BRB No. 12-0664 BLA

LOUIS A. WILLIAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 09/26/2013
	)	
PEABODY COAL 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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 (09-BLA-5800) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944

(Supp. 2011) (the Act). This case involves a miner's claim filed on January 16, 2008.[1] Director's Exhibit 2.

After finding that the claim was timely filed, the administrative law judge noted that Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

Applying amended Section 411(c)(4), the administrative law judge noted that the parties stipulated to nineteen years of coal mine employment, of which more than fifteen years were underground.[2] The administrative law judge also found that claimant established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits, commencing as of June 2004, the month in which he determined that the evidence established that claimant became totally disabled due to pneumoconiosis.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed. Employer argues further that the administrative law judge erred when he found that employer failed to rebut the Section 411(c)(4)

[1] By letter dated January 16, 2008, claimant notified the district director of his intent to file a claim. Director's Exhibit 2. On February 15, 2008, the district director informed claimant that his letter would be considered a claim if perfected by filing a claim form within six months of the district director's response. Claimant submitted his claim form on July 28, 2008. *Id.* Thus, pursuant to 20 C.F.R. §725.305, the effective date of filing of the claim is January 16, 2008. *See* 20 C.F.R. §725.305(b); Employer's Reply Brief at 7; Director's Brief at 1-2 n.2.

[2] The record reflects that claimant's coal mine employment was in Illinois. Director's Exhibits 3, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

presumption.[3] Finally, employer contends that the administrative law judge erred in his determination of the commencement date for benefits. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response urging the Board to affirm the administrative law judge's determination that the claim was timely filed. In a reply brief, employer reiterates its challenges to the award of benefits.

By order dated August 1, 2013, the Board requested that the parties address whether the administrative law judge's determination of the date from which benefits are payable was correct, under 20 C.F.R. §725.503(b). Claimant, the Director, and employer submitted supplemental briefs. Claimant and the Director urge affirmance of the administrative law judge's determination of June 2004 as the month in which claimant became totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §725.503(b). Specifically, they assert that, having found that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that employer did not rebut the presumption, the administrative law judge permissibly relied on the first evidence that established total disability and invoked the presumption, to determine the date for the commencement of benefits. Employer urges the Board to vacate the administrative law judge's determination, arguing that the first evidence of total disability does not establish when claimant became totally disabled due to pneumoconiosis.

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).

Timeliness of the Claim

Employer initially contends that claimant's claim was not timely filed. The Act provides that a claim for benefits by, or on behalf of, a miner must be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care

[3] Employer does not challenge the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and total disability at 20 C.F.R. §718.204(b)(2), and thus invoked the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4), 30 U.S.C. §921(c)(4). Those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a); *see Roberts & Schaefer Co. v. Director, OWCP* [*Williams*], 400 F.3d 992, 996-97, 23 BLR 2-302, 2-314-15 (7th Cir. 2005).

Employer argues that claimant received a diagnosis of total disability due to pneumoconiosis more than three years before he filed his claim on January 16, 2008, thus rendering his claim untimely. Employer relies upon Dr. Cohen's June 8, 2004 medical report. Director's Exhibit 14. The administrative law judge found that while Dr. Cohen's June 8, 2004 report was communicated to claimant, the report was not sufficient to trigger the running of the statute of limitations because it did not clearly state that claimant is totally disabled due to pneumoconiosis, and it was inadequately explained. Decision and Order at 6. Specifically, the administrative law judge noted that Dr. Cohen diagnosed coal workers' pneumoconiosis, due to coal mine dust exposure, and also diagnosed a severe obstructive pulmonary impairment due to coal mine dust exposure and smoking. Dr. Cohen next stated that he would still diagnose pneumoconiosis even if claimant's x-rays were negative. Finally, Dr. Cohen concluded that claimant's impairment from his severe obstructive lung disease is totally disabling for his last job as a continuous miner operator. Decision and Order at 6; Director's Exhibit 14 at 4-5. The administrative law judge found Dr. Cohen's opinion insufficient to trigger the statute of limitations because several portions of Dr. Cohen's report had to be read together in order to understand its meaning, and thus, the report would not have made claimant aware that he was totally disabled due to pneumoconiosis:

> Upon an integrated reading of the report, an attorney may readily recognize that Dr. Cohen's determination that [claimant's] severe pulmonary obstruction was caused in part by coal mine dust exposure represents a diagnosis of legal pneumoconiosis, and thus understand that Dr. Cohen is indicating [that claimant] is totally disabled due to legal pneumoconiosis. However, from [claimant's] perspective, Dr. Cohen's report lacks a clear, simple statement that he is totally disabled due to pneumoconiosis.

Decision and Order at 6.

Employer first contends that the administrative law judge erred in failing to apply the plain language of the statute and its implementing regulation, as neither requires that the medical determination contain a definitive statement that claimant is totally disabled due to pneumoconiosis, or that it be well-reasoned. Employer's Brief at 19-22; Employer's Reply Brief at 2-3. Employer also contends that, assuming arguendo, a

definitive medical statement is required, Dr. Cohen's report fulfills that requirement. Employer's Brief at 22-23.

We need not address employer's arguments because, as the Director asserts, even assuming that Dr. Cohen's report constituted a medical determination of total disability due to pneumoconiosis that was communicated to claimant, the record contains no evidence to establish *when* the report was communicated to claimant. Director's Brief at 2. To rebut the presumption of timeliness, employer must establish that Dr. Cohen's report was communicated to claimant sometime prior to January 16, 2005, three years before he filed his claim. 20 C.F.R. §725.308(a). Contrary to employer's assertion, the administrative law judge's decision does not reflect a finding that Dr. Cohen's report was communicated to claimant "within the relevant time period." Employer's Reply Brief at 2. The administrative law judge found only that the report "was communicated to [claimant]." Decision and Order at 5.

Nor does the record contain any evidence of when the communication occurred. Claimant testified at the hearing that during the June 8, 2004 physical examination, Dr. Cohen did not tell him that he was totally disabled due to pneumoconiosis. Hearing Tr. at 36. Because the record before us does not contain any evidence that could support employer's burden to demonstrate that Dr. Cohen's report was communicated to claimant prior to January 16, 2005, we reject employer's argument, and affirm the administrative law judge's determination that employer did not rebut the presumption that the claim was timely filed. *See* 20 C.F.R. §725.308(a), (c).

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995). The administrative law judge found that employer failed to establish rebuttal by either method.

The administrative law judge found that employer disproved the existence of clinical pneumoconiosis,[4] based on the x-ray, computerized tomography scan, and

[4] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

medical opinion evidence. Decision and Order at 32. With respect to whether employer disproved the existence of legal pneumoconiosis,[5] the administrative law judge considered the opinions of Drs. Repsher, Tuteur, Houser, and Cohen.[6] Drs. Repsher and Tuteur attributed claimant's obstructive impairment to smoking. Director's Exhibit 24; Employer's Exhibits 1, 10, 11. Drs. Houser and Cohen attributed claimant's obstructive impairment to both smoking and coal mine dust exposure. Director's Exhibits 10, 16; Claimant's Exhibits 4, 5; Employer's Exhibit 9.

The administrative law judge found that the opinions of employer's physicians, Drs. Repsher and Tuteur, were not sufficiently well-reasoned to disprove the existence of legal pneumoconiosis. Decision and Order at 30-32. Employer argues that, in so finding, the administrative law judge erred in referring to the preamble of the regulations when he assessed the credibility of those opinions. Employer's Brief at 26-31. We disagree.

It was within the administrative law judge's discretion to consult the discussion by the Department of Labor (DOL) of sound medical science in the preamble to the amended regulations, when evaluating the reasoning of the medical opinions in this case. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008). Further, contrary to employer's contention, the administrative law judge did not utilize the preamble as a legal rule, but merely consulted it as a statement of medical principles accepted by DOL when it revised the definition of pneumoconiosis to include obstructive impairments arising out of coal mine employment. *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115, 2-129-32 (4th Cir. 2012); Employer's Brief at 27-28.

Specifically, the administrative law judge found that Drs. Repsher and Tuteur relied, in part, on their shared views that coal mine dust exposure rarely causes a degree of obstructive impairment that is clinically significant.[7] In promulgating the revised

[5] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[6] The administrative law judge also considered the opinions of Drs. Codd, Verta, Miller, Kim, and Jones, finding that these physicians did not render a specific pulmonary diagnosis. Decision and Order at 17-21, 28. The administrative law judge further found that the opinions of Drs. Vacca, Rethorst, and Tazbaz, diagnosing pneumoconiosis, lacked sufficient reasoning and, thus, were of diminished probative value. Decision and Order at 30.

[7] Dr. Repsher opined that, while studies showed that some miners would have a clinically significant drop in their FEV1 value, the majority would not, and further stated

definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), DOL reviewed the medical literature on that issue and found that there was a consensus among medical experts that coal dust-induced COPD is clinically significant and that the causal relationship between coal mine dust and COPD is not merely rare. 65 Fed Reg. 79,920, 79,938 (Dec. 20, 2000). Accordingly, the administrative law judge acted within his discretion as fact-finder in determining that the opinions of Drs. Repsher and Tuteur were entitled to diminished weight to the extent that they relied upon studies that contradict the view accepted by DOL. *See Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

Additionally, the administrative law judge noted, accurately, Dr. Repsher's reasoning that it was significant that claimant stopped mining in 1997, but continued to smoke cigarettes. The administrative law judge permissibly discounted that reasoning as inconsistent with DOL's recognition that pneumoconiosis "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c). Finally, the administrative law judge permissibly found that Dr. Tuteur did not adequately explain how he could rule out coal mine dust exposure as a cause of claimant's obstruction, in light of his acknowledgment that there was a five percent chance that coal mine dust contributed to his pulmonary impairment. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-281 (7th Cir. 2001); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); Decision and Order at 31-32.

---

that the effect of coal mine dust in the development of obstructive lung disease is de minimus, compared with the effects of cigarette smoking. Director's Exhibit 24; Employer's Exhibit 11. In concluding that claimant's obstruction was not due to coal mine dust exposure, Dr. Repsher explained that, while he relied, in part, on the fact that claimant stopped mining in 1997, but continued to smoke, he primarily relied on medical studies showing that the likelihood of developing coal mine dust-related obstruction is very small. Director's Exhibit 24; Employer's Exhibit 11. Similarly, Dr. Tuteur opined that the development of clinically significant coal mine dust-related obstructive lung disease is "extremely rare." Employer's Exhibit 1. Dr. Tuteur cited medical studies and the relative length of claimant's cigarette smoke and coal mine dust exposures to conclude that there was only a five percent chance that claimant's obstruction was due to coal mine dust exposure. Employer's Exhibits 1; 10 at 9-13. Dr. Tuteur acknowledged that there was nothing about claimant that enabled Dr. Tuteur to rule out coal mine dust exposure as a contributing cause of claimant's COPD, and stated that his conclusions were based on claimant's unusually heavy smoking history, and on statistical likelihoods. Employer's Exhibit 10 at 39-40.

Thus, the administrative law judge provided valid reasons for discounting the opinions of Drs. Repsher and Tuteur, attributing claimant's obstructive impairment solely to smoking.[8] Therefore, we reject employer's allegations of error, and affirm the administrative law judge's finding that employer did not disprove the existence of legal pneumoconiosis. We therefore affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

With regard to the second method of rebuttal, the administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Repsher and Tuteur, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's disabling impairment is unrelated to his coal mine employment. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990); Decision and Order at 32. Therefore, we affirm the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

Date for the Commencement of Benefits

Finally, employer contends that the administrative law judge erred in determining the date for the commencement of benefits, pursuant to 20 C.F.R. §725.503(b), based on the date of the first qualifying[9] pulmonary function study of record.[10] Employer's Supplemental Brief at 3-4. In finding claimant to be totally disabled due to pneumoconiosis as of June 2004, the administrative law judge reasoned:

> Although [claimant] submitted his intention to file a claim in January 2008, the first pulmonary function test which gave rise to the unrebutted

[8] Thus, we need not address employer's additional allegations of error regarding the weight the administrative law judge accorded to the opinions of Drs. Repsher and Tuteur. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[9] A "qualifying" pulmonary function study yields values that are equal to or less than the applicable table values set out in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[10] The June 8, 2004 pulmonary function study upon which the administrative law judge relied was performed in connection with Dr. Cohen's physical examination. Director's Exhibit 16.

> presumption of total disability due to pneumoconiosis occurred on June 8, 2004. No medical evidence after that test demonstrates a period of time during which [claimant] did not have a totally disabling obstructive pulmonary impairment. Accordingly, I find [claimant's] black lung disability benefits are payable beginning June 1, 2004.

Decision and Order at 35.

Employer argues that the administrative law judge erred in awarding benefits from the month of the first qualifying pulmonary function study, June 2004, because the qualifying pulmonary function study shows only the onset of claimant's total disability, but not the onset of total disability due to pneumoconiosis. Employer's Supplemental Brief at 3-4. Employer's contention lacks merit.

Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 891-92, 22 BLR 2-514, 2-530 (7th Cir. 2002); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Contrary to employer's argument, the administrative law judge did not rely on the June 2004 pulmonary function study as the earliest evidence of total disability. Rather, the administrative law judge correctly found, and employer does not contest, that claimant has been continuously totally disabled from a pulmonary standpoint since June 2004, based upon the uniformly qualifying pulmonary function studies and unanimous medical opinion evidence of record. The administrative law judge further found that this continuous period of total disability, together with claimant's more than fifteen years of qualifying coal mine employment, established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and that the presumption was not rebutted. Thus, as claimant and the Director contend, on the facts of this case, the administrative law judge permissibly concluded that, through application of the Section 411(c)(4) presumption, claimant proved that his compensable totally disabling lung disease began in June 2004, and that, therefore, it is appropriate that benefits be paid beginning with that month.[11] *See* 20 C.F.R. §725.503(b); *see also Consolidation Coal*

[11] Employer additionally contends that, because the administrative law judge found that Dr. Cohen's June 8, 2004 medical opinion is not sufficiently reasoned to

Co. v. Director, OWCP [*Bailey*], 721 F.3d 789, 794, BLR (7th Cir. 2013) (holding that disability causation may be established by the fifteen-year presumption for the purpose of showing a change in an applicable condition of entitlement at 20 C.F.R. §725.309); *Zettler v. Director, OWCP*, 886 F.2d 831, 837-37 (7th Cir. 1989) (holding that a 1971 positive chest x-ray used to invoke the 20 C.F.R. Part 727 interim presumption of total disability due to pneumoconiosis, combined with the miner's testimony that he was disabled as of 1973, constituted substantial evidence supporting an award of benefits commencing prior to the regulatory default date); Decision and Order at 35; Claimant's Supplemental Brief at 3-5; Director's Supplemental Brief at 7-10. Therefore, on the facts of this case, we affirm the administrative law judge's finding that benefits commence as of June 2004, the month in which the evidence established that claimant became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503(b).

---

establish that claimant's total disability is due to pneumoconiosis, the administrative law judge acted inconsistently in relying upon Dr. Cohen's medical opinion to establish when claimant became totally disabled due to pneumoconiosis. Employer's Brief at 32. Employer's argument is misplaced. As set forth above, the administrative law judge based his determination of the date for the commencement of benefits on the first evidence that gave rise to the unrebutted presumption of total disability due to pneumoconiosis, namely, the June 2004 pulmonary function study, the validity of which is uncontested. He did not rely upon Dr. Cohen's disability causation opinion. Decision and Order at 35.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge