BRB No. 02-0124 BLA

VERNON K. DELUNG, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
MILBURN COLLIERY COMPANY	)	
	)	
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 on Remand Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

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

Jennifer U. Toth (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 on Remand Awarding Benefits (1998-BLA-00134) of Administrative Law Judge Daniel F. Sutton rendered 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] This case involving a duplicate claim is before the Board for the second time. Claimant's initial application for benefits filed on September 18, 1992 was denied by an administrative law judge on April 25, 1995 because the evidence did not establish the existence of pneumoconiosis or that the miner was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 29 at 1, 101. The Board affirmed the denial of benefits on February 6, 1996. *Id*. at 73. On February 27, 1997, claimant filed the current application, which is a duplicate claim for benefits because it was filed more than one year after the final denial of a previous claim. Director's Exhibit 1; *see* 20 C.F.R. §725.309(d)(2000).

After a hearing, the administrative law judge credited claimant with 14.25 years of coal mine employment and found that the medical evidence developed since the denial of claimant's first claim established the existence of pneumoconiosis. Consequently, the administrative law judge found that claimant demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d)(2000). *See Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Considering 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 was totally disabled by a respiratory or pulmonary impairment, and that the total disability was due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board vacated the finding that the newly-submitted x-ray readings established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), because the administrative law judge had improperly found the Department of Labor's physicians to be the only unbiased x-ray readers. *DeLung v. Milburn Colliery Co.*, BRB No. 99-0158 BLA at 5 (Jun. 29, 2000)(unpub.). The Board also vacated the administrative law judge's finding that the new medical opinions established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because he did not explain his reasons for crediting the opinions of Drs. Rasmussen and Doyle, and because he discredited the contrary opinions of Drs. Castle, Bellotte, Morgan, Fino and Jarboe, based largely on his finding that the x-ray evidence

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

established the existence of pneumoconiosis. *DeLung*, slip op. at 5-7. Consequently, the Board instructed the administrative law judge to reweigh the new x-ray readings and medical reports to determine whether the existence of pneumoconiosis and a material change in conditions were established, and if so, to then consider whether all of the evidence, old and new, established the existence of pneumoconiosis. Reviewing employer's challenges on the merits, the Board affirmed the administrative law judge's finding that claimant was totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(c)(2000), Slip op. at 8-9, and held that if the administrative law judge again found the existence of pneumoconiosis established, it was unnecessary for him to revisit the issue of whether claimant's total disability was due to pneumoconiosis because the administrative law judge's disability causation finding under 20 C.F.R. §718.204(b)(2000) was rational and supported by substantial evidence. Slip op. at 10.

On remand, the administrative law judge found that both the new x-ray evidence and medical opinion evidence established the existence of pneumoconiosis and a material change in conditions. The administrative law judge additionally found that the record as a whole established the existence of pneumoconiosis arising out of coal mine employment. Accordingly, the administrative law judge awarded benefits. Because the administrative law judge found that the medical evidence did not establish when claimant became totally disabled due to pneumoconiosis, he awarded benefits as of February 1, 1997, the month during which claimant filed his duplicate claim. *See* 20 C.F.R. §725.503(b).

On appeal, employer contends that substantial evidence does not support the finding that a preponderance of the x-ray evidence established the existence of pneumoconiosis. Employer further contends that the administrative law judge erred in his analysis of the medical opinions when he found that they established the existence of pneumoconiosis. Finally, employer asserts that the administrative law judge erred in setting the onset date as the month in which the duplicate claim was filed. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to respond to the evidentiary issues raised on appeal, but has filed a brief in response to certain legal issues raised by employer. Employer has filed a reply

brief reiterating those contentions.

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 into the Act 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 the miner was 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).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d)(2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d)(2000), the administrative law judge must consider all of the new evidence to determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. *Rutter, supra*. If so, claimant has established a material change in conditions and the administrative law judge must then determine whether all of the record evidence, old and new, supports a finding of entitlement. *Id*.

Pursuant to 20 C.F.R. §718.202(a)(1), employer contends that the administrative law judge erred in his analysis of the x-ray evidence. The record contains 37 readings of three x-rays taken since the prior denial. As noted by the administrative law judge, qualified readers are in conflict on each x-ray; there are 15 positive readings and 22 negative readings. Five of the 22 negative readings are 0/1 classifications rendered by employer's radiological experts. The administrative law

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[2] The dispute between employer and the Director concerns the alleged impermissible retroactivity of revised 20 C.F.R. §§718.104 and 718.201, and the alleged invalidity of the onset regulation, 20 C.F.R. §725.503(b). The specific issues raised by employer are moot and will not be addressed herein. *See Nat'l Mining Ass'n v. Department of Labor*, 292 F.3d 849, 861-63, --- 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, 68, 71, 82-83, --- BLR --- (D.D.C. 2001).

judge found that these 0/1 readings, although officially negative under 20 C.F.R. §718.102(b), were "more consistent with the 15 positive interpretations than they are with the 17 completely negative interpretations," because the 0/1 readers "departed from their brethren by acknowledging that the new x-rays are not completely negative and indeed could be interpreted as positive for pneumoconiosis. . . ." Decision and Order on Remand at 6. The administrative law judge found that the five 0/1 readings by employer's own experts "ma[de] it more likely than not that the completely negative interpretations are wrong." *Id.* He therefore "discounted the completely negative interpretations," and found that "a preponderance of the newly submitted x-ray evidence establishes the existence of pneumoconiosis." *Id.*

Employer argues that the administrative law judge violated Section 718.102(b) by relying upon 0/1 x-ray readings to find the existence of pneumoconiosis established. Employer's Brief at 7-8. Contrary to employer's contention, the administrative law judge did not credit the five 0/1 readings as positive for pneumoconiosis, but recognized that the 0/1 readings were "less than the minimum 1/0 classification required to constitute positive evidence of pneumoconiosis, 20 C.F.R. §718.102(b). . . ." Decision and Order on Remand at 6. Notwithstanding the officially negative status of the 0/1 readings, the administrative law judge reasonably found that they supported the 15 positive readings and detracted from the 17 completely negative readings, because the 0/1 readers "found parenchymal abnormalities consistent with pneumoconiosis . . . ." Decision and Order on Remand at 5; *see Adkins v. Arch of West Virginia*, No. 94-2510, 1995 WL 432403 at *2 (4th Cir., July 24, 1995)("[T]hough a 0/1 reading is not 'positive' for pneumoconiosis, it does show some dust retention in the lungs; consequently, it does not rebut a positive x-ray as strongly as does a completely negative reading. The ALJ did not act irrationally by simply keeping this fact in mind.") Substantial evidence supports the administrative law judge's finding, as four of the five physicians who read the x-rays as "0/1" checked "Yes" to box 2A on the x-ray classification form, indicating that they detected parenchymal abnormalities consistent with pneumoconiosis, albeit below the level of category 1. Employer's Exhibits 1, 2, 12, 14. The fifth reader indicated that the x-ray was not completely negative, but left box 2A unchecked. Employer's Exhibit 12. Finding no error in the administrative law judge's analysis, we reject employer's contention and affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(1).

Pursuant to 20 C.F.R. §718.202(a)(4), employer contends that the administrative law judge made several errors in weighing the newly-submitted medical opinion evidence. The administrative law judge found that the opinion of Dr.

[3] Section 718.102(b) provides, in part, that a chest x-ray classified as "0/-, 0/0, or 0/1 . . . does not constitute evidence of pneumoconiosis." 20 C.F.R. §718.102(b).

Rasmussen was better documented and reasoned than those of employer's experts and was supported by the opinion of Dr. Doyle, claimant's treating physician. The administrative law judge further found that Dr. Rasmussen's opinion merited greater weight even though Dr. Rasmussen lacks the Board-certification in Pulmonary Disease possessed by employer's experts.

Employer contends that the administrative law judge did not explain why Dr. Rasmussen's opinion was found to be better documented and reasoned. Employer's Brief at 29-32. Upon review, we conclude that the administrative law judge explained his analysis and that substantial evidence supports his findings.

The administrative law judge permissibly found that Dr. Rasmussen's diagnosis of pneumoconiosis, which was based in part on a positive x-ray reading, was better supported by the weight of the new x-ray evidence than were the opinions of Drs. Castle, Fino, Jarboe, and Morgan, who believed that claimant's x-rays were negative for the disease. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Additionally, the administrative law judge found, within his discretion, that Dr. Rasmussen persuasively explained that the pattern of claimant's pulmonary impairment--specifically, an impairment in blood oxygen transfer without significant ventilatory impairment--was consistent with an interstitial lung disease due to coal dust exposure and inconsistent with lung disease due to smoking. *See Hicks, supra; Akers, supra*. The administrative law judge further found that Dr. Rasmussen persuasively explained why claimant's blood oxygen transfer impairment is not the result of heart disease, and that Dr. Rasmussen reflected a more detailed understanding of the dust exposure hazard of claimant's job as a roof bolter than did the other physicians. *Id*. The administrative law judge exercises broad discretion in assessing the documentation and reasoning of the medical opinions, *see Hicks, supra*; *Akers, supra*; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993), and substantial evidence supports the administrative law judge's findings.

The administrative law judge additionally found that Dr. Rasmussen's opinion was supported by Dr. Doyle's opinion, which was sufficiently documented and reasoned to merit "substantial probative weight." Decision and Order on Remand at 16. Employer argues that the administrative law judge mechanically credited Dr. Doyle's opinion based solely on his treating status. Employer's Brief at 27-28. Review of the administrative law judge's Decision and Order, however, reflects that the administrative law judge found that Dr. Doyle based his opinion on x-ray readings, pulmonary function and blood gas studies, examinations, and a NIOSH study relating respiratory impairments to coal dust exposure. Decision and Order on Remand at 9-10, 15-16; *see Hicks, supra*; *Akers, supra*. The administrative law

judge further considered that Dr. Doyle has treated claimant for respiratory problems for two and a half years. Substantial evidence supports the administrative law judge's permissible finding that Dr. Doyle's opinion, attributing claimant's respiratory impairment to both smoking and coal dust exposure, was adequately documented and reasoned to merit enhanced weight. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1097, 17 BLR 2-123, 2-129 (4th Cir. 1993). Therefore, we reject employer's contention.

Employer further asserts that the administrative law judge did not provide valid reasons for giving less weight to the contrary opinions of Drs. Castle, Morgan, Fino, Jarboe, and Bellotte. Employer's Brief at 9-24. Review of the administrative law judge's Decision and Order discloses that the administrative law judge gave one or more valid reasons for the weight accorded to each physician's opinion.

As already noted, the administrative law judge found that the opinions of Drs. Castle, Fino, Jarboe, and Morgan were not as well-supported by the new x-ray evidence as was Dr. Rasmussen's opinion. The administrative law judge also found, within his discretion, that Dr. Castle's opinion that heart disease was the source of claimant's blood gas impairment did not adequately rebut Dr. Rasmussen's explanation for why heart disease was not the cause of the impairment. *See Hicks, supra*; *Akers, supra*. Substantial evidence also supports the administrative law judge finding that Dr. Castle essentially ignored Dr. Rasmussen's explanation that the specific pattern of claimant's pulmonary impairment was evidence of an interstitial lung disease due to coal mine employment. *Id*. As the administrative law judge noted, Dr. Castle instead stated that he would not attribute claimant's pulmonary impairment to interstitial lung disease without evidence of interstitial lung disease. Employer's Exhibit 7 at 26. Consequently, we reject employer's allegations of error in the weighing of Dr. Castle's opinion.

Substantial evidence supports the administrative law judge decision to give Dr. Morgan's opinion less weight because Dr. Morgan opined that claimant had no impairment in blood gas exchange when the qualifying blood gas study detected an oxygen transfer impairment, *see Trumbo, supra*, and because Dr. Morgan relied on a medical study to assert that the risk of developing pneumoconiosis is very low provided that respirable dust levels are kept below 3.5 mg per cubic meter, when the record contains no evidence that the dust levels in the mines where claimant worked were maintained below that level. *Hicks, Akers*. Therefore, we hold that the administrative law judge did not err in his weighing of Dr. Morgan's opinion.

Additionally, contrary to employer's contention, the administrative law judge permissibly found that Drs. Fino and Bellotte did not adequately explain their opinion that claimant's oxygen transfer impairment detected by blood gas study is due to

cigarette smoking, rather than coal mine dust exposure. *See Hicks, supra; Akers, supra*. Further, the administrative law judge permissibly declined to credit Dr. Jarboe's opinion that the drop in claimant's blood oxygen with exercise was inconsistent with pneumoconiosis because two medical studies reported improvement in the exercise blood oxygen levels of coal miners. The administrative law judge acted within his discretion when he found that there was no evidence that the studies Dr. Jarboe cited involved miners who had been diagnosed with pneumoconiosis. *Id*. Therefore, we reject employer's contention that the administrative law judge erred in his weighing of the opinions of Drs. Fino, Bellotte, and Jarboe, and we hold that the administrative law judge provided valid reasons for according less weight to the opinions of employer's experts.

Employer contends that the administrative law judge failed to consider that employer's physicians possess superior credentials in Pulmonary Disease. Employer's Brief at 14-15, 21, 28, 32. Employer's contention lacks merit. When weighing conflicting medical opinions, an administrative law judge must take into account the physicians' respective qualifications. *Hicks*, 138 F.3d at 546, 21 BLR at 2-341. Here, the administrative law judge explicitly considered that "Milburn's doctors are all board-certified in pulmonary medicine," Decision and Order on Remand at 18, while Dr. Rasmussen is Board-certified in only Internal Medicine and Forensic Medicine. Decision and Order on Remand at 7, 18. The administrative law judge nevertheless found, within his discretion, that the record demonstrated "that Dr. Rasmussen has substantially more experience in conducting pulmonary evaluations on coal miners (*e.g.*, 35,000 to 40,000 evaluations versus 400 to 500 evaluations by Dr. Castle. . . ." Decision and Order on Remand at 18. The administrative law judge also reiterated that he did not find the opinions of Drs. Castle, Fino, Jarboe, Morgan, and Bellotte to be as well reasoned as Dr. Rasmussen's opinion. *Id*. Because the administrative law judge factored the qualifications of the physicians into his analysis of the medical opinions and gave rational reasons for his credibility determination, we reject employer's contention. Therefore, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge properly found that a preponderance of all the evidence established the existence of pneumoconiosis because both the x-rays and medical opinions were "on the same side of the evidentiary scales." Decision and Order on Remand at 19; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Consequently, we affirm the administrative law judge's

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[4] Because we affirm the administrative law judge's analysis on the above grounds, we need not address employer's remaining allegations of error in the administrative law judge's weighing of the medical opinions.

finding that the existence of pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a), and his attendant finding that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d)(2000).

The administrative law judge further found that the old evidence that did not establish the existence of pneumoconiosis was outweighed by the new, "preponderantly positive" evidence, a development which the administrative law judge reasonably found to be consistent with the progressive nature of pneumoconiosis. Decision and Order on Remand at 23; *see Adkins v. Director, OWCP*, 958 F.2d 49, 51-52, 16 BLR 2-61, 2-65 (4th Cir. 1992). The administrative law judge also permissibly found that the new evidence was "qualitatively more persuasive in terms of greater detail, better reasoning and better documentation than the older evidence," in any event. *Id.*; *see Hicks, supra*; *Akers, supra*; *Trumbo, supra*. Employer does not challenge these findings, which we affirm.

The administrative law judge awarded benefits "as of the first day of February 1997, the month in which claimant filed his application for benefits, because the medical evidence does not establish a precise date of disability onset." Decision and Order on Remand at 23. Employer contends that we must remand this case for further consideration because the administrative law judge gave no rationale for why the medical evidence did not establish the month in which claimant became totally disabled due to pneumoconiosis. Employer's Brief at 34.

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 duplicate claim on February 27, 1997. Director's Exhibit 1. The administrative law judge found that claimant is totally disabled due to pneumoconiosis based upon claimant's 1997 x-rays, 1997 objective testing, and Dr. Rasmussen's and Dr. Doyle's 1997 reports. 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 such 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 duplicate claim. *See Owens, supra*. Therefore, on this record as weighed by the administrative law judge, he properly found that the medical evidence did not establish the onset date, and thus did not err in setting February 1, 1997 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 finding.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge