

BRB No. 14-0016 BLA

JAMES L. DAVIS)
)
 Claimant-Respondent)
)
 v.)
)
 DOMINION COAL CORPORATION)
)
 and)
)
 SUNCOKE ENERGY, INCORPORATED) DATE ISSUED: 08/22/2014
)
 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 on Remand of Linda S. Chapman,
Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford &
Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for
employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, SMITH and
McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (08-
BLA-5607) of Administrative Law Judge Linda S. Chapman determining the
commencement date for benefits on a claim filed pursuant to the provisions of the Black

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a claim filed on January 22, 2007, is before the Board for the third time.

After the Board remanded this case to the administrative law judge for the first time,¹ the administrative law judge found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4), 30 U.S.C. §921(c)(4).² Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's award of benefits. *Davis v. Dominion Coal Corp.*, BRB No. 11-0688 BLA (July 31, 2012) (unpub.). However, the Board vacated the administrative law judge's determination that the commencement date for benefits was January 2007, the month during which claimant filed his claim. *Id.* The Board noted that the administrative law judge had not discussed the evidence, or explained why it did not permit her to determine the month in which claimant became totally disabled due to pneumoconiosis. *Id.* Noting that the administrative law judge's finding of a totally disabling pulmonary impairment was based upon Dr. Fino's February 26, 2009 examination,³ the Board instructed the administrative law judge to address whether the medical opinion evidence established that "claimant was not totally disabled for a period prior to this date and subsequent to the

¹ *Davis v. Dominion Coal Corp.*, BRB No. 10-0181 BLA (Nov. 17, 2010) (unpub.).

² Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

³ In addressing employer's challenge to the administrative law judge's finding that the evidence established the existence of a totally disabling pulmonary impairment, the Board noted that the administrative law judge "explicitly accorded greatest weight to Dr. Fino's opinion that the non-qualifying pulmonary function studies showed a progressive decline and supported the diagnosis of a moderate obstructive impairment that prevented claimant from performing his last job as a roof bolter, which required heavy labor." *Davis v. Dominion Coal Corp.*, BRB No. 11-0688 BLA, slip op. at 7 (July 31, 2012) (unpub.). The Board, therefore, affirmed the administrative law judge's finding that "Dr. Fino's opinion [was] sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)." *Davis*, slip op. at 8.

filing of his claim.” *Id.* The Board, therefore, remanded the case for the administrative law judge to reconsider the commencement date of benefits, based upon a weighing of all of the relevant evidence.⁴ *Id.*

In a Decision and Order on Remand dated September 17, 2013, the administrative law judge found that Dr. Fino’s opinion established that claimant was totally disabled due to pneumoconiosis at some point prior to the doctor’s examination on February 26, 2009. The administrative law judge next considered whether there was any evidence that established that claimant was not totally disabled due to pneumoconiosis at any time after January 2007, the month during which the claim was filed. The administrative law judge found that the medical opinions of Drs. Rasmussen and Castle established that claimant was not totally disabled due to pneumoconiosis as of December 2007. The administrative law judge further found that the remaining medical opinions of record, specifically those of Drs. Baker, Robinette and Koenig, did not establish that claimant was not totally disabled at any time after December 2007. The administrative law judge, therefore, determined that the commencement date for benefits was January 2008.

On appeal, employer challenges the administrative law judge’s determination regarding the commencement date for benefits.⁵ Claimant responds in support of the administrative law judge’s determination regarding the commencement date for benefits. The Director, Office of Workers’ Compensation Programs, has not filed a response brief. In a reply brief, employer reiterates its previous contentions.

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.⁶ 33 U.S.C. §921(b)(3), as incorporated by 30

⁴ The Board subsequently denied employer’s request for reconsideration. *Davis v. Dominion Coal Corp.*, BRB No. 11-0688 BLA (Feb. 26, 2013) (Order) (unpub.).

⁵ We decline to address employer’s renewed contentions that the administrative law judge (1) erred by limiting the submission of evidence; (2) erred in finding that claimant invoked the Section 411(c)(4) presumption; and (3) erred in finding that employer did not rebut the presumption. The Board previously rejected these contentions of error. *Davis v. Dominion Coal Corp.*, BRB No. 11-0688 BLA, slip op. at 5, 8, 9 (July 31, 2012) (unpub.). Employer has not demonstrated any exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

⁶ Because claimant’s most recent coal mine employment was in Virginia, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit.

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

Commencement Date of Benefits

Employer challenges the administrative law judge’s determination regarding the commencement date for benefits. Once entitlement to benefits is established, the date for the commencement of those benefits is determined by the month in which the miner 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 evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

The Administrative Law Judge’s Finding

In addressing the commencement date for benefits, the administrative law judge initially considered Dr. Fino’s opinion, which she had credited in finding that claimant suffered from a totally disabling pulmonary impairment.⁷ The administrative law judge found that Dr. Fino’s opinion established only that claimant was totally disabled due to pneumoconiosis at some point prior to the doctor’s examination on February 26, 2009. Decision and Order on Remand at 5. The administrative law judge, therefore, next considered whether there was any credible medical opinion evidence establishing that claimant was not totally disabled subsequent to January 2007, the month in which claimant filed his claim.

See Shupe v. Director, OWCP, 12 BLR 1-200 (1989) (en banc); Director’s Exhibit 3; Hearing Transcript at 30.

⁷ Dr. Fino conducted the most recent examination of claimant on February 26, 2009, and reviewed all of the available medical evidence. Employer’s Exhibit 3. Noting a “heavy deterioration” in claimant’s lung function from December 18, 2007 to February 26, 2009, Dr. Fino opined that claimant’s “progressive obstructive ventilatory abnormality” was moderate in severity by the time of his examination. *Id.* Employer’s Exhibit 3. Dr. Fino opined that claimant’s obstructive lung disease would prevent claimant from performing his work as a roof bolter. *Id.*

The administrative law judge found that Dr. Castle's opinion established that claimant was not totally disabled as of December 18, 2007.⁸ Decision and Order on Remand at 4; Employer's Exhibit 5. The administrative law judge further found that the remaining medical opinions of Drs. Koenig, Robinette and Baker did not establish that claimant was not totally disabled after that time. *Id.* at 4-5. The administrative law judge, therefore, determined that the commencement date for benefits was January 2008. *Id.* at 5.

Discussion

Employer argues that the administrative law judge erred in determining that January 2008 was the appropriate date for the commencement for benefits. We disagree. The administrative law judge permissibly found that Dr. Fino's opinion, upon which the administrative law judge relied to find the existence of a totally disabling pulmonary impairment, established only that claimant was totally disabled due to pneumoconiosis at some point before February 26, 2009. *See Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-108-09 (1985); Employer's Exhibit 3. Moreover, because it is unchallenged in appeal, we also affirm the administrative law judge's finding that Dr. Castle's opinion established that claimant was not totally disabled as of December 2007. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Consequently, benefits may not commence prior to that date. *See Lykins*, 12 BLR at 1-182-83.

Employer, however, argues that the administrative law judge erred in finding that Dr. Baker's opinion was insufficient to establish that claimant was not totally disabled as of the time of the doctor's examination in October 2008. We disagree. Dr. Baker opined that claimant suffered from a mild pulmonary impairment. Claimant's Exhibit 1. Dr. Baker's diagnosis of a mild pulmonary impairment does not establish that claimant was not totally disabled at the time of his examination in October 2008, since even a "mild" respiratory impairment may preclude the performance of a miner's usual coal mine employment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *King v. Cannelton Indus., Inc.*, 8 BLR 1-146, 1-149 (1985). The administrative law judge accurately noted that Dr. Baker "did not indicate one way or the other" whether claimant's mild impairment would prevent him from performing his usual coal mine employment as a roof bolter, a job requiring heavy manual labor. Decision and Order on Remand at 5. We, therefore, affirm the administrative law judge's determination that Dr. Baker's October 2008 opinion did not establish that claimant was not totally disabled.

⁸ The administrative law judge also found that Dr. Rasmussen's medical opinion was sufficient to establish that claimant was not totally disabled as of March 29, 2007. Decision and Order on Remand at 4; Director's Exhibit 10.

Employer next argues that the administrative law judge erred in her consideration of Dr. Robinette's opinion. Dr. Robinette examined claimant in July 2008, and opined that claimant's "lung function [was] normal." Claimant's Exhibit 5. The administrative law judge found that, other than reporting the results of claimant's objective studies, Dr. Robinette did not offer an opinion as to whether claimant suffered from a totally disabling respiratory impairment. Decision and Order on Remand at 5. Employer, however, contends that Dr. Robinette's opinion "weighs against a finding of a disabling respiratory impairment." Employer's Brief at 14. We need not resolve this issue, in light of the administrative law judge's crediting of the reasoning underlying Dr. Fino's opinion. The administrative law judge credited Dr. Fino's opinion that claimant's respiratory function progressively declined so that, at the time of the doctor's examination on February 26, 2009, claimant was totally disabled. Based upon his review of all the evidence of record,⁹ Dr. Fino specifically opined that, subsequent to Dr. Castle's examination in December 2007, there was a "heavy deterioration" in claimant's lung function. Employer's Exhibit 3. Dr. Robinette's opinion, that claimant's lung function was "normal" in July 2008, is, therefore, inconsistent with Dr. Fino's opinion that claimant's respiratory function deteriorated heavily after December 2007. Given the administrative law judge's reasonable reliance upon Dr. Fino's opinion, that there was a progression in the decline of claimant's lung function after December 2007, substantial evidence supports the administrative law judge's finding that Dr. Robinette's opinion was insufficient to establish that claimant did not suffer from a totally disabling pulmonary impairment in July 2008.

Finally, employer contends that the administrative law judge erred in finding that Dr. Koenig's opinion supported a finding that claimant was totally disabled at the time of the doctor's examination on January 18, 2008.¹⁰ We need not address employer's contention. Because Dr. Koenig's opinion does not support a finding that claimant was not totally disabled after December 2007, the administrative law judge's error, if any, in her consideration of the doctor's opinion was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

Because it is based upon substantial evidence, we affirm the administrative law judge's determination that the medical evidence establishes that claimant became totally

⁹ Dr. Fino's review of the medical evidence included a review of Dr. Robinette's medical opinion, as well as the pulmonary function and arterial blood gas study results conducted by the doctor. Employer's Exhibit 3.

¹⁰ Dr. Koenig opined that, considering the strenuous nature of claimant's last job in the mines, his pulmonary impairment would render him totally disabled. Claimant's Exhibit 4.

disabled due to pneumoconiosis sometime before February 2009. We also affirm the administrative law judge's determination that the most recent month in which the credited evidence establishes that claimant was not totally disabled was December 2007. We, therefore, affirm the administrative law judge's determination that claimant is entitled to benefits as of January 2008. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order on Remand determining the commencement date for benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge