

BRB No. 09-0515 BLA

HUBERT P. WATTS)
)
 Claimant-Respondent)
)
 v.)
)
 ATLAS MINING COMPANY,)
 INCORPORATED)
)
 and)
)
 AMERICAN BUSINESS & PERSONAL) DATE ISSUED: 04/29/2010
 INSURANCE MUTUAL, INCORPORATED)
)
 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 and Decision and Order on Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand–Award of Benefits and Decision and Order on Reconsideration (04-BLA-5843) of Administrative Law Judge

Thomas F. Phalen, Jr., rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act).¹ This claim was filed on September 25, 2002, Director's Exhibit 3, and is before the Board for the second time.² In the initial decision, the administrative law judge credited claimant with at least twelve years of coal mine employment,³ as stipulated, and found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d), since new evidence established that claimant had a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also found that claimant smoked for less than ten pack years. Considering this claim on its merits, the administrative law judge found that claimant established that he had legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R. §718.202(a)(4), and that he was totally disabled due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, the Board vacated the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 718.204(c).⁴ *Watts v. Atlas*

¹ The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant's current claim was filed before January 1, 2005.

² Claimant filed his first claim on October 16, 1992, and it was denied on September 6, 1995, because claimant did not establish any element of entitlement. Director's Exhibit 1.

³ The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction 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*).

⁴ The Board affirmed the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as unchallenged on appeal, and affirmed the administrative law judge's finding, as within his discretion, that claimant smoked for less than ten pack years. *Watts v. Atlas Mining Co.*, BRB No. 06-0669 BLA (May 31, 2007)(unpub.). In the current appeal, employer objects to the Board's earlier affirmance of the administrative law judge's finding regarding claimant's smoking history. Employer's Brief at 5 n.2. However, the Board's previous affirmance of the administrative law judge's finding constitutes the law of the case, to which no exception applies, and the Board will not reconsider it. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990).

Mining Co., BRB No. 06-0669 BLA (May 31, 2007)(unpub.). The Board vacated the administrative law judge's finding pursuant to Section 718.202(a)(4) because the administrative law judge did not adequately explain the factors he relied on in finding that Dr. Baker's opinion was more convincing than Dr. Jarboe's contrary opinion. In light of the administrative law judge's error in finding legal pneumoconiosis established at Section 718.202(a)(4), the Board also vacated the administrative law judge's finding of total disability due to legal pneumoconiosis pursuant to Section 718.204(c), and remanded the case to the administrative law judge for reconsideration of both issues. Consequently, the Board remanded the case to the administrative law judge for a reweighing of the opinions of Drs. Baker and Jarboe.

On remand, the administrative law judge reweighed the opinions of Drs. Baker and Jarboe. Based on his crediting of Dr. Baker's opinion, and his decision to accord less weight to Dr. Jarboe's opinion, the administrative law judge found that claimant established that he had legal pneumoconiosis, and was totally disabled due to legal pneumoconiosis, pursuant to Sections 718.202(a)(4) and 718.204(c). Accordingly, the administrative law judge awarded benefits. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer challenges the administrative law judge's analysis and weighing of the opinions of Drs. Baker and Jarboe under Sections 718.202(a)(4) and 718.204(c). Claimant responds, urging affirmance of the award of benefits.⁵ The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief. Employer filed a reply brief, reiterating its contentions.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any 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).

⁵ Claimant died on January 4, 2009, and his surviving spouse is pursuing this appeal on his behalf. Claimant's Brief at 3; Employer's Brief at 4 n.1.

Pursuant to Section 718.202(a)(4), the administrative law judge found that legal pneumoconiosis⁶ was established, based on the better documented and reasoned opinion of Dr. Baker, who opined that claimant's totally disabling COPD was due to both coal dust exposure and smoking, Director's Exhibit 18; Claimant's Exhibits 4, 6. The administrative law judge accorded less weight to Dr. Jarboe's opinion, that claimant's totally disabling COPD was due solely to smoking. Director's Exhibit 20; Employer's Exhibit 3.

Employer first argues that the administrative law judge erred in accepting Dr. Baker's opinion and in rejecting Dr. Jarboe's opinion to find that legal pneumoconiosis was established pursuant to Section 718.202(a)(4). Employer asserts that the administrative law judge did not adequately evaluate Dr. Baker's reasoning. Further, employer argues that the administrative law judge erred in discounting Dr. Jarboe's opinion because the doctor did not adequately account for the latency and progressivity of pneumoconiosis, and failed to adequately explain why coal dust exposure did not contribute to claimant's totally disabling COPD.

Employer cites *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), and contends that the evidentiary conflicts are to be resolved based on the qualifications of the doctors, the thoroughness of the data, and the sophistication of their opinions. The court in *Rowe* also emphasized that "the determination as to whether [a doctor's] opinion [is] sufficiently documented and reasoned is essentially a credibility matter. As such, it is for the factfinder to decide." *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Thus, the Board must defer to the administrative law judge's reasonable credibility determinations, as the Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113.

Previously, we remanded this case to the administrative law judge to reweigh the evidence, as the administrative law judge did not provide an adequate explanation for crediting Dr. Baker's opinion over that of Dr. Jarboe. *Watts*, slip op. at 7. On remand, the administrative law judge explained that the qualifications of the physicians were not determinative, but that he credited Dr. Baker's opinion over that of Dr. Jarboe because he found that Dr. Baker's opinion was better reasoned and more persuasive. Specifically, the administrative law judge found that Dr. Baker's diagnosis of legal pneumoconiosis

⁶ A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). 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).

was adequately reasoned because it was based on claimant's significant coal mine employment history, the clinical test results establishing the overall progression of claimant's obstructive pulmonary impairment, and NIOSH studies cited by Dr. Baker regarding the effects of coal dust exposure and smoking on obstructive pulmonary impairments. Decision and Order on Remand at 9-12. Additionally, the administrative law judge found that Dr. Baker adequately explained why claimant's COPD showed partial reversibility on bronchodilators. *Id.* The administrative law judge found that, by contrast, Dr. Jarboe's opinion merited less weight, because the doctor's reasoning, that the significant fall in claimant's FEV1 value would not have occurred in the absence of further coal dust exposure, conflicted with the recognition in the regulations that pneumoconiosis may be latent and progressive. *Id.* at 10. The administrative law judge further found that Dr. Jarboe did not adequately explain why the partially reversible aspect of claimant's obstructive impairment eliminated coal mine dust exposure as a significant contributing factor in claimant's pulmonary impairment. Decision and Order on Remand at 11.

Upon review of the administrative law judge's decision, we conclude that substantial evidence supports the administrative law judge's permissible determination that Dr. Baker's opinion was adequately reasoned and documented. *See 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); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, contrary to employer's contention, Dr. Baker opined that claimant's COPD was due in part to coal mine dust exposure, and thus, the doctor's opinion is sufficient to establish legal pneumoconiosis. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2002).

Additionally, the administrative law judge reasonably found that Dr. Jarboe's opinion, that the development of claimant's COPD "would not occur in the absence of further coal dust exposure," was inconsistent with the amended regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 638, --- BLR --- (6th Cir. 2009); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Contrary to employer's assertion, the administrative law judge acted within his discretion as the fact-finder when he determined that Dr. Jarboe did not adequately explain why claimant's partial response to bronchodilators necessarily eliminated coal dust exposure as a cause of claimant's obstructive lung disease. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d

at 255, 5 BLR at 2-103. Because substantial evidence supports the administrative law judge's credibility determinations, we affirm the administrative law judge's finding that claimant established legal pneumoconiosis pursuant to Section 718.202(a)(4).

Employer also argues that the administrative law judge erred in crediting Dr. Baker's opinion over that of Dr. Jarboe to find that claimant was totally disabled due to legal pneumoconiosis pursuant to Section 718.204(c). A miner is totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1); *see Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997). Dr. Baker opined that claimant's coal dust exposure contributed to his totally disabling pulmonary impairment. Director's Exhibit 18; Claimant's Exhibit 4 at 13. Dr. Jarboe stated that claimant's "disabling impairment has been more likely caused by smoking than by dust inhalation." Director's Exhibit 20. On remand, the administrative law judge relied on Dr. Baker's opinion to find that disability causation was established, for the same reasons that he gave for crediting Dr. Baker's opinion that claimant's disabling COPD constituted legal pneumoconiosis pursuant to Section 718.202(a)(4). Dr. Baker's opinion supports a finding that claimant's total disability was due to pneumoconiosis. Director's Exhibit 18; Claimant's Exhibit 4 at 13. Because we have affirmed the administrative law judge's decision to credit Dr. Baker's opinion over that of Dr. Jarboe at legal pneumoconiosis pursuant to Section 718.202(a)(4), we affirm the administrative law judge's reliance on Dr. Baker's opinion, for the same reasons, to find that claimant was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *See Smith*, 127 F.3d at 507, 21 BLR at 2-185-86. Therefore, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand–Award of Benefits and Decision and Order on Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge