BRB Nos. 99-0677 BLA,
99-0677 BLA-A,
and
97-1502 BLA

ELDEN PRESLEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Edward T. Miller, Administrative Law Judge, United States Department of Labor.

Daniel Sachs, Springfield, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant and employer appeal the Decision and Order (96-BLA-1555) of Administrative Law Judge Edward T. Miller 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). Claimant initially filed an application for benefits on June 10, 1983. Director's Exhibit 78. Administrative Law Judge John J. Forbes, Jr., in a Decision and Order issued on February 8, 1989, found that claimant established seventeen

years of coal mine employment, and the presence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203 but failed to establish the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 78. Accordingly, benefits were denied. Claimant filed the present duplicate claim on December 5, 1994. Director's Exhibit 1. The claim was assigned to Administrative Law Judge Miller, who issued a Decision and Order on July 24, 1997, finding that claimant established the presence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1), (4), which established a material change in condition pursuant to 20 C.F.R. §725.309(d). Director's Exhibit 18. On the merits however, the administrative law judge found that claimant failed to establish that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were again denied. On appeal, the Board vacated and remanded the administrative law judge's weighing of the evidence pursuant to Sections 718.204(b), 718.204(c)(1), (4), and 725.309(d), and his finding that the record contained no evidence relevant to the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. On remand, the administrative law judge found that the newly submitted evidence of record did not establish the presence of complicated pneumoconiosis, but did establish total disability pursuant to Section 718.204(c)(4), which established a material change in conditions pursuant to Section 725.309(d), under the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert. denied,* 519 U.S. 1090 (1997).[1] The administrative law judge further found on the merits of the claim that the evidence was sufficient to establish every element necessary for entitlement, and awarded benefits as of December 1, 1994, the date of the filing of the duplicate claim.

In the instant appeal, claimant contends that the administrative law judge erred by failing to find that claimant established the presence of complicated pneumoconiosis, and by failing to award benefits as of March 1983, the month claimant was first diagnosed with complicated pneumoconiosis. Employer responds, asserting that the administrative law judge rationally found that claimant failed to establish the presence of complicated pneumoconiosis, that claimant waived the right to rely on the 1983 evidence diagnosing complicated pneumoconiosis, and that benefits cannot be awarded any earlier than the date

[1]The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit inasmuch as claimant's coal mine employment occurred in the Commonwealth of Virginia. *See Shupe v. Director, OWCP,* 12 BLR 2-1-200 (1989)(*en banc*). Director's Exhibits 2, 78.

claimant filed his duplicate claim. In its cross-appeal, employer asserts that the administrative law judge erred by finding that claimant established that his pneumonoconiosis contributed to his total disability, and that the administrative law judge erred with respect to the date of onset of claimant's disability. The Director, Office of Workers' Compensation Programs, (the Director), has not participated 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 supported by substantial evidence, is rational, and is 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).

To be entitled to benefits under Part 718, claimant must establish total respiratory disability due to pneumoconiosis arising out of coal mine employment. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*). Failure to prove any of these elements precludes entitlement. *Trent, supra; Perry, supra.*

Where a claimant filed 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 there has been a material change in conditions. 20 C.F.R. §725.309(d). The United States Court of Appeals for the Fourth Circuit has held that in determining whether a claimant has established a material change in conditions, the administrative law judge must determine whether the evidence developed since the prior denial establishes at least one of the elements previously adjudicated against claimant. *Rutter, supra.*

After consideration of the administrative law judge's findings and the evidence of record, we conclude that substantial evidence supports the administrative law judge's determination that the existence of complicated pneumoconiosis has not been established pursuant to Section. 718.304. The administrative law judge considered the relevant newly submitted x-ray evidence, which includes the readings of Drs. Spitz, Wiot, Gaziano, Fino, Scott, Wheeler, Shahan and Francke, of claimant's December 27, 1994 x-ray. Dr. Francke, a board-certified radiologist and B-reader, interpreted this x-ray as revealing Type A opacities, which is a diagnosis of complicated pneumoconiosis, although he interpreted claimant's x-ray dated June 15, 1995, as revealing only simple pneumoconiosis. The remaining physicians, five of whom are also dually qualified doctors,[2] either interpreted the December

[2]The record indicates that Drs. Spitz, Wiot, Scott, Wheeler and Shahan are all board-certified radiologists and B-readers. Director's Exhibits 17, 18, 30, 63. Drs. Fino and Gaziano are B-readers. Director's Exhibits 39, 49. The Decision and Order mistakenly indicates that only four of these physicians have dual qualifications in the field of radiology. Decision and Order at 5.

27, 1994, film as revealing simple pneumoconiosis, or as negative for the presence of the disease. Director's Exhibits 16-18, 30, 39, 49, 63. The administrative law judge also considered the treatment notes of Dr. Robinette, claimant's treating physician, who is board-certified in internal medicine and board-eligible in the subspecialty of pulmonary diseases, which indicate that he interpreted an unidentified CT scan as revealing probable pneumoconiosis. Claimant's Exhibit 1. Dr. Fino, a board-certified pulmonologist, reviewed CT scans dated May 22, 1995, August 16, 1995, and December 22, 1995, and found no evidence of even simple pneumoconiosis. Director's Exhibits 40, 68, 71. Dr. Iosif, also a board-certified pulmonologist, opined that the August 16, 1995, CT scan revealed probable scarring from chronic obstructive pulmonary disease, but could also indicate coal workers' pneumoconiosis, or a bulla and bleb resection. Director's Exhibit 58.

The administrative law judge weighed this evidence all together and rationally found that Dr. Francke's diagnosis of complicated pneumoconiosis was unpersuasive since several dually qualified readers found that the December 27, 1994, x-ray did not indicate complicated pneumoconiosis, and because Dr. Francke read a later x-ray as revealing only simple pneumoconiosis. *King v. Cannelton Industries, Inc.* 8 BLR 1-146 (1985); *Maypray v. Island Creek Coal Co.,* 7 BLR 1-683 (1985). The administrative law judge also rationally accorded Dr. Robinette's opinion little weight since it was unclear what CT scan this physician read, his assessment was equivocal, and his qualifications were exceeded by those of Dr. Fino. *McMath v. Director, OWCP,* 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.,* 11 BLR 1-113 (1988); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988). In addition, it was within the administrative law judge's discretion to accord little weight to Dr. Iosif's opinion since his assessment was also equivocal. *See Justice, supra.* We reject claimant's contention that the administrative law judge was required to find the presence of complicated pneumoconiosis based on the 1983 biopsy diagnosis by Dr. Patel. Director's Exhibit 78. The record indicates that Dr. Patel's report was submitted in support of claimant's original claim for benefits which was denied in 1989, and was resubmitted in support of the duplicate claim herein. Although Administrative Law Judge Forbes erred by failing to consider this evidence in his Decision and Order denying claimant's original application for benefits, claimant did not appeal this decision which is now final.[3] 33 U.S.C. §921(a); 20 C.F.R.

[3]We further reject claimant's contention that Dr. Patel's biopsy report diagnosed the presence of complicated pneumoconiosis as this physician merely indicated, under the section entitled "Gross Description," that specimen B was "labeled as blebs and consists [of] two irregular fragments of emphysematous bullae with dark brown to black lung parenchyma measuring 7 x 3 and 5.5 x 2.5 cm respectively." Under the diagnosis section, Dr. Patel found only severe pneumoconiosis with pulmonary emphysema, multiple emphysematous bullae, and parietal pleura showing fibrous adhesion with lung parenchyma showing pneumoconiosis. Director's Exhibit 78. *See Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). Additionally, Dr. Patel's diagnosis of severe pneumoconiosis is not equivalent to a

§802.205; *Rutter, supra; see also, Mecca v. Kemmerer Coal Co.*, 14 BLR 1-101 (1990); *Harris v. Nacco Mining Co.*, 12 BLR 1-115 (1989). As employer correctly contends, this evidence therefore, may not be considered as newly submitted evidence, or as evidence of a worsening in claimant's condition so as to establish a material change in conditions in connection with the present duplicate claim.[4] *Rutter, supra.* Accordingly, since the administrative law judge rationally weighed all the newly submitted evidence regarding the existence of complicated pneumoconiosis, his finding that claimant failed to establish entitlement pursuant to Section 718.304 is affirmed. *See generally Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-61 (4th Cir. 1992).

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diagnosis of complicated pneumoconiosis, which must be expressed in accordance with the requirements of Section 718.304, by means of the diagnosis of large opacities or massive lesions in the lungs. 20 C.F.R. §718.304. *See Neeley, supra; Lohr v. Rochester & Pittsburgh Coal Co.*, 16 BLR 1-1264 (1984).

[4]Moreover, although the administrative law judge failed to weigh the newly submitted evidence with the previously submitted evidence regarding this issue, this error is harmless since the previously submitted evidence does not diagnosis the presence of complicated pneumoconiosis. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Pursuant to 20 C.F.R. §718.204(b), employer contends that the administrative law judge erred by finding that claimant established that his pneumoconiosis contributed to his total disability.[5] The record contains several relevant medical reports. Dr. Forehand diagnosed a totally disabling respiratory impairment due to smoking and coal dust exposure. His medical report notes a smoking history of eight years in the section regarding claimant's health history, and twenty-eight years in the section regarding the etiology of claimant's condition. Dr. Forehand's pulmonary function studies recorded a smoking history of twelve years. Director's Exhibits 12, 13, 15. Dr. Iosif diagnosed chronic obstructive pulmonary disease and emphysema, but did not address the issue of total disability or causation. Director's Exhibit 58. Dr. Michos found no evidence of coal workers' pneumoconiosis or total disability due to this disease, but diagnosed asthma which resulted in a pulmonary abnormality, and indicated that this condition could be aggravated to the point of total disability by coal dust exposure. Director's Exhibit 37. Dr. Robinette diagnosed a severe restrictive and obstructive lung disease, "probably" associated with black lung disease and pulmonary emphysema, and noted that claimant had a history of smoking three to four cigarettes per day, quitting in 1969. Claimant's Exhibits 1, 3. Lastly, Dr. Sargent found no evidence of pneumoconiosis, but diagnosed a moderate obstructive respiratory impairment due to asthma, and emphysema due to smoking. Dr. Sargent also indicated that coal dust exposure might aggravate claimant's asthma, and that he could only determine whether claimant's asthma would allow him to tolerate coal dust exposure by monitoring claimant if he returned to work, and further stated his belief that coal workers' pneumoconiosis does not progress after the cessation of coal mine employment. Director's Exhibits 35, 59; Employer's Exhibit 8. The administrative law judge considered the aforementioned opinions and accorded little weight to Dr. Michos's opinion as he never examined the miner, or conducted any diagnostic tests, found no evidence of pneumoconiosis which the administrative law judge found was contrary to the record evidence, and was equivocal regarding the cause of claimant's disability since he concluded that asthma was the probable cause, but that coal dust might aggravate claimant's condition rendering him unable to perform his previous coal mine work. The administrative law judge also gave little weight to Dr. Sargent's opinion since he found that this doctor's statement that coal dust exposure might aggravate claimant's condition was equivocal, and that his reasoning is inconsistent with the principle that pneumoconiosis is a progressive disease. The administrative law

[5]The administrative law judge's findings that claimant established the presence of a totally disabling respiratory impairment pursuant to Section 718.204(c), thereby establishing a material change in conditions pursuant to Section 725.309(d), and his findings on the merits that claimant established the presence of pneumoconiosis arising out of coal mine employment, and a totally disabling respiratory impairment, are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

judge credited the opinions of Drs. Forehand and Robinette as persuasive and well reasoned opinions based on acceptable clinical and diagnostic techniques, that claimant suffers from a severe pulmonary condition, caused at least in part, by his coal dust exposure. Accordingly, the administrative law judge found that causation had been established at Section 718.204(b). Decision and Order at 13-14.

We find no merit in employer's contention that the administrative law judge placed the burden of proof on employer to prove that pneumoconiosis did not contribute to claimant's total disability or by rejecting Dr. Sargent's report on the basis that this opinion was equivocal, since although this physician did state that any aggravation of claimant's asthma would be transient and would cease with the cessation of coal dust exposure, he also clearly indicated that it was uncertain if exposure to coal dust would aggravate claimant's total disability due to asthma, so as to prevent claimant from performing his usual coal mine work. *Robinson v. Pickands Mather & Co.,* disability, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *Justice, supra.* The administrative law judge rationally accorded less weight to Dr. Sargent's opinion since this physician also clearly stated that simple pneumoconiosis did not progress absent further dust exposure, which belief is inconsistent with the principle that pneumoconiosis is a progressive disease, and undermines Dr. Sargent's credibility. *Mullins Coal Co. v. Director, OWCP,* 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Labelle Processing Co. v. Swarrow,* 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Ondecko, supra; Orange v. Island Creek Coal Co.,* 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986; *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Justice, supra; Stephens v. Bethlehem Mines Corp.,* 8 BLR 1-350 (1985). Similarly, the administrative law judge rationally gave little weight to Dr. Michos' opinion as this physician did not examine the miner, or review various pieces of medical evidence supportive of claimant's position, his opinion was contrary to the numerous pieces of evidence indicating that claimant suffered from pneumoconiosis, and was equivocal in his statement that coal dust exposure might aggravate claimant's condition to the point of total disability. *Clark, supra*; *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988)(*en banc*), *aff'd sub nom. Director, OWCP v. Cargo Mining Co.,* Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpub.); *Campbell v. Director, OWCP,* 11 BLR 1-16 (1987); *Justice, supra; Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985).

We hold however that the administrative law judge erred by crediting Dr. Robinette's report as supportive of claimant's burden of causation without discussing that this doctor indicated only that claimant's condition was "probably" due to claimant's pneumoconiosis, which is not a definite statement of causation. *Robinson, supra; Campbell, supra; Justice, supra.* Moreover, as employer correctly notes, the administrative law judge did not address the inconsistency between Dr. Robinette's smoking history and that testified to by claimant.[6]

[6]Claimant testified at the hearing that he smoked one-half pack per day from the age of seventeen or eighteen, until he ceased smoking approximately twenty-five years ago.

Trumbo v. Reading Anthracite Co., 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Accordingly, remand is required to permit the administrative law judge to reconsider Dr. Robinette's opinion regarding causation. Contrary to employer's contention however, the administrative law judge did not accord greater weight to Dr. Robinette's opinion based on his status as a treating physician, and was not required to reject this opinion regarding causation because the administrative law judge did not credit his opinion regarding the presence of complicated pneumoconiosis. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Moreover, the administrative law judge was not required to reject this opinion because it was based in part, on pulmonary function studies which were found valid by the administering physician, but found invalid by reviewing physicians, and because the administrative law judge failed to credit this study at Section 718.204(c). Whether a medical report is sufficiently documented and reasoned is for the administrative law judge as the fact-finder to determine. *Trumbo, supra; Clark, supra.*

Employer also challenges the administrative law judge's crediting of Dr. Forehand's opinion, contending that this physician failed to state how his invalid pulmonary function studies and his arterial blood gas studies support his diagnosis, or discuss the accuracy of this doctor's smoking history which was less than claimant testified to at the hearing, and did not adequately explain the basis for his diagnosis. We agree with employer's contention that remand is required for the administrative law judge to determine the accuracy of Dr. Forehand's smoking history since his report reflects differing statements on this issue. *Bobick, supra; Trumbo, supra.* Accordingly, we vacate the administrative law judge's findings pursuant to Section 718.204(b), and remand the case for the administrative law judge to reconsider this issue.

Claimant and employer contend that the administrative law judge erred in his finding regarding the date of onset of claimant's total disability. The Decision and Order indicates that the administrative law judge did not specifically address the medical evidence of record, but merely summarily found "[i]n the absence of convincing proof of an earlier date of onset, Claimant is entitled to benefits under the Act, commencing as of December 1, 1994," the month claimant filed the present duplicate claim. Decision and Order at 14. Once claimant's entitlement to benefits has been demonstrated, the date for commencement of benefits is determined by the date of onset, *i.e.*, the month in which the occupational pneumoconiosis progressed to the stage of total disability. 20 C.F.R. §725.503; *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 is not ascertainable from all the relevant evidence of

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Hearing Transcript at 39.

record, then benefits commence with the month during which the claim was filed or review was elected under Section 435 of the Act. 30 U.S.C. §945; 20 C.F.R. §725.503(b); *Green v. Director, OWCP,* 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Gardner v. Consolidation Coal Co.,* 12 BLR 1-184 (1989); *Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984). Contrary to claimant's contention, the administrative law judge was not required to award benefits as of March 1983, the month in which claimant asserts he was first diagnosed with complicated pneumoconiosis. In considering the issue of onset of total disability, the administrative law judge is required to specifically assess the credibility of the medical evidence, and discuss whether it establishes the date that claimant became totally disabled due to pneumoconiosis. *Williams v. Director, OWCP,* 13 BLR 1-28 (1989); *Lykins, supra*. The Decision and Order in the present case fails to indicate that the administrative law judge specifically considered and discussed the medical evidence on this issue. Accordingly, remand is required for the administrative law judge to provide a thorough assessment of this evidence and state the rationale for his findings. *Williams, supra; Lykins, supra.*

Claimant's counsel has also filed an itemized statement requesting a fee for services performed in this appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $2,587.50 for 17.25 hours of legal services at an hourly rate of $150.00. Employer has filed an objection to this fee petition.

Employer raises several objections to the fee petition. Specifically, employer contends that counsel's fee request for reviewing the file on November 17, 1997, December 29, 1997, January 19, 1998, February 23, 1998, March 23, 1998, May 11, 1998, June 8, 1998, June 28, 1998, and June 30, 1998, for a total of 2.25 hours is unwarranted. Employer also contends the request for .25 hours on March 9, 1998, for composing a letter to the administrative law judge, and the .25 hours requested for composing a letter to claimant on June 9, 1998, be disallowed as unreasonable, and that the request for 1 hour of fees for phone calls with claimant on April 5, 1998, April 8, 1998, and April 15, 1998, is excessive, and requests that these entries be reduced to a total of .5 hours. We hold that although periodic review of a client's file is a legitimate activity in the representation of a black lung claimant, the request for 2.25 hours of time herein is excessive. *McNulty v. Director, OWCP,* 4 BLR 1-128 (1981). We therefore reduce the number of compensable hours for this activity to 1.25 hours. *See generally, Parker v. Director, OWCP,* 4 BLR 1-453 (1982). We further hold that counsel's request for .25 hours for drafting a letter to claimant, and for 1.0 hours for phone calls with claimant are legitimate compensable activities, and we decline to disallow these expenses. *Lanning v. Director, OWCP,* 7 BLR 1-314 (1984); *Miller v. Director, OWCP,* 4 BLR 1-640 (1982); *Hill v. Director, OWCP,* 4 BLR 1-280 (1981); *Atchison v. Director, OWCP,* 2 BLR 1-699 (1979). Counsel's request for .25 hours on March 9, 1998, for drafting a letter to the administrative law judge however, is disallowed as unreasonable as counsel has not indicated how this letter was necessary to establish claimant's entitlement while awaiting the issuance of the Board's Decision and Order.

Lanning, supra. Claimant's counsel is hereby awarded a fee of $2,400.00 for 16 hours of legal services at an hourly rate of $150.00, to be paid directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203. Inasmuch as the decision in this case has not yet become final, this Order is neither enforceable nor payable until such time as an award becomes final, and that award reflects a successful prosecution of the claim. 33 U.S.C. §928. *See Wells v. International Great Lakes Shipping Company,* 693 F.2d 663 (7th Cir. 1982), 15 BRBS 47 (1982); *Spinner v. Safeway Stores, Inc.,* 18 BRBS 155 (1986).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge