BRB No. 00-0154 BLA

MARTIN SOMMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	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 Awarding Living Miner's Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Richard A. Dean (Arter & Hadden, LLP), Washington, D.C., for employer.

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

Employer appeals the Decision and Order Awarding Living Miner's Benefits (99-BLA-0369) of Administrative Law Judge Thomas M. Burke 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). The administrative law judge found that the instant claim was timely filed pursuant to 20 C.F.R. §725.308, and that the parties stipulated to a coal mine employment history of at least sixteen years. Decision and Order at 2-3. In considering the merits of entitlement, the administrative law judge found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and that claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b), that such pneumoconiosis arose out of coal mine employment. Decision and Order at 3-11. The administrative law judge further found that claimant established the existence of a totally

disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c) and that such disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Decision and Order at 11-15. Accordingly, benefits were awarded as of September, 1992. Decision and Order at 15-16.

On appeal, employer argues that the administrative law judge erred in refusing to admit into evidence documents which were a part of claimant's state worker's compensation claim, erred in concluding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4), erred in finding that total disability was established pursuant to Section 718.204(c), erred in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b), and erred in analyzing the evidence regarding the date of the onset of disability. Claimant, in response, urges affirmance of the award of benefits.[1] The Director, Office of Workers' Compensation Programs (the Director), 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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in refusing to

[1] Employer has subsequently filed a Reply Brief in which it reiterates its earlier contentions.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination, the finding that this claim was filed in a timely manner, the finding that claimant was entitled to the presumption found at 20 C.F.R. §718.203(b), and the findings that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2) and (3). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

consider the medical evidence amassed pursuant to a workers' compensation claim filed by claimant with the Illinois Industrial Commission. Employer asserts that these documents contain medical evidence relevant to the existence of a totally disabling respiratory impairment as well as the existence of pneumoconiosis. Employer argues that the evidence that claimant was totally disabled due to knee problems was relevant to the issue of total disability pursuant to the holdings of the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this claim arises. *See Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*,115 S.Ct. 1399 (1995) and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). Employer further asserts that contained within these documents are negative x-ray interpretations, relevant evidence of the non-existence of pneumoconiosis and thus evidence which should be addressed by the administrative law judge.

At the hearing of May 18, 1999, claimant objected to the admission of several documents, Employer's Exhibits 16-19, which were part of a claim filed with the Illinois Industrial Commission. Hearing Transcript at 51. Claimant argued that the evidence compiled pursuant to his state workers' compensation claim was not relevant to the instant claim and that the probative value of any such evidence would be outweighed by the danger of unfair prejudice resulting from its admission. Hearing Transcript at 51. Employer argued that the evidence was relevant because the x-ray evidence demonstrated the absence of pneumoconiosis, and that the evidence that claimant suffered from a totally disabling knee injury was sufficient to preclude an award of black lung benefits pursuant to the holdings of *Foster, supra* and *Vigna, supra*. Hearing Transcript at 53-54. The administrative law judge sustained claimant's objection to the admission of such evidence and excluded it. *See* Hearing Transcript at 67.

At the hearing, the administrative law judge is required to inquire fully into the matters at issue and to receive into evidence all testimony and documents that are relevant and material to the claim. 20 C.F.R. §725.455(b); *see also* 30 U.S.C. §923(b). While we recognize that the administrative law judge possesses broad discretion in resolving procedural issues, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986), the administrative law judge may not reject relevant medical evidence without adequate explanation. *See McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1984). In the instant case, the documents pertinent to claimant's Illinois Industrial Commission claim are not part of the record and, thus, we are not able to review such evidence and determine whether the administrative law judge's findings regarding the documents are supported by substantial evidence. Accordingly, absent a more specific determination that such evidence was not relevant, the administrative law judge's decision sustaining claimant's objection and precluding the admission of such evidence into the record is vacated. While we recognize

that such evidence may, ultimately, be accorded little weight based on several legally permissible bases, we are not able at this time to conclude that the administrative law judge's exclusion of such evidence is consistent with applicable law. Accordingly, we vacate the administrative law judge's Decision and Order Awarding Living Miner's Benefits and remand the claim to the administrative law judge for further consideration of the evidence in question.

We are mindful, however, that employer has also raised specific allegations of error regarding the administrative law judge's analysis of the evidence at Part 718. Accordingly, in the interest of judicial economy and to avoid the possibility of error on remand, we now address those allegations.

Employer asserts that the administrative law judge erred in concluding that the x-ray evidence of record supported a finding of pneumoconiosis at Section 718.202(a)(1). Employer contends that the administrative law judge erred in not addressing all of the x-ray evidence inasmuch as he failed to address a negative interpretation rendered by Dr. Sagel, Director's Exhibit 17, and failed to address negative interpretations which were part of claimant's claim before the Illinois Industrial Commission. Employer further asserts that the administrative law judge's "methodology" in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) was flawed inasmuch as he failed to consider the x-rays in conjunction with the holding in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993) and failed to consistently accord greatest weight to the interpretations of those physicians with superior qualifications.

In finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), the administrative law judge found that there were forty-two interpretations of five x-rays. After reviewing all of the x-rays, the administrative law judge found that inasmuch as the weight of the interpretations of the August 1, 1989 film, Director's Exhibits 17, 23, and the June 24, 1998 film, Director's Exhibits 32, 39, 40, 40, Employer's Exhibits 1-3, 10, 12; Claimant's Exhibits 7, 8, were positive for the existence of pneumoconiosis, they outweighed the interpretations of the April 3, 1998 film, Director's Exhibits 38, 41; Claimant's Exhibits 2-6, the weight of which were negative for the existence of pneumoconiosis. Decision and Order at 6.

The failure of an administrative law judge to consider all relevant evidence constitutes error. *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). As employer asserts, the x-ray interpretation of Dr. Sagel clearly indicates that "no radiographic evidence" of pneumoconiosis is seen. Director's Exhibit 17. As such, it constitutes relevant x-ray evidence which must be addressed by the administrative law judge. Further, if the

reports of the Illinois Industrial Commission do contain credible chest x-ray interpretations, such evidence should be addressed by the administrative law judge on remand if this report is admitted into the record, *see generally Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 9 BLR 2-1 (3d Cir. 1986). We reject, however, any assertion by employer that the administrative law judge's methodology was flawed in that he failed to consider the qualifications of the physicians rendering x-ray interpretations. A review of the administrative law judge's Decision and Order demonstrates that he properly took such factors into account when rendering his conclusions. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-1344 (1985); *see also Vance v. Eastern Associated Coal Corp.*, 8 BLR 1-65 (1985); *Aimone v. Morrison Knudson Co.*, 8 BLR 1-32 (1985). Accordingly, on remand, the administrative law judge must again weigh all the relevant x-ray evidence pursuant to Section 718.202(a)(1).

Employer next contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer asserts that the administrative law judge erroneously accorded greater weight to the opinions of Drs. Houser and Cohen, both of whom concluded that claimant suffered from pneumoconiosis, Director's Exhibits 22, 23; Claimant's Exhibits 11, 13, merely because these physicians conducted examinations of claimant. Employer contends that their opinions are nothing more than restatements of x-ray opinions. Likewise, employer asserts that the administrative law judge improperly discredited the opinions of Drs. Hippensteel and Renn, both of whom concluded that the claimant did not suffer from pneumoconiosis, Employer's Exhibits 12, 14, merely because these physicians did not examine claimant.

In finding that claimant established the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge considered all of the relevant medical opinion evidence and accorded greatest weight to the opinions of Drs. Houser and Cohen. Decision and Order at 7-11. The administrative law judge found that these opinions were the most credible because the physicians had both a first-hand knowledge of claimant's physical condition derived from their examinations of claimant and because their opinions were well-supported by underlying documentation.

The Seventh Circuit has precluded an administrative law judge from mechanically according greater weight to a physician's opinion merely based on that physician's status as an examining physician, *see Amax Coal Company v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *see also Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992); *see generally Freeman United Coal Mining Co. v. Stone*, 957 F.2d 360, 362-63, 16 BLR 2-57 (7th Cir. 1992). The administrative law judge has not, therefore sufficiently explained his basis for according greatest weight to the opinions of Drs. Houser and Cohen inasmuch as he has not provided a basis for his determination that their examinations of

claimant provided them with greater first-hand knowledge of the presence or absence of pneumoconiosis than the physicians who had not examined claimant. Further, while the administrative law judge has provided an alternative basis for according greater weight to the opinions of these examining physicians, *i.e.*, that their opinions are better supported by the underlying x-ray evidence of record, inasmuch as we have concluded that the administrative law judge's analysis of the x-ray evidence of record is flawed, *see* discussion, *supra*, we cannot affirm the administrative law judge's weighing relying on this alternative basis. *See generally Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996). Accordingly, we vacate the administrative law judge's determination that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4), and hold that, if reached on remand, the administrative law judge must again weigh all the relevant evidence pursuant to this subsection.

Employer next contends that the administrative law judge erred in concluding that claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c). Specifically, employer asserts that the administrative law judge failed to address the importance of the post-bronchodilator pulmonary function studies, the majority of which produced non-qualifying values.[3] Employer asserts that the failure of the administrative law judge to consider this evidence affected his analysis of the medical opinion evidence inasmuch as the administrative law judge credited the opinions of total disability rendered by Dr. Houser and Dr. Cohen based upon their review of qualifying pulmonary function studies.

In finding that claimant established the existence of a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge found that each of the ten pulmonary function studies of record, Director's Exhibits 7, 17, 23, 25, 31, 33, supported a finding of total disability pursuant to Section 718.204(c)(1). Decision and Order at 12-13. The administrative law judge further found that claimant was unable to demonstrate the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(2) and (3) inasmuch as there was no qualifying blood gas study evidence or evidence of cor pulmonale with right-sided congestive heart failure. Finally, the

[3] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §718.204, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

administrative law judge determined that the medical opinions of Drs. Houser and Cohen supported a finding of total disability pursuant to Section 718.204(c)(4) as their opinions were best supported by the underlying documentation of record, specifically the qualifying pulmonary function studies. Decision and Order at 13-14.

In order to determine whether claimant has established a totally disabling respiratory impairment pursuant to Section 718.204(c), the administrative law judge must weigh all contrary probative evidence, like and unlike, and determine whether the evidence as a whole is supportive of a finding of total disability. *Clark, supra*; *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), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). In the instant case, a review of the record demonstrates that, along with the ten qualifying pre-bronchodilator pulmonary function studies, Director's Exhibits 7, 17, 23, 25, 31, 33, claimant also performed eight studies after receiving bronchodilator treatment, Director's Exhibits 17, 23, 25, 31, 33. Of these eight post-bronchodilator studies, six produced non-qualifying values, Director's Exhibits 17, 23, 25, 31, 33. While the administrative law judge noted these non-qualifying studies in his charting of the evidence, he merely concluded that "each of the ten ventilatory studies in the record yielded qualifying values," without discussing the non-qualifying values produced after the administration of the bronchodilators. Decision and Order at 12. The administrative law judge's failure to specifically weigh the values of all the studies and explain which values he considered to be more probative constitutes error. *See Keen v. Jewell Ridge Coal Corp.*, 6 BLR 1-454 (1983). Accordingly, we vacate the administrative law judge's determination that claimant has demonstrated the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(1). *see Tackett, supra*; *Branham, supra*; *Arnold, supra*; *see also Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986). If reached on remand, the administrative law judge must reconsider all of the relevant evidence at this subsection.

Moreover, the administrative law judge's determination that claimant demonstrated the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c)(4) must also be vacated. The administrative law judge concluded that the opinions of Drs. Houser and Cohen that claimant was totally disabled were the best supported medical opinions of record as they were based on the qualifying pulmonary function study evidence. Decision and Order at 14. However, inasmuch as the administrative law failed to address all the relevant pulmonary function study evidence, *see* discussion, *supra*, the basis for according the opinions of Dr. Cohen and Dr. Houser dispositive weight cannot stand. Accordingly, we vacate the administrative law judge's determination at Section 718.204(c)(4) and remand the case for further consideration of all of the relevant evidence pursuant to Section 718.204(c). *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986); *Fields*,

supra; *Rafferty*, *supra*; *Shedlock*, *supra*.

Regarding Section 718.204(b), employer specifically asserts that the evidence of record establishes that claimant was totally disabled due to knee problems and argues that based upon the holdings of the Seventh Circuit in *Foster*, *supra* and *Vigna*, *supra*, such evidence precludes claimant from carrying his burden at Section 718.204(b). Employer contends that the medical opinions of Drs. Tuteur, Renn and Hippensteel all concluded that claimant's disability, if any, was not due to coal dust exposure, and that the administrative law judge erroneously discredited their opinions based on a flawed determination that claimant established the existence of pneumoconiosis. Employer further argues that the administrative law judge improperly relied upon the opinions of Dr. Cohen, that claimant's totally disabling respiratory impairment was due to pneumoconiosis, as Dr. Cohen merely based his conclusions upon medical literature and not on the specific facts presented in this case.

In order to carry his burden at Section 718.204(b) claimant must establish that pneumoconiosis is at least a contributing cause of a miner's total disability. In order to be a contributing cause, pneumoconiosis must be a necessary, but need not be a sufficient condition of the miner's total disability. Claimant must prove a simple "but for" nexus to be entitled to benefits. *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990).

In finding that claimant carried his burden at Section 718.204(b), the administrative law judge permissibly found the opinions of Dr. Cohen and Houser, that claimant's totally disabling respiratory impairment was due at least in part to coal dust exposure and pneumoconiosis, were the best reasoned of record. The administrative law judge further accorded less weight to the contrary opinions of Drs. Hippensteel, Tuteur and Renn, that pneumoconiosis played no role in the miner's disability, inasmuch as the opinions were based on a faulty premise, *i.e.*, that claimant did not suffer from pneumoconiosis. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. l990); *Church*, *supra*; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995). Nevertheless, inasmuch as we have vacated the administrative law judge's determinations that claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) and a totally disabling respiratory impairment pursuant to Section 718.204(c), we must, necessarily, vacate the administrative law judge's determination at Section 718.204(b). If reached on remand, the administrative law judge must again weigh the relevant evidence of record in conjunction with the relevant law.

Finally, employer argues that in the event the award of benefits is affirmed, the administrative law judge erred in determining that September 1992, is the date on which

claimant's entitlement to benefits commenced. Employer asserts that the administrative law judge failed to weigh all contradictory evidence in determining when the evidence established the presence of a totally disabling respiratory impairment due to pneumoconiosis. In concluding that claimant established entitlement to benefits as of September 1992, the administrative law judge relied upon Dr. Houser's September 30, 1992 deposition, Director's Exhibit 23, as the first medical evidence demonstrating that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis. Decision and Order at 16.

As a general rule, once claimant's entitlement to benefits has been demonstrated, the date for commencement of those benefits is determined by the month in which claimant became totally disabled. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Curse v. Director, OWCP*, 843 F.2d 456, 11 BLR 2-139 (11th Cir. 1988); *Lykins v. Director, OWCP* 12 BLR 1-181 (1989). It is well established that, if the date of onset is not ascertainable from all the relevant evidence of record, then benefits will commence with the month during which the claim was filed. 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 Corporation*, 14 BLR 1-47 (1990); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1984); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). A claimant may not receive benefits for any period during which he was not totally disabled. *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins, supra*. Similarly, the Board has held that it is improper to rely on claimant's filing date for determining onset if credible medical evidence indicates that claimant was not totally disabled at some point subsequent to the filing date. *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins, supra*. Therefore, inasmuch as the administrative law judge has failed to consider relevant evidence of non-disability, *i.e.*, the non-qualifying pulmonary function study evidence and blood gas study evidence, taken subsequent to Dr. Houser's deposition, Director's Exhibits 7, 10, 17, 23, 25, 31, 33, we vacate the administrative law judge's finding that September 1, 1992, constitutes the date that benefits must commence and hold that, on remand, the administrative law judge must reconsider the onset date, if the issue is reached.

Accordingly, the administrative law judge's Decision and Order Awarding Living Miner's Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge