BRB No. 97-0902 BLA

BEN JOHNSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
D M & M COAL COMPANY	)	
	)	
and	)	
	)	DATE ISSUED: _____
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 - Award of Benefits of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

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

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (95-BLA-1818) of Administrative Law Judge J. Michael O'Neill 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.* (the Act). This claim, filed on December 11, 1992, was properly adjudicated

pursuant to the permanent regulations at 20 C.F.R. Part 718.[1] After crediting claimant with twenty-six and one-half years of coal mine employment, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(4). Additionally, the administrative law judge found the evidence sufficient to establish that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. The administrative law judge also found claimant totally disabled pursuant to 20 C.F.R. §718.204(c), and concluded that claimant's total disability was due to pneumoconiosis under 20 C.F.R. §718.204(b). Accordingly, benefits were awarded. Employer appeals, arguing that the administrative law judge made numerous errors in weighing the medical evidence under Sections 718.202(a)(1) and (a)(4), 718.204(b), (c), and in setting the date for the commencement of benefits as the date of filing. Claimant responds, arguing that the administrative law judge's decision should be

[1]The relevant procedural history of this case is as follows: Claimant filed his claim for Black Lung benefits with the Department of Labor on December 11, 1992. Director's Exhibit 1. The claim was initially approved by the district director on May 28, 1993, Director's Exhibit 27, but subsequently denied on September 16, 1993, Director's Exhibit 33, December 13, 1993, Director's Exhibit 42, and July 29, 1994. Director's Exhibit 50. Subsequent to a conference on the case, the district director again reversed his decision, and issued a Proposed Decision and Order awarding benefits on March 27, 1995. Director's Exhibit 56. On April 5, 1995, employer requested a hearing before the Office of Administrative Law Judges (OALJ). Director's Exhibit 58. The case was transferred to the OALJ for a hearing on May 16, 1995. Director's Exhibit 60. Administrative Law Judge J. Michael O'Neill conducted a hearing on the claim in Hazard, Kentucky, on March 13, 1996. Decision and Order at 2; Hearing Transcript at 1. Judge O'Neill issued his decision on February 26, 1997. Decision and Order at 1.

affirmed. Employer replies, reiterating its arguments. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[2]The administrative law judge's finding regarding the length of claimant's coal mine employment, as well as his findings under 20 C.F.R. §§718.202(a)(2), (a)(3); 718.203; 718.204(c)(2), (c)(3), are unchallenged on appeal, and are therefore affirmed. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983).

Initially, employer raises several arguments regarding the administrative law judge's weighing of the x-ray evidence under 20 C.F.R. §718.202(a)(1). First, employer contends that the administrative law judge erred in discrediting the two negative readings by qualified physicians of an x-ray dated December 25, 1991, using positive readings from two less qualified physicians of an x-ray taken one day later.[3] In doing so, employer contends that the administrative law judge violated *Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), a decision of the United States Court of Appeals for the Sixth Circuit, under whose jurisdiction this case arises,[4] by relying on the numerical superiority of the positive x-ray interpretations rather than on the credentials of the various physicians. We disagree. Initially, the administrative law judge noted that if weighed separately, the December 25, 1991 x-ray could be considered negative because the credentials of the two doctors who provided negative readings were superior to those of the two doctors who provided positive readings; and the x-ray taken the following day could be considered positive because both readings of it were positive. The administrative law judge then permissibly weighed the December 25, 1991 and the December 26, 1991 x-ray readings together, in essence considering them as one x-ray. The administrative law judge properly found that the four positive readings by one dually qualified physician, one B-reader and two physicians with no special radiographical qualifications, outweighed the two negative readings from dually qualified doctors. *See Director, OWCP v. Greenwich Collieries [Ondecko],* 117 S.Ct. 2251, 18 BLR 2A-1 (1994); Decision and Order at 11. Moreover, contrary to employer's contention, the administrative law judge did consider the various physicians' credentials, pursuant to *Woodward*, but permissibly relied on the numerical superiority of the positive readings when the credentials of the various physicians were not dispositive. *See Staton v. Norfolk & Western Ry. Co.,* 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Edmiston v. F & R Coal Co.,* 14 BLR 1-65 (1990); *see also Ondecko, supra;* Decision and Order at 10-12.[5]

Next, employer contends that the administrative law judge's analysis of Dr. Sargent's

[3]Employer raises the same contention regarding x-rays taken on September 8, 1992 and September 9, 1992.

[4]Inasmuch as claimant's most recent coal mine employment occurred in the state of Kentucky, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989).

[5]Employer's contentions regarding the September 1992 x-rays are similarly rejected.

March 30, 1993 x-ray interpretation violates the Administrative Procedure Act (APA),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 30 U.S.C. §932(a). Employer argues that it was error for the administrative law judge to give little weight to the negative interpretation based on the fact that the doctor had read a previous x-ray a month and one-half earlier as positive, reasoning that inasmuch as pneumoconiosis is a progressive disease, claimant's lung condition could not have improved. Employer contends that the record does not contain evidence that pneumoconiosis is a progressive disease, and thus the administrative law judge has violated the APA in rendering a decision based on factors outside of the record. We disagree. As claimant states, the United States Court of Appeals for the Sixth Circuit has recognized the progressive nature of pneumoconiosis. *See Woodward, supra; Back v. Director, OWCP,* 796 F.2d 169, 9 BLR 2-93 (6th Cir. 1986); *Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *see also Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987); *Spese v. Peabody Coal Co.,* 19 BLR 1-45, 1-51, n.6 (1995). Consequently, we find no error in the administrative law judge's weighing of the March 30, 1993 x-ray. *See Mabe v. Bishop Coal Co.,* 9 BLR 1-67 (1988); *Kuchwara v. Director, OWCP,* 7 BLR 1-167 (1984).

Next, employer argues that the administrative law judge erred in applying the "later evidence rule"[6] to the x-ray evidence in this case. Employer contends that, contrary to the administrative law judge's determination that the latest x-ray was the "best" evidence, the latest x-ray in the case at hand was found to be unreadable by two dually qualified physicians, and amongst those physicians who did read it, the interpretations were widely divergent. Employer argues that the administrative law judge's reliance on this particular x-ray as the most probative was irrational. We disagree. An administrative law judge is not required to accord diminished weight to an x-ray because of a notation of marginal quality. *See Preston v. Director, OWCP,* 6 BLR 1-129 (1984). Additionally, divergent positive readings do not automatically call into question the credibility of the interpretations as positive. *See* 20 C.F.R. §718.102(b). Employer is asking the Board to re-weigh the evidence, a task which it may not perform. *See Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989).

[6]The "later evidence rule" holds that in light of the progressive nature of pneumoconiosis, later evidence positive for the existence of pneumoconiosis or total disability does not necessarily conflict with earlier negative evidence, and should, therefore, generally be accorded greater weight. *See Edwards v. Director, OWCP,* 6 BLR 1-265 (1983); *see also Woodward v. Director, OWCP,* 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Finally, in its Reply Brief, employer contends that the "later evidence rule" only applies if x-rays were taken over a time concomitant with claimant's exposure to coal dust, citing a 1985 report by the Surgeon General reflecting that pneumoconiosis does not usually worsen in the absence of additional coal dust exposure. Noting several circuit court decisions, employer contends that since all of the x-rays in this case were taken after claimant stopped working, the "later evidence rule" is an invalid means of weighing the evidence. We disagree. Employer's cited caselaw authority, *i.e., Staton*, *supra; Woodward*, *supra,* and *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), do not support its position, as the courts have not limited the "later evidence rule" application, as suggested by employer. *See Spese, supra* at 1-52, n.6. Here, the administrative law judge, after assessing both the quantity and quality of all of the x-ray interpretations, properly applied the "later evidence rule" in finding the existence of pneumoconiosis established. *See Staton, supra; Woodward, supra; Orange, supra; Pate v. Alabama By-Products,* 6 BLR 1-636 (1983). Accordingly, the administrative law judge's findings under 20 C.F.R. §718.202(a)(1) are affirmed.[7]

Turning to the administrative law judge's disability findings, employer argues under 20 C.F.R. §718.204(c)(1), that the administrative law judge erred in failing to reconcile the pre- and post-bronchodilator tests from the March 30, 1993 pulmonary function study, citing the Board's case in *Keen v. Jewell Ridge Coal Co.,* 6 BLR 1-454 (1983). We disagree. The administrative law judge is charged with assessing the credibility of the evidence, and is responsible for resolving any inconsistences therein; if substantial evidence supports his findings, they may not be overturned on appeal. *See, e.g., Riley v. National Mines Corp.* 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988). In the case at hand, while the administrative law judge did fail to reconcile the pre- and post-bronchodilator test results from Dr. Dahhan's March 1993 pulmonary function study, the error does not require remand, as the administrative law judge properly placed determinative weight on the latest test in the record, the qualifying test[8] of Dr. Broudy. *See Wetzel v. Director, OWCP,* 8 BLR 1-139

[7]In light of our affirmance of the administrative law judge's findings under 20 C.F.R. §718.202(a)(1), we need not consider employer's arguments regarding the administrative law judge's findings under 20 C.F.R. §718.202(a)(4). *See Dixon v. North Camp Coal Co.,* 8 BLR 1-344 (1985).

[8]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable values delineated in the tables at 20 C.F.R. Part 718,

(1985). Any error, therefore, in the administrative law judge's treatment of the March 1993 pulmonary function study is harmless, *see Larioni v. Director, OWCP,* 6 BLR 1-1276, and we consequently affirm the administrative law judge's findings under Section 718.204(c)(1). *See Riley, supra; Wetzel, supra*.

Next, under Section 718.204(c)(4), employer argues that the administrative law judge erred in discrediting Dr. Dahhan's opinion, based on Dr. Dahhan's failure to explain his qualifying pulmonary function study. Employer contends that because the post-bronchodilator test produced non-qualifying results, it showed reversibility and therefore did not show total disability. Consequently, employer contends that it did not require explanation. We disagree. It is the administrative law judge's responsibility to assess the evidence of record. *See Riley, supra; Mabe, supra; Kuchwara, supra.* The administrative law judge properly found Dr. Dahhan's opinion lacking in explanation. *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 18. Employer's contentions amount to little more than a request to re-weigh the evidence. *Anderson, supra*. Next, employer argues that the administrative law judge erred in failing to make a finding regarding the physical requirements of claimant's usual coal mine employment in light of the fact that he relied on the opinions of physicians who were unaware of claimant's work requirements, and who consequently diagnosed vocational, not functional, disability. We disagree. All of the doctors credited by the administrative law judge, namely, Drs. Vaezy, Baker and Lane, included a work history in their medical reports and opined that claimant was totally disabled from his usual coal mine employment. *See* Decision and Order at 18; Director's Exhibits 30, 32, 38, 48, 49. The administrative law judge's findings under Section 718.204(c)(4) are therefore affirmed.

Finally, regarding total respiratory disability, employer argues that the administrative law judge failed to apply the Board's decision in *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), which requires that claimant establish total disability in the absence of contrary, probative evidence. The administrative law judge is required to assign any contrary, probative evidence appropriate weight and determine whether it outweighs the evidence supportive of a finding of total disability. We reject employer's assertion. Contrary to employer's contentions, the administrative law judge weighed each subsection under 20 C.F.R. §718.204(c)(1)-(4) separately, finding disability at subsections (c)(1) and (c)(4), but no disability at subsections (c)(2) or (c)(3). *See* Decision and Order at 15-19. Thereafter, the administrative law judge properly found that the preponderance of all of the evidence under Section 718.204(c) established total disability. *Shedlock, supra*; *Id.* at 19. Accordingly, the administrative law judge's findings under Section 718.204(c) are affirmed.

Appendix B, C, respectively. A "nonqualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

Turning to the administrative law judge's findings under Section 718.204(b), employer contends that the administrative law judge applied an incorrect standard for causation, as he misconstrued the opinion of the Sixth Circuit in *Adams v. Director, OWCP*, 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).[9] Employer argues that the administrative law judge applied a *de minimus* standard, and then credited Dr. Lane because he made a *de minimus* connection between claimant's pneumoconiosis and his total disability. Although employer is correct that the administrative law judge misstated the law, we hold that this error does not require remand in this case. As both employer and claimant state, the administrative law judge placed determinative weight on Dr. Lane's opinion, which characterized claimant's coal dust inhalation as a "significant factor" in his disability. Decision and Order at 20; Director's Exhibits 32, 48. As Dr. Lane's opinion meets the *Adams* standard, we hold that the administrative law judge properly relied on Dr. Lane to find causation at Section 718.204(b), notwithstanding the administrative law judge's misstatement of the law.

Additionally, employer contends that the administrative law judge erred in ignoring the opinions of Drs. Dahhan and Anderson under Section 718.204(b) merely because they did not find total disability, noting that both doctors gave definite opinions regarding causation. We disagree. In rejecting the opinions of Drs. Dahhan and Anderson on the question of total disability causation, in light of their failure to diagnose total disability, *cf*. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986), the administrative law judge made an acceptable credibility determination within the bounds of his discretion as trier-of-fact. *See Riley, supra; Mabe*, *supra*. Because his findings are supported by substantial evidence, they may not be disturbed on appeal. *See O'Keefe, supra; Peabody Coal Co. v. Benefits Review Board [Wells]*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); *Anderson, supra.* We therefore affirm the administrative law judge's findings under Section 718.204(b), and consequently affirm his award of benefits under Part 718. *See Trent, supra; Perry, supra.*

Turning to the issue of the date for the commencement of benefits, employer argues that the administrative law judge erred in selecting the filing date of the claim, inasmuch as the first evidence of total disability was the qualifying pulmonary function study performed in September 1995. Employer contends that the administrative law judge's one- sentence finding on the issue is insufficient under 20 C.F.R. §725.503. We agree that the administrative law judge's discussion is too cursory to satisfy the APA. We therefore remand this case for further consideration under Section 725.503. *See Williams v. Director, OWCP,* 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *McFarland v. Peabody Coal Co.,* 8 BLR 1-163 (1985). On remand, the administrative law judge must assess the evidence of record to determine whether it establishes a date of onset of total disability. If it does not, the date for the commencement of benefits is the date of the filing

[9]In *Adams* v. *Director, OWCP,* 806 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), the United States Court of Appeals for the Sixth Circuit set forth a "contributing cause" standard for determining whether claimant's totally disabling respiratory or pulmonary impairment was due "at least in part" to his pneumoconiosis. *See Adams, supra* at 825, n.9, 2-63, n.9.

of the claim, unless credited medical evidence establishes that claimant was not totally disabled at some point subsequent thereto. *See* 20 C.F.R. §§725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d. Cir. 1989); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins, supra.*

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

SO ORDERED.[10]

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[10]The Board has received claimant's Motion to Submit, requesting that the Board "submit this case for decision." In light of our disposition of the case, claimant's motion is moot. 20 C.F.R. §802.219.