

BRB No. 10-0345 BLA

TROY G. SCARBERRY )  
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 Claimant-Respondent )  
 )  
 v. )  
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 CARTER BRANCH MINING COMPANY )  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE COMPANY ) DATE ISSUED: 02/18/2011  
 )  
 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 – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C., for employer.

Barry H. Joyner (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 on Remand – Awarding Benefits (2004-BLA-6064) of Administrative Law Judge Larry S. Merck 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). This case is before the Board for the second time. In the original Decision and Order, Administrative Law Judge Thomas F. Phalen, Jr., credited claimant with at least twenty years of qualifying employment, and adjudicated this claim, filed on November 18, 2002, pursuant to the regulations at 20 C.F.R. Part 718. Judge Phalen determined that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(2), (4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, the Board affirmed Judge Phalen's evidentiary rulings pursuant to 20 C.F.R. §725.414, but vacated his finding that claimant established clinical pneumoconiosis at Section 718.202(a)(2), (4), based on the biopsy and medical opinion evidence, and disability causation at Section 718.204(c). The Board remanded the case for Judge Phalen to determine whether Dr. Wheeler's deposition testimony,<sup>1</sup> questioning the accuracy of Dr. Caffrey's needle biopsy, was admissible for that purpose, and instructed him to consider Dr. Caffrey's interpretation of the biopsy slides in light of all relevant evidence regarding the reliability of the biopsy evidence at Section 718.202(a)(2). While the Board affirmed Judge Phalen's discounting of the medical opinions of Drs. Rasmussen and Wheeler, the Board instructed him on remand to reassess the opinions of Drs. Forehand, Fino, and Rosenberg on the issues of pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). *T.S. [Scarberry] v. Carter Branch Mining Co.*, BRB No. 07-0144 BLA (Dec. 14, 2007)(unpub.).

On remand, the case was assigned to Administrative Law Judge Larry S. Merck (the administrative law judge). The administrative law judge determined that Dr. Wheeler's deposition testimony was admissible for the limited purpose of establishing the relevance and reliability of CT scans in diagnosing pneumoconiosis, and therefore, his opinion regarding the accuracy of the needle biopsy was not admissible. The administrative law judge found that the weight of the evidence was sufficient to establish the existence of simple pneumoconiosis at Section 718.202(a)(2), (4), based on Dr. Caffrey's biopsy report and the medical opinions of Drs. Forehand and Fino. As employer did not challenge Judge Phalen's determination that the medical opinion evidence established total respiratory disability, the administrative law judge found that claimant established total disability at Section 718.204(b), and that the weight of the

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<sup>1</sup> Dr. Wheeler testified that "usually a needle biopsy gives a very small diagnostic window on what would be better done with either a total resection of the nodule . . . or at least a wedge biopsy out of it." Employer's Exhibit 9.

evidence established disability causation at Section 718.204(c). Accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's weighing of the medical opinions of record to find the existence of pneumoconiosis established at Section 718.202(a)(4), and disability causation established at Section 718.204(c). Employer also asserts that the administrative law judge erred in selecting November 2002, the month and year in which claimant filed his claim, as the date from which benefits commence. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, asserting that the commencement date was properly determined, to which employer replies in support of its position. By supplemental briefs, employer and the Director correctly assert that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the claim was filed prior to January 1, 2005.

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.<sup>2</sup> 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).

Employer contends that the administrative law judge erred in finding the weight of the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Specifically, employer asserts that Dr. Forehand's opinion is unreasoned; that the administrative law judge failed to consider relevant evidence; and that he misstated the proof he considered. Employer further maintains that the administrative law judge substituted his opinion for that of Dr. Forehand; treated Dr. Rosenberg's opinion in an inconsistent manner; and erroneously concluded that Dr. Fino diagnosed pneumoconiosis. Employer's Brief at 10-14.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the existence of pneumoconiosis established at Section 718.202(a)(2), the administrative law judge credited Dr. Caffrey's diagnosis of simple pneumoconiosis based on his pathology

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<sup>2</sup> The law of the United States Court of Appeals for the Sixth Circuit is applicable, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

findings of anthracotic pigment with associated fibrosis and birefringent particles, Employer's Exhibit 6, and discounted the medical opinion of Dr. Rosenberg, who questioned the sufficiency of the needle biopsy to determine the cause of the irregular mass formation within claimant's lungs, but noted that "[claimant] probably has at worst a degree of simple coal worker's pneumoconiosis," Employer's Exhibit 1. The administrative law judge determined that Dr. Caffrey was an experienced pathologist who found that the needle biopsy presented sufficient objective evidence to make a diagnosis of clinical pneumoconiosis, whereas Dr. Rosenberg's comments primarily addressed whether the biopsy was effective for purposes of diagnosing complicated pneumoconiosis. Thus, the administrative law judge acted within his discretion in finding that Dr. Caffrey's biopsy finding of simple pneumoconiosis was well-reasoned, well-documented and entitled to greater probative weight. Decision and Order on Remand at 5-7; Employer's Exhibits 1, 6, 9, 14; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

In finding the weight of the evidence sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4), the administrative law judge accurately summarized the medical opinions of Drs. Forehand, Rosenberg, and Fino,<sup>3</sup> noting their underlying documentation and the physicians' reasoning and explanations for their respective conclusions. Decision and Order on Remand at 8-11. The administrative law judge determined that Dr. Forehand's diagnosis of pneumoconiosis was not necessarily contradicted by the x-ray evidence, as the record contained positive x-ray interpretations by dually qualified Board-certified radiologists and B readers, and the x-ray evidence as a whole was inconclusive for the presence of pneumoconiosis. Decision and Order on Remand at 8-9; Director's Exhibit 10. The administrative law judge further determined that Dr. Forehand's opinion was supported by the doctor's physical examination, claimant's histories and symptoms, and the objective test results. *Id.* Thus, the administrative law judge acted within his discretion in finding that Dr. Forehand's diagnosis of coal workers' pneumoconiosis was well-reasoned and entitled to full probative weight. Decision and Order on Remand at 9; Director's Exhibit 10; *see Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Clark*, 12 BLR at 1-155. By contrast, the administrative law judge determined that Dr. Rosenberg's opinion<sup>4</sup> was too equivocal and vague to either rule out or constitute a diagnosis of

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<sup>3</sup> The Board affirmed Administrative Law Judge Thomas F. Phalen, Jr.'s prior credibility determinations that the opinions of Drs. Rasmussen and Wheeler were entitled to diminished weight. *T.S. [Scarberry] v. Carter Branch Mining Co.*, BRB No. 07-0144 BLA, slip op. at 7, n.7, 9 (Dec. 14, 2007)(unpub.).

<sup>4</sup> The Board had previously instructed Judge Phalen to consider the weight, if any, to accord Dr. Rosenberg's opinion, as the doctor reviewed both admissible and inadmissible CT scan evidence. *T.S. [Scarberry] v. Carter Branch Mining Co.*, BRB No.

pneumoconiosis. Decision and Order on Remand at 10; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988). Consequently, the administrative law judge rationally concluded that the opinion of Dr. Rosenberg was entitled to little weight. Decision and Order on Remand at 10; Employer's Exhibits 1, 14; *see Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). We do find merit in employer's assertion that the administrative law judge incorrectly credited Dr. Fino's notation of pathologic evidence of simple coal workers' pneumoconiosis as an independent diagnosis, rather than a restatement of Dr. Caffrey's biopsy findings.<sup>5</sup> Decision and Order on Employer's Exhibits 3, 13. However, as the administrative law judge properly relied on the reasoned and documented opinions of Drs. Caffrey and Forehand to find clinical pneumoconiosis established, any error in additionally crediting Dr. Fino's opinion is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Consequently, we affirm the administrative law judge's finding that the weight of the evidence was sufficient to establish the existence of clinical pneumoconiosis at Section 718.202(a)(2), (4), as supported by substantial evidence.

Employer next asserts that Dr. Forehand's opinion does not constitute reliable evidence sufficient to support a finding of disability causation at Section 718.204(c),<sup>6</sup> and

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07-0144 BLA, slip op. at 10 (Dec. 14, 2007)(unpub.). On remand, the administrative law judge accorded probative weight to Dr. Rosenberg's reports, redacting the doctor's references to his own CT scan interpretations, where possible. Decision and Order on Remand at 9. Based on the admissible evidence, Dr. Rosenberg opined that, at worst, claimant had a degree of simple pneumoconiosis, but that the inflammatory masses in claimant's lungs were not related to, or aggravated by, past coal dust exposure, and did not represent progressive massive fibrosis. Employer's Exhibit 1.

<sup>5</sup> Employer correctly notes that Dr. Fino did not render a definitive diagnosis upon his review of the admissible evidence, but "explained that he needed to review the CT scans personally to arrive at a reasoned and supported conclusion." Employer's Brief at 13; *see* Employer's Exhibit 3.

<sup>6</sup> Contrary to employer's argument, the Board did *not* acknowledge in the last appeal that Dr. Forehand's opinion was unreasoned. Employer's Brief at 14. Rather, because Judge Phalen found that Dr. Forehand's opinion was supported by the biopsy findings, yet the biopsy was obtained two years *after* the physician rendered his opinion of total disability due to pneumoconiosis, the Board remanded the case for a *determination* of whether Dr. Forehand's opinion was well-reasoned.

We also reject employer's argument that, because the administrative law judge credited the biopsy evidence to find pneumoconiosis established, there is no basis for

contends that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Fino. We disagree. After determining that Dr. Forehand considered claimant's social, employment and medical histories, including a history of coronary artery disease, the administrative law judge concluded that Dr. Forehand's opinion, that claimant's total disability was due entirely to pneumoconiosis, was well-reasoned and supported by its underlying documentation. Decision and Order on Remand at 12. Thus, the administrative law judge properly relied on the opinion to support his finding of disability causation at Section 718.204(c). See *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989); Director's Exhibit 10. The administrative law judge acted within his discretion in finding that the opinion of Dr. Rosenberg, that claimant's disability was not caused or aggravated by coal dust exposure, merited diminished probative weight, because the physician rendered an equivocal opinion on the issue of pneumoconiosis, and provided no explanation for his conclusion on the issue of disability causation.<sup>7</sup> See *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Clark*, 12 BLR at 1-155. The administrative law judge also properly found that Dr. Fino did not render an opinion as to the cause of claimant's disability, as the physician stated that he could not identify the cause of claimant's disabling respiratory impairment without reviewing the CT scans. Decision and Order on Remand at 13; Employer's Exhibit 3, 13. As substantial evidence supports the administrative law judge's findings at Section 718.204(c), we affirm his finding that disability causation was established thereunder, and affirm his award of benefits.<sup>8</sup>

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finding Dr. Forehand's opinion to be supported or reliable on the issue of disability causation. Employer's Brief at 14-15. On remand, in addition to crediting the biopsy evidence, the administrative law judge found that Dr. Forehand's opinion was well-reasoned, supported by its underlying documentation, and sufficient to establish every element of entitlement, independent of the biopsy findings. Decision and Order on Remand at 8-9, 11-13.

<sup>7</sup> The administrative law judge also permissibly discounted the opinion of Dr. Rasmussen, attributing claimant's severe pulmonary impairment to complicated pneumoconiosis, as the administrative law judge found that the record evidence did not support a finding of complicated pneumoconiosis, and that the opinion of Dr. Rasmussen was unreasoned. Decision and Order at 13; see *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

<sup>8</sup> Additionally, we affirm, as unchallenged on appeal, the earlier award of attorney fees by Judge Phalen, as modified by the administrative law judge on remand. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Finally, employer contends that because the earliest evidence of pneumoconiosis was obtained in January 2005, the month in which claimant's biopsy was performed, the administrative law judge erred in finding that benefits herein are payable from November 2002, the month in which claimant filed his claim. Employer's argument is without merit. The Director correctly notes that Dr. Forehand diagnosed total disability due to pneumoconiosis in 2002, but did not indicate the date when claimant became disabled. Director's Brief at 2. It is well-settled that, if the medical evidence does not establish the date that a miner became totally disabled due to pneumoconiosis, benefits are payable as of the filing date of the claim, unless credible medical evidence indicates that the miner was not totally disabled at some point subsequent to that date. *See* 20 C.F.R. §725.503; *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *see also Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). In this case, the administrative law judge stated that he could not determine the date of the onset of total disability, based on his review of the record. Decision and Order on Remand at 14. Consequently, pursuant to 20 C.F.R. §725.503, the administrative law judge properly found that benefits herein are payable as of November 2002, the month and year in which the claim was filed.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits 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