

BRB No. 04-0109 BLA

GARY L. LOONEY)
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 Claimant-Respondent)
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 v.)
)
 HARMAN MINING COMPANY) DATE ISSUED: 10/29/2004
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 and)
)
 OLD REPUBLIC INSURANCE COMPANY)
)
 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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

W. Andrew Delph, Jr. (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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

Helen H. Cox (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-0433) of Administrative Law Judge Linda S. Chapman 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). This case is before the Board for the seventh time. In the most recent decision,¹ the administrative law judge found that the medical opinion evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Weighing all of the evidence together, the administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Lastly, employer contends that liability for the payment of benefits should be transferred to the Black Lung Disability Trust Fund (Trust Fund). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, requesting the Board to reject employer's contention that liability for the payment of benefits should be transferred to the Trust Fund. In separate reply briefs, employer reiterates its previous contentions.²

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and

¹For a complete procedural history of this case, *see Looney v. Harman Mining Co.*, BRB No. 02-0502 BLA (Apr. 24, 2003) (unpublished); *Looney v. Harman Mining Co.*, BRB No. 00-0983 BLA (Aug. 21, 2001) (unpublished); *Looney v. Harman Mining Co.*, BRB No. 98-1550 BLA (Sept. 28, 1999) (unpublished).

²Since it is not challenged on appeal, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.203(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). While Drs. Forehand and Robinette opined that claimant suffers from pneumoconiosis, Director’s Exhibits 15, 17; Employer’s Exhibit 7, Drs. Fino and Sargent opined that claimant does not suffer from the disease.³ Director’s Exhibit 38; Employer’s Exhibits 8, 9, 13, 14. The administrative law judge found that the opinions of Drs. Forehand and Robinette that claimant suffered from pneumoconiosis outweighed Dr. Sargent’s contrary opinion. 2003 Decision and Order on Remand at 4-9.

Employer contends that the administrative law judge erred in failing to consider Dr. Fino’s opinion. In its 2003 Decision and Order, the Board held that the administrative law judge permissibly found that Dr. Fino’s opinion was hostile to the Act. *Looney v. Harman Mining Co.*, BRB No. 02-0502 BLA, slip op. at 3-4 (Apr. 24, 2003) (unpublished). The Board’s previous disposition of this issue constitutes the law of the case, and we decline to revisit this issue since there is no persuasive evidence that the law of the case doctrine is inapplicable, or that an exception has been demonstrated. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer also contends that the administrative law judge erred in finding that Dr. Sargent’s opinion was hostile to the Act. The administrative law judge found that Dr. Sargent’s opinion was based on an erroneous premise that chronic obstructive pulmonary disease cannot be caused by coal mine employment. The administrative law judge specifically stated:

Dr. Sargent did not say, either in his reports or in his deposition, that pneumoconiosis “likely would” cause a mixed obstructive and restrictive impairment, or that a mixed obstructive and restrictive impairment is “likely” to be present when pneumoconiosis causes a ventilatory impairment. His statement is unequivocal: “When coal worker’s pneumoconiosis *causes* a ventilatory impairment it *causes* a mixed

³In a Decision and Order dated July 31, 1998, Administrative Law Judge Ralph A. Romano discredited Dr. Sutherland’s opinion that claimant suffers from pneumoconiosis because the doctor failed to note whether he considered claimant’s smoking history. 1998 Decision and Order on Remand at 5. In its 1999 Decision and Order, the Board affirmed Judge Romano’s rejection of Dr. Sutherland’s opinion. *Looney v. Harman Mining Co.*, BRB No. 98-1550 BLA (Sept. 28, 1999) (unpublished).

obstructive and restrictive pattern.” Because Dr. Sargent determined that the [c]laimant’s impairment is “purely obstructive,” he concluded that this impairment was not indicative of pneumoconiosis. In his deposition testimony, he explained that he arrived at his opinion that the [c]laimant does not have a coal mine dust related disease by considering “the character of the impairment present and what’s known to cause an impairment of that kind versus what’s not known to cause an impairment of that kind.” The “character” of the [c]laimant’s impairment is purely obstructive, and according to Dr. Sargent, pneumoconiosis is “not known” to cause an impairment of that kind.

2003 Decision and Order on Remand at 6.

In this case, the administrative law judge reasonably found that Dr. Sargent’s opinion that claimant did not suffer from pneumoconiosis was based upon an improper assumption that pneumoconiosis does not cause purely obstructive disorders. *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *see also Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). We, therefore, hold that the administrative law judge properly found that Dr. Sargent’s opinion was contrary to the Act and the regulations under the facts in this case, as found by the administrative law judge.⁴

Employer also argues that Dr. Forehand’s opinion is not sufficiently reasoned. Although the administrative law judge noted that Dr. Forehand did not elaborate on his conclusion that the claimant suffered from legal pneumoconiosis (obstructive lung disease attributable to a combination of exposure to coal dust and cigarette smoke), he noted that the physician “clearly based his conclusion on his examination of the [c]laimant, his history of exposure to both factors, his medical history, and the results of x-ray, pulmonary function, and arterial blood gas testing.” 2003 Decision and Order on Remand at 8. Because the administrative law judge reasonably found that Dr. Forehand provided an adequate basis for his diagnosis of pneumoconiosis, we reject employer’s assertion that Dr. Forehand’s opinion is not sufficiently reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

⁴In light of our affirmance of the administrative law judge’s consideration of Dr. Sargent’s opinion, we need not address employer’s other contentions of error regarding the administrative law judge’s consideration of Dr. Sargent’s opinion. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Citing *United States Steel Mining Co. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999), employer next contends that the administrative law judge erred in finding Dr. Robinette’s opinion sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer argues that Dr. Rasmussen’s opinion is not reliable, probative or substantial enough to support a finding of pneumoconiosis. In *Jarrell*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that “even though the more stringent exclusionary rules of evidence, which are generally applicable to jury trials, are not justified in agency proceedings, the agency process nonetheless requires that the administrative law judge perform a gate keeping function while assessing the evidence to decide the merits of the claim.” *Jarrell*, 187 F.3d at 388-89, 21 BLR at 2-647. The Fourth Circuit further held that an administrative law judge has the affirmative duty to qualify evidence as ‘reliable, probative, and substantial’ before relying upon it to grant or deny a claim.”⁵ *Jarrell*, 187 F.3d at 389, 21 BLR at 2-647.

The administrative law judge found that Dr. Robinette’s opinion, that claimant’s lung disease is *probably* a combination of asthma, obstructive lung disease and coal workers’ pneumoconiosis, supported Dr. Forehand’s opinion that claimant suffers from pneumoconiosis. Specifically, the administrative law judge stated:

I find that, standing on its own, Dr. Robinette’s opinion is not sufficiently unequivocal to support a finding that the [c]laimant has pneumoconiosis. But considering it in conjunction with Dr. Forehand’s opinion, on which I

⁵In *United States Steel Mining Co. v. Director, OWCP, [Jarrell]*, 187 F.3d 384, 390, 21 BLR 2-639, 2-651 (4th Cir. 1999), the United States Court of Appeals for the Fourth Circuit held that a physician’s opinion did not qualify as “reliable, probative, and substantial” evidence upon which an administrative law judge could base a black lung benefits award.” The Fourth Circuit noted that the physician in question lacked knowledge of the circumstances of the miner’s death and based his opinion on a review of a record containing no evidence of causation between the miner’s pneumoconiosis and his death from cancer. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-649-50. The court also noted that the physician had never examined or treated the miner. *Jarrell*, 187 F.3d at 387, 21 BLR at 2-645. In addition, the court noted that the physician admitted that he had no information about the circumstances of the miner’s death. *Jarrell*, 187 F.3d at 390, 21 BLR at 2-650. Under these circumstances, the court held that the physician was reduced to speculating that it was *possible* that the miner’s death could have occurred due to pneumonia superimposed upon his pneumoconiosis. *Jarrell*, 187 F.3d at 387, 21 BLR at 2-652. The court therefore held that the physician’s opinion was insufficient to constitute probative evidence that pneumoconiosis was a substantially contributing cause or factor leading to the miner’s death. *Jarrell*, 187 F.3d at 389-91, 21 BLR at 2-649-53.

rely most heavily, I find that it adds weight to Dr. Forehand's opinion; it certainly does not detract from it.

2003 Decision and Order on Remand at 8.

We agree with the administrative law judge that the facts of this case are distinguishable from those in *Jarrell*. The administrative law judge found that Dr. Robinette's opinion that claimant's disabling respiratory impairment was *probably* due to a combination of asthma, obstructive disease and pneumoconiosis was more probative than the physician's opinion in *Jarrell* "because 'probably' indicates 'more likely than not,' unlike 'possible,' which, as the [c]ourt noted, is entirely speculative." 2003 Decision and Order on Remand at 9. Unlike the entirely speculative medical opinion that the Fourth Circuit rejected in *Jarrell*, Dr. Robinette, in this case, referenced specific medical evidence in the record, as well as his own examination of claimant, as the bases for his opinion that claimant suffered from pneumoconiosis. Employer's Exhibit 7. Furthermore, as noted by the administrative law judge, Dr. Robinette's opinion supports that of Dr. Forehand. *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *Newland v. Consolidation Coal Co.*, 6 BLR 1-1286 (1984); 2003 Decision and Order on Remand at 8. Under the facts of this case, we find no error in the administrative law judge's reliance upon Dr. Robinette's opinion to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

We also reject employer's contention that Dr. Robinette's diagnosis was based solely upon a discredited x-ray interpretation. Dr. Robinette based his opinion on an x-ray interpretation, smoking and coal mine employment histories, symptoms and a physical examination.⁶ Employer's Exhibit 7. Employer also contends that the administrative law judge erred in relying upon Dr. Robinette's opinion because it is based, in part, upon an invalid pulmonary function study. However, since pulmonary function studies are not relevant to the issue of pneumoconiosis, *Lambert v. Itmann Coal Co.*, 6 BLR 1-256 (1983), we reject this contention of error.

Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of

⁶In its 1996 Decision and Order, the Board stated that "[i]nasmuch as the opinions of Drs. Forehand and Robinette are each based upon symptomatology, patient history and a physical examination, they are considered documented." *Looney v. Harman Mining Co.*, BRB No. 96-0637 BLA, slip op. at 2-3 (June 27, 1996) (unpublished). The Board also stated that "inasmuch as Drs. Forehand and Robinette provided adequate bases for their respective diagnoses of coal workers' pneumoconiosis, the administrative law judge properly relied upon their opinions as reasoned." *Id.* at 3 (footnote omitted).

pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, since the administrative law judge properly weighed all of the relevant evidence together at 20 C.F.R. §718.202(a)(1) and (a)(4) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we also affirm the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge credited the opinions of Drs. Forehand and Robinette that claimant's total disability was due to pneumoconiosis, Director's Exhibits 15, 17; Employer's Exhibit 7, over Dr. Sargent's contrary opinion. 2003 Decision and Order on Remand at 9; Director's Exhibit 38; Employer's Exhibits 8, 13 at 26. Employer contends that the administrative law judge erred in relying upon the opinions of Drs. Forehand and Robinette to support a finding that claimant's total disability was due to his pneumoconiosis. However, in making its contention, employer raises essentially the same objections that it asserts in challenging the administrative law judge's finding that the opinions of Drs. Forehand and Robinette support a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because we have rejected these contentions of error, we affirm the administrative law judge's finding that the evidence is sufficient to establish that the miner's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Finally, employer contends that liability for the payment of benefits should be transferred to the Trust Fund because its due process rights have been violated. Employer argues that "this case has now reached a 'stalemated posture' that precludes a fair trial." Employer's Brief at 22. We disagree. Employer has not provided any evidence that its due process rights have been violated. Under the facts of this case, we hold that the Department of Labor did not deprive employer of a fair opportunity to mount a meaningful defense. Consequently, we decline to transfer liability to the Trust Fund.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge