BRB No. 08-0369 BLA

R.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH COAL COMPANY	)	DATE ISSUED: 02/25/2009
	)	
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 Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd), Washington, D.C., for employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Acting 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 Awarding Benefits on Remand (2004-BLA-5725) of Administrative Law Judge Alice M. Craft with respect to a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the

second time. In a Decision and Order issued on September 22, 2005, Administrative Law Judge Daniel J. Roketenetz credited claimant with seventeen years of qualifying coal mine employment, and determined that this subsequent claim, filed on September 25, 2002, was subject to the regulatory provisions at 20 C.F.R. §725.309(d).[1] Judge Roketenetz found that the evidence developed since the prior denial of benefits established that claimant was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and thus, claimant had demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, however, Judge Roketenetz found that the evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or disability causation pursuant to 20 C.F.R. §718.204(c), and denied benefits.

On appeal, the Board vacated Judge Roketenetz's findings pursuant to Sections 718.202(a)(4), 718.204(c), and remanded this case for a reassessment and weighing of the medical opinions of Drs. Baker, McCormick, Sandlin and Jarboe on the issues of the existence of pneumoconiosis and disability causation. [*R.G.*] *v. Arch Coal Co*., BRB No. 06-0164 BLA (Sept. 22, 2006)(unpub.). On remand, this case was assigned to Judge Craft (the administrative law judge), who found that the weight of the evidence of record established the existence of legal pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and disability causation pursuant to 20 C.F.R. §718.204(c).[3] Accordingly, benefits were awarded, commencing in May 1999, the month in which the denial of claimant's prior claim became final.

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[1] Where a miner files a claim for benefits more than one year after the 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); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The applicable conditions of entitlement "shall be limited to those conditions upon which the prior claim was based." 20 C.F.R. §725.309(d)(2).

[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).

[3] The administrative law judge additionally determined that the prior claim had been denied by the district director for failure to establish the existence of pneumoconiosis and disability causation. After finding that the newly submitted medical opinions established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge law judge found that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and considered all of the evidence of record in adjudicating the merits of the claim. The administrative law judge did not readjudicate the issue of total respiratory

In the present appeal, employer challenges the administrative law judge's findings of pneumoconiosis and disability causation at Sections 718.202(a)(4), 718.204(c), and her determination of the appropriate date from which benefits should commence. Claimant responds, urging affirmance, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with employer's argument that the administrative law judge failed to properly apply the onset date provisions at 20 C.F.R. §725.503.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first contends that the administrative law judge erred in finding the existence of legal pneumoconiosis established pursuant to Section 718.202(a)(4). Employer maintains that the administrative law judge failed to provide valid reasons for crediting the opinions of Drs. Baker, Sandlin and McCormick, that claimant has chronic obstructive pulmonary disease (COPD) due to smoking and coal dust exposure, over the contrary opinion of Dr. Jarboe, that claimant does not have pneumoconiosis but has emphysema due solely to smoking. Employer asserts that Dr. Jarboe's opinion is well-reasoned, while the opinions of Drs. Baker, Sandlin and McCormick are conclusory, are based solely on the presence of a lung impairment and exposure to coal dust, and do not constitute reasoned and supported diagnoses of legal pneumoconiosis. Employer's Brief at 11-13. Employer's arguments are without merit.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In evaluating the conflicting medical opinions of record at Section 718.202(a)(4), the administrative law judge accurately summarized the physicians' explanations for their conclusions and their underlying documentation, Decision and Order at 9-13, and acted within her discretion in finding that the opinion of Drs. Baker,

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disability at 20 C.F.R. §718.204(b)(2), as the Board did not disturb Administrative Law Judge Daniel J. Roketentz's prior findings on this issue.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Decision and Order at 3; Director's Exhibit 1.

Sandlin and McCormick were well-reasoned, were consistent with the definition of legal pneumoconiosis adopted by the Department of Labor (DOL), as well as with the conclusions expressed in the scientific studies that the DOL relied upon in drafting the definition, and were entitled to "probative weight."[5] Decision and Order at 17-18; *see* 20 C.F.R. §§718.201(a)(2), 718.202(a)(4); 65 Fed. Reg. 79936-45 (Dec. 20, 2000); *Crockett Collieries, Inc., v. Director, OWCP* [*Barrett*], 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Contrary to employer's arguments, these physicians were not required to quantify with specificity the relative contributions of smoking and coal dust exposure to claimant's respiratory condition, 20 CFR 718.201(a)(2); rather, the administrative law judge could rationally rely on their judgment that the effects of smoking versus coal dust exposure cannot necessarily be medically differentiated. *See Barrett*, 478 F.3d 350, 23 BLR 2-472; *cf. Consolidation Coal Co. v. Williams*, 453 F.3d 609, 23 BLR 2-345 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2004). By contrast, the administrative law judge determined that Dr. Jarboe ruled out coal dust exposure as a factor in claimant's severe emphysema based on the lack of evidence of dust deposition or retention in claimant's lungs as reflected on x-rays and CT scan.[6] The administrative law judge rationally found that because Dr. Jarboe focused on the absence of clinical pneumoconiosis but failed to adequately explain why seventeen years of coal dust exposure was not a contributing or aggravating factor in claimant's COPD, his opinion was entitled to little weight on the issue of legal pneumoconiosis. Decision and Order at 18-19; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Barrett*, 478 F.3d 350, 23 BLR 2-472; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge's finding that the weight of the medical

[5] The administrative law judge acknowledged that Dr. Sandlin was claimant's treating physician from December 1992 to April 2002, and that Dr. McCormick, who is Board-certified in Internal Medicine and Pulmonary Medicine, treated claimant from February 2000 to March 2003. Decision and Order at 17; Director's Exhibit 12. The administrative law judge considered the factors at 20 C.F.R. §718.104(d), and accorded the opinions of Drs. Sandlin and McCormick "probative weight," but not controlling weight. Decision and Order at 16-18.

[6] The administrative law judge noted Dr. Jarboe's deposition testimony that the CT scan dated April 18, 2000 "made no mention of any streaks, nodules or anything else that would indicate dust deposition", and his opinion that if claimant's emphysema "were due to coal dust, I would anticipate that, certainly, we would be able to see some dust in his lungs." Decision and Order at 18; Employer's Exhibit 1 at 9, 14, 15.

opinions of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) is supported by substantial evidence, and is affirmed.[7]

Next, employer contends that the administrative law judge erred in finding disability causation established at Section 718.204(c). Specifically, employer asserts that the administrative law judge improperly discounted the opinion of Dr. Jarboe and "gave no valid reason for crediting the causation opinions of Drs. Baker, Sandlin and McCormick as being sufficient to establish that 'legal' pneumoconiosis was more than a *de minimis* contributing factor to claimant's impairment." Employer's Brief at 25, 27. We disagree. The administrative law judge accurately determined that Drs. Sandlin and McCormick opined that claimant's totally disabling respiratory impairment was caused by a combination of coal dust exposure and smoking, Director's Exhibit 12, and that Dr. Baker specified that coal dust exposure was a "significant" contributing factor in claimant's disability, Claimant's Exhibit 1 at 8. Decision and Order at 11-12, 20-21. The administrative law judge rationally concluded that Dr. Jarboe's contrary opinion, that claimant's disability was caused entirely by smoking, was entitled to little weight, as it rested upon the physician's disagreement with her finding of legal pneumoconiosis. Decision and Order at 21; *cf. Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). The administrative law judge acted within her discretion in finding that the opinions of Drs. Baker, Sandlin and McCormick were entitled to greater weight, and were sufficient to establish disability causation at Section 718.204(c). Decision and Order at 23; *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-611, 22 BLR 2-288, 2-303 (6th Cir. 2001). Because substantial evidence supports the administrative law judge's credibility determinations at Section 718.204(c), we affirm her findings thereunder, and we affirm the award of benefits.

Lastly, employer challenges the administrative law judge's finding that claimant is entitled to benefits commencing as of May 1999. The administrative determined that the evidence in the prior claim supported the conclusion that claimant was totally disabled at the time the claim was denied; that the record contains no evidence that claimant was not totally disabled at any subsequent time; and that no benefits may be paid in an award on a subsequent claim for any period prior to the date upon which the order denying the prior claim became final. Decision and Order at 21; 20 C.F.R. §725.309(d)(5). The

[7] We reject employer's contention that the administrative law judge erred in finding that claimant was entitled to the presumption that his legal pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Employer's Brief at 10 n.2. In this case, the administrative law judge properly concluded that claimant established disease causality based on the opinions of Drs. Baker, Sandlin and McCormick. Decision and Order at 19; 20 C.F.R. §718.201; *see Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).

administrative law judge thus concluded that benefits were payable commencing in May 1999, the month in which the denial of claimant's prior claim became final. Decision and Order at 21. Employer and the Director correctly maintain, however, that the applicable regulation specifically directs benefit payments to commence "with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment." 20 C.F.R. §725.503(b). The administrative law judge found that the relevant evidence failed to establish the date claimant became totally disabled due to pneumoconiosis. The appropriate date from which benefits may commence herein is, therefore, September 2002, the month during which this subsequent claim was filed. *Id*. Consequently, we modify the administrative law judge's Decision and Order to reflect benefits payable from September 2002.

Accordingly, the Decision and Order Awarding Benefits on Remand is affirmed as modified.

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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BETTY JEAN HALL
Administrative Appeals Judge