BRB No. 10-0250 BLA

RUSSELL FOUTS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
COASTAL COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: 12/23/2010
UNDERWRITERS SAFETY & CLAIMS, INCORPORATED	)	
	)	
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 William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Jonathan P. Rolfe (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-5788) of Associate Chief Administrative Law Judge William S. Colwell, rendered on a subsequent claim filed 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).[1] In a Decision and Order dated November 30, 2009, the administrative law judge credited claimant with at least thirty-two years of coal mine employment, as stipulated by the parties, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the newly submitted evidence was 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) and 718.203 and total disability due to simple pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). The administrative law judge found, therefore, that claimant was able to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

On the merits, the administrative law judge weighed the newly submitted evidence with the evidence from the prior claim, and found that the preponderance of the evidence established that claimant is totally disabled due to simple pneumoconiosis. Independent of this finding, the administrative law judge also determined that the evidence established that claimant suffers from complicated pneumoconiosis and, therefore, claimant is also entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits, commencing November 2003, "the month following the month in which complicated pneumoconiosis was established." Decision and Order at 30.

On appeal, employer contends that the administrative law judge erroneously weighed the medical opinion evidence in finding that claimant established total disability due to simple pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer further alleges that the administrative law judge erred in determining the date for the commencement of benefits. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response,

[1] Claimant filed an initial claim on October 21, 2002, which was denied by the district director on October 22, 2003, because claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to the denial until he filed this subsequent claim on July 17, 2006. Director's Exhibit 3.

agreeing with employer that the administrative law judge erred in his determination of the date for the commencement of benefits.[2]

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.[3] 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from 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*).

I. Total Disability Due to Simple Pneumoconiosis

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the medical opinions of Drs. Agarwal, Naeye and Jarboe. Dr. Agarwal examined claimant on August 9, 2006 and diagnosed coal workers' pneumoconiosis, progressive massive fibrosis, and chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure. Director's Exhibit 13. He noted that claimant's arterial blood gas study revealed mild resting hypoxemia, with a reduction in pO2 and pCO2 during exercise. *Id*. He opined that claimant suffers from a totally disabling respiratory impairment, based on reduced exercise capacity, with coal workers' pneumoconiosis as the main cause of the impairment and COPD playing a minor role. *Id*.

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[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's crediting of claimant with thirty-two years of coal mine employment and his determination 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), (2), (4), 718.203(b), a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. *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).

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

Dr. Naeye reviewed claimant's medical records, including the medical report of Dr. Agarwal, and prepared a consultative report dated December 17, 2006. Director's Exhibit 40. He opined that claimant has coal workers' pneumoconiosis and stated that claimant's pulmonary impairment prevented him from returning to coal mining. *Id*. Dr. Naeye indicated that he was unable to state how much of claimant's impairment was due to coal workers' pneumoconiosis and how much was due to claimant's smoking history, based on the biopsy data alone. *Id*.

Dr. Jarboe examined claimant on February 22, 2007 and reviewed claimant's medical records. Employer's Exhibit 1. He diagnosed coal workers' pneumoconiosis based on the lung biopsy. He noted that claimant's pulmonary function study revealed moderate airflow obstruction and hyperinflation of lung volumes, combined with significant air trapping. *Id*. He concluded that these conditions were "not characteristic of changes associated with coal workers' pneumoconiosis," and that the airflow obstruction was due to claimant's history of smoking and bronchial asthma *Id*. He opined that claimant has a totally disabling gas exchange impairment, evidenced by his exercise arterial blood gas studies, unrelated to coal workers' pneumoconiosis. *Id*. Dr. Jarboe reiterated his conclusions in a March 8, 2007 deposition. *Id*.

In weighing the medical opinions pursuant to 20 C.F.R. §718.204(c), the administrative law judge found that the opinions of Drs. Naeye and Jarboe were compromised by their "failure to diagnose legal coal workers' pneumoconiosis," contrary to the administrative law judge's finding that claimant's obstructive impairment is due, in part, to coal dust exposure.[4] Decision and Order at 17. The administrative law judge also found that neither physician offered a reasoned opinion as to the etiology of claimant's disabling respiratory impairment. In contrast, the administrative law judge found Dr. Agarwal's opinion to be well-reasoned, documented, and sufficient to establish that claimant's totally disabling respiratory impairment is due to pneumoconiosis. The administrative law judge concluded, "based on a *de novo* review of all of the relevant evidence of record," that claimant established "a totally disabling respiratory impairment due to simple coal workers' pneumoconiosis." *Id*. at 30.

On appeal, employer contends that the administrative law judge erred in according less weight to the opinion of Dr. Jarboe, than to the opinion of Dr. Agarwal, under 20

[4] Pursuant to 20 C.F.R. §718.201(a)(2), 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

C.F.R. §718.204(c).[5] Employer asserts specifically that the administrative law judge erred in finding that Dr. Jarboe's disability causation opinion was compromised by his failure to diagnose legal pneumoconiosis, as "Dr. Jarboe's report and deposition testimony, in fact, support a diagnosis of both clinical and legal pneumoconiosis." Employer's Brief in Support of Petition for Review at 18. Employer also maintains that, in finding that Dr. Jarboe did not sufficiently explain why claimant's respiratory impairment was due solely to non-coal dust related ailments, the administrative law judge ignored Dr. Jarboe's testimony, that claimant's "spirometric and lung volume testing was not consistent with disability due to coal workers' pneumoconiosis, but was consistent with causation by something other than coal dust inhalation." *Id*., *citing* Employer's Exhibit 1 at 16. Employer's allegations of error are without merit.

Contrary to employer's contention, Dr. Jarboe specifically opined that claimant's obstructive respiratory condition was not caused by his coal dust exposure. Employer's Exhibit 1 at 9-10 (medical report attached as deposition exhibit). The administrative law judge permissibly gave less weight to Dr. Jarboe's opinion, therefore, as it conflicted with his finding that claimant has legal pneumoconiosis in the form of an obstructive respiratory condition due, in part, to coal dust exposure. Decision and Order at 12-14, 17; *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).

In addition, we reject employer's allegation that the administrative law judge erred in finding that Dr. Jarboe's opinion was inadequately explained. Employer's Brief in Support of Petition for Review at 19-20. The administrative law judge specifically acknowledged Dr. Jarboe's opinion, that claimant's pattern of respiratory impairment – pure obstruction with no restriction – was more typical of the kind caused by cigarette smoking. The administrative law judge then noted that, in the preamble to the amended definition of pneumoconiosis, the Department of Labor (DOL) indicated that coal dust exposure is additive with smoking in causing clinically significant airway obstruction and quoted the DOL's statement that it is "now a well-documented fact" that coal dust exposure can cause obstructive lung disease. Decision and Order at 13, *quoting* 20 Fed. Reg. 79,943 (Dec. 20, 2000). The administrative law judge concluded that the portion of Dr. Jarboe's opinion regarding the cause of the claimant's obstructive impairment was entitled to less weight, stating:

[5] Because employer does not challenge the administrative law judge's finding that Dr. Naeye's opinion is insufficiently explained, it is affirmed. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

> Dr. Jarboe does not explain why the "'super normal FVC" with a reduced FEV1 and lung hyperinflation are more indicative of a non-coal dust induced lung disease in this particular miner. The reduced FEV1 and normal FVC indicate that the miner's lung disease is obstructive, not restrictive. Under the regulations, an obstructive lung disease without restriction may be due to coal dust exposure. In this light, Dr. Jarboe does not adequately explain his conclusion regarding the etiology given [claimant's] [thirty-two] year history of coal mine employment and [seventeen to nineteen] pack year smoking history.

Decision and Order at 14. We affirm, as within his discretion as fact-finder, the administrative law judge's determination that Dr. Jarboe's opinion is entitled to little weight because his view, that coal dust exposure does not cause pure obstruction, conflicts with the view accepted by the DOL. *Id*.; *see Martin v. Ligon Preparation Co*., 400 F.3d 302, 306-308, 23 BLR 2-261, 2-284-287 (6th Cir. 2005); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989).

Employer also challenges the administrative law judge's crediting of Dr. Agarwal's opinion. Contrary to employer's arguments, the administrative law judge permissibly found Dr. Agarwal's opinion to be well-documented and reasoned, and sufficient to meet claimant's burden of establishing that he is totally disabled due to pneumoconiosis.[6] Decision and Order at 18; *see Cornett*, 227 F.3d at 576, 22 BLR at 2-120; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *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). The administrative law judge stated:

> [Dr. Agarwal] properly takes the miner's smoking and coal dust exposure histories into account as well as biopsy evidence of [the] presence of the disease. Dr. Agarwal's conclusions are supported by the diagnostic testing, physical examination findings, observations and notation of complaints from [claimant]. Moreover, a review of Dr. Agarwal's report does not reveal that he premised his

[6] Employer's argument, that Dr. Jarboe took claimant's smoking and coal dust exposure histories into account, as well as the biopsy evidence of record, and that Dr. Jarboe offered "more of an explanation regarding his causation opinion than did Dr. Agarwal," amounts to a request that the Board reweigh the evidence, which we are not empowered to do. *See* Employer's Brief in Support of Petition for Review at 21; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988).

> opinion on views that are contrary to those of the Department [of Labor] in its preamble to the amended regulations.

Decision and Order at 18. Determining the credibility of the medical experts is committed to the sound discretion of the administrative law judge. *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 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. Because the administrative law judge acted within his discretion in fully crediting Dr. Agarwal's opinion, and in according less weight to Dr. Jarboe's opinion, and substantial evidence supports his conclusion that claimant is totally disabled due to simple pneumoconiosis, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c).

Based on our affirmance of the administrative law judge's finding, that claimant established, by a preponderance of the evidence, that he is totally disabled due to simple pneumoconiosis under 20 C.F.R. §718.204(c), we need not address employer's argument, that the administrative law judge erred in determining that claimant is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R §718.304, based on the finding of complicated pneumoconiosis. Therefore, the award of benefits is affirmed.[7]

II. Commencement of Benefits

The administrative law judge concluded that, because complicated pneumoconiosis was diagnosed based on the October 21, 2003 biopsy, claimant was entitled to benefits commencing that month. However, noting that he could not award claimant benefits prior to October 22, 2003 – the date of the denial of the prior claim – the administrative law judge awarded benefits beginning November 2003, "the month following the month in which complicated pneumoconiosis was established." *Id*. at 30. Employer and the Director assert that, because the prior denial of benefits did not become final until November 21, 2003, the administrative law judge erred in his designation of November 2003, as the date from which claimant is entitled to benefits. Because we declined to address the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis, however, we also decline to address the

[7] In light of our affirmance of the award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

propriety of the administrative law judge's reliance upon this finding to designate the date from which the award of benefits in this subsequent claim is payable.[8]

Generally, in cases in which entitlement to benefits has been demonstrated without invocation of the irrebuttable presumption, 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; *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Under 20 C.F.R. §725.503(b), and the relevant case law, if the date of onset of total disability due to pneumoconiosis is not ascertainable, benefits will commence 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).

In rendering his finding, that claimant is entitled to benefits beginning November 2003, the administrative law judge also indicated:

> Notably, had the miner not demonstrated complicated coal workers' pneumoconiosis, he would have been entitled to benefits from the date he filed this claim, which is July 2006. 20 C.F.R. §725.503(d). This is because the first medical opinion of total disability due to pneumoconiosis was issued by Dr. Agarwal in August 2006, and there is no medical data between the date of filing the claim and the date of Dr. Agarwal's examination to demonstrate when the miner became totally disabled due to the disease. Moreover, because no post-exercise blood gas testing was conducted in conjunction with the miner's original claim, the record does not contain sufficient evidence of a totally disabling respiratory condition at that time except for the very significant findings of complicated pneumoconiosis.

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[8] Even if we affirmed the award of benefits based upon the finding of complicated pneumoconiosis, the administrative law judge could not rely upon the October 21, 2003 biopsy evidence to determine the date from which benefits are payable. 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). The denial of the claimant's initial claim became final on November 21, 2003. Because the October 21, 2003 biopsy was developed before this date, it could not be used to determine the date of onset of claimant's total disability. The remaining evidence of complicated pneumoconiosis was developed after July 2006 – the month in which claimant filed his subsequent claim.

Decision and Order at 30 n. 12. We affirm the administrative law judge's determination that, in the absence of invocation of the irrebuttable presumption, claimant is entitled to benefits from the date he filed his subsequent claim, as it is consistent with 20 C.F.R. §725.503(d) and the relevant case law. *See Owens*, 14 BLR at 1-50; *Lykins*, 12 BLR at 1-182-83. Based upon the administrative law judge's appropriate finding, therefore, we modify the administrative law judge's decision to reflect that claimant is entitled to benefits as of July 2006. *Williams v. Director, OWCP*, 13 BLR 1-28, 1-30 (1989).

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed, but modified as to the date from which benefits commence, consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge