BRB No. 02-0326 BLA

MARTIN SOMMER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
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 on Remand - Awarding Benefits of Thomas M. Burke, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Barry H. Joyner (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (1999-BLA-00369) of Associate Chief Judge Thomas M. Burke (the administrative law judge) awarding

benefits 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).[1] This case is before the Board for the second time. In the original Decision and Order, the administrative law judge found that the instant claim was timely filed pursuant to 20 C.F.R. §725.308; he noted that the parties stipulated to a coal mine employment history of at least sixteen years and adjudicated the claim pursuant to 20 C.F.R. Part 718. 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) (2000), and that claimant was entitled to the presumption, found at 20 C.F.R. §718.203(b) (2000), that such pneumoconiosis arose out of coal mine employment. 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)(1) and (4) (2000) and that his disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, benefits were awarded as of September, 1992.

Employer appealed the award of benefits to the Board and in *Sommer v. Peabody Coal Co.*, BRB No. 00-0154 BLA (Dec. 18, 2000) (unpub.), the Board vacated the administrative law judge's decision that precluded the admission of the medical evidence amassed pursuant to a workers' compensation claim filed by claimant with the Illinois Industrial Commission. The Board remanded the case to the administrative law judge for further consideration of the evidence in question. The Board also vacated the administrative law judge's findings under Sections 718.202(a)(1), (4) and 718.204(b), (c)(1), (4) (2000). In addition, the Board vacated the administrative law judge's finding that September 1, 1992, constitutes the date that benefits commence and instructed the administrative law judge, on remand, to reconsider the onset date, if the issue was reached.

On remand, the administrative law judge initially found that, with respect to the medical evidence amassed pursuant to the workers' compensation claim filed by claimant with the Illinois Industrial Commission, it did not preclude eligibility for black lung benefits and that the x-ray evidence, in particular, deserved no weight. On the

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002).

merits, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1), (4) and 718.203 (2000). The administrative law judge further found that total disability due to pneumoconiosis was established pursuant to Section 718.204(b), (c)(1), (4) (2000). Accordingly, benefits were awarded as of August 1989, the month in which, upon further consideration, the administrative law judge found that Dr. Houser's testimony established claimant's total disability due to pneumoconiosis.

On appeal, employer argues that the administrative law judge erred in concluding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4) (2000), erred in finding that total disability was established pursuant to Section 718.204(c) (2000), erred in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to Section 718.204(b) (2000), and erred in analyzing the evidence regarding the date of the onset of disability. Employer also asserts that claimant's knee injury precludes entitlement and that the claim is untimely filed. Claimant, in response, urges affirmance of the administrative law judge's Decision and Order on Remand awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter in response to employer's appeal addressing the issue of disease causation.[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 the 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2000). Failure of claimant to establish any of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

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

After consideration of the administrative law judge's Decision and Order on Remand, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. Employer contends that the administrative law judge erred in finding that claimant established the existence of "legal" pneumoconiosis pursuant to Section 718.202(a)(4) (2000). Specifically, employer asserts that the administrative law judge erroneously accorded greater weight to the opinions of Drs. Cohen and Houser, who concluded that claimant suffered from pneumoconiosis, Director's Exhibits 23, 33; Claimant's Exhibits 11, 13, and asserts that the administrative law judge improperly discounted the opinions of Drs. Renn, Hippensteel and Tuteur, who concluded that the claimant did not suffer from pneumoconiosis, Director's Exhibits 17, 25; Employer's Exhibits 4-5, 12, 14.

In addressing the issue of whether the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000), the administrative law judge noted that while Drs. Cohen and Houser attributed claimant's pulmonary impairment to a combination of smoking and coal mine employment, Drs. Renn, Hippensteel and Tuteur diagnosed a pulmonary condition due to smoking and not coal dust exposure. Decision and Order on Remand at 6. The administrative law judge properly considered the qualifications of the physicians[3] and the underlying documentation proffered by the physicians for their opinions, and he acted within his discretion in finding that the opinions of Drs. Cohen and Houser were more persuasive than the opinions of Drs. Renn, Hippensteel and Tuteur. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*). The administrative law judge rationally accorded greater weight to Dr. Cohen's opinion because he found it to be supported by the opinion of Dr. Houser, who diagnosed pneumoconiosis and found that claimant's severe respiratory impairment was related, at least in part, to pneumoconiosis and coal dust exposure in coal mine employment. Decision and Order on Remand at 6-8; *see Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984). The administrative law found the opinions of Drs. Cohen and Houser more persuasive in light of the documentation and reasoning contained in their reports.[4] *See Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10

[3]The administrative law judge correctly stated that Drs. Cohen, Houser, Renn, Hippensteel and Tuteur are Board-certified pulmonary specialists. Decision and Order at 4-6.

[4] We reject employer's assertion that the administrative law judge's reliance on the opinions of Drs. Cohen and Houser was not rational. Drs. Cohen and Houser

BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In addition, contrary to employer's assertions, the administrative law judge extensively compared and contrasted Dr. Cohen's review of the medical literature with the opposing viewpoints by Drs. Hippensteel, Renn and Tuteur and reasonably accepted Dr. Cohen's representations because of his expertise as a Board-certified pulmonologist and in light of his duties as a senior attending physician of Pulmonary Medicine at Cook County Hospital, an instructor of Clinical Medicine at the University of Illinois College of Medicine and the Director of the Black Lung Clinics Program at Cook County Hospital, in spite of the similar qualifications of Drs. Hippensteel and Tuteur. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Clark*, *supra*; *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Decision and Order on Remand at 6. Thus, we reject employer's assertion that the administrative law judge erred in finding Dr. Cohen's opinion more persuasive than the opinions of Drs. Renn, Hippensteel and Tuteur and we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) (2000).[5]

With regard to total disability, we also reject employer's contention that the administrative law judge erred in finding the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 718.204(c)(1) (2000). The administrative law judge noted that in his prior decision he found that the pulmonary function studies established total disability because all ten studies yielded qualifying values, but that the Board instructed him, on remand, to consider the eight post-bronchodilator results, six of which did not yield qualifying values.[6] Decision and

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based their opinions on a physical examination, a smoking history, a coal mine employment history, a pulmonary function study, an arterial blood gas study and an x-ray. *See* Director's Exhibits 23, 33; Claimant's Exhibit 11, 13. The administrative law judge findings are supported by substantial evidence. Decision and Order at 6-8; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Ogozalek v. Director, OWCP*, 5 BLR 1-309 (1982).

[5] In light of our affirmance of the administrative law judge's finding that the existence of pneumoconiosis was established pursuant to to Section 718.202(a)(4), we need not address employer's arguments that the administrative law judge erred in his evaluation of the x-ray evidence pursuant to Section 718.202(a)(1). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

[6] 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

Order on Remand at 8. In resolving the conflicting evidence, the administrative law judge rationally considered the physicians' opinions interpreting the results and reasonably concluded that these opinions supported a finding that the pulmonary function study evidence demonstrated total disability pursuant to Section 718.204(c)(1) (2000), notwithstanding the nonqualifying post-bronchodilator results. *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); Decision and Order on Remand at 8-10. We therefore affirm the administrative law judge's finding that the pulmonary function study evidence was sufficient to establish total disability pursuant to Section 718.204(c)(1) (2000).

With respect to Section 718.204(c)(4) (2000), the administrative law judge reconsidered the relevant medical opinion evidence, as instructed by the Board, and rationally determined that the evidence of record was sufficient to establish total disability. In considering whether total disability was established by the medical opinions of record under Section 718.204(c)(4) (2000), the administrative law judge permissibly accorded the most weight to the opinions of Drs. Cohen, Renn and Houser since he found their conclusions supported by the objective evidence, *i.e.*, the pulmonary function study results. *Clark*, *supra*; *Lucostic*, *supra*; *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); Decision and Order on Remand at 10. Contrary to employer's contention, the administrative law judge was not required to consider the exertional limitations to claimant's usual coal mine employment as the physicians who stated claimant's impairment was disabling were aware of claimant's coal mining history and the exertional requirements claimant's job entailed. 1999 Decision and Order at 8-10, 14. Consequently, we affirm the administrative law judge's finding that the medical opinions of record establish total disability pursuant to Section 718.204(c)(4) (2000).

B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2).

We also reject employer's contention that the administrative law judge erred in finding that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(b) (2000). The administrative law judge considered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant's totally disabling respiratory impairment was due, at least in part, to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In weighing the medical opinions of record, the administrative law judge permissibly accorded greater weight to the opinions of Drs. Cohen and Houser regarding the contribution of the miner's coal mine employment to his pulmonary disease and rationally found this evidence sufficient to establish total disability due to pneumoconiosis. *Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990); Decision and Order on Remand at 11. The administrative law judge rationally credited the opinions of Drs. Cohen and Houser, who attributed the impairment to smoking and coal mine employment, as he found them to be the best reasoned opinions of record. *Clark*, *supra*; Decision and Order on Remand at 11. Contrary to employer's argument, the opinions of Drs. Cohen and Houser support a finding that claimant's pneumoconiosis is a substantially contributing factor in his totally disabling respiratory impairment as both physicians concluded that claimant's distant smoking history was too remote to be the primary cause of his pulmonary condition. Decision and Order on Remand at 11. As the administrative law judge permissibly relied on the opinions of Drs. Cohen and Houser to find that claimant's totally disabling pulmonary condition was due to pneumoconiosis, and his findings at Section 718.204(b) (2000) are not inherently incredible or patently unreasonable, *see Tackett*, *supra*, we affirm his finding that claimant established he was totally disabled due to pneumoconiosis pursuant to Section 718.204(b) (2000). Consequently, we affirm the administrative law judge's finding that the evidence was sufficient to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. *See generally Trent*, *supra*.[7]

[7] Employer also argues that claimant is not eligible for black lung benefits because he suffers from a pre-existing totally disabling nonpulmonary impairment and that the administrative law judge erred in concluding that the revised regulations abrogated the holdings of the United States Court of Appeals for the Seventh Circuit in *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's Brief at 35-36. Inasmuch as the administrative law judge found that the records of the Illinois Industrial Commission do not establish "a total disability from a knee injury as they do not show that claimant could not work with the knee injury," employer's assertion is rendered moot. Decision and Order on Remand at 11.

Lastly, employer asserts that the administrative law judge erred in determining the date from which benefits should commence. To establish the date of onset, claimant must show when he became totally disabled due to pneumoconiosis, not simply when he became totally disabled. 20 C.F.R. §725.503(b); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983); *Carney v. Director, OWCP*, 11 BLR 1-32 (1988). The administrative law judge found entitlement as of August, 1989, based on the testimony of Dr. Houser who had examined claimant on that date and diagnosed him to be totally disabled due to pneumoconiosis. Decision and Order at 11-12, *see* Director's Exhibit 23. The administrative law judge discussed the evidence relevant to his determination of the date of onset of claimant's total disability due to pneumoconiosis and specifically stated a basis for his determination. *Id.* Consequently, we affirm the administrative law judge's onset date determination as it is supported by substantial evidence. 20 C.F.R. §§725.503(b); *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983).[8]

[8] Employer's argument that the claim was untimely filed is without merit as the administrative law judge previously found that the record does not contain sufficient evidence to make a determination that claimant received a written report by Dr. Houser communicating his diagnosis or that, if so, claimant comprehended it. 1999 Decision and Order at 2-3; *see Adkins v. Donaldson Mine Co.*, 19 BLR 1-34 (1993).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge