his conclusion as to the cause of claimant's total disability. Employer's Exhibit 5 at 1-3. On these facts, employer identifies no abuse of discretion by the administrative law judge in declining to consider Dr. Bush's biopsy report at Section 718.204(c)(1).[8]

Finally, employer contends that we must remand this case for further consideration because the administrative law judge automatically selected April, 2001, the month in which claimant filed his subsequent claim, as the date upon which claimant became totally disabled due to pneumoconiosis.

As a general rule, once entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless credited evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

Here, the administrative law judge did not err in setting the onset date as of the month of filing. Claimant filed his subsequent claim on April 18, 2001. Director's Exhibit 3. The administrative law judge found that claimant is totally disabled due to pneumoconiosis based upon Dr. Ranavaya's July, 2001 report. This credited medical evidence showing total disability due to pneumoconiosis does not establish the date of onset but merely indicates that claimant became totally disabled due to pneumoconiosis at some time prior to the date of the evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his subsequent claim. Therefore, on this record as weighed by the administrative law judge, he did not err in setting April, 2001 as the date for the commencement of benefits. *See* 20 C.F.R. §725.503(b). Consequently, we affirm the administrative law judge's onset determination.

[8] We emphasize that our holding is limited to the specific circumstances presented here. Accordingly, we do not hold that a pathologist such as Dr. Bush may not submit a medical report as defined under 20 C.F.R. §725.414(a)(1).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge