BRB No. 10-0245 BLA

ARNOLD BRUMLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
H.C. COAL COMPANY	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE FUND	)	DATE ISSUED: 12/30/2010
	)	
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 Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (K & L Gates LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-5215) of Administrative Law Judge Alice M. Craft, rendered on a subsequent claim[1] filed

[1] Claimant has filed three previous claims for benefits. Director's Exhibit 1. Claimant's initial claim was filed on August 30, 1973 and was denied by the district director on July 9, 1981, because the evidence failed to establish any of the requisite elements of entitlement. *Id*. Claimant filed a second claim on April 5, 1984, which was

pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Claimant filed his subsequent claim on January 11, 2002,[2] and the district director issued a Proposed Decision and Order awarding benefits on April 17, 2003. Director's Exhibits 2, 33. At employer's request, the case was forwarded to the Office of Administrative Law Judges (the OALJ) for a formal hearing, which was held on April 30, 2004, before Administrative Law Judge Pamela Lakes Wood. In a Decision and Order issued on April 18, 2005, Judge Wood found that the evidence was sufficient to establish the existence of pneumoconiosis and total disability, but that claimant failed to prove that he was totally disabled due to pneumoconiosis. Claimant filed a motion for reconsideration on May 6, 2005, asserting that he did not receive a complete pulmonary evaluation, as required under the regulations. Judge Wood issued an Order Granting Reconsideration, Vacating Decision and Order, and Remanding Claim to District Director on July 28, 2005. Judge Wood determined that because the Department of Labor (DOL) sponsored pulmonary evaluation, performed by Dr. Wicker on February 26, 2002, was incomplete on the issue of disability causation, it was necessary to remand the

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again denied by the district director on August 28, 1984, for failure to establish any element of entitlement. *Id*. Claimant filed a third claim on December 6, 1988. *Id*. Administrative Law Judge Robert L. Hillyard found that claimant suffered from pneumoconiosis, but denied benefits because claimant did not establish total disability. *Id*. The Board affirmed the denial. *Brumley v. H.C. Coal Co*., BRB No. 92-1825 BLA (Sept. 17, 1993) (unpub.). Claimant filed a request for modification on June 20, 1994. *Id*. In a Decision and Order issued on March 7, 1997, Judge Hillyard denied modification, and the Board affirmed his decision. *Id.*; *Brumley v. H.C. Coal Co.*, BRB No. 97-1021 (Mar. 31, 1998) (unpub.). However, pursuant to claimant's appeal, the United States Court of Appeals for the Sixth Circuit vacated the denial and remanded the case for further consideration. *Brumley v. H.C. Coal Co*, No. 98-3602 (6th Cir. June. 14, 1999) (unpub.). On remand, in a Decision and Order issued on March 29, 2000, Judge Hillyard found that claimant established total disability but failed to prove that he was totally disabled by pneumoconiosis and denied benefits. Director's Exhibit 1. Claimant took no action with regard to that denial until he filed his current subsequent claim on January 11, 2002. Director's Exhibit 2.

[2] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Based on the filing date of claimant's subsequent and prior claims, the recent amendments are not applicable to this case.

case to the district director in order for Dr. Wicker to correct the deficiencies in his report.

On remand, Dr. Wicker prepared two supplemental reports dated November 30, 2005 and December 6, 2005. The case was then returned to the OALJ, and a second hearing was held before Administrative Law Judge Joseph E. Kane on January 12, 2007. At the hearing, claimant again raised the issue of whether he had received a complete pulmonary evaluation. Judge Kane issued an Order of Remand on March 14, 2007, finding that Dr. Wicker's supplemental opinions also did not satisfy the Director's obligation to provide claimant with a complete pulmonary evaluation on the issue of disability causation pursuant to 20 C.F.R. §725.406. Judge Kane therefore remanded the case to the district director with an instruction that claimant be provided with a new pulmonary evaluation with a different physician.

On remand, claimant was evaluated by Dr. Baker at the request of DOL. When the case was returned to the OALJ, it was assigned to Judge Craft (the administrative law judge). In a Decision and Order issued on December 9, 2009, the administrative law judge credited claimant with twenty-three and three-quarter years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established a totally disabling respiratory impairment due to coal dust exposure, based on Dr. Baker's opinion, and that he demonstrated, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the claim on the merits, the administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits, commencing March 2001, the month in which the denial of claimant's prior claim became final.

On appeal, employer contends that claimant should not have received a new pulmonary evaluation with Dr. Baker, as Dr. Wicker's opinion was adequate to fulfill the DOL's obligation pursuant to 20 C.F.R. §725.406. Employer requests that the case be remanded to the administrative law judge for consideration of only that evidence which was initially transferred to Judge Kane. Employer also contends that the principle of *res judicata* precludes claimant from establishing that he is totally disabled due to pneumoconiosis based on Dr. Baker's 2007 report, and that the administrative law judge erred in failing to address whether there has been an actual change in claimant's condition since the prior denial of his claim. Employer further asserts that the administrative law judge erred in crediting the newly submitted opinion of Dr. Baker, along with the opinions of Drs. Bushey and Westerfield, developed in conjunction with claimant's prior claim, over the opinions of Drs. Dahhan and Broudy, on the issue of

whether claimant's disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] Finally, employer asserts that the administrative law judge erred in determining the date from which benefits are payable. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a brief in response to employer's appeal, unless specifically requested to do so by the Board.

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.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. Complete Pulmonary Evaluation

Initially, we address employer's contention that Dr. Wicker's opinion was adequate to fulfill the DOL's obligation pursuant to 20 C.F.R. §725.406 and, therefore, claimant should not have received a new pulmonary evaluation by Dr. Baker. The initial DOL-sponsored pulmonary evaluation was performed by Dr. Wicker on February 26, 2002. Director's Exhibit 42. Dr. Wicker recorded a coal mine employment history of thirty-five years, noted the absence of a smoking history, and obtained a chest x-ray, a pulmonary function study, and a blood gas study. *Id*. Dr. Wicker read the x-ray as positive for simple pneumoconiosis and noted the presence of a Category A large opacity. *Id*. Dr. Wicker diagnosed simple pneumoconiosis, based on the x-ray and claimant's employment history. *Id*. Dr. Wicker opined that claimant was totally disabled, stating that claimant's "respiratory capacity does not appear to be adequate to perform his previous occupation in the coal mining industry which appears to be due to exposure to coal in the coal mining industry." *Id*. When asked to identify the extent to which pneumoconiosis contributed to the impairment, he wrote, "[n]ot applicable." *Id*.

[3] We affirm, as unchallenged by the parties on appeal, the findings in which Judge Craft (the administrative law judge) credited the miner with twenty-three and three-quarter years of coal mine employment and determined that the evidence, as a whole, is sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203, and total disability under 20 C.F.R. §718.204(b)(2)(i), (iv). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

Judge Wood found that Dr. Wicker's opinion did not constitute a complete pulmonary evaluation because he "relie[d] upon an inaccurate smoking history" and "left the critical portions . . . on the issue of the etiology of [claimant's] total disability blank." July 28, 2005 Order of Remand at 3. Judge Wood further noted that Dr. Wicker provided no explanation for his statement that claimant's disabling impairment "appears to be due to exposure to coal in the coal mining industry." *Id*., *quoting* Director's Exhibit 42. Judge Wood concluded that it was necessary to remand the case to the district director and explained:

> Although reliance upon an inaccurate smoking history may not be grounds for a remand, I agree with the [district director] that a complete pulmonary examination should include a determination by the examiner as to whether coal mine employment contributed to [claimant's] respiratory condition[,] as well as consideration by the examiner of the impact of any repeat testing upon his opinion. . . . [U]nder the specific facts of this case, I find that a remand for clarification and expansion of Dr. Wicker's opinion, to remedy the above deficiencies, is required.

July 28, 2005 Order of Remand at 4.

On remand, the district director sought clarification of Dr. Wicker's disability causation opinion. In a letter dated November 30, 2005, Dr. Wicker reiterated that claimant suffers from pneumoconiosis, as seen on x-ray, and further stated that the fact that claimant has smoked in the past affects the diagnosis. Director's Exhibit 42-19. He stated that cigarette smoking would contribute to claimant's pulmonary disability, and that claimant's "respiratory incapacity is based primarily on his obstructive lung disease which would have arisen primarily from his cigarette abuse." *Id*. He concluded, "It is my opinion that, at this point, his disability arises purely from the cigarette abuse." *Id*.

In a subsequent letter dated December 6, 2005, Dr. Wicker reiterated his opinion that claimant's respiratory impairment arises solely from claimant's "abuse of cigarettes." Director's Exhibit 42. He opined that claimant "does not appear to have complicated [pneumoconiosis], rather he has simple pneumoconiosis" based on claimant's history of "coal mine employment plus [chest x-ray findings]." *Id*. He noted that repeat pulmonary function studies revealed no significant difference in terms of the normal predicted values and, therefore, would not change his opinion as to claimant's total disability. *Id*. Dr. Wicker also stated, "[i]n terms of his mine employment contributing to his disability, I see no evidence beyond the actual presence of pneumoconiosis that his mine employment contributed to his disability. Once again, I feel that his disability arises solely, at this point, from his cigarette abuse." *Id*.

The case was subsequently returned to the OALJ and re-assigned to Judge Kane, at which time claimant objected to Dr. Wicker's supplemental reports, asserting that DOL again failed to meet its obligation to provide him with a complete pulmonary evaluation pursuant to 20 C.F.R. §725.406. Claimant requested that Dr. Wicker's opinion be stricken from the record, and that he be provided with a new pulmonary evaluation by a different physician. Employer objected to claimant's request.

On March 14, 2007, Judge Kane issued an Order of Remand, finding that Dr. Wicker's opinion failed to satisfy the Director's obligation to provide a complete pulmonary evaluation. In support of this ruling, Judge Kane noted that Dr. Wicker's diagnosis of pneumoconiosis was based solely on an x-ray reading and claimant's history of coal dust exposure and did not constitute a reasoned medical opinion for purposes of diagnosing pneumoconiosis at 20 C.F.R. §718.202(a)(4), that Dr. Wicker did not address the etiology of claimant's chronic bronchitis, relevant to the issue of legal pneumoconiosis, and that Dr. Wicker failed to cite to any objective evidence to support his opinion on disability causation. Judge Kane specifically noted:

> There are [] problems with Dr. Wicker's total disability due to pneumoconiosis opinion. In his first opinion, Dr. Wicker related claimant's impairment to coal dust exposure. However, he provided no basis for this finding. He needed to identify objective testing or symptoms to support this finding. Then in his supplemental opinions[,] he changed his opinion and related the impairment to smoking. Dr. Wicker also provided no objective testing to support his opinion. He simply relied upon [c]laimant's history of smoking which is not even definite. Therefore, his opinion is unreasoned and undocumented.

Order of Remand at 3. Judge Kane concluded that because Dr. Wicker provided three medical opinions in this case, all of which were "unreasoned and undocumented," and in light of the fact that the "claim has already been remanded once and the problems were not corrected," it was necessary to remand the case to the district director with a specific instruction that claimant is entitled to a new examination by an entirely different physician. *Id.*

On remand to the district director, claimant was sent to Dr. Baker for a new DOL-sponsored evaluation, which was conducted on April 3, 2007. Director's Exhibit 47. Dr. Baker concluded that claimant had both clinical and legal pneumoconiosis, and is totally disabled due, at least in part, to his coal dust exposure.[5] *Id.* The case was returned to the

[5] In response to Dr. Baker's examination, employer also obtained a new examination of claimant by Dr. Broudy on January 16, 2008. Employer's Exhibit 2. Dr.

OALJ and was assigned to Judge Craft (the administrative law judge), who issued a Decision and Order Awarding Benefits on December 9, 2009, which is the subject of this appeal.

Employer asserts on appeal that Dr. Wicker's initial report and two supplemental letters satisfy DOL's obligation to provide claimant with a complete pulmonary evaluation, and that Judge Kane erred in remanding the case in order for claimant to receive a new pulmonary evaluation with a different physician. Employer's Brief in Support of Petition for Review at 16-20. Employer states, "[i]t was very prejudicial to employer to have to face multiple DOL-sponsored reports, especially when the first exam and reports by Dr. Wicker weighed against entitlement." *Id*. at 18. Employer maintains that Dr. Baker's report should be stricken from the record. We disagree.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), implemented by 20 C.F.R. §§718.101(a), 725.406. The issue of whether the Director has met this duty may arise where "the administrative law judge finds a medical opinion incomplete," or where "the administrative law judge finds that the opinion, although complete, lacks credibility." *Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994); *accord Cline v. Director, OWCP*, 917 F.2d 9, 11, 14 BLR 2-102, 2-105 (8th Cir. 1990); *Newman v. Director, OWCP*, 745 F.2d 1162, 1166, 7 BLR 2-25, 2-31 (8th Cir. 1984). The United States Court of Appeals for the Sixth Circuit has recently set forth the standard for determining whether a pulmonary evaluation is complete:

> In the end, the [Department of Labor's] duty to supply a "complete pulmonary evaluation" does not amount to a duty to meet the claimant's burden of proof for him. In some cases, that evaluation will do the trick. In other cases, it will not. But the test of "complete[ness]" is not whether the evaluation presents a winning case. The [Department of Labor] meets its statutory obligation to provide a "complete pulmonary evaluation" under 30 U.S.C. §923(b) when it pays for an examining physician who (1) performs all the medical tests required by 20 C.F.R. §§718.101(a) and 725.406(a), and (2) *specifically links each conclusion in his or her medical opinion to those medical tests*. Together, the completion of these tasks will result in a medical opinion . . . that is both documented, *i.e.*, based on objective medical evidence, and reasoned.

Broudy agreed that claimant has clinical pneumoconiosis by x-ray, but opined that his disabling obstructive respiratory impairment is due entirely to smoking. *Id.*

Greene v. King James Coal Mining, Inc., 575 F.3d 628, 641-42, 24 BLR 2-199, 221 (6th Cir. 2009) (emphasis added). The court held in *Greene* that, while the physician who performed the DOL-sponsored pulmonary evaluation "could have explained his reasoning more carefully," the miner received a complete pulmonary evaluation, given that the physician's report addressed all of the elements of entitlement, "even if lacking in persuasive detail." *Greene*, 575 F.3d at 642, 24 BLR at 2-221.

Employer maintains that because Dr. Wicker addressed all of the requisite elements of entitlement, his opinion satisfies the Director's obligation at 20 C.F.R. §725.406, and the requirements of *Greene*. However, based on Judge Kane's rational determination that Dr. Wicker did not provide a complete pulmonary evaluation on the issue of disability causation because he did not link his medical conclusions to any objective medical evidence in the record, we affirm his finding that claimant did not receive a complete pulmonary evaluation. *See Greene*, 575 F.3d at 642, 24 BLR at 2-221; *R.G.B.* [*Blackburn*] *v. Southern Ohio Coal Co.*, 24 BLR 1-129, 1-146 (*en banc*). Furthermore, we reject employer's assertion that it has been prejudiced by Dr. Baker's examination, since employer also obtained a pulmonary evaluation by Dr. Broudy in response to the new DOL-sponsored pulmonary evaluation by Dr. Baker. Thus, we reject employer's argument that the case must be remanded to the administrative law judge with instructions that she strike Dr. Baker's report from the record and consider only the evidence that was originally before Judge Kane.

II. Merits of Entitlement

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

In addition, when 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 "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, claimant's prior claim was denied because the evidence was insufficient to establish that his total disability was due to pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing this element of entitlement in order to have the administrative law judge review the subsequent claim on the merits. *See White*, 23 BLR at 1-3.

Employer contends that the administrative law judge erred in relying on Dr. Baker's opinion to find that claimant satisfied his burden of proof at 20 C.F.R. §725.309, without first considering whether claimant has shown a worsening of his condition since the denial of his prior claim. Employer asserts that claimant could not satisfy the requirements of 20 C.F.R. §725.309 by "simply bring[ing] in repetitive new evidence from Dr. Baker restating his old discredited causation opinion as being sufficient to establish the requirements of [20 C.F.R. §]725.309." Employer's Brief in Support of Petition for Review at 23. Employer argues that because "Dr. Baker's opinion has not changed [on the issue of disability causation] since 1990," Dr. Baker's 2007 opinion can not be relied upon to satisfy claimant's burden under the regulation. *Id*.

Contrary to employer's contention, however, the regulation at 20 C.F.R. §725.309 specifically provides that claimant may demonstrate a change in an applicable condition of entitlement by submitting new evidence establishing an element of entitlement previously adjudicated against claimant. *See White*, 23 BLR at 1-3; *see also* 65 Fed. Reg. 79,968 (Dec. 20, 2000). As claimant's prior claim was denied because he failed to prove the element of disability causation, the administrative law judge engaged in a proper analysis of the newly submitted evidence to determine whether claimant had satisfied his burden of proving this one element. Moreover, we reject employer's assertion that principles of *res judicata* preclude the administrative law judge from crediting Dr. Baker's 2007 disability causation opinion, based on the fact that Dr. Baker's 2003 diagnosis of total disability due to pneumoconiosis was found insufficient to establish disability causation in the prior claim. The regulation at 20 C.F.R. §725.309(d) specifically provides that "no findings made in conjunction with a prior claim, except those based on a party's failure to contest an issue, . . . shall be binding on any party in the adjudication of the subsequent claim." 20 C.F.R. §725.309(d)(4); *see* 65 Fed. Reg. 79,973 (Dec. 20, 2000); *Williams Mountain Coal Co. v. Director, OWCP* [*Compton*], 328 F. App'x 243 (4th Cir. 2009). Thus, employer's arguments with respect to 20 C.F.R. §725.309 are without merit.

We now turn to employer's assignments of error with regard to the weight accorded to the conflicting medical opinion evidence. In considering whether claimant established disability causation at 20 C.F.R. §718.204(c) and a change in an applicable condition of entitlement under 20 C.F.R. §725.309, the administrative law judge considered the medical opinions of Dr. Wicker, summarized *supra*, in addition to the opinions of Drs. Dahhan, Baker and Broudy.

Dr. Dahhan examined claimant on December 17, 2002, and opined that there were insufficient objective findings to justify a diagnosis of pneumoconiosis, based on the normal chest examination and arterial blood gas test, along with a pulmonary function study that showed an obstructive impairment with significant response to bronchodilators. Director's Exhibits 31, 47. Dr. Dahhan concluded that claimant is

totally disabled, but attributed his total disability to a "lengthy smoking habit and hyperactive airway disease that has been confirmed by the significant response to bronchodilator therapy." *Id*. He opined that there was no evidence of impairment caused, or aggravated, by coal dust exposure. *Id*. In a deposition conducted on May 13, 2008, Dr. Dahhan reiterated his conclusion that the significant reversibility of the obstructive defect indicates that claimant has bronchial asthma and that the obstructive process is disabling. Employer's Exhibit 4.

Dr. Baker examined claimant on April 3, 2007, at the request of the DOL, and noted that an x-ray was positive for pneumoconiosis. Director's Exhibit 47. He further noted that arterial blood gas testing revealed mild hypoxemia and pulmonary function testing revealed a moderate obstructive defect, but that the latter test was later invalidated. *Id*. Dr. Baker diagnosed coal workers' pneumoconiosis based on an abnormal chest x-ray and significant history of coal dust exposure. *Id*. He further diagnosed chronic obstructive pulmonary disease (COPD) with a moderate obstructive defect, based on pulmonary function testing, chronic bronchitis by history, and hypoxemia, based on arterial blood gas testing. *Id*. Dr. Baker attributed claimant's respiratory condition to coal mine work, noting that claimant's smoking history was less than five pack years, that claimant had not smoked in twenty years, and that claimant worked eighteen to twenty-three years in coal mine employment. *Id*. Dr. Baker concluded that claimant does not have the respiratory capacity to perform the work of a coal miner because his FEV1 was forty to fifty-nine percent of predicted, with claimant's clinical pneumoconiosis and legal pneumoconiosis both contributing to his disabling impairment. *Id*.

In a November 1, 2007 supplemental report, Dr. Baker assumed a coal mine employment history of eighteen years and a smoking history varying from one-half of a pack of cigarettes from 1939 to 1950 to one pack of cigarettes for fifty years. Director's Exhibit 47. He concluded that if claimant had a fifty pack year smoking history, then smoking would be the predominant cause of his breathing difficulties, but because coal dust exposure also causes obstructive defects, claimant's coal mine employment would be contributory. *Id*. Dr. Baker stated that claimant's "significant x-ray changes" imply that he is "unduly sensitive to coal dust exposure by formation of nodularity and may mean he is unduly sensitive to coal dust in terms of obstructive airway disease." *Id*. After noting that there was no procedure to partition the effects of cigarette smoking and coal dust exposure, he concluded that coal dust exposure would account for fifteen percent of the decline in claimant's FEV1. *Id*.

Dr. Broudy examined claimant on February 6, 2008. Employer's Exhibit 2. He noted that a chest x-ray was positive for pneumoconiosis and that the pulmonary function testing results exceeded the criteria for total disability. *Id*. He diagnosed COPD with "marked responsiveness to bronchodilation" and opined that claimant suffered from a

combination of a fixed and partially reversible obstruction due to asthma, as pneumoconiosis on x-ray would not be expected to cause that type of impairment. *Id*. In a deposition conducted on May 2, 2008, Dr. Broudy reiterated his conclusions. Employer's Exhibit 3.

In considering the conflicting evidence, the administrative law judge found that the physicians were in agreement that claimant had a disabling obstructive respiratory impairment, but that they disagreed as to the cause of claimant's disability. Decision and Order at 47. The administrative law judge assigned less weight to the opinions of Drs. Dahhan and Broudy, noting that she could "find no specific and persuasive reasons for concluding that their judgments that exposure to coal dust did not cause or contribute to [claimant's] disability or impairment did not rest on their disagreement with my finding that the [c]laimant has legal pneumoconiosis." *Id*. at 52. The administrative law judge also found Dr. Wicker's disability causation opinion to be unpersuasive, as he did not explain his conclusion that claimant's disabling obstructive impairment was due entirely to smoking. *Id*. at 47. In contrast, the administrative law judge found Dr. Baker's opinion, that claimant's disabling COPD was due, in part, to coal dust exposure, to be reasoned and documented and entitled to controlling weight. *Id*. at 48. Thus, the administrative law judge found that claimant established disability causation at 20 C.F.R. §718.204(c) and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *Id*.

Considering all of the evidence of record, the administrative law judge assigned less weight to the opinions that Drs. Broudy and Vaezy submitted in conjunction with the prior claim, because neither physician explained why coal dust was not a factor in claimant's obstructive condition. Decision and Order at 47. She further found that a preponderance of the evidence established disability causation under 20 C.F.R. §718.204(c), as "Dr. Baker, in 1990 and 2007, Dr. Bushey, in 1990, and Dr. Westerfield, in 1995, all state that [claimant] was disabled due this obstructive disease, which in turn was due, at least in part, to coal dust exposure." *Id*. at 52.

Employer asserts that the administrative law judge erred in assigning less weight to Dr. Broudy's disability causation opinion, on the ground that he did not diagnose legal pneumoconiosis. Employer's Brief in Support of Petition for Review at 25-26. Employer maintains that, insofar as Dr. Broudy agreed that claimant had x-ray evidence for simple clinical pneumoconiosis, he necessarily diagnosed legal pneumoconiosis, which is defined at 20 C.F.R. §718.201.[6] *Id*. Contrary to employer's contention,

[6] "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). The phrase "arising out of coal mine employment" refers to "any chronic pulmonary disease or

however, the administrative law judge found, pursuant to 20 C.F.R. §718.202(a)(4), that the evidence was sufficient to establish the existence of legal pneumoconiosis, in the form of COPD due, in part, to coal dust exposure. The administrative law judge specifically determined at 20 C.F.R. §718.202(a)(4), that Dr. Broudy's opinion, excluding coal dust exposure as a cause of claimant's COPD was not well-reasoned, and we have affirmed this finding, as employer has not challenged the administrative law judge's credibility determinations with regard to 20 C.F.R. §718.202(a)(4) in this appeal. Slip op. at 4 n.3. Thus, because Dr. Broudy specifically opined that claimant's obstructive respiratory condition was unrelated to coal dust exposure,[7] his opinion is not consistent with the administrative law judge's finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). We affirm, therefore, the administrative law judge's decision to accord the opinions of Drs. Dahhan[8] and Broudy less weight on the issue of disability causation at 20 C.F.R. §718.204(c), based on their failure to diagnose legal pneumoconiosis. *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Director, OWCP, v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see Toler v. Eastern Associated Coal Co*., 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995).

Additionally, we reject employer's argument that the administrative law judge erred in discounting Dr. Wicker's opinion. The administrative law judge reasonably found that Dr. Wicker offered contradictory statements as to the etiology of claimant's respiratory impairment:

> Dr. Wicker initially said that coal dust caused [claimant's] obstructive disease, which is totally disabling. But after he was advised that [claimant] had a smoking history of from [eleven to fifty] years, he said that [claimant's] disability was due entirely to smoking. . . . Nor did he offer any reason why he attributed [claimant's] obstructive disease entirely to

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respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] Dr. Broudy attributed claimant's obstructive respiratory condition to bronchial asthma and smoking. Employer's Exhibits 2, 3. He also stated that the evidence of simple clinical pneumoconiosis found on x-ray would not be expected to cause the type of obstructive respiratory impairment claimant demonstrated on pulmonary function testing. *Id*.

[8] Dr. Dahhan did not diagnose either clinical or legal pneumoconiosis.

> smoking, despite . . . the lengthy history of coal mine employment he attributed to [claimant].

Decision and Order at 47. Thus, we affirm her finding that Dr. Wicker's opinion was insufficiently reasoned.[9] *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Lastly, employer asserts that Dr. Baker's opinion is not sufficiently reasoned to satisfy claimant's burden of proof at 20 C.F.R. §718.204(c), because Dr. Baker "admitted that he could not 'partition the results of cigarette smoking and coal dust,' but he speculated that 'coal dust exposure has contributed perhaps 15 to even 20%'" in claimant's disability. Employer's Brief in Support of Petition for Review at 33, *quoting* Director's Exhibit 47. Employer also contends that the administrative law judge did not explain her credibility findings as required by the Administrative Procedure Act(APA).[10] *Id*. at 30-32. Employer's assertions of error are without merit.

Contrary to employer's contention, Dr. Baker was not required to definitely apportion the amount of impairment due to coal dust exposure in order for the administrative law judge to rely on his opinion at 20 C.F.R. §718.204(c). To the extent that Dr. Baker specifically opined that coal dust exposure was a substantially contributing factor in claimant's respiratory disability, the administrative law judge had discretion to find Dr. Baker's opinion to be sufficient to satisfy claimant's burden of proof. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Moreover, the administrative law judge was persuaded that Dr. Baker's opinion was credible because he attributed claimant's respiratory disability to coal dust exposure, in part, despite the fact that he reported a greater smoking history and a lesser history of coal dust exposure than

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[9] Employer further argues that the administrative law judge erred in concluding that Dr. Wicker offered an inconsistent opinion as to whether claimant has complicated pneumoconiosis. However, because we affirm, on an alternate ground, the administrative law judge's finding that Dr. Wicker's opinion was not sufficiently reasoned on the issue of disability causation, we decline to address employer's additional arguments with respect to Dr. Wicker's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[10] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented . . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a).

was found by the administrative law judge. Decision and Order at 48. The administrative law judge has complied with the requirements of the APA, and specifically explained why she found Dr. Baker's opinion, that claimant suffers from a disabling respiratory impairment due, in part, to coal dust exposure, to be reasoned and documented:

> Dr. Baker's most recent opinion demonstrates that differences in assumptions about how long [claimant] worked in the mines, and how long he smoked, affect the relative roles played by these two risk factors in causing his obstructive impairment, but do not negate the premise that both played some role as long as both were significant. I found a longer history of coal mine work ([twenty-three and three-quarters] years as opposed to [eighteen]), and a lesser smoking history ([twenty to twenty-five] pack-years as opposed to [fifty]) than Dr. Baker was asked to assume. Applying Dr. Baker's reasoning to my findings, coal dust exposure would have made an even greater contribution to [claimant's] obstructive disease than Dr. Baker postulated with the numbers provided to him. His opinion is supported by the evidence available to him. His attribution of [claimant's] obstructive disease to a combination of factors is consistent with the regulations, and sufficient to meet the requirement that coal dust be a contributing cause to [claimant's] obstructive impairment to diagnose legal pneumoconiosis.

Decision and Order at 48; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).[11]

Because the credibility of the medical experts is committed to the sound discretion of the administrative law judge, we affirm her decision to credit Dr. Baker's opinion at 20 C.F.R. §718.204(c), and her conclusion that claimant established a change in an applicable condition of entitlement on the issue of disability causation based on his opinion pursuant to 20 C.F.R. §725.309. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-714, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277

[11] We reject employer's assertion that the administrative law judge did not explain the basis for his finding as to the length of claimant's smoking history. The administrative law judge discussed the discrepancies in the record with regard to the amount and duration of claimant's smoking habit and concluded, based on her consideration of all of the evidence, that claimant smoked at the rate of one-half to one pack a day, for a total of twenty to twenty-five years. Decision and Order at 6. We affirm this discretionary finding by the administrative law judge, as it is supported by substantial evidence. *See generally Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

F.3d 829, 836, 22 BLR 2-320, 2-325 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Clark*, 12 BLR at 1-151.

Moreover, in weighing all the evidence on the merits of the claim, the administrative law judge properly found that Dr. Baker's opinion was supported by the earlier medical opinions of Drs. Bushey and Westerfield, who opined in the prior claim that claimant was totally disabled due to pneumoconiosis. *Clark*, 12 BLR at 1-151; *Fields*, 10 BLR at 1-19. Accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and further affirm the award of benefits. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

III. Date of Entitlement

Employer's final argument on appeal is that the administrative law judge erred in determining the date from which benefits are payable. The administrative law judge found that "[w]hen [claimant] was examined by Dr. Baker in 1990, he was already totally disabled [and that] [t]here is no substantial evidence that he was not disabled at any time after Dr. Baker's 1990 examination." Decision and Order at 52. The administrative law judge acknowledged that claimant was not entitled to benefits for any period prior to the denial of his last claim. Because Judge Hillyard issued the denial in the prior claim on March 29, 2000, and claimant had one year during which to appeal that decision, the administrative law judge determined that benefits should be awarded, beginning March 2001, the month in which Judge Hillyard's denial of benefits became final. *Id*. at 52-53.

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 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, 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).

We agree with employer that the administrative law judge erred in relying on Dr. Baker's 1990 opinion to support her onset date determination, as the administrative law judge based her finding on evidence of total disability, without recognizing that the relevant date is the date of onset of total disability *due to pneumoconiosis*. *Lykins*, 12 BLR at 182-83. In addition, evidence predating the date upon which the prior denial became final cannot be used to establish the date from which benefits are payable. *See*

20 C.F.R. §725.309(d)(5). Pursuant to 20 C.F.R. §725.309(d)(5), "[i]n any case in which a subsequent claim is awarded, no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(5); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). We vacate, therefore, the administrative law judge's findings that benefits should commence March 2001, and remand this case to the administrative law judge for further consideration as to the proper date from which benefits are payable.

On remand, the administrative law judge is instructed to determine whether the relevant evidence establishes the date upon which claimant became totally disabled due to pneumoconiosis. Where a claimant is awarded benefits in a subsequent claim, the date for the commencement of benefits is determined in the same manner provided under 20 C.F.R §725.503(b), with the proviso that no benefits may be paid for any time period prior to the date upon which the denial of the previous claim became final. 20 C.F.R. §725.309(d)(5). If the new evidence does not establish when claimant became totally disabled due to pneumoconiosis, the administrative law judge must award benefits commencing January 2002, based on the filing date of the subsequent claim, pursuant to 20 C.F.R §725.503(b), unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. *See Owens*, 14 BLR at 1-50.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge