BRB No. 11-0488 BLA

ORBIE N. JUSTICE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PETER CREEK COAL COMPANY	)	DATE ISSUED: 04/19/2012
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	
	)	
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 of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2007-BLA-05442) awarding benefits of Administrative Law Judge Kenneth A. Krantz, rendered on a claim filed pursuant to 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). This case is before the Board for a second time and the procedural history is found in the Board's prior decision, which is incorporated herein. *See Justice v. Peter Creek Coal Co.*, BRB No. 09-0440 BLA, slip op. at 3-4 (Jan. 13, 2010) (unpub.) The Board previously vacated the administrative law judge's February 27, 2009 Decision and Order denying benefits because he mistakenly adjudicated the case as a request for modification of a *subsequent* claim, when in fact it involves a request for modification of an *initial* claim, filed on December 18, 1998.[1] *Id.* at 4. The Board remanded the case for consideration pursuant to 20 C.F.R. §725.310 (2000), directing the administrative law judge to consider all of the evidence of record relevant to claimant's entitlement to benefits. *Id*. The Board further noted that the evidentiary limitations are not applicable based on the filing date of the claim. *Id*.

On remand, the administrative law judge found that claimant established at least seventeen years of coal mine employment and adjudicated the claim pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge also found, based on his review of all the record evidence, that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b), (c). Accordingly, the administrative law judge determined that claimant established a mistake in a determination of fact and a basis for modification pursuant to 20 C.F.R. §725.310 (2000), and awarded benefits.

On appeal, employer contends that the administrative law judge impermissibly changed his analysis of the medical evidence on remand. Employer asserts that the administrative law judge erred in relying on the preamble to the regulations in evaluating the credibility of the physicians' opinions and in finding that Dr. Castle's opinion was inconsistent with the preamble. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited

[1] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, and apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). The amendments are not applicable to this case, as it was filed prior to January 1, 2005.

response brief, asserting that the administrative law judge reasonably considered the preamble in resolving the conflict in the medical opinion evidence.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and 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, claimant 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Additionally, because this case involves a request for modification, claimant must establish a change in conditions or a mistake in a determination of fact with regard to the prior denial of his claim.[4] In considering whether claimant established a change in conditions, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence on modification, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish an element that defeated entitlement in the prior decision. *See Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon*., 16 BLR 1-71 (1992). The purpose of allowing modification,

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[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant established at least seventeen years of coal mine employment and total disability at 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 30, 32.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 7, 10.

[4] Claimant's initial claim was denied on December 28, 2000 by Administrative Law Judge Thomas F. Phalen for failure to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant filed an appeal with the Board, which was later withdrawn. He then filed his request for modification on October 2, 2001. Director's Exhibit 3.

based on a mistake in a determination of fact, is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *see also O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *King v. Jericol Mining, Inc.*, 246 F.3d 822, 22 BLR 2-305 (6th Cir. 2001).

On remand, the administrative law judge found that the x-ray evidence was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), that there was no biopsy evidence pursuant to 20 C.F.R. §718.202(a)(2), and that claimant is not eligible for any of the regulatory presumptions for establishing the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(3). Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the eight medical opinions of record relevant to whether claimant suffers from legal pneumoconiosis.[5] Decision and Order at 25-29. The administrative law judge found that the physicians were in agreement that claimant has a disabling lung disease. *Id*. at 31. He noted that Drs. Sundaram, Siddiqui, Simpao and Forehand opined that claimant's respiratory condition is due to coal dust exposure, while Drs. Hippensteel, Hussain, Dahhan and Castle opined that it is unrelated to coal mine employment. *Id*. at 27-28. The administrative law judge further found that Drs. Sundaram, Siddiqui and Forehand qualified as treating physicians. *Id*. at 25-26. Taking into consideration the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge determined that the opinions of Drs. Forehand and Siddiqui were entitled to greatest weight based on their status as treating physicians and because their conclusions were "well-reasoned" and "their examinations and reports the most recent." *Id*. at 29. The administrative law judge specifically rejected Dr. Castle's opinion, that claimant's disabling chronic obstructive respiratory disease was due entirely to smoking, because he found that Dr. Castle expressed views that were inconsistent with accepted medical science relied upon by the Department of Labor (DOL) in the preamble to the revised regulations. *Id*. at 28-29. The administrative law judge also concluded that the opinions of Drs. Hussain, Dahhan, Hippensteel and Castle, were outweighed by the more credible findings by Drs. Forehand and Siddiqui that claimant has legal pneumoconiosis.[6] *Id*. at

[5] Legal pneumoconiosis is defined in 20 C.F.R. §718.201(a)(2) as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] Although the administrative law judge gave some weight to the diagnoses of pneumoconiosis by Drs. Sundaram and Simpao, he "assigned the greatest weight to the opinions of Drs. Forehand and Siddiqui, because they are well-reasoned, the most

29. Thus, the administrative law judge found that claimant satisfied his burden to establish that he has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. Turning to the issue of causation, the administrative law judge rejected the opinions of those doctors who did not diagnose pneumoconiosis, and determined, based on the opinions of Drs. Forehand and Siddiqui, that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 32-33.

Employer argues that, because the administrative law judge determined in his first decision that the opinions of Drs. Siddiqui and Forehand were insufficient to establish that claimant is totally disabled by legal pneumoconiosis, he erred in reaching a different finding on remand. Employer's Brief at 3. Employer maintains that the administrative law judge "impermissibly changed his analysis of the medical evidence." *Id*. Contrary to employer's argument, when the Board vacates an administrative law judge's decision, the effect is to return the parties to status quo ante with all rights, benefits and/or obligations they had prior to issuance of the decision. *See Dale v. Wilder Coal Co.*, 8 BLR 1-119 (1985). Furthermore, because the Board did not address the administrative law judge's credibility findings in the last appeal, we reject employer's assertion that the administrative judge was bound by his prior findings, pursuant to the doctrine of the law of the case. Employer's Brief at 3, *citing Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988). Thus, we conclude that the administrative law judge permissibly exercised his discretion on remand to further reflect on the medical opinion evidence, draw inferences, resolve the conflicts and make new findings thereon. *See Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004) (en banc); *Dillon v. Peabody Coal Co*., 11 BLR 1-113 (1988).

We also reject employer's argument that it was error for the administrative law judge to consult the preamble to the regulations in weighing the medical opinion evidence. Employer's Brief at 6-7. The Board has held that the extent to which a medical opinion accords with accepted scientific evidence, as recognized by the DOL in the preamble to the revised regulations, is a valid criterion for an administrative law judge to consider in weighing an opinion. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009).

Furthermore, contrary to employer's assertion, the administrative law judge rationally explained why Dr. Castle's opinion was inconsistent with the preamble and entitled to less weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (en banc). As noted by the administrative law judge, Dr. Castle's opinion, that claimant does

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heavily-weighted treating physicians, and their examinations and reports the most recent." Decision and Order on Remand at 29.

not have legal pneumoconiosis, is "strongly based" on his belief that "coal dust-related obstructive disease is very distinct from smoking-related disease." Decision and Order on Remand at 28. The administrative law judge permissibly found, however, that Dr. Castle did not account for the position of the DOL that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. . . . [t]he risk is additive with smoking," and that medical literature "supports the theory that dust-induced emphysema and smoke-induced emphysema occur through *similar mechanisms*." *Id*. at 28-29, *quoting* 65 Fed. Reg. 79,940, 79,943 (Dec. 21, 2000) (emphasis added). Thus, we affirm the administrative law judge's credibility findings with respect to Dr. Castle's opinion and reject employer's assertions of error as they amount to a request that the Board reweigh the evidence, which we are not empowered to do. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-152; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Because employer does not raise any specific error with the weight assigned to the opinions of Drs. Sundaram, Simpao, Forehand, Hussain, Dahhan or Hippensteel, we affirm the administrative law judge's credibility findings with regard to those physicians. *See Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). As the administrative law judge concluded that the opinions of Drs. Sundaram, Simpao and Forehand, that claimant has legal pneumoconiosis, are reasoned and documented and outweigh the contrary opinions of Drs. Hussain, Dahhan, Hippensteel and Castle, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).[7] Decision and Order on Remand at 29. We further affirm the administrative law judge's decision to reject the opinions of Drs. Hussain, Dahhan, Hippensteel and Castle on the issue of disability causation because they did not diagnose pneumoconiosis, and his finding, based on Dr. Forehand's opinion, that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* at 32-33; *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); *Toler v. Eastern Associated Coal Co.*, 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). Thus, we affirm the administrative law judge's finding that claimant established his entitlement to benefits and a basis for modification pursuant to 20 C.F.R. §725.310.

[7] Because substantial evidence supports the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), it is not necessary that we address employer's argument that the administrative law judge erred in crediting Dr. Siddiqui's opinion that claimant has pneumoconiosis. Employer's Brief at 6.

As an additional matter, claimant's counsel has filed a fee petition for services he performed before the Board during the following appeals in this case: BRB Nos. 01-0831 BLA, 06-0189 BLA, 09-0440 BLA and 11-0488 BLA. Claimant's counsel requests a fee of $4,575.00 for the period of January 4, 2001 through April 26, 2011, representing 15.25 hours of legal services that he performed at an hourly rate of $300.00. No objections to the fee petition have been received.

An award of attorney fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), will be ordered if the requested fee reflects services necessary to the proper conduct of the case and the time requested for such work is reasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Claimant's counsel is entitled to an attorney fee payable by employer for successfully prosecuting the claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see generally Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (en banc); *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

After reviewing counsel's fee petition, we approve the hourly rate and services performed as they are reasonable in this case. Accordingly, we hold that counsel is entitled to receive a fee, payable directly to counsel by employer, of $4,575.00 for legal services performed before the Board. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand 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