BRB Nos. 98-1547 BLA
and 97-0902 BLA

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| BEN JOHNSON | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| D M & M COAL COMPANY | ) | DATE ISSUED: |
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| 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 Awarding Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Richard Davis (Arter & Hadden), Washington, D.C., for employer and carrier.

Cathryn Celeste Helm (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (95-BLA-1818) of Administrative Law Judge J. Michael O'Neill awarding benefits 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). This case is on appeal before the Board for a second time. In his initial Decision and Order issued on February 26, 1997, the administrative law judge credited claimant with over twenty-six and one-half years of qualifying coal mine employment, and adjudicated the claim, filed on December 11, 1992, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's findings on the merits, and affirmed the award of benefits. The Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §725.503, however, and remanded the case for the administrative law judge to address all relevant evidence and determine whether it established an onset date of disability due to pneumoconiosis. *Johnson v. D M & M Coal Co. v. Director, OWCP*, BRB No. 97-0902 BLA (Feb. 26, 1998)(unpublished). In his Decision and Order on Remand, issued on July 30, 1998, the administrative law judge determined that claimant was entitled to benefits commencing on February 1, 1992.

In the present appeal, employer challenges the administrative law judge's onset findings at Section 725.503, and also requests a remand for the administrative law judge to reweigh the evidence at Sections 718.202(a)(1) and 718.204(b) in light of subsequent case law. Claimant responds, urging affirmance of the administrative law judge's findings at Section 725.503, and arguing that because the Board previously affirmed the administrative law judge's findings on the merits and his award of benefits, employer is limited in this appeal to arguments challenging the administrative law judge's onset findings. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, opposing employer's request for remand for reconsideration of the evidence at Sections 718.202(a)(1) and 718.204(b).

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 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).

Employer initially maintains that in crediting the most recent film at Section 718.202(a)(1) as being the most probative of claimant's physical condition, and in discounting one dually-qualified reader's negative interpretation because the physician read a prior film as positive, the administrative law judge relied on the general proposition that

pneumoconiosis is a progressive disease, even in the absence of further coal dust exposure. Employer asserts that the administrative law judge assumed progression and latency of simple pneumoconiosis without any review of the evidence to support his conclusion, and erred in failing to provide the parties an opportunity to respond with evidence regarding progressivity when he, without notice, made it a determinative factor in his evaluation of the x-ray evidence. Employer thus contends that due process requires remand and a reopening of the record to allow the parties to submit evidence on this issue, and relies on the holdings in *Allentown Mack Sales & Service, Inc. v. NLRB*, 118 S.Ct. 818 (1998), and *Glen Coal Co. v. Seals*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting), *reversing and remanding, Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring), as support for its position that the administrative law judge must reevaluate the x-ray evidence of record. Employer's reliance on *Allentown* and *Seals* is misplaced.

In *Allentown*, the United States Supreme Court repudiated judicial application of an evidentiary standard which was inconsistent with and more stringent than the standard formally announced by the agency, as a violation of reasoned decision making. *Allentown*, *supra*. In *Seals*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, rejected a judicial presumption created by the Fourth Circuit, that a miner's bills for medical treatment of a pulmonary condition were related to his pneumoconiosis and therefore the opposing party bore the burden of rebutting this presumption by demonstrating that the bills were not related to pneumoconiosis, as inconsistent with the Act and the law of the Sixth Circuit. *Seals*, *supra*. In the present case, however, the general proposition that pneumoconiosis is a progressive disease is fully consistent with the Act and regulations, and it is well settled that the relevant inquiry is claimant's pulmonary condition at the time of the hearing, thus the administrative law judge may reasonably conclude that the more recent interpretations are more probative of claimant's current condition. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). In weighing the totality of the evidence at Section 718.202(a)(1), the administrative law judge did not alter or shift the burden of proof, and his credibility determinations were consistent with the Act and controlling case law. *See Woodward*, *supra*. Inasmuch as the Board previously affirmed the administrative law judge's finding that the weight of the evidence established the existence of pneumoconiosis at Section 718.202(a)(1), and no exception to the law of the case doctrine has been demonstrated, we reaffirm the administrative law judge's findings thereunder and reject employer's request for remand and reevaluation of the evidence. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer next contends that the administrative law judge must reevaluate his previous finding of disability causation at Section 718.204(b) in light of subsequent Sixth Circuit case law which clarified the applicable standard. In determining whether claimant's totally

disabling respiratory or pulmonary impairment was due at least in part to his pneumoconiosis, the administrative law judge held that claimant "need only show a *de minimis* contribution by pneumoconiosis." Decision and Order at 19. Employer argues that the Sixth Circuit rejected a *de minimis* contribution standard and requires that "a miner must affirmatively establish that pneumoconiosis is a contributing cause of some discernible consequence to his totally disabling respiratory impairment....[t]he miner's pneumoconiosis must be more than a speculative cause of his disability," *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). Hence, employer contends that remand is required for the administrative law judge to apply the proper standard and to address inconsistencies in Dr. Lane's deposition testimony which demonstrate that Dr. Lane could not quantify the role that coal dust played in claimant's disability and that his opinion was speculative. Employer's arguments have merit.

In previously affirming the administrative law judge's finding of disability causation at Section 718.204(b), the Board held that the administrative law judge's error in misstating the "contributing cause" standard enunciated by the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), as requiring merely a *de minimis* contribution by pneumoconiosis, did not necessitate remand because Dr. Lane's ultimate conclusion, that claimant's coal dust exposure was a significant factor in his disability although smoking was the primary factor, met the *Adams* standard. *See* Director's Exhibits 32, 48. We are persuaded by employer's argument, however, that *Smith* compels a remand for the administrative law judge to evaluate the evidence and determine whether it satisfies the applicable standard. Consequently, as employer has demonstrated an exception to the law of the case doctrine, *see Brinkley, supra*; *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting), we vacate the administrative law judge's award of benefits and his findings pursuant to Section 718.204(b), and remand this case for reevaluation of the medical opinions relevant to disability causation in light of *Smith*.

Employer also challenges the administrative law judge's award of benefits commencing as of February 1, 1992, based on his finding that claimant was not disabled prior to the last day of coal mine employment on January 13, 1992, and his crediting of the February 28, 1998 reports of Drs. Vaezy and Baker finding claimant totally disabled due to pneumoconiosis. Employer asserts that the administrative law judge failed to address all relevant evidence of record in his onset analysis at Section 725.503, specifically the non-qualifying objective tests performed subsequent to February 1, 1992, and the opinion of Dr. Anderson that claimant's pulmonary function study results of September 8, 1992, revealed only a ten to fifteen percent impairment. Inasmuch as the administrative law judge's disability causation findings at Section 718.204(b) may impact upon his onset findings, we vacate his findings at Section 725.503 for the administrative law judge on remand to reevaluate all evidence relevant to the onset date of total disability due to pneumoconiosis thereunder. We reject employer's additional argument, however, that pursuant to 30 U.S.C.

§924(c), benefits are not payable to claimant as a matter of law for any period prior to the date he filed his claim for benefits. The provisions of Section 414(c) of the Act, 30 U.S.C. §924(c), are not applicable to a Part C claim, such as this. Rather, in accordance with the provisions of Section 6(a) of the Longshoremen's and Harbor Workers' Compensation Act, as incorporated by Section 422(a) of the Act, 30 U.S.C. §932, and as implemented by 20 C.F.R. §725.503, benefits are payable on a Part C claim beginning with the month of onset of total disability due to pneumoconiosis or January 1, 1974, whichever is later, and the month of filing controls only if the month of onset cannot be ascertained. 20 C.F.R. §725.503; *see Kuhar v. Bethlehem Mines Corp.*, 5 BLR 1-765 (1983).

Lastly, claimant's counsel has filed a complete, itemized statement requesting a fee for services performed in his prior appeal to the Board, BRB No. 97-0902 BLA, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $2,000.00 for 10 hours of legal services at an hourly rate of $200.00. No response to the fee petition has been received.

The Board finds the requested fee to be reasonable in light of the services performed, and hereby approves a fee of $2,000.00 for 10 hours of legal services at an hourly rate of $200.00, enforceable upon entry of a final judgment awarding benefits, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge