

BRB No. 04-0187 BLA

DENNIS R. VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/23/2004
	)	
CHEYENNE EAGLE MINING COMPANY,	)	
INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2001-BLA-0538) of Administrative Law Judge Rudolf L. Jansen 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).<sup>1</sup> This case is before the Board for the third time.<sup>2</sup> Based

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<sup>1</sup>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

on the date of filing, the administrative law judge adjudicated this petition for modification pursuant to 20 C.F.R Part 718. The administrative law judge found the evidence of record sufficient to establish that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

On appeal, employer challenges the findings of the administrative law judge that the evidence of record was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and also that claimant's total respiratory disability was due to pneumoconiosis. Claimant has not participated in this appeal. The Director, Office of

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>The record indicates that claimant filed an application for benefits on March 18, 1997, which was denied on December 28, 1998, by Administrative Law Judge Robert L. Hillyard due to claimant's failure to establish the presence of a totally disabling respiratory impairment, although claimant established twenty-two and one-half years of coal mine employment and the existence of coal workers' pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(1), 718.203 (2000). Director's Exhibits 1, 63. On appeal, the Board affirmed the denial of benefits. *Varney v. Cheyenne Eagle Mining Company, Inc.*, BRB No. 99-0421 BLA (Dec. 16, 1999)(unpub.); Director's Exhibit 71. Claimant filed a petition for modification on December 5, 2000, which was denied on April 24, 2002, by Administrative Law Judge Rudolf L. Jansen (the administrative law judge), due to claimant's failure to establish that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 75. The administrative law judge further found however, that claimant established the existence of coal workers' pneumoconiosis arising out of coal mine employment at Sections 718.202(a)(1),(4) and 718.203, and the presence of a totally disabling respiratory impairment at Section 718.204(b)(2)(i),(iv), which established a change in conditions pursuant to 20 C.F.R. §725.310. On appeal, the Board affirmed the administrative law judge's finding of the existence of simple coal workers' pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a) and 718.203, and total respiratory disability pursuant to Section 718.204(b), but vacated and remanded the findings pursuant to Section 718.204(c), due to the administrative law judge's failure to consider several relevant medical opinions. *Varney v. Cheyenne Eagle Mining Co., Inc.*, BRB No. 02-0551 BLA (Mar. 11, 2003)(unpub.).

Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

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 by 30 U.S.C. §932(a); *O'Keefe 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 prove 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer contends that the administrative law judge erroneously found the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Employer specifically contends that the administrative law judge erred by crediting Dr. Rosenberg's diagnosis of pneumoconiosis, asserting that this opinion, and those of Drs. Mettu, Myers, Westerfield, Fritzhand and Sundaram, are merely restatements of the physician's positive x-ray readings, and are therefore insufficient to establish the presence of legal pneumoconiosis. We disagree. The record indicates that all of the aforementioned physicians relied on the results of their examinations, objective tests and claimant's work and medical histories, or on an extensive review of claimant's medical records.<sup>3</sup> Employer's Exhibit 2; Director's Exhibits 15-18, 21-23, 52, 76. Thus, it was within the administrative law judge's discretion, as the finder of fact, to credit Dr. Rosenberg's

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<sup>3</sup>Dr. Rosenberg diagnosed coal workers' pneumoconiosis based on his review of claimant's medical records and x-ray readings. Employer's Exhibit 2. Dr. Sundaram's diagnosis was based on an x-ray reading and a qualifying pulmonary function study. Director's Exhibit 76. Dr. Westerfield relied on his review of claimant's medical records and his interpretation of claimant's x-ray readings and the pulmonary function studies which he interpreted as showing a gradual decline over time. Director's Exhibits 18, 22, 52. Dr. Fritzhand's diagnosis of pneumoconiosis was based on claimant's work history, chest x-ray and abnormal pulmonary function and arterial blood gas studies. Director's Exhibit 23. Dr. Myers and Dr. Mettu diagnosed pneumoconiosis based on claimant's x-ray readings and the results of their pulmonary function studies. Director's Exhibits 15-18, 21.

opinion, as supported by Dr. Sundaram's opinion, in finding that the existence of legal pneumoconiosis was established. 2002 Decision and Order at 10-12; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-623 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000);<sup>4</sup> *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). Therefore, we hold that substantial evidence supports the administrative law judge's finding of pneumoconiosis pursuant to Section 718.202(a)(4), and we decline to address employer's argument that the administrative law judge erred in his consideration of the x-ray evidence pursuant to Section 718.202(a)(1). *See Cornett*, 227 F.3d 569, 22 BLR 2-107; *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With respect to the administrative law judge's weighing of the medical evidence relevant to Section 718.204(c), employer contends that the administrative law judge erred by rejecting those medical reports of record which did not contain a diagnosis of pneumoconiosis or a totally disabling respiratory impairment, while crediting the reports of Drs. Westerfield and Fritzhand on the issue of causation. Employer argues that the administrative law judge applied inconsistent reasoning since Drs. Westerfield and Fritzhand both concluded in their reports dated between April 4, 1995 and December 16, 1997, that claimant was totally disabled due to pneumoconiosis, which contradicts Administrative Law Judge Hillyard's 1998 Decision and Order finding that claimant was not totally disabled at that time. Director's Exhibits 18, 22-24; 1998 Decision and Order at 16-20.

Contrary to employer's argument, the administrative law judge may accord less weight to medical reports regarding the cause of claimant's total disability if the physicians did not diagnose the presence of pneumoconiosis or a disabling respiratory impairment. *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-374 (4th Cir. 2002); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, the administrative law judge permissibly accorded less weight to the causation opinions of Drs. Fino, Repsher, Broudy, Wright, Branscomb and Rosenberg as their failure to diagnose pneumoconiosis or total respiratory disability undermined the credibility of their causation findings. Employer's Exhibits 2, 3, 5-8, 11; Director's Exhibits 48, 49, 51; Decision and Order at 7-11. Moreover, as the present case involves a petition for modification in which claimant has established a change in conditions, the administrative law judge was

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<sup>4</sup>Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

required to reconsider all the record evidence relevant to the issue of causation, and was free to reach his own conclusions regarding the persuasiveness of this evidence. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986).

We further reject employer's assertion that the administrative law judge erred by finding the reports of Drs. Westerfield and Fritzhand, attributing claimant's total respiratory disability to his pneumoconiosis, well reasoned, because the record supports the administrative law judge's finding that these physicians thoroughly explained how their documentation supported their conclusions. Director's Exhibits 18, 22- 24, 52; Decision and Order at 7-11; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Additionally, as Dr. Fritzhand noted claimant's position as a continuous miner operator in the coal mines, and based his opinion that claimant was unable to perform his former coal mine work on his examination, claimant's history and objective test results, Dr. Fritzhand opinion is not undermined by the doctor's failure to state claimant's specific job duties, or by the doctor's description of claimant's impairment as mild and moderate. Director's Exhibit 23, 24; Decision and Order at 7-11; *Trumbo*; 17 BLR 1-85; *Lafferty*, 12 BLR 1-190; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). We also find no merit in employer's assertion that Dr. Westerfield was unaware of claimant's smoking history,<sup>5</sup> and therefore, his opinion was not credible regarding causation, as the record indicates that this physician noted claimant's four to five year smoking history, but found that it was not significant. Director's Exhibit 18, 22, 52. We therefore hold that substantial evidence supports the administrative law judge's finding that claimant established that his total respiratory disability was due to pneumoconiosis, and affirm the administrative law judge's award of benefits. *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Employer also challenges the administrative law judge's finding regarding the date from which claimant's benefits are payable. Specifically, employer asserts that the administrative law judge erred by awarding benefits as of the date claimant filed his initial application for benefits, and that the Decision and Order fails to provide an analysis of the evidence relevant to the date of onset and therefore violates the provisions of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C §554(c)(2). We agree. The Decision and Order indicates that the administrative law judge awarded

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<sup>5</sup> The administrative law judge found claimant smoked one-half package of cigarettes per day for twelve years. Decision and Order at 4.

benefits as of March 1, 1997, the month in which claimant filed his original claim for benefits, without discussing whether the evidence established the date claimant became totally disabled due to pneumoconiosis. Decision and Order at 11-12. The regulation pursuant to 20 C.F.R. §725.503(b), states that where the evidence does not establish the month of onset of claimant's total disability, in a modification case based upon a change in conditions benefits are payable no earlier than the effective date of the most recent denial of benefits. Because the administrative law judge's onset findings do not satisfy the provisions of the APA, and do not comply with the applicable regulations regarding the date from which benefits may be awarded in this claim, we must vacate the administrative law judge's finding that employer's liability for benefits commenced on March 1, 1997, and remand the case to the administrative law judge for further consideration. *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). On remand, the administrative law judge must determine whether the medical evidence establishes the month claimant became totally disabled due to pneumoconiosis, or if the evidence fails to establish such a date, award benefits commencing December 2000, the month in which claimant filed his petition for modification. Director's Exhibit 75; 20 C.F.R. §725.503.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, and vacated in part and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge