BRB No. 07-0674 BLA

M.W. on behalf of B.W., deceased miner Claimant-Respondent	)	
v.	)	
ISLAND CREEK COAL COMPANY Employer-Petitioner	)	DATE ISSUED: 05/29/2008
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Anthony J. Kovach, Uniontown, Pennsylvania, for claimant.

Ashley M. Harman and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (04-BLA-6571) of Administrative Law Judge Alice M. Craft 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 involves a miner's subsequent claim filed on May 21, 2003.[1] The administrative law judge credited claimant with at least thirty-eight years of

[1] Due to the miner's death, this claim is being pursued by his widow. The miner initially filed a claim for benefits on April 6, 1993. In a Decision and Order issued on September 11, 1995, Administrative Law Judge Robert G. Mahony denied benefits

coal mine employment[2] and found that the newly submitted evidence established the existence of pneumoconiosis and thus a change in one of the applicable conditions of entitlement. *See* 20 C.F.R. §725.309(d). She also found that all of the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a) and 718.203, and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c).

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of pneumoconiosis and that the miner was totally disabled due to pneumoconiosis. Employer argues further that the administrative law judge erred in her finding regarding the date for the commencement of benefits. Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief, restating its position. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, the miner 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. If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.,* 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). The

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because the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Pursuant to the miner's appeal, the Board affirmed the denial of benefits. [*B.W.*] *v. Island Creek Coal Co.*, BRB No. 96-0168 BLA (May 31, 1996)(unpub.); Director's Exhibit 1.

[2] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mine industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc).*

miner's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing the existence of pneumoconiosis, to obtain consideration of the merits of the miner's subsequent claim. 20 C.F.R. §725.309(d)(2),(3).

In evaluating the newly submitted evidence relevant to the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that the "preponderance of newly submitted x-ray evidence is not sufficient to form the basis for a finding of pneumoconiosis, but neither does it rule it out." Decision and Order at 17. The administrative law judge then began her analysis of the new medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4), by setting out the position of the Department of Labor regarding the scientific literature concerning coal dust exposure and obstructive lung disease:

> The Department of Labor has taken the position that coal dust exposure may induce obstructive lung disease even in the absence of fibrosis or complicated pneumoconiosis. This underlying premise was stated explicitly in the commentary that accompanied the final version of the current regulations. The Department concluded that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. **The risk is additive with cigarette smoking.**" 65 Fed. Reg. at 79940 (emphasis added). Citing to studies and medical literature reviews conducted by NIOSH, the Department quoted the following from NIOSH:
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>> . . . COPD may be detected from decrements in certain measures of lung function, especially FEV1 and the ratio of FEV1 and the ratio FEV1/FVC. **Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present** . . . .
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> 65 Fed. Reg. at 79943 (emphasis added). Moreover, the Department concluded that the medical literature "support[s] the theory that dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms." Medical opinions which are based on the premise that coal dust-related obstructive disease is completely distinct from smoking-related disease, or that it is never clinically significant, are therefore contrary to the premises underlying the regulations. I have considered how to weigh the conflicting medical opinions in this case based on these principles.

Decision and Order at 18 (emphases and ellipses in original).

Weighing the medical opinions in view of the foregoing findings by the Department of Labor, the administrative law judge found that claimant established that the miner suffered from legal pneumoconiosis, based upon Dr. Levine's opinion. The administrative law judge found that Dr. Levine's opinion was well-reasoned and well-documented, and explained that coal dust exposure caused the miner's severe obstructive lung disease. By contrast, the administrative law judge found that the contrary opinions of Drs. Renn and Fino were not well-reasoned, as these physicians did not provide convincing reasons for their belief that the miner's coal dust exposure did not contribute to his obstructive lung disease. Considering both the x-rays and medical opinions, the administrative law judge found that claimant established the existence of pneumoconiosis and thus a change in one of the applicable conditions of entitlement. *Id.* In weighing all of the evidence of record, the administrative law judge found that, although the x-ray evidence was negative for clinical pneumoconiosis, the opinions of Drs. Rasmussen and Schmitt supported Dr. Levine's diagnosis of legal pneumoconiosis. Therefore, the administrative law judge found that the evidence as a whole established the existence of pneumoconiosis. *Id.* at 20-21.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Renn and Fino, contending that the administrative law judge's finding that Drs. Renn and Fino failed to provide convincing reasons for discounting the contribution of the miner's coal dust exposure to his obstructive disease is not supported by the record. Employer argues that the administrative law judge's statement that these physicians appeared to reject the premises behind the regulations is not supported by the record. In addition, employer asserts that, by requiring Drs. Renn and Fino to "rule out" the contribution of coal dust to the miner's obstructive disease, the administrative law judge improperly shifted the burden of proof to employer. Employer's contentions lack merit.

The administrative law judge noted that Dr. Renn has superior credentials and she found that his opinion was well-documented.[3] The administrative law judge stated:

[3] Dr. Renn diagnosed pulmonary emphysema; either idiopathic interstitial pulmonary fibrosis and/or compression of the mid and lower lung zones by emphysema; chronic bronchitis due to smoking history; and other non-respiratory conditions. Employer's Exhibits 4, 7. He explained that he was able to exclude coal dust exposure as a cause of claimant's obstructive defect. In his deposition, Dr. Renn explained that the two causes of claimant's obstructive defect are chronic bronchitis and pulmonary emphysema, both resulting from tobacco smoking. Dr. Renn stated that he could exclude coal dust exposure as the cause of these conditions because of the speed of the progression of the obstruction, the degree of the obstruction, the pattern of the ventilatory dysfunction and the marked reduction in the diffusing capacity. Employer's Exhibit 9 at

> However, [Dr. Renn] appears to reject the premise behind the regulations that exposure to coal dust can cause clinically significant obstructive disease. I have found that the Miner had 38 years of coal mining, and less than a 5 pack year history of smoking. Dr. Renn has failed to provide any convincing reasons for discounting the contribution of coal dust exposure to the Miner's admittedly severe obstructive disease. I find that Dr. Renn's report is not well reasoned on the cause of the Miner's obstructive disease, and give it little weight.

Decision and Order at 19-20.

We reject employer's challenge to the administrative law judge's decision to accord little weight to Dr. Renn's opinion. The administrative law judge credited the miner with thirty-eight years of coal mine employment and less than a five pack-year smoking history, a finding that employer does not challenge on appeal. It is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Bearing in mind the miner's coal mine employment and smoking histories, and the Department of Labor's findings concerning the medical literature on coal dust exposure and obstructive lung disease, the administrative law judge permissibly analyzed Dr. Renn's reasoning, and substantial evidence supports her finding that Dr. Renn did not provide a convincing reason for completely discounting coal dust exposure as a cause of the miner's obstructive disease, in view of the disparity between the miner's thirty-eight years of coal mine employment and five years of smoking. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). Therefore, we affirm the administrative law judge's permissible finding that Dr. Renn's opinion was not well-reasoned on the cause of the miner's obstructive lung disease.

In considering Dr. Fino's opinion,[4] the administrative law judge stated:

24-26. Further, Dr. Renn explained that claimant had signs of bullous emphysema, which does not occur in coal workers' pneumoconiosis, but does occur in "the tobacco smoke-related disease of emphysema." Employer's Exhibit 9 at 27.

[4] Dr. Fino's newly submitted medical opinion was based on his review of the miner's medical records. Dr. Fino diagnosed bullous emphysema, which progressed from 2002 until 2004, and stated "The progression is typical of what I have seen in individuals with bullous emphysema who have never been exposed to coal mine dust." Employer's Exhibit 7.

> I find that Dr. Fino's opinion was based on premises contrary to those underlying the current regulations. I also find that Dr. Fino failed to provide any convincing reason for excluding the Miner's 38 years of exposure to coal dust as a factor contributing to his obstructive disease. The fact that the same progression of disease can be found in a smoker who is not a miner, does not mean that coal dust does not contribute to the disease in a miner, especially where, as here, the Miner has a much more substantial history of exposure to coal dust than to smoking. Thus, I also find that Dr. Fino's opinion is not well reasoned on the cause of the Miner's obstructive disease.

Decision and Order at 20.

We affirm the administrative law judge's finding that Dr. Fino's statements regarding the progression in the miner's bullous emphysema, Employer's Exhibit 7, did not provide a "convincing reason for excluding the Miner's 38 years of exposure to coal dust as a factor contributing to his obstructive disease." Decision and Order at 20. As with Dr. Renn's opinion, the administrative law judge's analysis of Dr. Fino's opinion was rational, in view of her findings regarding the miner's coal mine employment and smoking histories, and her finding is supported by substantial evidence. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Further, because the issue is the miner's condition as of the time of his subsequent claim, we reject employer's contention that the administrative law judge erred by not discussing more extensively Dr. Fino's explanation for excluding pneumoconiosis in his 1995 opinion that was rendered in the miner's previous claim. *Coffey v. Director, OWCP,* 5 BLR 1-404 (1982).

In addition, we reject employer's argument that the administrative law judge erred in commenting that Drs. Fino and Renn appeared to reject the premises behind the regulations when they excluded thirty-eight years of coal mine employment as a contributing factor in the miner's severe obstructive lung disease. Little weight can be accorded to medical opinions that conflict with the premises underlying the regulations. *See Lewis Coal Co. v. Director, OWCP* [*McCoy*], 373 F.3d 570, 23 BLR 2-184 (4th Cir. 2004); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). The administrative law judge reasonably considered the comments to the regulations regarding the causal connection between coal dust exposure and obstructive lung disease, and, on this record, reasonably concluded that the doctors at least "appear[ed] to reject the premise behind the regulations that exposure to coal dust can cause clinically significant obstructive lung disease." Decision and Order at 19; *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, --- BLR --- (7th Cir. 2008); Director's Exhibit 1; Employer's Exhibits 4, 7, 9.

Finally, since we affirm the administrative law judge's finding that the opinions of Drs. Renn and Fino were not well-reasoned, the administrative law judge was not required to compare their qualifications with the qualifications of the other physicians of record. Moreover, there is no merit to employer's assertion that the administrative law judge shifted the burden to employer to "rule out" the contribution of coal dust to claimant's disease. A review of the administrative law judge's Decision and Order indicates that the administrative law judge's evaluation of the opinions of Drs. Renn and Fino did not shift the burden to employer to disprove the existence of pneumoconiosis. Decision and Order at 19-20.

Employer also asserts that the administrative law judge erred by crediting the opinion of Dr. Levine. We disagree. As the administrative law judge found, Dr. Levine diagnosed both clinical and legal pneumoconiosis,[5] and she permissibly found that Dr. Levine's conclusion, that coal dust exposure was the cause of the miner's severe obstructive disease, was well-reasoned and well-documented. Decision and Order at 19; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Employer's contention that the administrative law judge did not adequately consider that Dr. Levine relied on a positive x-ray to diagnose pneumoconiosis, when the administrative law judge found that the x-rays did not establish pneumoconiosis, lacks merit. In weighing Dr. Levine's opinion, the administrative law judge recognized that, although she found that the x-rays did not support a finding of clinical pneumoconiosis, the x-ray evidence did establish the presence of abnormalities that were consistent with the miner's progressive obstructive lung disease, such as emphysema and hyperinflation, and thus supported Dr. Levine's opinion in that respect. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000). Moreover, Dr. Levine was asked to what he would attribute the miner's abnormalities in the absence of a positive chest x-ray, and he specified that he would attribute the miner's ventilatory abnormalities to chronic or industrial bronchitis related to coal dust exposure. Employer's Exhibit 6 at 34-35. Therefore, we affirm the administrative law judge's crediting of Dr. Levine's diagnosis of legal pneumoconiosis. Since the administrative law judge permissibly relied upon Dr.

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[5] In a 2003 report, Dr. Levine diagnosed pneumoconiosis due to coal dust. He explained that the miner was "exposed to coal dust for 45 years and as a result has developed changes of pneumoconiosis, manifested by nodular opacities on his chest x-ray." Claimant's Exhibit 1. In a subsequent deposition, Dr. Levine restated this opinion and he excluded the miner's smoking history as a cause of the changes on his x-ray. Dr. Levine also stated that in the absence of any abnormality on the miner's chest x-ray, he would not diagnose pneumoconiosis. Claimant's Exhibit 3; Employer's Exhibit 6. He stated further, that in that situation, he would attribute the miner's abnormalities and ventilatory impairment to chronic or industrial bronchitis from "exposure to coal dust and other noxious agents during his employment." Employer's Exhibit 6 at 34-35.

Levine's diagnosis of legal pneumoconiosis, any error by the administrative law judge in relying on Dr. Levine's diagnosis of clinical pneumoconiosis was harmless.[6] *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

In view of the foregoing, we affirm the administrative law judge's finding that the evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a).

Pursuant to Section 718.204(c), employer argues that the administrative law judge erred in discounting the disability causation opinions of Drs. Renn and Fino because neither physician diagnosed pneumoconiosis. We disagree. The administrative law judge correctly applied *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), in finding that the evidence established total disability due to pneumoconiosis. Decision and Order at 22-23; *see also Collins v. Pond Creek Mining Co*., 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). Where an administrative law judge has found the existence of pneumoconiosis arising out of coal mine employment established, and a physician opines that the miner has neither clinical nor legal pneumoconiosis, the administrative law judge "may not credit a medical opinion" that pneumoconiosis did not cause the miner's disability "unless the [administrative law judge] can and does identify specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *Toler*, 43 F.3d at 116, 19 BLR at 2-83. Even then, such an opinion "could carry little weight, at the most." *Scott*, 289 F.3d at 269, 22 BLR at 2-384. Here, the administrative law judge found the existence of pneumoconiosis arising out of coal mine employment established. By contrast, Drs. Renn and Fino did not diagnose either clinical or legal pneumoconiosis and they did not diagnose any symptoms related to coal mine dust exposure. Director's Exhibit 1; Employer's Exhibits 4, 7, 9. Thus, the administrative law judge properly gave their opinions as to disability causation "little weight." Decision and Order at 23; *Scott*, 289 F.3d at 269, 22 BLR 2-384.

Finally, employer asserts that the administrative law judge erred in finding that the miner was totally disabled due to pneumoconiosis as of May 31, 1997. We agree. The administrative law judge found that August, 1993 blood gas study results contained in the record of the miner's prior denied claim showed that the miner was totally disabled at

[6] We reject employer's assertion that it was irrational for the administrative law judge to discredit Dr. Schmitt's opinion because of his reliance on an x-ray, when she did not treat Dr. Levine's opinion the same way. Contrary to employer's assertion, the administrative law judge did not discredit Dr. Schmitt's opinion, but found this opinion entitled to some weight. Decision and Order at 20.

that time. She further considered the regulation providing that, where benefits are awarded on a subsequent claim, "no benefits may be paid for any period prior to the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d)(5). Because the denial of the prior claim became final on May 31, 1997, the administrative law judge awarded benefits as of that date. Decision and Order at 23. The administrative law judge erred in this respect.

Once entitlement to benefits is demonstrated, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

Where a claimant is awarded benefits in a subsequent claim, the date for the commencement of benefits is determined in the same manner provided under 20 C.F.R. §725.503, with the proviso that no benefits may be paid for any time period prior to the date upon which the denial of the previous claim became final. 20 C.F.R. §725.309(d)(5). In promulgating 20 C.F.R. §725.309(d)(5), the Department of Labor explained that the purpose of the rule was to give full effect to the language of the United States Court of Appeals for the Fourth Circuit in *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), that a prior, final determination that the miner was not entitled to benefits at that time must be accepted as legally correct. 64 Fed.Reg. 54966, 54985 (Oct. 8, 1999). Therefore, in this case, the administrative law judge was bound to accept as correct the previous claim determination that the miner was not totally disabled due to pneumoconiosis as of May 1997. Consequently, the administrative law judge erred in relying on the medical evidence contained in the record of the miner's prior denied claim to find that he was then totally disabled due to pneumoconiosis, but could only be awarded benefits as of May 1997.

The record of the miner's subsequent claim contains no medical evidence predating the claim's May 21, 2003 filing date. The medical evidence credited by the administrative law judge in the subsequent claim establishes only that the miner became totally disabled due to pneumoconiosis at some time prior to the date of that evidence. *See Merashoff v. Consolidation Coal Co*, 8 BLR 1-105, 1-109 (1985). Further, the administrative law judge did not credit any evidence that the miner was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his

subsequent claim. Since the medical evidence does not reflect the date upon which the miner became totally disabled due to pneumoconiosis, benefits are payable from the month in which he filed his subsequent claim. 20 C.F.R. §725.503(b). Therefore, we modify the administrative law judge's onset finding, and hold that claimant is entitled to benefits on the miner's subsequent claim commencing as of May, 2003.

Accordingly, the administrative law judge's onset date determination is modified, and her Decision and Order Awarding Benefits is otherwise affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge