BRB No. 97-0333 BLA

CHARLES H. BLAKELEY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
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 Upon Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Thomas M. Rhoads (Rhoads & Rhoads, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Upon Remand (93-BLA-1798) of Administrative Law Judge Richard K. Malamphy 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*. This is the second time this case is before the Board on appeal. By Decision and Order dated December 12, 1994, Administrative Law Judge Bernard J. Gilday, Jr. awarded benefits under 20 C.F.R. Part 718.[1] Employer appealed the

[1] Claimant filed his claim on May 26, 1992. Director's Exhibit (DX) 1.

award, and the Board affirmed Judge Gilday's finding that claimant established the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). *Blakeley v. Peabody Coal Co.*, BRB No. 95-0856 BLA (July 31, 1995)(unpub.). The Board, however, vacated Judge Gilday's finding that claimant established total disability under 20 C.F.R. §718.204(c)(1) because he failed to weigh all the contrary probative evidence of record prior to finding claimant totally disabled. *Id.* The Board also vacated Judge Gilday's finding under 20 C.F.R. §718.204(b) as well as his finding regarding the onset date of total disability due to pneumoconiosis. *Id.* On remand, the case was reassigned to Administrative Law Judge Richard K. Malamphy (the administrative law judge). The administrative law judge issued a Decision and Order Upon Remand awarding benefits on October 17, 1996. On appeal, employer argues that the administrative law judge erred in his analysis under 20 C.F.R. §718.204(b) and (c). Additionally, employer contends that the administrative law judge erred in ordering benefits to commence from the date claimant filed his claim. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 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).

On appeal, employer challenges the administrative law judge's determination that claimant is totally disabled. Employer first argues that the administrative law judge ignored

the Board's instruction that he render specific findings under 20 C.F.R. §718.204(c)(1)-(4). Contrary to employer's argument, in weighing the pulmonary function study evidence at Section 718.204(c)(1), the administrative law judge permissibly credited the most recent study of record, dated May 6,1993, which is qualifying for total disability. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); D&O Upon Remand at 3. The administrative law judge also properly credited the two most recent arterial blood gas studies dated August 4 and 21, 1992 as being qualifying for total disability under Section 718.204(c)(2).[2] *Id*. Moreover, under Section 718.204(c)(4), the administrative law judge noted that claimant was examined by five physicians, each of whom opined that claimant is totally disabled. Inasmuch as the administrative law judge considered claimant to have established total disability pursuant to Sections 718.204(c)(1), (c)(2), and (c)(3), he complied with the Board's directive on remand.

We further reject employer's argument that the administrative law judge failed to conduct a *Shedlock* analysis. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). Because the administrative law judge specifically noted that he had considered all of the contrary probative evidence in finding claimant established total disability, Decision and Order Upon Remand at 8, his analysis is consistent with *Shedlock*. *Id*.

[2] With respect to Section 718.203(c), the administrative law judge properly found that there is no medical evidence of record to establish that claimant has cor pulmonale with right-sided congestive heart failure by which claimant could establish total disability. Decison and Order (D&O) Upon Remand at 3.

Employer's next argument is that the administrative law judge erred in weighing the medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4). Employer specifically challenges the administrative law judge's reliance on the opinions of Drs. Wright, Anderson, Lane, and Taylor as establishing that claimant is totally disabled from performing his usual coal mine employment. We reject employer's arguments as without merit. In the instant case, the administrative law judge properly determined that claimant last worked as a mechanic in the mines. D&O Upon Remand at 6. Contrary to employer's contention, the admnistrative law judge also properly found that Drs. Wright, Anderson, and Lane each opined that claimant was unable to perform his usual coal mine work.[3] *Id*. Inamsuch as the adminstrative law judge properly noted that Drs. Wright, Anderson, and Lane were aware that claimant had last worked as a mechanic when they diagnosed him as being totally disabled, we affirm his decision to credit their opinion at Section 718.204(c)(4).

[3] Dr. Wright diagnosed that claimant suffered respiratory impairment sufficient to preclude mining. DX 27; Employer's Exhibit (EX) 2. Dr. Anderson opined that because of decreased pulmonary function and obesity, claimant is unable to perform his usual coal mine employment. DX 27; EX 1. Dr. Lane also opined that from a respiratory standpoint, claimant is unable to perform his usual coal mine work. DX 27; EX 4.

Furthermore, the administrative law judge permissibly relied on Dr. Taylor's opinion at Section 718.204(c). We note that Dr. Taylor opined that claimant should not carry more than thirty pounds for a prolonged period of time. EX 3 at 9. Insofar as the administrative law judge found that claimant's usual coal mine employment required him to handle tools that weighed up to one hundred pounds, Decision and Order Upon Remand at 6, Dr. Taylor's opinion was reasonably considered to be supportive of a finding of total disability by the administrative law judge under Section 718.204(c)(4). *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) aff'd 9 BLR 1-104 (1986). Thus, because there is substantial evidence to support the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(4), it is affirmed.[4]

[4] Dr. Traughber opined that claimant has mild to moderately severe respiratory impairment. DXs 11, 12. Although employer correctly points out that Dr. Traughber did not address whether claimant is totally disabled, any error committed by the administrative law judge in crediting Dr. Traughber's opinion at 20 C.F.R. §718.204(c)(4) is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984), as the administrative law judge's finding that claimant established total disability would still be supported by substantial evidence of record.

Additionally, employer argues that even if claimant is totally disabled, the administrative law judge erred in finding that claimant established causation under 20 C.F.R. §718.204(b). In order to establish causation under Section 718.204(b), we note that a claimant must establish that his totally disabling respiratory impairment was due, at least in part, to pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). According to employer, the administrative law judge selectively analyzed the opinions of Drs. Wright and Taylor in finding causation established under Section 718.204(b). Employer also contends that the administrative law judge failed to inquire whether pneumoconiosis played more than a de minimis role in claimant's respiratory impairment as required by *Adams*. Employer's arguments are rejected as without merit. The Board previously held that the opinions of Drs. Lane, Anderson, Taylor, and Wright are supportive of a finding that claimant's totally disabling respiratory impairment is due at least in part to pneumoconiosis. *Blakeley*, slip op. at 5. Thus, on remand, the administrative law judge acted within his discretion in finding the opinions of Drs. Lane, Anderson, Taylor, and Wright sufficient to carry claimant's burden of proof at Section 718.204(b).[5] We, therefore,

[5] Contrary to employer's argument, although the administrative law judge's discussion of the pulmonary function study evidence may have been cursory within the context of 20 C.F.R. §718.204(c)(1), the administrative law judge properly considered at 20 C.F.R. §718.204(b) that Drs. Anderson, Wright, Lane, and Taylor attribute claimant's

affirm the administrative law judge's finding that claimant established causation pursuant to 20 C.F.R. §718.204(b) as supported by substantial evidence.

Lastly, employer argues that the administrative law judge erred in ordering benefits to commence May, 1992, the month in which claimant filed for benefits. According to employer, the administrative law judge failed to follow the Board's directive that he consider whether there was credible evidence to establish that claimant was not totally disabled at some point subsequent to the date the claim was filed. *Blakeley*, slip op. at 6-7. Employer's argument is without merit. In addressing the issue of date of onset of total disability, the administrative law judge properly noted that there is evidence of record to suggest that claimant was totally disabled prior to the filing date of his claim. D&O Upon Remand at 8. Specifically, the record shows that both Drs. Wright and Anderson examined claimant in the months preceding May, 1992, and each physician opined that he was totally disabled in part by a respiratory condition. Director's Exhibit 27. Thus, contrary to employer's contention, although the record contains non-qualifying pulmonary function and arterial blood gas studies obtained subsequent to May, 1992, that evidence does not refute the possibility that claimant was totally disabled before he filed his claim.

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pulmonary function study results in part to obesity. D&O Upon Remand at 4-6. Moreover, employer is incorrectly states that the administrative law judge relied on Dr. Traughber's opinion at Section 718.204(b). Employer's Brief at 20. Rather, the administrative law judge specifically discounted Dr. Traughber's opinion relevant to Section 718.204(b) because the doctor recorded an inaccurate smoking history. D&O on Remand at 7.

Consequently, because the record fails to establish the exact date when claimant became totally disabled, the administrative law judge properly found claimant to be totally disabled as of the month in which he filed his claim. *See* 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); D&O Upon Remand at 8.

Accordingly, the administrative law judge's Decision and Order Upon Remand awarding benefits is affirmed.

SO ORDERED.

ROY P, SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge