BRB No. 09-0314 BLA

WILMER HAGY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 11/24/2009
	)	
LESLIE RESOURCES, INCORPORATED c/o ACORDIA EMPLOYERS SERVICE CORPORATION	)	
	)	
and	)	
	)	
AMERICAN ZURICH	)	
	)	
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-Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass, Harlan, Kentucky, for claimant.

James M. Kennedy (Baird and Baird, P.S.C.), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand-Award of Benefits (04-BLA-5610) of Administrative Law Judge Larry S. Merck rendered on a claim filed on September 27, 2002 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 second time. Initially, the administrative law judge credited claimant with thirty-three years of coal mine employment, based on the parties' stipulation.[1] The administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). *W.H.* [*Hagy*] *v. Leslie Res., Inc.*, BRB No. 06-0941 BLA (Aug. 29, 2007)(unpub.). Noting that the administrative law judge had found that all of the medical opinions of record, including that of claimant's treating physician, Dr. Mandviwala, were reasoned and documented, the Board remanded the case for the administrative law judge to consider whether Dr. Mandviwala's opinion merited greater weight in light of the factors set forth at 20 C.F.R. §718.104(d). *Id.*

On remand, the administrative law judge found that claimant established the existence of legal pneumoconiosis,[2] in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine employment, pursuant to Section 718.202(a)(4), giving great weight to Dr. Mandviwala's opinion as that of claimant's treating physician. Based on Dr. Mandviwala's opinion, the administrative law judge found that claimant established that his total disability is due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits from September 2002, the date upon which claimant filed his claim, because the record did not establish when he became totally disabled due to pneumoconiosis.

[1] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 3.

[2] 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).

On appeal, employer challenges the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to 718.204(c). Additionally, employer challenges the administrative law judge's onset date determination. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions on 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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 a finding of entitlement. *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).

The evidence relevant to Section 718.202(a)(4) consists of the medical opinions of Drs. Mandviwala, Baker, Dahhan, and Rosenberg. All four physicians are Board-certified in Internal Medicine and Pulmonary Disease. Dr. Mandviwala, claimant's treating physician from 2002, completed a questionnaire on July 25, 2003, in which he opined that claimant's thirty-eight years of coal dust exposure and his smoking history are responsible for his COPD and disabling respiratory condition. Director's Exhibit 25; *see also* Director's Exhibit 28; Claimant's Exhibits 1, 4. Dr. Baker examined claimant on November 20, 2002, and diagnosed COPD due to both smoking and coal dust exposure. Director's Exhibit 8. Dr. Dahhan examined claimant and reviewed his medical records. He related claimant's pulmonary disability solely to his lengthy smoking habit. Employer's Exhibits 5; 6; 7 at 9-10. Dr. Rosenberg reviewed claimant's medical records, and opined that claimant's totally disabling obstruction is due solely to claimant's long smoking history. Employer's Exhibits 1; 2; 3 at 11-14, 17; 4 at 6-7, 15-16.

Pursuant to Section 718.202(a)(4), the administrative law judge considered that Drs. Mandviwala, Baker, Dahhan, and Rosenberg are equally qualified, and he found that each physician rendered a well-reasoned and well-documented opinion. Applying the regulatory criteria at Section 718.104(d)(1)-(4),[3] the administrative law judge found that

[3] Pursuant to 20 C.F.R. §718.104(d), the administrative law judge must take into account the nature and duration of the treating physician's relationship, as well as the

Dr. Mandviwala has treated claimant for his COPD, a pulmonary condition, and that the doctor had first treated claimant in 1998, and then regularly from 2002. The administrative law judge took into account that Dr. Mandviwala has extensively treated claimant and performed regular physical examinations and objective testing, and that Dr. Mandviwala attended claimant during a five-day hospitalization for respiratory failure. The administrative law judge found that a review of the criteria at Section 718.104(d)(1)-(4) indicated that Dr. Mandviwala's treatment relationship with claimant afforded him a thorough, in-depth understanding of claimant's respiratory health. Weighing all of the medical opinions, the administrative law judge found that Dr. Mandviwala's opinion was entitled to controlling weight as that of claimant's treating physician, considering the similar qualifications of all the physicians, the reasoning and documentation underlying the physicians' opinions, as well as the factors at Section 718.104(d), and the record as a whole. *See* 20 C.F.R. §718.104(d)(5). Consequently, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

Employer contends that the administrative law judge erred by giving controlling weight to Dr. Mandviwala's opinion. Employer asserts that Dr. Mandviwala's opinion, that claimant's coal dust exposure is a contributing factor to his disabling lung disease, is not reasoned, as it contains no basis for that opinion, and because, employer alleges, Dr. Mandviwala did not understand the exertional requirements of claimant's usual coal mine employment. Employer also asserts that the administrative law judge mechanically applied the treating physician rule pursuant to Section 718.104(d), in according great weight to Dr. Mandviwala's opinion. Employer additionally asserts that, although the administrative law judge noted that Dr. Mandviwala had treated claimant for the past five years, the administrative law judge erred by relying on Dr. Mandviwala's written report, which was rendered less than one year after Dr. Mandviwala began treating claimant.

Contrary to employer's contention, the administrative law judge rationally found that Dr. Mandviwala's opinion is well-reasoned because it is based on claimant's history,

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frequency and extent of his treatment, in weighing the treating physician's opinion. 20 C.F.R. §718.104(d)(1)-(4). The applicable regulation additionally provides that "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see also Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003).

symptoms, physical examinations, as well as pulmonary function and blood gas testing.[4] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 11; Director's Exhibits 25, 28; Claimant's Exhibits 1, 4. The administrative law judge, as fact finder, must "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is 'essentially a credibility matter.'" *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Consequently, we will not overturn the administrative law judge's credibility determination, that Dr. Mandviwala's opinion is well-reasoned, in this case. *Id.* It is not the function of the Board to assess the credibility of the medical opinion evidence.[5] *See Anderson*, 12 BLR at 1-113.

Employer cites *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 647 (6th Cir. 2003) for the proposition that "the opinions of treating physicians get the deference they deserve based on their power to persuade." *Williams*, 338 F.3d at 513, 22 BLR at 2-647. In *Williams*, the court also recognized that "a highly qualified treating physician who has lengthy experience with a miner may deserve tremendous deference." *Id.* In this case, as the administrative law judge found, Dr. Mandviwala is a qualified pulmonologist who has been treating claimant regularly since 2002 for pulmonary disease, and has performed objective testing on him as early as 1998. The administrative law judge rationally accorded Dr. Mandviwala's opinion controlling weight, after considering the factors pursuant to Section 718.104(d), and finding that all the medical opinions of record were well-reasoned and well-documented. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge's decision to rely on Dr. Mandviwala's opinion, despite its issuance only one year

[4] Dr. Mandviwala's opinion is based on claimant's smoking history of forty-five pack years, as well as his coal mine employment history of seventeen years underground, followed by twenty-two years above ground, for a total of thirty-nine years, claimant's symptoms of shortness of breath with wheezing and a productive cough, physical examinations occurring regularly every 2-3 months since 2002, as well as periodic pulmonary function and blood gas testing.

[5] Employer does not explain the relevance of its assertion that Dr. Mandviwala did not record the exertional requirements of claimant's usual coal mine employment. It is undisputed that claimant is totally disabled, and the Board has affirmed the finding that claimant is totally disabled. *W.H.* [*Hagy*] *v. Leslie Res., Inc.*, BRB No. 06-0941 BLA (Aug. 29, 2007)(unpub.), slip op. at 2 n.2.

after he commenced treating claimant, was within the administrative law judge's discretion, in view of the fact that employer's physicians examined claimant only once or not at all.[6] *See Williams*, 338 F.3d at 513, 22 BLR at 2-647. Consequently, we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

We next address employer's challenge to the administrative law judge's finding pursuant to Section 718.204(c). Dr. Mandviwala opined that claimant's total disability is due to both his coal dust exposure and smoking history. Director's Exhibits 25, 28; Claimant's Exhibits 1, 4. Drs. Dahhan and Rosenberg attributed claimant's total disability solely to his smoking history. Employer's Exhibits 1 at 5; 2 at 3; 3 at 15; 4 at 15-16; 5 at 2; 7 at 9-10. The administrative law judge discounted the opinions of Drs. Dahhan and Rosenberg because they did not diagnose legal pneumoconiosis. Decision and Order on Remand at 12. The administrative law judge relied on Dr. Mandviwala's opinion, as it was well-reasoned and well-documented, especially in view of Dr. Mandviwala's in-depth perspective gained as the treating physician.[7] Decision and Order on Remand at 12-13. Employer makes the same arguments it made pursuant to Section 718.202(a)(4).

Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Dahhan and Rosenberg because they did not diagnose legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63-64 (6th Cir. 1989). Moreover, as the administrative law judge rationally relied on the well-reasoned and well-documented opinion of Dr. Mandviwala to find that claimant established the existence of legal pneumoconiosis, the administrative law judge rationally relied on Dr. Mandviwala's opinion to find that claimant is totally disabled due to legal pneumoconiosis. *See Williams*, 338 F.3d at 513, 22 BLR at 2-647; *Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Consequently, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c).

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[6] Dr. Dahhan saw claimant once. Employer's Exhibit 7 at 14. Dr. Rosenberg never saw claimant. Employer's Exhibit 4 at 10.

[7] The administrative law judge did not weigh Dr. Baker's opinion at disability causation because the administrative law judge previously had found it unreasoned as to total disability. Decision and Order on Remand at 12-13 n.3.

Lastly, employer challenges the administrative law judge's onset date determination. The administrative law judge found that the evidence did not establish the date upon which claimant became totally disabled due to pneumoconiosis. Hence, the administrative law judge awarded benefits from the date claimant filed his claim in September 2002. Decision and Order on Remand at 13. Employer argues that the earliest medical opinion diagnosing total disability due to pneumoconiosis is July 25, 2003, the date of Dr. Mandviwala's report, and thus, benefits cannot be awarded any earlier than this date. Claimant responds that there is evidence establishing his total disability due to pneumoconiosis prior to July 25, 2003, and thus that the administrative law judge properly awarded benefits from September 2002, since the exact date on which claimant became totally disabled due to pneumoconiosis is not established. Claimant points to Dr. Baker's November 20, 2002 examination, as well as Dr. Mandviwala's June 4, 1999 pulmonary function study revealing a severe obstructive defect, and Dr. Mandviwala's records from May 1, 2000 to June 17, 2003, showing acute and chronic respiratory failure.[8] Employer replies, reiterating its contentions.

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, 603-04, 12 BLR 2-178, 2-184-85 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181, 1-182-83 (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, 1119 n.4, 9 BLR 2-32, 2-36 n.4 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

After a consideration of the relevant evidence, we reject employer's argument that benefits cannot be awarded any earlier than July 25, 2003, the date of Dr. Mandviwala's

[8] Alternatively, claimant argues that employer waived any contest to the administrative law judge's onset date determination because it did not contest the issue earlier before the district director or the administrative law judge. We reject claimant's contention that employer waived the right to contest the administrative law judge's onset date determination. Employer contested claimant's entitlement to benefits before the administrative law judge, and it was not until the administrative law judge issued his award of benefits on remand on December 16, 2008, that the administrative law judge awarded benefits from September 2002. Thus, employer could not object to the onset date determination before December 16, 2008, and has properly raised it before the Board in this appeal.

report. Dr. Mandviwala's report dated July 25, 2003 establishes only that claimant became totally disabled due to pneumoconiosis at some time prior to the date of Dr. Mandviwala's report. *See Krecota*, 868 F.2d at 603-04, 12 BLR at 2-184-85; *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105, 1-109 (1985). Moreover, the administrative law judge did not credit any evidence that claimant is not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Since the administrative law judge considered the record evidence and rationally found that the exact date claimant became totally disabled due to pneumoconiosis could not be established, the administrative law judge properly awarded benefits as of September 2002, the month in which claimant filed his claim for benefits. *See* 20 C.F.R. §725.503(b); *Green*, 790 F.2d at 1119 n.4, 9 BLR at 2-36 n.4; *Owens*, 14 BLR at 1-50.

Accordingly, the administrative law judge's Decision and Order on Remand-Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge