

BRB No. 05-0615 BLA

GERALD H. TRIPLETT)	
)	
Claimant-Respondent)	
)	
v.)	
)	
SEWELL COAL COMPANY)	DATE ISSUED: 04/26/2006
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand - Awarding Benefits of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

S. F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Ashley M. Harmon (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Third Remand - Awarding Benefits (99-BLA-0094) of Administrative Law Judge Gerald M. Tierney on a claim¹ 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 fourth time. The procedural history of this case is contained in the Board's most recent decision. *Triplett v. Sewell Coal Co.*, BRB No. 03-0400 BLA (Feb. 27, 2004) (unpub.). In that decision, initially the Board rejected employer's argument that the administrative law judge's finding, that

¹ Claimant, Gerald H. Triplett, filed his application for benefits on April 1, 1998. Director's Exhibit 1.

claimant had an eighteen-pack-year cigarette smoking history, failed to comply 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), because the administrative law judge provided the bases for his findings regarding the nature and extent of the conflicting evidence concerning claimant's cigarette smoking history. However, the Board vacated the administrative law judge's determinations pursuant to Section 718.202(a)(4) and 718.204(c) based on errors in his weighing of the medical opinions of Drs. Bellotte and Branscomb. Specifically, the Board held that the administrative law judge mischaracterized the evidence of record when finding that the opinion of Dr. Bellotte was unexplained and, impermissibly substituted his opinion for that of Dr. Bellotte when finding that the physician relied only on an x-ray interpretation and a pulmonary function study to exclude coal dust exposure as a cause of claimant's pulmonary disability. The Board additionally held that the administrative law judge erred in discounting Dr. Branscomb's February 11, 1999 report as equivocal since he had not taken into account Dr. Branscomb's March 3, 1999 report containing a definitive conclusion that claimant has asthma. Rejecting employer's challenge to the administrative law judge's weighing of the opinions of Drs. Durham and Rasmussen diagnosing pneumoconiosis, the Board held that substantial evidence in the record supported his determination that these physicians' opinions were reasoned and documented, and upheld the administrative law judge's ultimate finding of the existence of pneumoconiosis as consistent with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Finally, because the administrative law judge's consideration of the medical opinion evidence under 20 C.F.R. §718.202(a)(4) contained error and provided the basis for the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), the Board vacated that finding and remanded the case for further consideration. *Triplett v. Sewell Coal Co.*, BRB No. 03-0400 BLA (Feb. 27, 2004) (unpub.).

In accordance with the Board's remand instructions, the administrative law judge reweighed the medical opinion evidence of record, specifically the opinions of Drs. Bellotte and Branscomb, and found that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge determined that Dr. Bellotte's opinion was contrary to controlling case law, and therefore, it was entitled to less weight as it was unpersuasive and unreasoned. Similarly, the administrative law judge found that Dr. Branscomb's reliance on faulty underlying data and his lack of an adequate explanation concerning his conclusion that claimant's asthma was unrelated to coal dust exposure rendered this opinion unreasoned and equivocal, and thus, entitled to little weight. In addition, the administrative law judge evaluated Dr. Durham's deposition testimony with respect to the existence of pneumoconiosis and, because he found that Dr. Durham's opinion was not equivocal, the administrative law judge accorded it probative weight. Consequently, the administrative law judge weighed all the evidence together and, after concluding that the medical opinion evidence was more reliable and probative than the x-ray evidence, determined that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a) by a preponderance of the evidence. In addition, the administrative law judge

determined that the evidence of record was sufficient to affirmatively establish total respiratory disability due to pneumoconiosis under Section 718.204(c),² and accordingly, awarded benefits commencing as of April 1, 1998.

On appeal, employer argues that the administrative law judge erred in his evaluation and reconsideration of the medical opinions of Drs. Bellotte, Branscomb, Durham, and Rasmussen, and based on an erroneous weighing of these physicians' opinions, that he erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total disability due to pneumoconiosis pursuant to Section 718.204(c). Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he will not participate in this appeal.

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 the applicable law, they are binding upon this Board and 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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In challenging the administrative law judge's determination under Section 718.202(a)(4), employer argues that the administrative law judge erred in finding Dr. Bellotte's opinion unreasoned and in stating that Dr. Bellotte opined that pneumoconiosis causes only restrictive impairments. Employer asserts that the administrative law judge's inappropriate application of the "hostility to the Act" doctrine as a basis to discredit Dr. Bellotte's assessment is not supported by applicable case law because Dr. Bellotte did not render an opinion that is hostile to the Act, *i.e.*, he did not opine that coal workers' pneumoconiosis can never cause an obstructive defect or that simple pneumoconiosis can never be totally disabling. Employer's Brief at 6. Rather, employer avers that Dr. Bellotte opined that while coal workers' pneumoconiosis can cause an obstructive impairment, it would not cause an obstructive defect sufficient to decrease an FEV₁ measurement on a pulmonary function study to one liter, as was exhibited by claimant. Employer's Exhibit 17 at 30-32. Contrary to employer's argument, however, a review of Dr. Bellotte's April 23, 1999 deposition testimony and his December 10, 1998 report reveals that the administrative law judge did not err in finding that Dr. Bellotte's opinion was contrary to legal precedent. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge may discount a medical opinion predicated on a tenet that is inimical to the Act, *e.g.*, pneumoconiosis does not progress after cessation

² Because the parties stipulated that claimant had a totally disabling respiratory impairment, the administrative law judge concluded that claimant established total disability. Decision and Order at 4.

of a miner's coal mine employment; pulmonary disease arising out of coal mine employment cannot cause obstructive disorders; or pneumoconiosis cannot render a miner totally disabled, because such an opinion is hostile to the Act, and therefore, is not entitled to much, if any, weight. *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). While employer is correct that Dr. Bellotte testified at the deposition that simple pneumoconiosis can be disabling and can cause an obstructive impairment, when questioned he stated, "The patients who develop problems with chronic obstructive pulmonary disease who have coal mine worker's pneumoconiosis have a very small, mild, minimal amount of chronic obstructive pulmonary disease. They don't have this severe type of disabling chronic obstructive pulmonary disease that this gentleman has." Employer's Exhibit 17 at 28. When questioned as to whether pneumoconiosis can cause an obstructive impairment on cross-examination, he responded, "Yes. But not of this degree. I've seen it cause problems, but not this kind of disabling, [sic] not decreasing your FEV₁ to one liter..." Employer's Exhibit 17 at 31-32. Consequently, because Dr. Bellotte's opinion, that claimant's totally disabling pulmonary disorder was due solely to chronic obstructive pulmonary disease with chronic bronchitis, asthma, old granulomatous disease, and chest wall trauma unrelated to coal dust exposure, was premised on his belief that pneumoconiosis cannot cause a totally disabling obstructive impairment, the administrative law judge, within a permissible exercise of discretion, found that Dr. Bellotte rendered a conclusion based on a premise that was at odds with controlling precedent. See *Stiltner*, 86 F.3d at 341-342, 20 BLR at 2-253-254; *Warth*, 60 F.3d at 174-175, 19 BLR at 2-268-269; see also *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 n.7, 22 BLR 2-265, 2-281 n.7 (7th Cir. 2001); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 314-315, 20 BLR 2-76, 2-88-89 (3d Cir. 1995); Decision and Order on Third Remand at 3.³ Accordingly, we reject employer's argument in this regard and affirm the administrative law judge's determination that the credibility of Dr. Bellotte's opinion was undermined because Dr. Bellotte rendered a conclusion based on a premise that was fundamentally at odds with controlling precedent. Decision and Order on Third Remand at 3.

Employer contends that, in discrediting Dr. Branscomb's March 3, 1999 review of Dr.

³ It is ambiguous whether Dr. Bellotte's reference to "pneumoconiosis" was a reference to the medical disease "coal workers' pneumoconiosis" or to "pneumoconiosis" as more broadly defined in the Act and regulations. The administrative law judge construed Dr. Bellotte's remarks as pertaining to the latter. This was within his discretion. See *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988) (*en banc*); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).

Bellotte's report and diagnostic tests, the administrative law judge erred in concluding that Dr. Branscomb merely adopted Dr. Bellotte's opinion as his own; employer asserts that Dr. Branscomb rendered his own independent conclusions and analysis to opine that there was no objective evidence of pneumoconiosis. Employer avers further that the administrative law judge erred in finding that Dr. Branscomb's opinion was equivocal because, in his February 11, 1999 report, Dr. Branscomb candidly admitted that the medical records he reviewed at that time were insufficient to enable him to render an opinion as to the presence or absence of pneumoconiosis or the etiology of claimant's total disability, whereas in his subsequent March 3, 1999 report, Dr. Branscomb was able to unequivocally confirm his prior conclusion that claimant has a disabling pulmonary disorder due to severe asthma.

Pursuant to the Board's remand instructions, the administrative law judge reweighed Dr. Branscomb's opinion contained in both his February 1999 and March 1999 reports and, within a rational exercise of his discretion, attributed less weight to his opinion because Dr. Branscomb failed to adequately explain his opinion that claimant's asthma is entirely unrelated to coal mine employment and based his conclusion on the opinion of Dr. Bellotte. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984); Decision and Order on Third Remand at 3; Employer's Exhibits 7, 8. The administrative law judge acknowledged that while Dr. Branscomb rendered a more definitive conclusion in the subsequent March 1999 report, the reliability of his opinion, that there was no objective evidence of pneumoconiosis and that claimant's disabling pulmonary disorder was attributable to asthma, was called into question based upon his reliance on the opinion of Dr. Bellotte. It is well established that an administrative law judge may consider the reliability of the evidence upon which a physician's opinion is based because such evidence is relevant in assessing whether a report is documented and reasoned, hence, we reject employer's argument and affirm the administrative law judge's determination that Dr. Branscomb's opinion was entitled to diminished weight. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984).

Employer next asserts that the administrative law judge erred in relying on the opinion of Dr. Durham to find the existence of pneumoconiosis and disability causation established because Dr. Durham failed to affirmatively diagnose the existence of pneumoconiosis but rather, provided the equivocal and ambiguous statement that claimant "probably" had pneumoconiosis, which is insufficient to conclusively establish the presence of the disease. Likewise, employer contends that Dr. Durham's opinion that claimant's moderate obstructive impairment as demonstrated on the ventilatory studies was "most likely" secondary to coal workers' pneumoconiosis lacks an explanation for the exclusion of his history of tobacco abuse as a cause of claimant's lung disease. Consequently, employer contends that because Dr. Durham's assessment is inadequate to support a finding of disability due to

pneumoconiosis, the administrative law judge similarly erred in crediting this opinion to establish disability causation.

Contrary to employer's contention, however, the administrative law judge critically evaluated Dr. Durham's testimony in its entirety and, after reassessing the qualified nature of Dr. Durham's opinion, determined that Dr. Durham's opinion contained in the April 28, 1998 report and the March 25, 1999 deposition was not equivocal when considered in its entirety. The administrative law judge noted that Dr. Durham made conditional statements concerning the etiology of claimant's pulmonary disability during the deposition. However, he was offering variations on his opinion to respond to different hypothetical situations, assorted cigarette smoking histories, and various notations from records that were different from his own. It is well established that both the meaning of an ambiguous word or phrase and the weight to give testimony of an uncertain witness are questions within the province of the administrative law judge, *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987), and "a reasoned medical opinion is not rendered a nullity because it acknowledges the limits of reasoned medical opinions" or because it contains qualifying or conditional language, *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997); *Endrizzi v. Bethlehem Mines Corp.*, 8 BLR 1-11, 1-13 (1985). While the administrative law judge considered the qualified nature of Dr. Durham's opinion, he nevertheless found that the conditional portions concerned hypothetical cases and assorted histories, and consequently, the probative value of Dr. Durham's opinion was not undermined or diminished in any way. Decision and Order on Third Remand at 4; Employer's Exhibit 13; Director's Exhibit 11. Hence, the administrative law judge found Dr. Durham's opinion worthy of determinative weight. See *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988) (The Board is not empowered to reweigh evidence nor substitute its inferences for those of administrative law judge); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985); Decision and Order on Third Remand at 4; see also [2003] Decision and Order on Second Remand at 6. Accordingly, employer's argument is rejected.⁴

⁴ Similarly, we reject employer's contention that Dr. Durham's opinion, that 25% of claimant's disability was due to smoking-induced chronic obstructive pulmonary disease while 75% was due to coal workers' pneumoconiosis, is neither well explained nor well documented. In our previous Decision and Order, the Board held, "Contrary to employer's contention, the administrative law judge properly found that Dr. Durham's medical opinion was reasoned and documented as he found that it was based on 'physical examinations, symptoms, work and social histories, and the underlying data which is sufficient to support his determination'." *Triplett v. Sewell Coal Co.*, BRB No. 03-0400 BLA, *slip op.* at 11 (Feb. 27, 2004) (unpub.). Because employer's argument has been previously addressed and rejected by the Board, this holding constitutes the law of the case and is, therefore, controlling on this issue. See *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991);

Arguing that scientific testimony must meet scientific standards of accuracy, employer asserts that the administrative law judge erred in finding Dr. Rasmussen's opinion sufficient to demonstrate disability causation because the articles Dr. Rasmussen cited in his report do not contain definitive conclusions specifically addressing the issue of total disability due to pneumoconiosis, and the studies cited do not support his conclusions regarding claimant in particular. In our previous Decision and Order, the Board held:

Substantial evidence in the record supports the administrative law judge's determination that Dr. Rasmussen's opinion is reasoned and documented because Dr. Rasmussen thoroughly explained and supported his opinion regarding the effect of coal dust exposure on claimant's condition. The administrative law judge specifically noted that Dr. Rasmussen provided a list of medical articles that discuss how exposure to coal dust is capable of producing chronic obstructive lung disease, bronchitis, and emphysema. Claimant's Exhibit 4. The administrative law judge thereby properly evaluated the evidence upon which Dr. Rasmussen's conclusions were based, ... and *employer's attempt to interpret the import of those medical articles is unavailing.*

Triplett, slip op. at 12. Because employer's argument has been previously addressed and rejected by the Board, this holding constitutes the law of the case and is, therefore, controlling on this issue. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Based on the foregoing, therefore, we hold that the administrative law judge conducted a full and comparative weighing of all relevant evidence; he reasonably determined that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) and total disability due to pneumoconiosis pursuant to Section 718.204(c), and he fully explained how the opinions of Drs. Durham and Rasmussen outweighed the contrary opinions of Drs. Bellotte and Brancomb. *See Trumbo*, 17 BLR at 1-88-89; *Clark*, 12 BLR at 1-149; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984). Accordingly, because we affirm the administrative law judge's finding that claimant satisfied his burden of establishing that he suffers from coal workers' pneumoconiosis and is totally disabled due to pneumoconiosis, we affirm the administrative law judge's determination that claimant is entitled to benefits in this case. *See* 20 C.F.R. §§718.202(a), 718.204(c); *Trent v.*

Bridges v. Director, OWCP, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Director, OWCP, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

Accordingly, the Decision and Order on Third Remand - Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge