BRB No. 10-0231 BLA

SIDNEY BURDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 12/23/2010
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
and	)	
	)	
PITTSTON 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 Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (04-BLA-6332) of Administrative Law Judge Alice M. Craft rendered on a claim filed

pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[1] This case is before the Board for the second time.

In her initial decision, the administrative law judge credited claimant with at least forty-two years of coal mine employment, as stipulated by the parties.[2] The administrative law judge further accepted the parties' stipulation that claimant established the existence of clinical coal workers' pneumoconiosis by biopsy evidence, pursuant to 20 C.F.R. §718.202(a)(2), arising out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant established the existence of legal pneumoconiosis,[3] in the form of chronic obstructive pulmonary disease (COPD) with emphysema, arising in part out of coal mine employment, pursuant to Section 718.202(a)(4). The administrative law judge then found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits, commencing in August 1996, the month in which the administrative law judge found the first evidence of total disability.

In the prior appeal, the Board affirmed the administrative law judge's length of coal mine employment determination, as well as her acceptance of the parties' stipulations that claimant established the existence of simple clinical coal workers' pneumoconiosis by biopsy evidence, and that claimant suffers from a totally disabling respiratory impairment, pursuant to 20 C.F.R. §§718.202(a)(2), 718.204(b)(2). *See S.B.* [*Burden*] *v. Clinchfield Coal Co.*, BRB No. 07-0512 BLA (Mar. 25, 2008)(unpub.), slip op. at 2 n.2. The Board vacated, however, the administrative law judge's award of

[1] This claim was filed on April 28, 2003. Director's Exhibit 2. Thus, as employer and the Director, Office of Workers' Compensation Programs, correctly assert, the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case because it involves a miner's claim filed prior to January 1, 2005. Employer's Reply Brief at 1 n.1; Director's Response Brief at 1 n.1.

[2] The record indicates that claimant'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*).

[3] Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

benefits, and remanded the case for the administrative law judge to more fully consider the opinions of Drs. Paranthaman, Castle, and Fino, as to whether claimant's disabling COPD is due to coal dust exposure. *See* 20 C.F.R. §§718.202(a)(4), 718.204(c). Finally, the Board vacated the administrative law judge's determination that claimant is entitled to benefits beginning August 1996.

On remand, the administrative law judge recognized that the Board's instruction that she reconsider the opinions of Drs. Paranthaman, Castle, and Fino, as to whether claimant's disabling COPD is due to coal dust exposure, necessitated that she revisit the issues of both legal pneumoconiosis and disability causation. Reconsidering these issues, the administrative law judge found that the weight of the evidence of record established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and disability causation pursuant to 20 C.F.R. §718.204(c). After revisiting her date of onset determination, the administrative law judge awarded benefits, again commencing August 1996.

In the present appeal, employer challenges the administrative law judge's finding that the weight of the medical evidence establishes that claimant's totally disabling respiratory impairment is due to coal dust exposure. *See* 20 C.F.R. §§718.202(a)(4), 718.204(c). Employer also challenges the administrative law judge's determination of the appropriate date from which benefits should commence. Employer additionally requests that the case be remanded to a different administrative law judge. Claimant did not file a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response in support of the administrative law judge's discounting of Dr. Fino's opinion as to the cause of claimant's disabling impairment. Employer filed a reply brief, responding to the Director's arguments, and reiterating its contentions on appeal.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

In finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge accorded greater weight to the opinions of Drs. Paranthaman and Fino, that both coal mine dust and smoking contributed to claimant's obstructive impairment, than to the contrary opinion of Dr. Castle, that claimant's impairment is due entirely to smoking. Employer asserts that the administrative law judge erred in crediting the opinion of Dr. Paranthaman, and in discrediting the opinion of Dr. Castle. Employer's arguments lack merit.

With regard to Dr. Paranthaman's opinion, consistent with the Board's instructions, the administrative law judge addressed the discrepancy between her own finding that claimant has a thirty pack-year smoking history, and the twenty-pack year history relied upon by Dr. Paranthaman. Decision and Order on Remand at 15. Contrary to employer's argument, the administrative law judge permissibly concluded that the discrepancy was "not so great as to decrease the reliability of his opinion, as it was still a significant history of smoking." Decision and Order on Remand at 15; Employer's Brief at 3. In assessing the credibility of a medical opinion, an administrative law judge may take into account the fact that a physician has relied upon an inaccurate smoking history. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1994); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988). However, the significance of the discrepancy, and the effect, if any, that it has on the credibility of a physician's opinion, is left to the discretion of the administrative law judge.[4] *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986). Therefore, we affirm the administrative law judge's finding that Dr. Paranthaman's opinion as to the existence of legal pneumoconiosis is entitled probative weight, pursuant to Section 718.202(a)(4).

Employer further asserts that the administrative law judge erred in finding that Dr. Castle offered no "creditable explanation [of] why coal dust did not contribute to the Claimant's obstructive [lung] disease." Decision and Order on Remand at 16; Employer's Brief at 4-5. Employer argues that the administrative law judge's finding contradicts the Board's holding that Dr. Castle delineated his reasons for concluding that claimant's COPD was not due to coal mine dust exposure. Employer's Brief at 6; *Burden*, 07-0512 BLA, slip op. at 5.

In addressing Dr. Castle's reasons for his opinion that claimant's COPD is caused entirely by smoking, the administrative law judge initially noted Dr. Castle's deposition

[4] The administrative law judge's finding is supported by Dr. Castle's statement that the different smoking histories reported by claimant, including twenty, thirty, and sixty pack-years, were all "sufficient enough to have caused him to develop chronic obstructive lung disease." Director's Exhibit 33 at 10.

testimony that coal mine dust exposure causes only focal emphysema, and does not cause centrilobular or bullous emphysema, as diagnosed by Drs. Caffrey and Castle, respectively. Decision and Order on Remand at 16; Director's Exhibit 33 at 9, 11; Employer's Exhibit 12 at 13-15. Contrary to employer's argument, the administrative law judge correctly found that Dr. Castle's opinion, that coal dust exposure does not cause centrilobular emphysema, is inconsistent with the conclusions contained in medical literature and scientific studies relied upon by the Department of Labor (DOL) in drafting the definition of legal pneumoconiosis. Decision and Order on Remand at 16; 65 Fed. Reg. at 79941, 79942 (Dec. 20, 2000). Moreover, the administrative law judge permissibly concluded, in light of DOL's finding that medical literature indicates that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms, that Dr. Castle did not adequately explain why claimant's forty-two years of coal dust exposure, along with claimant's thirty pack-year smoking history, is not a contributing or aggravating factor to claimant's obstructive impairment. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009); 65 Fed. Reg. 79,943 (Dec. 20, 2000); Decision and Order on Remand at 16. Consequently, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next contends that the administrative law judge erred in finding disability causation established at 20 C.F.R. §718.204(c).[5] Employer asserts that the administrative law judge erred in according greater weight to the opinion of Dr. Paranthaman, that claimant's disabling obstructive impairment is due to both clinical and legal pneumoconiosis, than to the contrary opinions of Drs. Fino and Castle. We disagree.

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[5] A miner is totally disabled due to pneumoconiosis if pneumoconiosis:

> is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

Employer initially contends that in crediting Dr. Paranthaman's opinion, that claimant's disabling COPD is due to the combined effects of cigarette smoking and coal mine dust exposure, the administrative law judge failed to consider whether Dr. Paranthaman's diagnoses were supported by the evidence of record. Employer's Brief at 3-4. Contrary to employer's contention, the administrative law judge considered the entirety of Dr. Parathaman's opinion, correctly noting that in addition to clinical pneumoconiosis, Dr. Paranthaman diagnosed pulmonary emphysema, pulmonary hypertension, and cor pulmonale, and supported his diagnoses with reference to his findings on physical examination, and the pulmonary function study, blood gas study and electrocardiogram results.[6] Decision and Order on Remand at 9; Director's Exhibit 12 at 2-4; Employer's Brief at 4. Thus, the administrative law judge permissibly found Dr. Paranthaman's opinion to be well-documented and well-reasoned. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 18; Director's Exhibit 12. The administrative law judge, as fact finder, must decide whether a physician's report is sufficiently reasoned, because such a determination is a credibility matter. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-533, 21 BLR 2-334-2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997). It is not the function of the Board to assess the credibility of the medical opinion evidence. *See Anderson*, 12 BLR at 1-113. Consequently, we affirm the administrative law judge's determination to credit the opinion of Dr. Paranthaman, pursuant to 20 C.F.R. §718.204(c).

Employer also challenges the administrative law judge's discrediting of Dr. Fino's opinion, that while coal dust contributed to claimant's obstructive disease, claimant's impairment was entirely due to the effects of cigarette smoking. Employer's Brief at 6; Employer's Exhibits 9, 13. Dr. Fino opined that claimant's FEV1 value was 950 cubic centimeters below the normal predicted value for a man his age, and that both smoking and coal mine dust had contributed to that loss. Director's Exhibit 9 at 13-14. Dr. Fino stated, based on epidemiological studies, that claimant's projected loss of FEV1 due to coal mine dust was between five and nine cubic centimeters for each year he worked

[6] The record reflects that Dr. Paranthaman diagnosed emphysema based on the pulmonary function study results, and diagnosed hypertension based on the results of the blood pressure reading taken in his office 150/86 and an electrocardiogram (EKG) showing prominent P waves in LII, LIII aVF. *See* Director's Exhibit 12 at 2, 3. Moreover, Dr. Paranthaman's diagnosis of cor pulmonale is based on the results of the EKG taken during the office visit, showing pulmonary second sound, right axis deviation and tall "P" wave in LII, LIII, and aVF. *See* Director's Exhibit 12 at 4; Employer's Exhibit 12 at 19.

prior to the implementation of dust controls, and two to three cubic centimeters for each year he worked after the dust control measures. *Id.* Thus, Dr. Fino calculated that claimant could be expected to have suffered an average loss in FEV1 of 276 cubic centimeters as a result of his coal mine dust exposure, and 674 cubic centimeters due to smoking (950 minus 276). *Id.* Dr. Fino explained that a 276 cubic centimeter loss of FEV1 does not equate to a disabling impairment for claimant; conversely, a loss of 674 cubic centimeters in FEV1 would prevent claimant from performing his usual coal mine work. *Id.* Thus, Dr. Fino concluded that claimant's disabling respiratory impairment is due entirely to smoking. *Id.*

Contrary to employer's argument, as the Director correctly asserts, the administrative law judge permissibly accorded little weight to Dr. Fino's opinion because it is at odds with the disability causation standard set forth at 20 C.F.R. §718.204(c), which does not require that claimant's pneumoconiosis be, itself, totally disabling. 20 C.F.R. §718.204(c); *see Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 372 (4th Cir. 2006); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-18 (2003); 65 Fed. Reg. 79948 (Dec. 20, 2000); Decision and Order on Remand at 18; Director's Brief at 5. In addition, the administrative law judge acted within her discretion in according less weight to Dr. Fino's opinion because it is based in part on studies showing the projected average losses in FEV1, under average dust conditions for certain years, rather than on the miner's specific circumstances. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-51 (1985); *see also Fuller v. Gibraltar Corp.*, 6 BLR 1-1292 (1984); *Duke v. Director, OWCP*, 6 BLR 1-673 (1983); Decision and Order on Remand at 18; Employer's Exhibit 9 at 13-14. Because we affirm the administrative law judge's discrediting of Dr. Fino's opinion on other grounds, we need not address employer's challenge to the administrative law judge's additional finding that Dr. Fino's opinion, that coal mine dust exposure contributed to claimant's obstructive impairment, "came close" to establishing disability causation. *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

We also reject employer's assertion that the administrative law judge erred in discrediting the opinion of Dr. Castle. Employer's Brief at 5. Contrary to employer's arguments, the administrative law judge rationally discounted Dr. Castle's opinion because the doctor did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); Decision and Order on Remand at 17; Director's Exhibit 33; Employer's Exhibit 12.

As the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Paranthaman to find that claimant established the existence of

legal pneumoconiosis, the administrative law judge rationally relied on Dr. Paranathman's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c), and, therefore has established entitlement to benefits. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990).

Finally, employer contends that the administrative law judge erred in determining the date for the commencement of benefits, pursuant to 20 C.F.R. §725.503(b), based on the date of the first qualifying pulmonary function study of record. Employer's Brief at 8-10. In finding claimant to be totally disabled as of August 1996, the administrative law judge reasoned:

> The Claimant filed his claim for benefits in April 2003. When Dr. Baron administered pulmonary function testing in August 1996, before the Claimant was diagnosed with cancer, he was already totally disabled by obstructive disease. I have found that his obstructive disease was caused, at least in part, by exposure to coal dust. There is no evidence that he was not disabled at any time after August 1996.

Decision and Order on Remand at 19.

Employer argues that the administrative law judge erred in awarding benefits from the date of the first qualifying pulmonary function study of August 1996 because the qualifying pulmonary function study shows the onset of claimant's total disability, but not the onset of total disability due to pneumoconiosis. Employer's contention has merit.

Once entitlement to benefits is demonstrated, 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, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (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, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

The administrative law judge determined that claimant was totally disabled due to pneumoconiosis by August 1996, based on the date of the first objective test results supporting total disability, together with her own legal determination that claimant's disabling obstructive disease was caused, at least in part, by exposure to coal dust; not on medical evidence establishing that claimant was totally disabled due to pneumoconiosis by 1996. *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65, 1-69 (1990); *Carney v. Director, OWCP*, 11 BLR 1-32 (1987); Decision and Order on Remand at 19. The administrative law judge has impermissibly substituted her own opinion for that of a physician. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Bogan v. Consolidation Coal Co.*, 6 BLR 1-1000 (1984); *see also Hicks*, 138 F.3d at 533, 21 BLR at 2-336. The record reflects that Dr. Paranthaman's May 15, 2003 opinion, which the administrative law judge credited, is the earliest medical determination that claimant is totally disabled due to pneumoconiosis, and the record contains no evidence credited by the administrative law judge that establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green*, 790 F.2d at 1119 n.4, 9 BLR at 2-36 n.4; *Owens*, 14 BLR at 1-50; Director's Exhibit 12. Thus, the appropriate date from which benefits may commence herein is April 2003, the month during which this claim was filed. 20 C.F.R. §725.503(b); *Green*, 790 F.2d at 1119 n.4, 9 BLR at 2-36 n.4; *Owens*, 14 BLR at 1-50. Consequently, we modify the administrative law judge's Decision and Order to reflect benefits payable from April 2003.

Lastly, employer argues that the case requires remand to a different administrative law judge for a "fresh look at the evidence." Employer's Brief at 9. In light of our determination to affirm the administrative law judge's award of benefits, we need not address employer's request for reassignment.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge