

BRB No. 14-0056 BLA

DENISE C. THOMAS¹)
(o/b/o RONNIE S. THOMAS, deceased))
)
Claimant-Respondent)
)
v.)
)
BARTON MINING, INCORPORATED)
)
and)
)
LIBERTY MUTUAL INSURANCE) DATE ISSUED: 08/19/2014
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 on Remand of Alice M. Craft,
Administrative Law Judge, United States Department of Labor.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for
employer/carrier.

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

PER CURIAM:

¹ The miner died on November 11, 2006, while his claim was pending before the Board. Director's Exhibit 63. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

Employer/carrier (employer) appeals the Decision and Order on Remand (2004-BLA-6170) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case, involving a subsequent claim filed on July 10, 2002,² is before the Board for the second time.

In the initial decision, the administrative law judge credited the miner with twenty-three years of coal mine employment,³ and found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the miner's prior claim became final. *See* 20 C.F.R. §725.309. Consequently, the administrative law judge considered the miner's 2002 claim on the merits. Although the administrative law judge found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), she found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration. *Thomas v. Barton Mining, Inc.*, BRB No. 06-0445 BLA (Jan. 30, 2007) (unpub.). The Board also vacated the administrative law judge's finding that the evidence established that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).⁴ *Id.*

² The miner's previous claim, filed on May 9, 1997, was finally denied by the district director because the miner failed to establish that he suffered from pneumoconiosis. Director's Exhibit 1.

³ The miner's coal mine employment was in Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

⁴ The Board also determined that the miner's prior claim was denied, not because the miner failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), but because the miner failed to establish the existence of pneumoconiosis. *Thomas v. Barton Mining, Inc.*, BRB No. 06-0445 BLA (Jan. 30, 2007) (unpub.). Consequently, the Board noted that, in order to establish that the applicable condition of entitlement had changed

On remand, the administrative law judge found that the new evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the miner's 2002 claim on the merits, the administrative law judge found that the evidence established that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b), and that his total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer also challenges the administrative law judge's determination of the date for the commencement of benefits. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a 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 establish 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).

Legal Pneumoconiosis

Employer argues that the administrative law judge erred in finding that the new

since the denial of his prior claim, the miner was required to submit new evidence establishing the existence of pneumoconiosis. *Id.* The Board further noted that if, on remand, the administrative law judge found that the new evidence established the existence of legal pneumoconiosis, the miner will have established a change in the applicable element of entitlement pursuant to 20 C.F.R. §725.309. *Id.*

medical opinion evidence established the existence of legal pneumoconiosis⁵ pursuant to 20 C.F.R. §718.202(a)(4). In considering whether the new medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Rasmussen, Sutherland, Rosenberg, Fino, and Smiddy. Dr. Rasmussen diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema, due to both coal mine dust exposure and smoking. Director's Exhibit 9. Dr. Sutherland also diagnosed legal pneumoconiosis, opining that the miner suffered from "[COPD] associated with exposure to coal dust." Director's Exhibit 32. Although Drs. Rosenberg also diagnosed COPD, he opined that the disease was due solely to cigarette smoking. Director's Exhibits 33. Dr. Fino diagnosed emphysema, but attributed the disease solely to cigarette smoking. Director's Exhibit 44. Finally, Dr. Smiddy diagnosed COPD, but did not address its etiology. Director's Exhibit 45.

The administrative law judge credited Dr. Rasmussen's diagnosis of legal pneumoconiosis, finding that the doctor's opinion, that the miner's COPD/emphysema was due to both coal mine dust exposure and smoking, was well-reasoned, and "consistent with the medical evidence available to [him], the medical evidence as a whole, and the premises underlying the regulations." Decision and Order at 20, 22. Although the administrative law judge found that Dr. Smiddy's opinion provided "some support to a finding of legal pneumoconiosis," she found that the doctor's opinion was "somewhat ambiguous and vague." *Id.* at 20. The administrative law judge discounted the opinions of Drs. Rosenberg and Fino because she found that their opinions were inconsistent with the premises underlying the regulations. Decision and Order at 21-22. The administrative law judge also questioned the opinions of Drs. Rosenberg and Fino because she found that neither physician adequately explained how the miner's coal dust exposure could be eliminated as a source of the miner's obstructive impairment. *Id.* The administrative law judge also gave less weight to Dr. Sutherland's diagnosis of legal pneumoconiosis because she found that it was not sufficiently reasoned. *Id.* at 20. The administrative law judge, therefore, accorded the greatest probative weight to Dr. Rasmussen's opinion, as supported by that of Dr. Smiddy, and held that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 22.

Employer contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to support a finding of legal pneumoconiosis. Employer specifically argues that the administrative law judge erred in finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was sufficiently reasoned. Employer's

⁵ 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).

Brief at 16-22. We disagree. Dr. Rasmussen based his diagnosis of legal pneumoconiosis on the miner's coal mine employment and smoking histories, a medical history, a physical examination, and the results of a pulmonary function study. Director's Exhibit 9. The administrative law judge found that Rasmussen's opinion, that the miner's COPD/emphysema was due to both cigarette smoking and coal mine dust exposure, was well reasoned, noting that the doctor explained that "both risk factors damage the lung tissue" and that the miner "seemed unusually susceptible to the toxic effects of both." Decision and Order at 13. We conclude that substantial evidence in the record supports the administrative law judge's determination that Dr. Rasmussen's diagnosis of legal pneumoconiosis was reasoned. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000).

We also reject employer's contention that the administrative law judge erred in her consideration of the opinions of Drs. Rosenberg and Fino. The administrative law judge permissibly questioned the opinions of Drs. Rosenberg and Fino, that the miner's obstructive pulmonary impairment was due solely to smoking, because she found that the physicians failed to adequately explained how they eliminated the miner's twenty-three years of coal dust exposure as a source of the miner's obstructive impairment. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 21. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Rosenberg and Fino.⁶

Because it is supported by substantial evidence, the administrative law judge's finding, that the new medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), is affirmed.⁷ In light of our

⁶ Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Rosenberg and Fino, any error she may have made in according less weight to their opinions for other reasons would be harmless. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer's remaining arguments regarding the weight accorded to the opinions of Drs. Rosenberg and Fino.

⁷ We agree with employer that the administrative law judge erred in finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was supported by that of Dr. Smiddy. As the Board previously noted, while Dr. Smiddy diagnosed chronic obstructive pulmonary disease, he did not address the etiology of the disease. *Thomas*, BRB No. 06-0445 BLA, slip op. at 7. However, because the administrative law judge accorded "probative weight" to Dr. Rasmussen's diagnosis of legal pneumoconiosis, and permissibly discounted all of the contrary opinions in the record, we hold that the administrative law judge's error, in finding that Dr. Rasmussen's opinion was supported

affirmance of this finding, we also affirm the administrative law judge's determination that the miner established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

The administrative law judge also considered whether all of the medical opinion evidence of record, including the medical opinion evidence previously submitted in connection with the miner's 1997 claim, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The previously submitted medical evidence consists of Dr. Iosif's 1997 medical report, wherein the doctor diagnosed COPD, opining that it was "the likely result of . . . cigarette smoking." Director's Exhibit 1. Employer contends that the administrative law judge erred in her consideration of Dr. Iosif's opinion. We disagree. The administrative law judge permissibly questioned Dr. Iosif's opinion that the miner's COPD was due solely to smoking, because she found that the physician failed to adequately explain how he eliminated the miner's coal dust exposure as a source of the disease. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; Decision and Order on Remand at 22. The administrative law judge, therefore, properly accorded less weight to Dr. Iosif's opinion.⁸ We, therefore, affirm the administrative law judge's finding, on the merits, that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

The administrative law judge also found that all of the evidence of record, when weighed together, established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Compton*, 211 F.3d at 208-09, 22 BLR at 2-170; Decision and Order on Remand at 22. Because it is supported by substantial evidence, this finding is also affirmed.

Total Disability Due to Pneumoconiosis

Employer next argues that the administrative law judge erred in finding that the evidence established that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). We disagree. The administrative law judge rationally discounted

by that of Dr. Smiddy, was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

⁸ Because the administrative law judge provided a valid basis for according less weight to Dr. Iosif's opinion, the administrative law judge's error, if any, in according less weight to his opinion for other reasons, would be harmless. *See Kozele*, 6 BLR at 1-382 n.4. Therefore, we need not address employer's remaining arguments regarding the weight accorded to his opinion.

the opinions of Drs. Rosenberg and Fino because they did not diagnose legal pneumoconiosis. See *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 24-25. Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Rasmussen to find that the miner established the existence of legal pneumoconiosis, she permissibly found that Dr. Rasmussen's opinion supported a finding that the miner is totally disabled due to legal pneumoconiosis. Consequently, we affirm the administrative law judge's finding that the evidence established that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Date of Entitlement

Employer challenges the administrative law judge's determination regarding the commencement date for benefits. In this case, the administrative law judge found that the miner was entitled to benefits as of July 1998, the month in which the denial of his prior claim became final. Decision and Order on Remand at 25; Director's Exhibit 1.

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 erred in concluding that the miner was totally disabled due to pneumoconiosis when his prior claim was denied. The district director's determination in the prior claim, that the miner was not totally disabled due to pneumoconiosis, became final and must be accepted as correct. See *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 1361, 20 BLR 2-227, 2-232 (4th Cir. 1996) (en banc). Moreover, the miner filed this subsequent claim in July 2002, and the record contains no evidence of total disability due to pneumoconiosis prior to the filing date. Dr. Rasmussen's opinion, on which the administrative law judge relied, was provided in January 2003 and establishes only that the miner was totally disabled due to pneumoconiosis at some point prior to that date. See *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-108-09 (1985); Director's Exhibit 9. Because the evidence does not establish when the miner became totally disabled due to pneumoconiosis, the miner is

entitled to benefits as of July 2002, the month in which he filed his subsequent claim. 20 C.F.R. §725.503(b).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, as modified to reflect July 2002 as the date from which benefits commence.

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge