BRB No. 00-0376 BLA

HENRY BOLLING	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
BOSSCO, INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF	)	
WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	DECISION AND ORDER
Party-in-Interest		

Appeal of the Decision and Order on Reconsideration and Decision and Order on Remand - Date of Disability Onset of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Donald E. Earls (Earls & Fleming), Norton, Virginia, for claimant.

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

Helen H. Cox (Henry L. Solano, 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Reconsideration and Decision and Order on Remand - Date of Disability Onset (84-BLA-8151) of Administrative Law Judge Mollie W. Neal awarding benefits with respect to 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 has been before the Board previously. In its most recent Decision and Order, the Board affirmed the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4) and her determination that employer did not establish rebuttal under 20 C.F.R. §727.203(b)(3) and (b)(4). Accordingly, the Board affirmed the award of benefits, but remanded the case to the administrative law judge for reconsideration of her determination of the date from which employer is liable for the payment of benefits. *Bolling v. Bossco, Inc.*, BRB No. 96-1355 BLA (June 26, 1997)(unpub.).

On remand, the administrative law judge found that inasmuch as the medical evidence of record did not establish the date on which claimant became totally disabled due to pneumoconiosis and claimant was still working as a miner at the time he filed his application for benefits, benefits are payable from the first day of the month in which claimant ceased working in the coal mines. The administrative law judge ordered employer to begin paying benefits effective September 1, 1982; a date almost three years subsequent to claimant's retirement from coal mine employment. Both employer and the Director, Office of Workers' Compensation Programs (the Director), moved for reconsideration of the administrative law judge's Decision and Order on Remand.

In her Decision and Order on Reconsideration, the administrative law judge, at employer's urging, reconsidered her findings under Sections 727.203(a)(4), 727.203(b)(3), and 727.203(b)(4) in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). The administrative

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[1]In an earlier disposition, the Board affirmed Administrative Law Judge George A. Fath's finding that claimant did not establish invocation pursuant to 20 C.F.R. §727.203(a)(1)-(3) and his determination that employer did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1) and (b)(2). *Bolling v. Bossco, Inc.*, BRB No. 92-0951 BLA (Jan. 30, 1995)(unpub.).

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's last year of coal mine employment occurred in the Commonwealth of Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

law judge determined once again that claimant established invocation under Section 727.203(a)(4) and that employer failed to establish rebuttal under Section 727.203(b)(3) and (b)(4). The administrative law judge also reiterated her finding that no specific date of onset of total disability due to pneumoconiosis could be ascertained, but changed the date from which benefits commenced to October 1, 1979.

Employer argues on appeal that the administrative law judge erred in mechanically according greatest weight to the opinion of Dr. Kanwal based upon his status as claimant's treating physician. Employer also argues that the administrative law judge's finding with respect to the date from which claimant is entitled to benefits cannot be affirmed. Employer further contends that liability in this case should be transferred to the Black Lung Disability Trust Fund (the Trust Fund) based upon a violation of employer's right to due process. Claimant has responded and urges affirmance of the award of benefits and the administrative law judge's date of onset determination. The Director has also responded and maintains that employer's argument regarding transfer of liability to the Trust Fund is without merit.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law. 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).

Employer contends that the administrative law judge erred in according determinative weight to Dr. Kanwal's opinion under Sections 727.203(a)(4), 727.203(b)(3), and 727.203(b)(4). Employer maintains that Dr. Kanwal's opinion is not adequately reasoned or documented and that the administrative law judge mechanically gave it more weight than the contrary opinions of record solely on the basis of Dr. Kanwal's status as claimant's treating physician. In her prior Decision and Order, the administrative law judge discussed all of the relevant medical opinions in their entirety and stated that:

> After weighing all of the physician opinions, I find Dr. Kanwal's opinion that the miner is totally disabled by his chronic lung disease to be the most persuasive of the opinions expressed by the eight physicians who either examined claimant or reviewed his medical records and offered an opinion regarding his pulmonary condition. Dr. Kanwal's diagnosis of a pulmonary impairment and disability assessment is well reasoned and entitled to greater weight. I reach this conclusion, in part, based on the fact that he has been claimant's treating physician over an extended period. While he may not be as highly qualified as other physicians whose opinions appear

> in the record, his status as treating physician entitles his opinion to great weight. *Grigg v. Director, OWCP*, 28 F. 3d 416[, 18 BLR 2-299] (4th Cir. 1994). Although his status of treating physician, alone, does not render his decision dispositive, he is in a better position to objectively evaluate the miner's progressively worsening symptoms over time, and the effect those symptoms had on his ability to give maximum effort during pulmonary function and arterial blood gas testing. Dr. Kanwal's opinion is further supported by the findings of Drs. Tholp[a]dy and Smiddy. Therefore, I find that the physician opinion evidence is sufficient to establish subsection (a)(4) invocation.

Decision and Order on Remand Awarding Benefits at 16-17. The administrative law judge relied upon this weighing of the medical opinions of record to determine that employer did not establish rebuttal under Section 727.203(b)(3) and (b)(4). Upon considering employer's allegations of error regarding the administrative law judge's consideration of Dr. Kanwal's opinion, the Board affirmed the administrative law judge's decision to accord greatest weight to Dr. Kanwal's diagnosis of pneumoconiosis and his identification of pneumoconiosis as a contributing cause of claimant's totally disabling pulmonary impairment. *Bolling v. Bossco, Inc.*, BRB No. 96-1355 BLA (June 26, 1997)(unpub.), slip op. at 3-4, 5.

In her Decision and Order on Reconsideration, the administrative law judge reexamined her findings with respect to Dr. Kanwal's opinion in light of the United States Court of Appeals for the Fourth Circuit's decision in *Akers*, which was issued subsequent to the administrative law judge's initial Decision and Order on Remand. In *Akers*, the court held that an administrative law judge cannot mechanistically credit, to the exclusion of all other evidence, the opinion of an examining or treating physician. The court further indicated that in assessing the relative probative weight of the medical opinions of record, an administrative law judge must address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *Akers*, *supra*. The administrative law judge reviewed her findings with respect to Dr. Kanwal's reports in detail and set forth her rationale for determining that she did not employ an absolute preference for Dr. Kanwal's opinion in contravention of the court's holding in *Akers*. Decision and Order on Reconsideration at 4-7.

Employer asserts that the administrative law judge's weighing of Dr. Kanwal's opinion cannot be affirmed under the standards expressed by the United States Court of Appeals for the Fourth Circuit in *Akers, U.S. Steel Mining Co., Inc. v. Director, OWCP* [Jarrell], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Employer maintains that these decisions required the administrative law judge to discredit Dr. Kanwal's diagnoses, despite his status as claimant's treating physician, as his reports do not constitute reliable, probative, and substantial evidence in support of a finding of a totally disabling pulmonary impairment caused, in part, by pneumoconiosis. Specifically, employer alleges that Dr. Kanwal declared claimant totally disabled in only three preprinted statements, that Dr. Kanwal relied upon invalid pulmonary function tests in rendering his opinion, and that Dr. Kanwal's diagnosis of a totally disabling pulmonary impairment is not supported by the objective evidence of record.

Upon consideration of employer's arguments, the administrative law judge's Decisions and Orders, and the relevant evidence, we affirm the administrative law judge's findings with respect to Dr. Kanwal's opinion under Sections 727.203(a)(4), 727.203(b)(3), and 727.203(b)(4). In reviewing the administrative law judge's Decision and Order, the Board is charged with determining whether the administrative law judge's findings are rational and supported by substantial evidence. "Substantial evidence" consists of evidence that is of sufficient quality and quantity as a reasonable mind might accept as adequate to support the finding at issue. *See Piney Mountain Coal Co. v. Mays,* 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999), citing *Richardson v. Perales*, 402 U.S. 389, 401 (1971)(quoting *Consolidated Edison Co. of New York v. NLRB*, 305 U.S. 197 (1938)). A decision that reflects the workings of a "reasonable mind," is that which falls within the "realm of rationality." *Mays*, 176 F.3d at 757, 21 BLR at 2-591. Thus, an administrative law judge's finding cannot be vacated merely because a different result could have been reached or a different interpretation of the facts could have been adduced. *Id*.

Under *Akers*, *Hicks*, and *Jarrell*, the Fourth Circuit made it clear that when weighing the medical opinion evidence, an administrative law judge must look beyond the surface of the opinion and the status of its author and carefully assess the factors that affect the probative value of the opinion, *i.e.*, the physician's qualifications, the nature and quantity of the documentation underlying the opinion, the extent to which a physician has explained his conclusions, and the sophistication of the doctor's diagnoses. Nevertheless, the court has not abandoned the notion that "as a general matter, the opinions of treating and examining physicians deserve special consideration." *Grizzle v. Pickands Mather and Co.,* 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *accord Akers, supra*. In the present case, the administrative law judge findings with respect to Dr. Kanwal's opinion are consistent with the principles set forth by the Fourth Circuit, are rational, and are supported by substantial evidence. *See Mays*, *supra*.

In her Decision and Order on Remand - Awarding Benefits and in her Decision and Order on Reconsideration, the administrative law judge described Dr. Kanwal's medical reports in detail and explicitly acknowledged that Dr. Kanwal's status as claimant's treating physician for approximately fifteen years was not sufficient, in and of itself, to warrant granting his opinion determinative weight. Decision and Order on Remand at 3-5, 17; Decision and Order on Reconsideration at 4-7. The administrative law judge rationally determined that, contrary to employer's allegations, Dr. Kanwal provided an adequate explanation for his diagnosis of pneumoconiosis and total and permanent respiratory disability, despite the variability of claimant's pulmonary function and blood gas study results, and for his conclusion that there is no link between claimant's heart disease and his totally disabling respiratory impairment. *Id*.; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Dr. Kanwal confirmed that claimant often could not perform a valid pulmonary function test, but he attributed claimant's difficulties to chronic lung disease. Claimant's Exhibit 7 at 15-17. In addition, employer is incorrect in asserting that Dr. Kanwal's diagnosis of a totally disabling respiratory impairment appeared only in the form of a checked box on three preprinted forms. Dr. Kanwal deemed claimant totally disabled from a respiratory or pulmonary standpoint in numerous narrative reports and in his deposition testimony. Director's Exhibits 29, 35, 39, 43, 48; Claimant's Exhibits 4, 7 at 8. Moreover, Dr. Kanwal supported his diagnosis of dust related chronic lung disease in the absence of x-ray evidence of pneumoconiosis by referring to claimant's history of coal dust exposure and the symptoms that he observed during his examinations of claimant in addition to claimant's lengthy history of coal dust exposure. *Id*.

The remainder of employer's allegations regarding the administrative law judge's weighing of the remaining medical opinions of record constitute a reiteration of the arguments raised by employer and rejected by the Board in employer's prior appeal. Therefore, the Board's previous holdings on this issue constitute the law of the case and need not be disturbed. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Inasmuch as the administrative law judge considered all relevant evidence and did not mechanistically accord greater weight to Dr. Kanwal's opinion merely because he is claimant's treating physician, we affirm the administrative law judge's findings with respect to Dr. Kanwal's opinion under Sections 727.203(a)(4), 727.203(b)(3), and 727.203(b)(4). Thus, the award of benefits under Part 727 is also affirmed.

Employer next argues that in accordance with the decisions of the United States Court of Appeals for the Fourth Circuit in *Consolidation Coal Co. v. Borda*,

171 F.3d 175, 180, 21 BLR 2-545, 2-555 (4th Cir. 1999), and *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), liability in the present case should transfer to the Trust Fund, inasmuch as the administrative law judge deprived employer of its right to due process by applying an absolute presumption in favor of claimant's treating physician. We disagree. In *Borda* and *Lockhart*, the court recognized that when an inexcusable delay in notifying an employer of a claim prevents it from mounting a meaningful defense, employer has been deprived of due process and, thus, must be absolved of liability for benefits. Such a circumstance has not occurred in the present case, as the district director notified employer of claimant's application for benefits within ten months of its filing and employer promptly contested the claim. Director's Exhibits 1, 15, 16. Contrary to employer's suggestion, the decisions of Judge Fath and the administrative law judge have not prevented employer from mounting a meaningful defense; employer's defense has simply been deemed unsuccessful. Even assuming that liability has been imposed upon employer due to an error of law, employer's due process rights are protected by its right of appeal. 20 C.F.R. §802.410.

Finally, employer contends that the administrative law judge erred in determining that the evidence of record did not support a finding of a specific date of onset of total disability due to pneumoconiosis. Employer also asserts that the regulation pertaining to the identification of the date from which benefits commence is invalid, as it creates an irrebuttable presumption in favor of claimants. Employer's contentions are without merit. Pursuant to 20 C.F.R. §725.503(b), benefits are payable from the month of onset of total disability due to pneumoconiosis. Thus, an administrative law judge is required to consider all relevant evidence of record and identify the pertinent date. If the evidence of record does not establish when the miner became totally disabled due to pneumoconiosis, then benefits commence as of the miner's filing date, unless uncontradicted medical evidence indicates that the miner was not totally disabled at some point subsequent to his filing date. *See Green v. Director, OWCP,* 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

In the present case, the administrative law judge considered the medical reports of record and rationally determined that although Dr. Kanwal stated for the first time that pneumoconiosis was a contributing cause of claimant's total disability in a report dated September 9, 1982, this report did not establish the date of onset of total disability due to pneumoconiosis, but rather established that claimant became totally disabled due to pneumoconiosis at some prior date. Decision and Order on Remand - Date of Disability Onset at 2; Director's Exhibit 39; *see Hall*, *supra*. In addition, the administrative law judge acted within her

discretion in finding that the remaining evidence of record did not demonstrate a specific date of onset of total disability due to pneumoconiosis. *Id*. at 3; *see Edmiston*, *supra*. Accordingly, the administrative law judge properly utilized August 17, 1979 - the date of filing of the miner's claim - as the starting point for her designation of the date on which entitlement to benefits commenced and acted appropriately in adjusting the date to October 1, 1979 - the first day of the month following claimant's retirement from mining. *Id*.; Director's Exhibits 1, 4; *see Owens v. Jewell Smokeless Coal Corp.,* 14 BLR 1-47 (1990).

Lastly, we find no merit in employer's argument regarding the validity of Section 725.503(b). Contrary to employer's assertion, Section 725.503(b) does not create an irrebuttable presumption mandating selection of the date of filing as the date from which benefits are payable. If the record contains evidence affirmatively establishing that the miner was not totally disabled subsequent to his filing date, the date from which entitlement to benefits commences cannot be fixed any earlier than the date of such evidence. *See Lykins*, *supra*. In the present case, the administrative law judge rationally determined that Dr. Kanwal's opinion outweighs the opinions of record in which the physicians determined that claimant has never been totally disabled due to pneumoconiosis. In addition, there is no other evidence affirmatively demonstrating that claimant was not totally disabled at some point subsequent to his retirement. We hold, therefore, that substantial evidence supports the administrative law judge's designation of October 1, 1979 as the date from which claimant's entitlement to benefits commences. *See Green*, *supra*; *Edmiston*, *supra*; *Owens*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Reconsideration and Decision and Order on Remand - Date of Disability Onset are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge