

BRB No. 98-0756 BLA

CARL FOGARTY)	
)	
Claimant-Respondent)	
)	
v.)	
)	
UNITED CASTLE COAL COMPANY)	DATE ISSUED:
)	
and)	
)	
OLD REPUBLIC INSURANCE)	
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 on Remand - Onset Date of Disability of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Onset Date of Disability (89-BLA-0704) of Administrative Law Judge Clement J. Kichuk ordering benefits to commence as of December 1, 1983 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). This case is before the Board for the third time. In the original Decision and Order, the administrative law judge credited claimant with nineteen and one quarter years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c), and sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, the administrative law judge awarded benefits. Since the date of onset of total disability could not be ascertained from the evidence of record, the administrative law judge ordered benefits to commence as of May 1, 1983, the beginning of the month in which claimant filed his claim for benefits. In addition, the administrative law judge ordered employer to pay prejudgment interest to the Department of Labor (DOL) for any payments which were owed by employer and paid by the DOL.

In response to employer's appeal, the Board affirmed the administrative law judge's implicit finding that May 23, 1983 was "the operative date of the filing in this case."¹ The Board also affirmed the administrative law judge's length of coal mine employment finding and his findings at 20 C.F.R. §§718.202(a)(4), 718.203(b), and 718.204(b) and (c). However, the Board vacated the administrative law judge's onset date determination, and remanded the case for further review of the evidentiary record. The Board instructed the administrative law judge to provide an explicit rationale for his conclusions with respect to the onset date of total disability issue. Further, the Board vacated the administrative law judge's award of prejudgment interest, and remanded the case for further consideration of this issue in accordance with 20 C.F.R. §725.608. *Fogarty v. United Castle Coal Co.*, BRB No. 91-0952 BLA (June 16, 1992)(unpub.). On remand, the administrative law judge found that claimant's disability was medically ascertained in October 1987 by Dr. Kanwal, a treating physician. Accordingly, the administrative law judge ordered benefits to commence as of October 1, 1987.

¹Claimant filed a prior claim for benefits on December 11, 1980. Director's Exhibit 2.

In disposing of employer's second appeal, the Board held that the administrative law judge's original finding that claimant is entitled to benefits is the law of the case. The Board also held that the administrative law judge erred in concluding that Dr. Kanwal's 1983 and 1984 opinions establish that claimant is not totally disabled. Further, the Board held that Dr. Kanwal's 1987 report does not establish the date that claimant became totally disabled.² Hence, the Board vacated the administrative law judge's onset date of disability determination, and remanded the case for further consideration of the evidence. The Board instructed the administrative law judge to consider all of the evidence of record to determine whether it contains credited evidence that claimant was *not* totally disabled between claimant's 1983 filing date and the date of Dr. Kanwal's 1987 opinion. Moreover, the Board instructed the administrative law judge that if he finds that the evidence of record is insufficient to establish that claimant was disabled at some point subsequent to the filing of his claim, then the administrative law judge must award benefits from the filing date of the claim. *Fogarty v. United Castle Coal Co.*, BRB No. 93-1109 BLA (Mar. 15, 1996)(unpub.). In a subsequent Order, the Board denied the specific relief requested by both claimant's and employer's requests for reconsideration, and reaffirmed its March 15, 1996 Decision and Order. *Fogarty v. United Castle Coal Co.*, BRB No. 93-1109 BLA (Order)(Aug. 28, 1997)(unpub.). On the most recent remand, the administrative law judge determined that the onset of claimant's disabling pulmonary impairment due to pneumoconiosis was at least during December 1984, based on the administrative law judge's review of all relevant medical evidence. Consequently, the administrative law judge ordered benefits to commence as of December 1, 1984.

On appeal, employer contends that intervening case law compels the reversal of the administrative law judge's award of benefits. Employer also contends that the administrative law judge erred in finding December 1, 1984 to be the onset date of total disability. Claimant responds, urging the Board not to disturb the administrative law judge's findings with regard to the merits of entitlement to benefits, and contending that benefits should commence as of the date of the filing of the claim. Nonetheless, claimant indicates that he is willing to accept an onset date of December 1, 1984 in order to bring these proceedings to a close. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

²The Board noted that the fact that Dr. Kanwal's 1987 opinion is the first medical opinion diagnosing claimant as totally disabled establishes only that claimant was totally disabled by that point. *Fogarty v. United Castle Coal Co.*, BRB No. 93-1109 BLA, slip op. at 3 (Mar. 15, 1996)(unpub.).

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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that intervening case law compels the reversal of the administrative law judge's award of benefits. Specifically, employer asserts that the administrative law judge's weighing of the conflicting evidence of record is not in accordance with the recent decisions of the United States Court of Appeals for the Fourth Circuit in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), inasmuch as the administrative law judge erroneously relied on labels such as recency and status as a treating physician, as well as a mere head-count of the evidence. The Board has previously affirmed the administrative law judge's award of benefits. *Fogarty v. United Castle Coal Co.*, BRB No. 91-0952 BLA (June 16, 1992)(unpub.). Furthermore, the Board has held that its affirmance of the administrative law judge's reliance on Dr. Kanwal's opinion, for the reasons that Dr. Kanwal conducted several examinations of the miner and was the miner's treating physician, does not fall within the admonition of *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Contrary to employer's assertion, the application of *Hicks* and *Akers* would not alter the administrative law judge's decision. While the court in *Hicks* observed that it had explicitly rejected a "later is better" approach to contradictory x-ray evidence, in remanding that case, the court suggested it may not be applicable in weighing objective evidence probative of the issue of total disability. See *Hicks*, 138 F.3d at 530, 531, 21 BLR at 2-330, 2-332, citing *Gray v. Director, OWCP*, 943 F.2d 513, 520-21, 15 BLR 2-214, 2-223-25 (4th Cir. 1991). Thus, the administrative law judge permissibly accorded determinative weight to the most recent pulmonary function and arterial blood gas studies of record, which are qualifying. In addition, in *Hicks* and *Akers*, the court held that an administrative law judge may not mechanically accord determinative weight to the opinion of a treating physician. In *Akers*, the court held that the administrative law judge erred by relying on a head-count of the medical opinions of record to establish the existence of pneumoconiosis. In the instant case, however, the administrative law judge permissibly accorded determinative weight to the opinion of claimant's treating physician, Dr. Kanwal, because Dr. Kanwal performed numerous examinations on claimant over a seven year period. Thus, we reject employer's assertion that the administrative law judge's weighing of the evidence is not in accordance with the court's holdings in

Hicks and Akers. Furthermore, since the administrative law judge's award of benefits, which the Board has affirmed, constitutes the law of the case, and since there is no persuasive evidence that the law of the case doctrine should not be applied, or that an exception has been shown, we decline to revisit this issue. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Remand is necessary only when the application of intervening case law will materially alter the prior result. See *Riley v. Director, OWCP*, 7 BLR 1-139 (1984), citing *Hormel v. Helvering*, 312 U.S. 552 (1941).

Next, employer contends that the administrative law judge erred in finding December 1984 to be the onset date of total disability since the administrative law judge failed to adequately explain the basis for his finding on this issue. As previously noted, the Board instructed the administrative law judge to consider all the evidence of record to determine whether it contains credited evidence that claimant was *not* totally disabled between claimant's 1983 filing date and the date of Dr. Kanwal's 1987 opinion. In his decision, the administrative law judge credited the 1983, 1984 and 1987 opinions of Dr. Kanwal, none of which is sufficient to show that claimant was *not* totally disabled. Additionally, the administrative law judge noted the fact that the record contains both qualifying and non-qualifying objective evidence,³ and stated that "from my review of all relevant medical evidence, I determine that the evidence is sufficient to establish onset of claimant's disabling pulmonary impairment due to pneumoconiosis was at least during December 1984." Decision and Order on Remand - Onset Date of Disability at 2-3.

An administrative law judge must determine the date on which claimant became totally disabled due to pneumoconiosis, not just the date on which he

³The administrative law judge stated that although "Dr. Dahhan's examination of claimant on November 20, 1984 produced a non-qualifying pulmonary function study and a non-qualifying blood gas study,...the objective tests pre-dating as well as post-dating Dr. Dahhan's report produced qualifying spirometry and/or blood gas study values which this Court found established claimant suffered from a disabling respiratory or pulmonary impairment." Decision and Order on Remand - Onset Date of Disability at 3.

becomes totally disabled by any cause. See *Carney v. Director, OWCP*, 11 BLR 1-32 (1987). However, if a date for the onset of disability is not ascertainable from the evidence of record, then benefits commence as of the month the claim was filed unless credible evidence indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date. See 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). We hold, in the instant case, that the administrative law judge's conclusion that claimant is entitled to benefits beginning December 1, 1984 is not supported by substantial evidence, as the administrative law judge's conclusion does not follow from his factual findings. Inasmuch as the administrative law judge credited the 1983, 1984 and 1987 opinions of Dr. Kanwal, which the administrative law judge reasonably interpreted as failing to show that claimant was *not* totally disabled in 1983, and since the administrative law judge properly noted that the objective evidence of record consists of both qualifying and non-qualifying pulmonary function and arterial blood gas studies pre-dating and post-dating 1984, we modify the administrative law judge's decision to award benefits from May 1, 1983, the beginning of the month in which claimant filed his claim for benefits.

Accordingly, the administrative law judge's Decision and Order on Remand - Onset Date of Disability ordering benefits to commence as of December 1, 1984 is modified to order benefits to commence as of May 1, 1983, the beginning of the month in which claimant filed his claim for benefits.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge