BRB No. 01-0936 BLA

WENDELL FUGATE STEPP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARTIN COUNTY COAL CORPORATION	)	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 - Award of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Martin E. Hall (Jackson & Kelly), Lexington, Kentucky, for employer.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (00-BLA-0785) of Administrative Law Judge Daniel J. Roketenetz 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 accepted the parties' stipulation of twenty-three years of coal mine employment, based on the date of filing, adjudicated the claim pursuant to 20 C.F.R. Part 718 (2001). Decision and Order at 5. The administrative law judge found that claimant established the totally disabling pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. 718.202(a)(1), (4), 718.203(b), 718.204(b)(2)(iv), and 718.204(c). Accordingly, benefits were awarded. The administrative law judge determined that the date of the commencement of benefits is August 1999, the month in which claimant filed his application for benefits.

On appeal, employer challenges the administrative law judge's weighing of the evidence. Employer also contends that the administrative law judge arbitrarily set the onset date. Lastly, employer contends that the administrative law judge erred in retroactively applying the amended regulations to this claim. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, takes no position on the merits of this claim, but urges the Board to reject employer's challenge to the validity of Section 725.503 and

[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 20 C.F.R. Parts 718, 722, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

its argument that the administrative law judge erred in retroactively applying the amended regulations to this claim.

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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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. Failure to establish any 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*).

After consideration of the administrative law judge's Decision and Order, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order of administrative law is supported by substantial evidence and contains no reversible error. Employer contends that the administrative law judge impermissibly accorded greater weight to the opinions of Drs. Baker and Younes and less weight to the contrary opinions of record. We do not find merit in employer's arguments. Employer's

contentions constitutes a request that the Board reweigh the evidence, which is beyond the scope of the Board's powers. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). The administrative law judge must determine the credibility of the evidence of record and the weight to be accorded this evidence when deciding whether a party has met its burden of proof. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

The administrative law judge assigned the greatest probative weight to the opinions of Drs. Baker and Younes[2], finding that the physicians are highly qualified, personally examined claimant, and rendered well-reasoned and documented opinions on the basis of personal examinations, occupational history of coal dust exposure, positive readings of chest x-rays, smoking and family histories, and other test results. Decision and Order at 13, 17. The administrative law judge's decision to accord greater weight to the examining physicians who rendered well-reasoned

[2]Dr. Younes examined claimant on August 25, 1999. Director's Exhibit 10. He noted 23 years of coal mine employment, performed objective tests and noted relevant histories, and diagnosed claimant with coal workers' pneumoconiosis, due to occupational dust exposure, and chronic obstructive pulmonary disease and chronic bronchitis, both primarily due to cigarette smoking but secondarily due to occupational dust exposure. Dr. Younes opined that claimant has a severe obstructive ventilatory impairment which would interfere with claimant's last coal mine employment.

Dr. Baker examined claimant on June 14, 2000. Claimant's Exhibit 6. He noted 23 years of coal mine employment, performed objective tests and noted histories. Dr. Baker diagnosed coal workers' pneumoconiosis 1/0 based on abnormal x-ray and history of coal dust exposure, chronic bronchitis and COPD with moderate obstructive defect due to coal dust exposure and cigarette smoking. Dr. Baker diagnosed a moderate impairment and indicated that claimant does not have the respiratory capacity to perform the work of a coal miner.

which were better supported by the underlying documentation is rational and within his discretion as fact-finder. *See Peabody Coal Co. v. Groves*, 277 F.3d 834, BLR (6th Cir. 2002); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-111 (6th Cir. 2000); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *cf*; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995).

In according less probative weight to the opinions of Drs. Branscomb, Castle and Jarboe, the administrative law judge found that these physicians are also highly qualified but did not personally examine claimant. Decision and Order at 13. Furthermore, the administrative law judge found that these physicians partially based their opinions on negative x-ray interpretations whereas the administrative law judge found the x-ray evidence to be positive for pneumoconiosis. The administrative law judge also found that these physicians relied upon a February 12, 2000 pulmonary function study which the administrative law judge found to be invalid.[3] The administrative law judge additionally found that Drs. Branscomb, Castle, Dahhan and Jarboe did not sufficiently explain on what basis they believe that coal dust exposure

[3]The administrative law judge's Decision and Order indicates that the administrative law judge considered Dr. Burki's invalidation of the February 12, 2000 pulmonary function study against the technician's observations who administered the test on behalf of Dr. Dahhan. Noting that the technician found that claimant's cooperation and comprehension were "good", the administrative law judge accorded great weight to Dr. Burki's opinion, that the variability and curve shapes indicated

did not contribute to claimant's respiratory problems. Decision and Order at 14. Lastly, the administrative law judge accorded less weight to the physicians' opinions because they did not diagnose pneumoconiosis whereas the administrative law judge determined that claimant satisfies the legal definition of that condition. Decision and Order at 18. As the administrative law judge rationally accorded diminished weight to the opinions by these physicians based upon their erroneous finding that claimant did not suffer from pneumoconiosis we affirm his findings in this regard. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).(additional cites????). We therefore affirm the administrative law judge's weighing of the evidence and his determination that claimant established a totally disabling respiratory impairment arising out of coal mine employment.

We decline to address employer's contention that 20 C.F.R. §725.503 is invalid because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d) as it allows claimant to receive benefits from the date of filing even when there is no medical proof submitted by claimant showing that he has a totally disabling respiratory impairment at that time. Employer's Brief at 26. In the instant case, Dr. Younes examined claimant in August 1999, the month in which claimant filed his application for benefits, and determined that claimant is totally disabled due to pneumoconiosis. In light of our affirmance of the

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suboptimal effort, on the basis of physician's expertise in that area.

administrative law judge's weighing of the evidence, the administrative law judge's reliance on the filing date as the date of onset of total disability coincides with the earliest medical evidence indicating that claimant is totally disabled. Therefore, any error committed by the administrative law judge in relying upon the filing date is harmless, and we affirm his determination that the onset date is August 1999.

Lastly, we reject employer's contention that the administrative law judge erred by retroactively applying the amended regulations to this claim. In *Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, --- BLR --- (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001), the Court of Appeals for the District of Columbia held that the "total disability rule", and Section 725.701 were impermissibly retroactive and that Section 725.459 is invalid. However, the Court rejected all other challenges. Employer only specifically challenges the retroactive application of Section 725.201 (2001). However, as the revised version of the regulation codifies Sixth Circuit precedent, recognizing the distinction between medical and legal pneumoconiosis, acknowledging that pneumoconiosis can cause both obstructive and restrictive defects, and recognizing the latent and progressive nature of the disease, we reject employer's contention. *Crace v. Kentland-Elkhorn Coal Corp*., 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997); *Peabody Coal Co. v. Holskey*, 888 F.2d 440, 13 BLR 2-95 (6th Cir. 1989); *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987)

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

is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge