U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0457 BLA

EVERETT SHEPHERD Claimant-Respondent v. NUMBER 8 LTD OF VIRGINIA and LIBERTY MUTUAL INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 07/21/2016 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

Before: BOGGS, BUZZARD, and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (2011-BLA-05089) of Administrative Law Judge Lystra A. Harris, rendered on a subsequent claim filed on December 7, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended 30 U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time.[2]

In her initial decision dated July 10, 2012, the administrative law judge credited claimant with nine to ten years of coal mine employment and determined that the newly submitted medical opinion evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4)[3] and, therefore, established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), but vacated the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and, consequently, vacated the finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Specifically, the Board held that the administrative law judge failed to consider whether Drs. Al-Khasawneh and DeFore have an accurate understanding of the length of claimant's coal mine employment in according greater weight to their opinions than to the contrary

[1] Claimant's prior claim for benefits, filed on November 2, 2000, was denied on July 1, 2004 because, while claimant established total disability at 20 C.F.R. §718.204(b)(2), he failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Claimant took no action with regard to that denial until he filed his current subsequent claim. Director's Exhibits 1, 3.

[2] The amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, because claimant did not establish at least fifteen years of qualifying coal mine employment. *See* Pub. L. No. 111-148, §1556(a), (c); 30 U.S.C. §§921(c)(4) and 932(*l*)).

[3] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

opinions of Drs. Rosenberg and Fino. *Shepherd v. Number 8 Ltd of Va.*, BRB No. 12-0569 BLA, slip op. at 4 (July 17, 2013) (unpub.). The Board further held that the administrative law judge erred in failing to render a specific finding as to the length and extent of claimant's smoking history prior to evaluating the credibility of the medical opinion evidence in light of the conflicting smoking histories reported by the physicians. *Shepherd*, slip op. at 4-5.

The Board instructed the administrative law judge to determine whether the physicians have an accurate understanding of claimant's exposure histories in assessing the credibility of their opinions, and to fully explain her credibility determinations in compliance with 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).[4] *Shepherd*, slip op. at 5. The Board further instructed that if the administrative law judge found that claimant established a change in the applicable condition of entitlement, the administrative law judge must weigh all of the evidence, including the evidence from claimant's prior claim, to determine whether claimant has established all the elements of entitlement. *Shepherd*, slip op. at 6.

On remand, the administrative law judge reiterated her prior finding that while claimant worked for twenty-five years "off and on" in coal mining, his cumulative coal mine work was between nine and ten years. The administrative law judge also found that claimant had "at least" a twenty-five year smoking history. Further, the administrative law judge found that claimant established the existence of legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203 and, therefore, established a change in the applicable condition of entitlement under 20 C.F.R. §725.309. Finally, the administrative law judge found that claimant's totally disabling respiratory impairment was substantially due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits, beginning August 2009.

On appeal, employer contends that the administrative law judge erred in her determination of the extent of claimant's smoking history. Employer further asserts that the administrative law judge erred in her analysis of the medical opinion evidence when she found that claimant established the existence of legal pneumoconiosis and a change in the applicable condition of entitlement. Employer also asserts that the administrative

[4] Additionally, the Board instructed the administrative law judge to consider whether Dr. DeFore's opinion, that coal dust exposure and smoking "likely contribute" to claimant's disabling respiratory impairment, was equivocal. Further, the Board directed the administrative law judge to address Dr. Rosenberg's testimony, explaining the cause of claimant's residual impairment on bronchodilation. *Shepherd v. Number 8 LTD of Va.*, BRB No. 12-0569 BLA, slip op. at 5 n.7 (July 17, 2013) (unpub.).

law judge erred in finding total disability due to pneumoconiosis established. Finally, employer contends that the administrative law judge erred in her determination of the commencement date for benefits. Claimant responds in support of the award, but concurs with employer that the administrative law judge's determination of the benefits commencement date is erroneous. The Director, Office of Workers' Compensation Programs, did not file 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.[5] 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 the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, a totally disabling respiratory or pulmonary impairment, and that the totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes an award of benefits. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

When 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(c);[6] *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(c)(3). Claimant's prior claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 1. Therefore, to obtain

[5] Because the record indicates that claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1-616.

[6] The Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (codified at 20 C.F.R. §725.309(c)).

review of the merits of his claim, he had to submit new evidence establishing the existence of pneumoconiosis. *See* 20 C.F.R. §725.309(c)(3), (4).

Employer challenges the administrative law judge's finding that claimant has a smoking history of "at least" twenty-five pack-years. Employer's Brief at 5-6; Decision and Order at 7. Employer contends that the administrative law judge failed to consider evidence of record which reflects that claimant has a smoking history of "at least [thirty] pack years."[7] Employer's Brief at 5-6. Thus, employer asserts, the administrative law judge's finding fails to satisfy the requirements of the APA that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); Employer's Brief at 5. Employer's contentions lack merit.

On remand, the administrative law judge acknowledged that the record contains conflicting evidence regarding claimant's smoking history. Decision and Order at 3. Specifically, the administrative law judge noted that claimant testified that he smoked for about twenty to twenty-five years at a rate of one pack per day. Decision and Order at 3; Hearing Tr. at 20-21. The administrative law judge also noted that at the hearing in connection with his prior claim, claimant testified that he began smoking at the age of twenty-eight, around 1965, and quit around 1985, and stated that he never smoked more than one pack per day. Decision and Order at 3; 2004 Hearing Tr. at 28-29. Additionally, the administrative law judge noted that claimant reported "various smoking histories to the physicians of record" ranging from only seventeen pack-years, recorded by Dr. Fino, to thirty-five pack-years, recorded by Dr. DeFore.[8] Decision and Order at 3.

Contrary to employer's contention, the administrative law judge recognized that claimant "reported varying smoking histories," of up to thirty-five pack-years, but the administrative law judge permissibly credited claimant's recent testimony, "taken under oath," to determine that claimant has "at least a twenty-five pack [-] year smoking

[7] Employer asserts that the record contains two letters from the University of Kentucky Hospital to Dr. Caudill dated September 5, 1986 and September 22, 1986, which noted a history of smoking two packs of cigarettes per day for fifteen years, quitting four years earlier, and a note from Cardiopulmonary Laboratories, Inc., dated September 26, 1998, indicating a smoking history of one and one-half packs per day for twenty years, quitting fifteen years earlier. Employer's Brief at 5-6.

[8] The administrative law judge also noted that Dr. Rosenberg recorded a smoking history of twenty pack-years, and Dr. Al-Khasawneh recorded a history of twenty-five pack-years. Decision and Order at 3.

history." *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 3. The length and extent of claimant's smoking history is a factual, not medical, determination committed to the administrative law judge's discretion. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the credibility of witnesses and the weight to be accorded hearing testimony is within the discretion of the administrative law judge. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). Because the record reflects that the administrative law judge considered the complete range of claimant's reported smoking histories, and permissibly relied on claimant's sworn testimony to determine that claimant has at least a twenty-five pack-year smoking history, the administrative law judge's finding is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8; *Clark*, 12 BLR at 1-155; Decision and Order at 3.

We next address employer's argument that the administrative law judge erred in her consideration of the medical opinion evidence relevant to the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge properly found that, while all the physicians agree that claimant suffers from severe chronic obstructive pulmonary disease (COPD), Drs. Al-Khasawneh and DeFore attributed claimant's COPD to both coal mine dust exposure and smoking, while Dr. Rosenberg opined that claimant's COPD is due solely to smoking.[9] Decision and Order at 4-6. The administrative law judge discredited the opinion of Dr. DeFore as based, in part, on an inflated coal mine employment history. Decision and Order at 7. The administrative law judge also discredited the opinion of Dr. Rosenberg, as not well reasoned and inadequately explained. *Id*. at 7-8. In contrast, the administrative law judge found Dr. Al-Khasawneh's opinion to be well-reasoned and well-documented, and entitled to significant weight. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 8.

Employer asserts that the administrative law judge erred in crediting the opinion of Dr. Al-Khasawneh. Initially, employer notes that while Dr. Al-Khasawneh recorded a twenty-seven pack-year smoking history in his January 2010 report, similar to the

[9] The administrative law judge also considered Dr. Fino's opinion that claimant does not suffer from pneumoconiosis. The administrative law judge reiterated her prior determination, affirmed by the Board, that Dr. Fino's opinion is not well-reasoned and merited diminished weight. Decision and Order at 8; *Shepherd*, BRB No. 12-0569 BLA, slip op. at 5 & n.8.

administrative law judge's finding of twenty-five pack-years, Dr. Al-Khasawneh's December 2010 report reflected only an eighteen pack-year smoking history. Employer's Brief at 6; *see* Director's Exhibit 10 at 28; Claimant's Exhibit 1 at 4. Thus, employer contends, the administrative law judge failed to adequately consider whether Dr. Al-Khasawneh's opinion was based on an "underreported" smoking history. Employer's Brief at 6-7. Employer's argument lacks merit.

After finding that the miner had a twenty-five pack-year smoking history, the administrative law judge considered whether any of the physicians of record should be accorded less weight due to their reliance on an erroneous smoking history. Decision and Order at 7. The administrative law judge found that while some of the physicians recorded smoking histories as low as fifteen or seventeen pack-years,[10] each physician "took a significant smoking history into account when diagnosing claimant's lung disease." Decision and Order at 7. Thus, the administrative law judge "accorded equal weight regarding claimant's smoking history" to each medical opinion. *Id*.

Employer does not challenge the administrative law judge's permissible finding that even a fifteen or seventeen pack-year smoking history is "significant." *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Moreover, Dr. Al-Khasawneh concluded in both of his medical reports that both coal mine dust exposure and cigarette smoking significantly contributed to and aggravated claimant's obstructive impairment. *See* Director's Exhibit 10 at 29; Claimant's Exhibit 1 at 3-4. In light of these factors, employer has not shown how it was prejudiced by the administrative law judge's failure to acknowledge that Dr. Al-Khasawneh's December 2010 report recorded only an eighteen pack-year smoking history. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1985). We, therefore, reject employer's allegation that in crediting Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis, the administrative law judge failed to adequately consider whether his opinion was based on an accurate smoking history.

Employer next argues that while the administrative law judge "went through each of Dr. Rosenberg's findings" in determining that his opinion is not credible, the administrative law judge simply accepted Dr. Al-Khasawneh's opinion at face value.

[10] Specifically, the administrative law judge stated that Dr. DeFore noted a fifteen pack-year history, Dr. Fino recorded a seventeen pack-year history, Dr. Rosenberg documented a twenty pack-year history, and Dr. Al-Khasawneh documented a twenty-seven pack-year history. Decision and Order at 7. As employer points out, and as the administrative law judge accurately noted earlier in her decision, Dr. DeFore actually recorded a thirty-five pack-year smoking history. *See* Decision and Order at 3; Employer's Brief at 6, 12 at n.2; Claimant's Exhibit 2 at 2, 3.

Employer's Brief at 7. Employer contends that Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis is unexplained and "cannot be credited." *Id*. at 8-10. These arguments are without merit.

Dr. Al-Khasawneh diagnosed legal pneumoconiosis, in the form of a severe obstructive impairment, to which both cigarette smoking and coal mine dust exposure "contributed significantly and substantially." Director's Exhibit 10; Claimant's Exhibit 1. The administrative law judge noted Dr. Al-Khasawneh's explanation that both coal mine dust and cigarette smoking cause obstruction and that it is "medically impossible to distinguish" the effects of smoking and coal mine dust in the development of obstructive lung disease. Decision and Order at 4; Claimant's Exhibit 1. Additionally, as the administrative law judge noted, Dr. Al-Khasawneh explained that his diagnosis of legal pneumoconiosis was "supported by the severe obstruction on [claimant's] pulmonary function test with partial reversibility with bronchodilator [use but] without complete normalization[,] as well as his decreased O2 at rest and with exercise." Decision and Order at 4; *see* Director's Exhibit 10; Claimant's Exhibit 1. The administrative law judge also permissibly found that Dr. Al-Khasawneh's conclusions are consistent with the Department of Labor's recognition that miners who smoke have an additive risk for developing significant obstruction. *See A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203, 2-210-11 (6th Cir. 2012); Decision and Order at 7, *referencing* 65 Fed. Reg. 79,920, 79,940, 79,943 (Dec. 20, 2000).

Review of the administrative law judge's decision reflects that she specifically found that Dr. Al-Khasawneh set forth the rationale for his findings, "based on claimant's pulmonary function results, his decreased oxygen level, his chest x-ray depicting emphysema, and his physical examination." Decision and Order at 7. The administrative law judge also found that Dr. Al-Khasawneh credibly explained why he concluded that claimant's severe obstructive impairment is due, in part, to coal mine dust exposure. Decision and Order at 7. Therefore, we reject employer's argument that the administrative law judge failed to critically analyze Dr. Al-Khasawneh's opinion, and we affirm her finding that Dr. Al-Khasawneh's diagnosis of legal pneumoconiosis is "well documented and reasoned" and sufficient to satisfy claimant's burden of proof. *See* 20 C.F.R. §718.201(a)(2), (b); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Decision and Order at 7, 8.

Moreover, as employer raises no further challenge to the administrative law judge's weighing of the medical opinion evidence, we affirm her finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Accordingly, we also affirm the administrative law judge's determination that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Turning to the merits of entitlement, we first address employer's contention that in finding that claimant established all elements of entitlement, the administrative law judge erred by failing to consider all of the relevant evidence of record, including that submitted with the prior claim. Employer's Brief at 10-12. Employer's contention lacks merit.

The administrative law judge summarized the prior x-ray and medical opinion evidence, but permissibly concluded that the more recent medical evidence was of greater probative value than that submitted with the prior claim because of the progressive nature of pneumoconiosis.[11] *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 11-12. Thus, the administrative law judge properly reiterated her conclusion that the recent medical opinion evidence establishes the existence of pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(4).[12]

Employer next challenges the administrative law judge's finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 12-14. Employer asserts that the administrative law judge applied an incorrect standard, and erred in crediting the opinion of Dr. Al-Khasawneh, in finding that claimant

[11] Employer asserts that because the pulmonary function studies submitted in the prior claim show the same pattern of impairment as those in the current claim, and thus indicate that claimant's disease has not progressed, the administrative law judge's reason for declining to credit the prior medical opinion evidence cannot be affirmed. Employer's Brief at 11-12. Employer concedes that "had the testing submitted in conjunction with claimant's prior claim shown . . . results showing far less impairment . . . the administrative law judge's decision would be understandable." Employer's Brief at 11. Employer cites no medical opinion or other evidence in support of its argument. Further, we note that on their face, the pulmonary function studies submitted in the current claim reflect lower FEV1 values than even the qualifying pulmonary function study credited by the administrative law judge in the prior claim. Director's Exhibits 1-21, 1-594, 10, 12; Claimant's Exhibits 1, 2; Employer's Exhibit 7.

[12] The administrative law judge further found that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(c). Decision and Order at 8. We note that, having found that the medical opinion evidence established the existence of legal pneumoconiosis, the administrative law judge was not required to separately determine the cause of the pneumoconiosis at 20 C.F.R. §718.203, as her finding at 20 C.F.R. §718.202(a)(4) necessarily subsumed that inquiry. *Henley v. Cowan & Co.*, 21 BLR 1-147, 1-151 (1999).

is totally disabled due to legal pneumoconiosis.[13] We disagree. The administrative law judge correctly noted that, in order to establish that he is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c), claimant must establish that pneumoconiosis is a substantially contributing cause of his totally disabling pulmonary or respiratory impairment. Decision and Order at 9. Further, as the administrative law judge correctly noted, Dr. Al-Khasanweh specifically opined that "legal pneumoconiosis contributes substantially to [claimant's disabling] impairment." Decision and Order at 9; Director's Exhibit 10; *see* Claimant's Exhibit 1. We have held that the administrative law judge permissibly found that Dr. Al-Khasawneh's opinion, that claimant's severe obstructive pulmonary impairment was contributed to and aggravated by coal mine dust exposure and thus constitutes legal pneumoconiosis, is well-reasoned. Dr. Al-Khasawneh attributed claimant's total disability solely to that same severe obstructive impairment. Director's Exhibit 10; Claimant's Exhibit 9. Consequently, based on Dr. Al-Khasawneh's opinion, in this case the totally disabling impairment and legal pneumoconiosis are identical. Thus, contrary to employer's contention, the administrative law judge permissibly found that Dr. Al-Khasawneh's opinion that legal pneumoconiosis is a "substantially contributing cause" of claimant's total disability is well-reasoned, pursuant to 20 C.F.R. §718.204(c). *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004); Decision and Order at 10-11; Employer's Brief at 12-14. As employer makes no other argument regarding the administrative law judge's disability causation finding, we affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), we affirm the administrative law judge's award of benefits.

Lastly, employer challenges the administrative law judge's determination of the date for the commencement of benefits. Employer's Brief at 14. Once entitlement to benefits is established, the date for their commencement is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503;

[13] We affirm, as unchallenged on appeal, the administrative law judge's determination to discredit the opinions of Drs. Fino and Rosenberg, relevant to the cause of claimant's disabling impairment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Further, as we have affirmed the administrative law judge's reliance on the more recent evidence of record, we reject employer's assertion that the administrative law judge erred in failing to consider the disability causation opinions of Drs. Dineen, Broudy, and Dahhan, submitted with the prior claim. Employer's Brief at 11-12.

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, as here, a claimant is awarded benefits in a subsequent claim, the date for the commencement of benefits is determined as 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 order denying the prior claim became final. 20 C.F.R. §725.309(c)(6) (2013).

After finding that she was unable to determine the exact month in which claimant became disabled, the administrative law judge stated that benefits are payable "as of August 2009 – the month and year in which claimant filed this current claim for benefits." Decision and Order at 12. As employer asserts, and claimant concurs, the record reflects that claimant filed this claim with the district director on December 7, 2009. *See* Decision and Order at 2; Employer's Brief at 14; Claimant's Brief at 15 (unpaginated); Director's Exhibit 3 at 1, 3. Consequently, we modify the administrative law judge's decision to reflect that benefits shall commence as of December 2009, the month and year in which claimant filed his subsequent claim. 20 C.F.R. §§725.305(b), 725.503(b).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits on Remand is affirmed, as modified to reflect December 2009 as the month from which benefits commence.

SO ORDERED.

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge