BRB No. 00-1018 BLA

ROBERT L. RAY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENNELLIS ENERGIES, INCORPORATED	)	DATE ISSUED:
	)	
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 On Third Remand of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Mark E. Solomons, Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order On Third Remand (90-BLA-1359) of Administrative Law Judge Ellin M. O'Shea awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended,

30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the fourth time.[1] On

[1] Claimant originally filed a claim on September 29, 1980, Director's Exhibit 1, which was denied by the district director on March 9, 1981, inasmuch as total disability due to pneumoconiosis was not established, Director's Exhibit 19. No further action was taken by claimant on this claim.

Claimant filed the instant, duplicate claim on April 22, 1986, Director's Exhibit 2. In a Decision and Order issued on October 28, 1991, Administrative Law Judge Robert S. Amery determined that the evidence was sufficient to establish a material change in conditions in this duplicate claim pursuant to 20 C.F.R. §725.309(d)(2000), found that claimant established at least twenty-five years of coal mine employment and awarded benefits pursuant to 20 C.F.R. Part 718. In relevant part, Judge Amery found the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b) and, while Judge Amery found that total disability was not demonstrated by the relevant evidence pursuant to 20 C.F.R. §718.204(c)(1)-(3)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(iii), Judge Amery found total disability established by the relevant medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv).

Employer appealed and the Board vacated Judge Amery's findings that a material change in conditions was established pursuant to Section 725.309(d)(2000) and that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) and remanded the case for reconsideration. *Ray v. Kennellis Energies, Inc.*, BRB No. 92-0519 BLA (Sep. 27, 1993)(unpub.). Finally, while the Board affirmed Judge Amery's finding that the medical opinion evidence demonstrated total disability pursuant to Section 718.204(c)(4) (2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), the Board remanded the case for reconsideration of all relevant evidence pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and, if necessary, for consideration pursuant to 20 C.F.R. §718.204(b) (2000), as revised at 20 C.F.R. §718.204(c).

In a Decision and Order On Remand issued on March 3, 1994, Judge Amery again awarded benefits. Employer appealed and the Board vacated Judge Amery's findings pursuant to Sections 725.309(d)(2000), 718.202(a)(4), 718.204(b) and (c)(2000), as revised at 20 C.F.R. §718.204(b)(2), (c), and remanded the case for reconsideration. *Ray v. Kennellis Energies, Inc.*, BRB No. 94-2255 BLA (May 25, 1995)(unpub.).

On remand, the case was reassigned to the administrative law judge, who awarded benefits in a Decision and Order After Remand issued on October 3, 1997. Employer appealed and the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4). *Ray v. Kennellis*

remand, at issue herein, the administrative law judge, considering all relevant evidence, found total disability demonstrated by the medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, found a material change in conditions established pursuant to 20 C.F.R. §725.309(d)(2000).[2] The

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Energies, Inc., BRB No. 98-0230 BLA (Aug. 19, 1999)(unpub.). However, the Board vacated the administrative law judge's findings pursuant to Sections 725.309(d)(2000), 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), and 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c), and remanded the case for reconsideration.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which all the parties, including the Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, have responded. Both claimant and the Director contend that the revised regulations will not affect the outcome of this case in any material way, while employer contends that a stay is necessary as the revised regulations affect the issue of causation.

Employer contends that a challenged regulation, 20 C.F.R. §718.204(a), affects the outcome of this case because it changes the law within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, the jurisdiction in which this case arises. *See Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). In *Vigna*, the Seventh Circuit held that nonpulmonary and nonrespiratory disabilities are irrelevant to the determination of whether a miner is totally disabled due to pneumoconiosis. This case is distinguishable from *Vigna*, where the medical opinion evidence diagnosed the miner as totally disabled due to a stroke before the first evidence of pneumoconiosis appeared. The Board has previously held in this case that medical evidence has not been introduced to show, as employer contends, that claimant was totally disabled from a knee injury. *See Ray*, 98-0230 BLA at 11 n. 2; *Ray*, 94-2255 BLA at 3 n. 2, and at 7. The Board's previous holdings stands as law of the case on this issue, and no exception to that doctrine has been

demonstrated by employer herein, *Moriarty v. Svec*, 233 F.3d 955, 963 (7th Cir. 2001); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Consequently, because employer's contention fails under both the law as set forth in *Vigna*, and under the revised Section 718.204(a), which provides in part that an independent, non-respiratory disability "shall not be considered in determining whether a miner is totally disabled due to pneumoconiosis," 20 C.F.R. §718.204(a), application of 20 C.F.R. §718.204(a) does not affect the outcome of this case.

In addition, this case involves a duplicate claim filed pursuant to 20 C.F.R. §725.309 (2000), but not pursuant to the revised, and challenged, regulation at 20 C.F.R. §725.309, which is applicable only to claims filed after January 19, 2000, *see* 20 C.F.R. §725.2(c). Moreover, as both the Director and employer contend, the revised regulations and/or criteria for establishing and/or defining total disability pursuant to 20 C.F.R. §718.204 have not changed in any material way to affect the outcome of the case. Finally, as both claimant and the Director contend, the challenged revised regulation at 20 C.F.R. §725.503(b), also at issue herein, has not changed in any material way to affect the outcome of the case, but has been changed only in a minor way to refer to the individual to whom benefits are payable, *i.e.*, the miner entitled to benefits. Thus, having reviewed the briefs submitted by the parties and the record of the case, we hold that the disposition of this case before the Board is not impacted by the challenged regulations.

administrative law judge also found total disability due to pneumoconiosis established pursuant to 20 C.F.R. §718.204(b)(2000), as revised at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, in finding a material change in conditions established pursuant to Section 725.309(d)(2000). In addition, employer contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c), and in determining the date of onset of claimant's disability due to pneumoconiosis from which benefits should be awarded. Claimant responds, urging that the administrative law judge's Decision and Order On Third Remand awarding benefits should be affirmed. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to employer's appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that a material change in conditions is established pursuant to Section 725.309(d)(2000) where the miner did not have pneumoconiosis at the time of the first application for benefits but has since contracted it and has become totally disabled by it, or where the miner's pneumoconiosis has progressed to the point of total respiratory disability since the filing of the first application, *see Sahara Coal Co. v. Director, OWCP [McNew]*, 946 F.2d 554, 15 BLR 2-227 (7th Cir. 1991). Moreover, the Seventh Circuit has held that in order to prevail with a duplicate claim, claimant must show that something capable of making a difference has changed since the record closed in the first claim, *i.e.*, at least one element that might independently have supported a decision against the claimant has now been shown to be different, *see Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997)(*en banc* rehearing), *modifying*, 94 F.3d 369 (7th Cir. 1996), *and affirming* 19 BLR 1-45 (1995).

In order to establish entitlement to benefits under Part 718 in a living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id.* Pursuant to Section 718.204, the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total

respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).[3]

Employer contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(c)(2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, in finding a material change in conditions established pursuant to Section 725.309(d)(2000).

Considering the newly submitted medical opinion evidence, the administrative law

[3] Employer reiterates the same contentions that it advanced in its previous appeal that the administrative law judge erred in finding the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). However, the Board addressed employer's contentions in its previous Decision and Order, affirming the administrative law judge's finding the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4), *see Ray*, BRB No. 98-0230 BLA at 9. Moreover, employer does not cite to any relevant case law issued since the Board's previous Decision and Order. Thus, inasmuch as the Board's previous holding stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, we reject employer's argument, *Moriarty, supra*; *Brinkley, supra*. In addition, Judge Amery found in his original 1991 Decision and Order that pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §718.203(b), *see* 1991 Decision and Order at 9. Inasmuch as this finding has not been challenged on appeal, it is also affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge credited as documented and well-reasoned the opinion of Dr. Myers, Claimant's Exhibit 1, which the Board previously held, the administrative law judge had reasonably found constituted a diagnosis of total disability. Decision and Order On Third Remand at 2, 6; *Ray*, BRB No. 98-0230 BLA at 7. The administrative law judge found that the opinion of Dr. Myers as supported by the opinions of Drs. Sanjabi and Rao, Director's Exhibits 10, 12; Claimant's Exhibit 5, showed a worsening in claimant's condition and ability to perform his usual coal mine employment, which was strenuous and arduous, since the denial of claimant's original claim. The administrative law judge also found the opinion of Dr. Thompson, that claimant was now suffering from "more severe" Black Lung disease, supported a finding that claimant was suffering from an increased respiratory disability since the prior denial. Claimant's Exhibit 5.

The administrative law judge considered the newly submitted opinion of Dr. Houser, who diagnosed pneumoconiosis and obstruction and indicated at a deposition that claimant did not have any "functional disability" attributable to his coal mine employment, *see* Employer's Exhibit 18 at 28, but advised that claimant should not return to coal mine employment in light of his respiratory impairment, *see* Claimant's Exhibit 6; Employer's Exhibit 18 at 20. The administrative law judge found the meaning of Dr. Houser's opinion regarding whether claimant suffered from any "functional disability" to be ambiguous. Decision and Order at 5. However, after considering Dr. Houser's opinion in its totality, the administrative law judge concluded that it indicated that claimant's diagnosed lung condition would adversely affect claimant's ability to meet the demands of his usual coal mine employment. Decision and Order at 5-6.

The administrative law judge also incorporated her prior finding that the opinions of Dr. Tuteur, Employer's Exhibits 4, 14-17, were poorly reasoned. Dr. Tuteur found that claimant suffered from unexplained dyspnea or breathlessness, which he indicated could be caused by high blood pressure, *see* Employer's Exhibits 4, 16, obesity or muscoskeletal problems, *see* Employer's Exhibits14, 16,[4] but that claimant did not suffer from any disabling respiratory or pulmonary impairment due to his coal dust exposure, Employer's Exhibits 14, 17 at 16. The administrative law judge previously found that Dr. Tuteur's opinions were inconsistent and poorly reasoned, as Dr. Tuteur did not account for the physical limitations caused by claimant's breathlessness, which Dr. Tuteur had noted in finding that claimant was not totally disabled, *see* 1997 Decision and Order On Remand at 11. In addition, the administrative law judge found that Dr. Tuteur failed to adequately explain and document his reliance on evidence not found in the record in stating that claimant's breathlessness and/or

[4] On deposition Dr. Tuteur testified that claimant's overweight status was insufficient to account for his breathlessness. Employer's Exhibit 17 at 12.

disability could be caused by muscoskeletal problems, but not cardiopulmonary problems.[5]

Ultimately, although noting that total disability was not demonstrated under Section 718.204(c)(1)-(2)(2000), as revised at 20 C.F.R. §718.204(b)(2)(i)-(ii), the administrative law judge found that, after weighing all of the relevant evidence, like and unlike, in conjunction with the previously submitted evidence, total disability was established by the opinion of Dr. Myers, who had considered the non-qualifying objective study results and nevertheless found claimant totally disabled as defined under Section 718.204, and that Dr. Myers's opinion was supported by the opinions of Drs. Sanjabi and Rao.[6]

Employer contends that, contrary to the administrative law judge's finding, Judge Amery had previously found that Dr. Houser believed that claimant could return to his former coal mine employment and employer contends that because Dr. Houser found that claimant did not have "any" functional disability, his opinion was sufficient to establish that claimant was not totally disabled as defined under Section 718.204. Thus, employer contends that the administrative law judge selectively analyzed Dr. Houser's opinion and

[5] Although employer contends that the it is not clear why the administrative law judge's finding that Dr. Tuteur did not adequately explain why claimant's breathlessness and/or disability could be caused by muscoskeletal problems warrants according less weight to Dr. Tuteur's opinion as to total respiratory disability, Dr. Tuteur's opinion as to whether claimant suffered from a disabling respiratory or pulmonary impairment would be affected, as defined at 20 C.F.R. §718.204(b)(1), by the credibility of Dr. Tuteur's belief that claimant's disability could be attributed to muscoskeletal problems as opposed to pulmonary problems, *see* Employer's Exhibit 17 at 16.

[6] Thus, we reject employer's contention that the administrative law judge failed to weigh all the relevant evidence together, like and unlike, under Section 718.204(b)(2), *see Budash*, *supra*; *Fields*, *supra*; *Rafferty*, *supra*; *Shedlock*, *supra*.

inconsistently weighed his opinion as compared to Dr. Myers's opinion, which employer contends is insufficient to establish total disability as defined under Section 718.204. Moreover, employer contends that Drs. Houser and Tuteur possess superior qualifications to Dr. Myers' and that their opinions were better reasoned and documented than the physicians credited by the administrative law judge.

Contrary to employer's foregoing contentions regarding the administrative law judge's weighing of the medical opinion evidence, the Board previously held that Judge Amery erred in his weighing of the medical opinion evidence under Sections 725.309(d)(2000) and 718.204 (2000) and remanded the case for reconsideration of the medical opinion evidence, *see Ray*, BRB No. 94-2255 BLA at 4, 6. Moreover, the Board previously held that the administrative law judge had reasonably found that Dr. Myers's opinion constituted a diagnosis of total disability, *see Ray*, BRB No. 98-0230 BLA at 7. Thus, inasmuch as the Board's previous holding stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *Moriarty v. Svec*, 233 F.3d 955, 963 (7th Cir. 2001); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). We reject employer's contention in this regard.[7]

The administrative law judge also found, within her discretion, that Dr. Houser's opinion, regarding whether claimant suffered from any "functional disability" to be ambiguous, and that it was inconclusive as to whether or not Dr. Houser believed claimant could perform his usual coal mine employment which is strenuous and arduous. Decision and Order at 6. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). The administrative law judge, as the trier-of-fact, has broad discretion to both assess the evidence of record, draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and to determine whether an opinion is documented and reasoned, *see Clark v. Karst-Robbins Coal*

[7] Indeed, the Board previously affirmed Judge Amery's finding that the medical opinion evidence demonstrated total disability pursuant to Section 718.204(c)(4)(2000), as revised at 20 C.F.R. §718.204(b)(2)(iv), *see Ray*, 92-0519 BLA at 6, which also stands as law of the case, and no exception to that doctrine has been demonstrated by employer herein, *see Moriarty, supra*; *Brinkley, supra*.

Co., 12 BLR 1-149 (1989)(*en banc*); *Fields*, *supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985), and the Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

In addition, although employer contends that Dr. Myers's opinion is merely the same kind of proof that was rejected in claimant's original claim and does not address whether claimant's condition has changed since the denial of claimant's original claim in 1981, Dr. Myers's based his opinion on an examination of claimant in 1987, *see* Claimant's Exhibit 1, and the date of hearing is the date upon which disability is to be assessed by the administrative law judge, *see Freeman United Coal Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990). Moreover, the administrative law judge found the assessments of claimant's physical limitations due to his pulmonary or respiratory condition provided by Drs. Sanjabi and Rao, in conjunction with Dr. Myers's opinion, showed a worsening in claimant's condition and ability to perform his usual strenuous and arduous coal mine employment job since the denial of claimant's original claim, *see Spese*, *supra*; *McNew*, *supra*.[8] Consequently, we affirm the administrative law judge's finding that total disability was established pursuant to Section 718.204(c) (2000), as revised at 20 C.F.R. §718.204(b)(2), and, therefore, that a material change in conditions was established pursuant to Section 725.309(d) as supported by substantial evidence.

Employer also contends that the administrative law judge erred in finding total disability due to pneumoconiosis established pursuant to Section 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c). The administrative law judge credited the opinion of Dr. Myers over the contrary opinions of Drs. Houser and Tuteur. Decision and Order On Third Remand at 6-8. The administrative law judge discounted Dr. Tuteur's opinion because he did not diagnose pneumoconiosis, which the administrative law judge found was established, and because he did not adequately explain his opinion that claimant's respiratory or pulmonary symptoms and condition were due to smoking and not claimant's coal dust exposure. The administrative law judge again found the opinion of Dr. Houser, who diagnosed pneumoconiosis but found that claimant did not have any "functional disability" attributable to his coal mine employment, was ambiguous.

[8] While employer reiterates its contention that the opinions of Drs. Sanjabi and Rao are not medical assessments of claimant's functional pulmonary impairment, the Board has previously rejected employer's contention, *see Ray*, BRB No. 92-0519 BLA at 6; *Ray*, BRB No. 94-2255 BLA at 5; *Ray*, BRB No. 98-0230 BLA at 7, which stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *Moriarty*, *supra*; *Brinkley*, *supra*.

Initially, employer reiterates its contention that claimant was totally disabled from a knee injury which, therefore, precludes a finding of total disability due to pneumoconiosis in accordance with the Seventh Circuit's holding in *Vigna*, *supra*. However, the Board has previously held that this case is distinguishable from *Vigna*, because medical evidence has not been introduced in this case to show, as employer contends, that claimant was totally disabled from a knee injury, *see Ray*, 98-0230 BLA at 11 n. 2; *Ray*, 94-2255 BLA at 3 n. 2, and at 7. The Board's previous holdings stand as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Moriarty, supra*; *Brinkley, supra*.

Employer also contends that Dr. Myers offered no opinion as to whether pneumoconiosis was a contributing cause of claimant's disability and, therefore, contends that his opinion is insufficient to establish total disability due to pneumoconiosis pursuant to the revised standard at Section 718.204(c)(1).[9] Contrary to employer's contention, the Board previously held that the administrative law judge had reasonably found that the opinion of Dr. Myers supported a finding that pneumoconiosis was a necessary, contributing cause of claimant's total disability, *see Ray*, BRB No. 98-0230 BLA at 10, which stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Moriarty, supra*; *Brinkley, supra*. In addition, inasmuch as the administrative law judge's finding that Dr. Houser's opinion under Section 718.204(b) (2000), as revised at 20 C.F.R. §718.204(c)(1), was ambiguous is unchallenged on appeal, it is affirmed, Decision and Order at 7; *see Skrack, supra*. While employer further contends that Dr. Tuteur explained why he believed claimant's symptoms were caused by smoking and not coal dust exposure, the administrative law judge permissibly gave Dr. Tuteur's opinion on causation less weight because he did not diagnose pneumoconiosis, which the administrative law judge had found was established, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). The Board is not empowered to reweigh the evidence or substitute its inferences for those of the administrative law judge, *see Anderson, supra*; *Worley, supra*. Consequently, we affirm the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(b)(2000), as revised at 20 C.F.R. §718.204(c), as supported by substantial evidence.

Finally, employer contends that the administrative law judge erred in determining the

[9] Pursuant to 20 C.F.R. §718.204(c)(1), a miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1).

date of onset of claimant's total disability due to pneumoconiosis from which benefits should be awarded. The administrative law judge found that the medical opinions which he credited from Drs. Myers, Sanjabi and Rao do not explicitly state or establish the date upon which claimant became disabled due to pneumoconiosis, but at best show only that claimant was disabled due to pneumoconiosis at the time of their examinations in 1986 and 1987. Decision and Order On Third Remand at 8. Thus, because the evidence did not establish a particular onset date, the administrative law judge awarded benefits from the month in which claimant filed the instant, duplicate claim, *i.e.*, April, 1986, *see* Director's Exhibit 2.

Employer contends that the administrative law judge did not make any specific, reasoned findings in determining the onset date, but merely stated that she could not identify a specific date. Inasmuch as the administrative law judge relied on medical opinions dating from 1987 and 1988 in finding claimant total disability due to pneumoconiosis, employer contends that benefits should not commence before 1987.

If a date of the onset of the miner's disability is not ascertainable from the evidence of record, then benefits commence as of the month the claim was filed unless credited evidence establishes that claimant was not disabled at any time thereafter. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). Employer cites no evidence which establishes claimant was not totally disabled after April, 1986, *see* 20 C.F.R. §725.503; *Gardner v. Consolidation Coal Co.*, 12 BLR 1-84 (1989). As the administrative law judge determined, the date of onset is not established by the first medical evidence indicating total disability due to pneumoconiosis, but, rather, such medical evidence merely indicates that claimant became totally disabled due to pneumoconiosis at some time prior to the date of that medical evidence, *see Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Hall v. Consolidation Coal Co.*, 6 BLR 1-1306 (1984). Thus, we affirm the administrative law judge's finding that the medical evidence of record does not establish a date of onset of claimant's total disability due to pneumoconiosis, *see Gardner*, *supra*, as rational and supported by substantial evidence. Consequently, we affirm the administrative law judge's award of benefits as of the date of filing of the instant claim in April, 1986, pursuant to Section 725.503(b), *see Gardner*, *supra*.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge