

BRB Nos. 99-0561 BLA
and 99-0561BLA-A

JAMES E. CABE)	
(Deceased))	
)	
Claimant-Respondent)	
Cross-Petitioner)	
)	
v.)	
)	DATE ISSUED:
COWIN & COMPANY,)	
INCORPORATED)	
)	
Employer-Petitioner)	
Cross-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

William H. Howe and Mary Lou Smith (Howe, Anderson & Steyer, P.C.), Washington, D.C., for employer.

Rita Roppolo (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, BROWN and

McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant's counsel¹ cross-appeals, the Decision and Order on Third Remand (91-BLA-1698) of Administrative Law Judge Frederick D. Neusner on a duplicate 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 is before the Board for the fifth time.² On remand, the administrative law judge determined that the date of onset of disability was between March 1984, the date of a pulmonary function study relied upon by the West Virginia Occupational Pneumoconiosis Board in making its March 20, 1986 finding that the

¹Claimant died on November 18, 1994. Unnumbered Exhibit.

²In its most recent decision in this case, the Board affirmed the administrative law judge's findings that the existence of pneumoconiosis is established pursuant to 20 C.F.R. §718.202(a)(4) and that pneumoconiosis is a necessary contributing cause of the miner's total disability pursuant to 20 C.F.R. §718.204(b). The Board then held that the administrative law judge failed to comply with its previous instructions on second remand to discuss and weigh the medical evidence in order to determine the onset date of disability due to pneumoconiosis. Consequently, the Board vacated the administrative law judge's finding that the date of onset is February 1984, the date of filing of this claim, and remanded the case for further consideration of the evidence as previously instructed. *Cabe v. Cowin & Co.*, BRB Nos. 97-1806 BLA and 97-1806 BLA-A (Sep.15, 1998)(unpub.).

miner was suffering from a 25% disability due to pneumoconiosis, and July 24, 1991, the date of an examination by Dr. Rasmussen diagnosing claimant to be totally disabled due to pneumoconiosis. The administrative law judge determined that this period of time is eighty-six months, and that the halfway point of that amount of time, or forty-three months, is January 1988. Accordingly, the administrative law judge found that the date of onset of total disability due to pneumoconiosis is January 1988 and ordered payment to claimant commencing that date with augmentation for the dependent spouse of the deceased miner. On appeal, both employer and claimant challenge the administrative law judge's onset determination. The Director, Office of Workers' Compensation Programs (the Director) urges the Board to vacate the administrative law judge's finding and order commencement of benefits as of the date of filing of this claim, February 1984.

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).

On appeal, employer contends that while Dr. Rasmussen's July 24, 1991 report establishes that the miner was totally disabled due to pneumoconiosis as of that date, Dr. Zaldivar submitted an opinion that stated that claimant was not totally disabled due to pneumoconiosis on July 10, 1991. Thus, employer contends that the medical evidence establishes that the onset date of disability could only be in July 1991. Alternatively, employer contends that if Dr. Zaldivar's opinion does not establish the date of onset, the date could be no earlier than February 12, 1988. On October 18, 1990, Dr. Scott opined that claimant did not have a respiratory impairment related to coal dust. Dr. Scott partially based his opinion on a February 12, 1988 x-ray, which was read negative by three B-readers. Employer therefore argues that since claimant was not suffering from pneumoconiosis on February 12, 1988, he could not establish that he was totally disabled due to the disease as of that date.

Neither of employer's contentions is meritorious. With regard to employer's contention that Dr. Zaldivar's opinion demonstrates that claimant was not totally disabled due to pneumoconiosis earlier in the month of July 1991, in his Decision and Order Following Remand, dated March 24, 1995, the administrative law judge found Dr. Zaldivar's opinion to be outweighed by Dr. Rasmussen's opinion at Section 718.204(c)(4). We affirmed this finding in *Cabe v. Cowin & Co.*, BRB No. 95-1328 BLA (Mar.29, 1996)(unpub.). The administrative law judge did not find Dr. Zaldivar's

opinion to be credible and therefore, the physician's opinion is not probative evidence of the issue of onset of disability. See *Rochester v. Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600 (3d Cir. 1989), 12 BLR 2-178; *Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

We also reject employer's contention that the February 1988 negative x-ray proves that claimant could not have been totally disabled due to pneumoconiosis, since he did not demonstrate the presence of pneumoconiosis. Although the negative reading proves that claimant was not suffering from clinical pneumoconiosis, it does not prove that claimant was not suffering from legal pneumoconiosis pursuant to 20 C.F.R. §718.201. See *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Inasmuch as the negative x-ray does not prove that claimant was not totally disabled due to legal pneumoconiosis on February 12, 1988, we reject employer's contention that the onset date could be no earlier than February 1988.

In his cross-appeal, claimant's counsel contends that the evidence is indeterminate regarding the date of onset of disability due to pneumoconiosis and contends that the onset date should be January 1985, the date of his last coal mine employment. Claimant testified at the 1991 hearing that he was last employed in January 1984. See Hearing Transcript at 21. As the Director notes in his brief, the administrative law judge repeatedly found January 1984 to have been where claimant was last engaged in coal mine employment. Decision and Order at 3 n. 4. The record supports a finding that claimant last worked in January 1984, and no evidence has been submitted into the record to substantiate claimant's assertion in his brief that he last worked in January 1985. We hold therefore that the administrative law judge's prior determination in his August 20, 1997 Decision and Order on Second Remand with respect to claimant's last date of employment as January 14, 1984, is supported by substantial evidence.

We do, however, agree with claimant that the evidence of record does not establish the date of onset of disability. As the Director states in his brief, the administrative law judge could not permissibly rely on the state workers' compensation examination as proof that claimant was not totally disabled in April 1984 because the record contains no information concerning the state disability guidelines. The administrative law judge acknowledges the limitations of the state determination when he states "[w]hile the finding of the Occupational Pneumoconiosis Board is not definitive in the administration of the Act and regulations, it provides a point of departure in reconsidering this record on remand." Decision and Order on Third Remand at 3. However, the administrative law judge then considers the March 1984 pulmonary function test relied upon by the state

board to be determinative of the date after which claimant became totally disabled due to pneumoconiosis. Since the state board's finding of a twenty-five percent disability does not establish that claimant was not totally disabled, particularly in light of the administrative law judge's finding that claimant's pulmonary disability caused him to retire from his usual coal mine employment which entailed heavy manual labor, and there is no medical evidence credited by the administrative law judge which indicates that claimant was not totally disabled at some point subsequent to his filing, claimant is entitled to benefits as of his filing date. Decision and Order on Third Remand 3-4. See *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); see also *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins*, *supra*. This is particularly suitable since claimant filed for benefits in February 1984, following his retirement in the previous month. Accordingly, we modify the administrative law judge's finding of the onset date to February 1984, the month in which claimant filed his duplicate claim.

Inasmuch as the evidence is insufficient to establish the date of onset of claimant's total disability, we modify the administrative law judge's Decision and Order on Third Remand to reflect an onset date for the commencement of benefits as February 1984.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge