

BRB No. 09-0784 BLA

RICHARD KELLY)
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 Claimant-Respondent)
)
 v.)
)
 PBS COALS, INCORPORATED)
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 and)
)
 ROCKWOOD CASUALTY INSURANCE) DATE ISSUED: 08/31/2010
 COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of Second Decision and Order on Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Sean B. Epstein (Pietragallo, Gordon, Alfano, Bosick & Raspanti, LLP), Pittsburgh, Pennsylvania, 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 Second Decision and Order on Remand - Awarding Benefits (04-BLA-5057) of Administrative Law Judge Daniel L. Leland rendered on a claim¹ 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).² This case is before the Board for the fourth time.³ In the most recent appeal, the Board held that the administrative law judge did not provide a valid reason for crediting Dr. Fino's opinion, that claimant does not have pneumoconiosis, or for discrediting the opinions of Drs. Begley and Schaaf, that claimant has pneumoconiosis, under 20 C.F.R. §718.202(a)(4).⁴ The Board further held that because the administrative law judge's finding, that Dr. Begley's opinion is not entitled to enhanced weight as the miner's treating physician, was premised on the administrative law judge's finding that Dr. Begley's opinion is not well-reasoned, the administrative law judge's finding under 20 C.F.R. §718.104(d) was also in error. Consequently, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.104(d), 718.202(a)(4), 718.204(c), and remanded the case for further consideration of the opinions of Drs. Fino, Begley, and Schaaf. *Kelly v. PBS Coals, Inc.*, BRB No. 08-0600 BLA (Apr. 7, 2009) (unpub.), slip op. at 4-6.

¹ Claimant filed his first claim for benefits on February 2, 1996, which was administratively denied on June 12, 1996. Claimant filed his second claim for benefits on January 25, 2002.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim filed before January 1, 2005.

³ The complete procedural history of this case, set forth in the Board's prior decisions in *Kelly v. PBS Coals, Inc.*, BRB No. 05-0606 BLA (Apr. 27, 2006) (unpub.), *R.K. [Kelly] v. PBS Coals Co., Inc.*, BRB No. 07-0180 BLA (Oct. 24, 2007) (unpub.), and *R.K. [Kelly] v. PBS Coals, Inc.*, BRB No. 08-0600 BLA (Apr. 7, 2009) (unpub.), is incorporated by reference.

⁴ The Board previously affirmed, as unchallenged, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Kelly*, BRB No. 05-0606 BLA, slip op. at 2. The Board also noted that the administrative law judge was not required to determine whether a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d) because employer conceded at the hearing that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against claimant. *Id.* at 2 n.2.

On remand, the administrative law judge credited the opinions of Drs. Begley and Schaaf over the opinion of Dr. Fino, to find that claimant established the existence of legal pneumoconiosis⁵ and that claimant's total disability is due to pneumoconiosis, pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability was due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant did not participate in this appeal. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's 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 supported by substantial evidence, is rational, and is in accordance with applicable law.⁶ 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any

⁵ 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). "Clinical pneumoconiosis" is defined as "those diseases recognized by the medical community as pneumoconiosis, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). "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).

⁶ The record indicates that claimant's last coal mine employment was in Pennsylvania. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

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*).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Dr. Fino, that claimant's chronic obstructive pulmonary disease (COPD) is due solely to smoking, and Drs. Begley and Schaaf, that claimant's COPD is attributable to both smoking and coal mine dust exposure. Second Decision and Order on Remand at 2-3; Claimant's Exhibits 4, 7, 9, 10; Employer's Exhibit 5.

As the administrative law judge noted, Dr. Fino examined claimant and performed objective testing, and diagnosed severe COPD with chronic obstructive bronchitis and emphysema. Second Decision and Order on Remand at 2; Employer's Exhibit 5. Dr. Fino opined, that while both smoking and coal mine dust can cause severe obstruction, either alone or together, the fact that claimant has a forty year smoking history, and continues to smoke, is sufficient to indicate that smoking caused claimant's entire pulmonary problem. Second Decision and Order on Remand at 2; Employer's Exhibit 5 at 14. Dr. Fino also explained that claimant's nineteen year history of surface mining would not cause the degree of impairment claimant exhibited, as, generally speaking, obstructive abnormalities occur in underground coal miners who have a higher concentration of coal mine dust to inhale. Second Decision and Order on Remand at 2; Employer's Exhibit 5 at 14-15. In addition, Dr. Fino stated that the presence of hypercarbia, the elevation of claimant's carbon dioxide level, "is really very unusual" in a coal mine dust-related pulmonary condition, but is quite common in individuals who have significant smoking-related lung disease. Employer's Exhibit 5 at 16. Dr. Fino concluded that, based on these factors, even assuming claimant had legal pneumoconiosis, claimant's nineteen years of above ground coal mine work would not have caused any clinically significant obstruction. Second Decision and Order on Remand at 2; Employer's Exhibit 5 at 16-17.

Turning to Dr. Begley's opinion, the administrative law judge noted that Dr. Begley had treated the miner for his pulmonary condition for eighteen months, evaluating him five or six times, and had performed chest x-rays, spirometry, and physical examinations. Second Decision and Order on Remand at 2; Claimant's Exhibit 10 at 6. Dr. Begley diagnosed COPD in the form of chronic bronchitis, due to both coal dust exposure and cigarette smoking. Dr. Begley stated that he could not exclude cigarette smoking or coal dust exposure as a cause of claimant's pulmonary impairment because claimant continued to suffer from chronic bronchitis even during periods when he was not smoking. Second Decision and Order on Remand at 3; Claimant's Exhibit 10 at 29. As the administrative law judge noted, Dr. Begley explained that when coal dust is inhaled, it causes damage to the lungs, and because the coal dust is not broken down by the immune system, the chronic presence of coal dust can continue to cause aggravating conditions like chronic bronchitis. Second Decision and Order on Remand at 3;

Claimant's Exhibit 10 at 30. Dr. Begley disagreed with Dr. Fino as to the significance of claimant's hypercarbia, noting that hypercarbia is indicative of severe pulmonary dysfunction, such as claimant's severe COPD. Claimant's Exhibit 10 at 10, 25.

Dr. Schaaf also examined claimant and performed objective testing, and diagnosed very severe COPD and chronic bronchitis. Second Decision and Order on Remand at 2; Claimant's Exhibit 9 at 21. Dr. Schaaf opined that both claimant's coal dust exposure and his cigarette smoking had substantially contributed to claimant's COPD with chronic bronchitis, and that he could not exclude either factor as a contributing cause. Second Decision and Order on Remand at 2; Claimant's Exhibit 9 at 30. The administrative law judge correctly noted that Dr. Schaaf agreed with Dr. Begley that hypercarbia, as a measure of physiologic impairment, occurs in patients with severe lung disease, including pneumoconiosis. Second Decision and Order on Remand at 2; Claimant's Exhibit 9 at 28-29.

Evaluating their opinions pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge initially found that Drs. Begley, Schaaf, and Fino are all Board-Certified in Internal Medicine and Pulmonary Disease, and had each provided a reasoned and documented medical opinion. Second Decision and Order on Remand at 3. However, considering the factors set forth at 20 C.F.R. §718.104(d), the administrative law judge permissibly found that, "[t]aking into account Dr. Begley's well reasoned opinion and the other evidence of record . . . Dr. Begley's opinion as the miner's treating physician is entitled to greater weight than the opinion of Dr. Fino."⁷ 20 C.F.R. §718.104(d)(1)-(5); *see Soubik v. Director, OWCP*, 366 F.3d 226, 235, 23 BLR 2-82, 2-101 (3d Cir. 2004); Second Decision and Order on Remand at 3. In addition, the administrative law judge found that, in contrast to the better reasoned opinions of Drs. Begley and Schaaf, Dr. Fino's opinion was "couched in generalities and he failed to provide a convincing explanation for excluding [claimant's] coal mine dust exposure as a significant cause or substantial aggravation of his pulmonary disease."⁸ Second Decision and Order on

⁷ We affirm the administrative law judge's determination to accord greater weight to the opinion of Dr. Begley, based on his status as claimant's treating physician, as it is unchallenged by employer on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁸ As set forth above, in considering Dr. Fino's opinion, the administrative law judge noted that Dr. Fino attributed the miner's pulmonary impairment exclusively to cigarette smoking, based on claimant's smoking history, his above-ground coal mine employment, and the presence of hypercarbia, or elevated carbon dioxide level. Second Decision and Order on Remand at 3. Drs. Begley and Schaaf also considered claimant's smoking and employment histories, and explained why they disagreed with Dr. Fino, that the presence of hypercarbia supports the conclusion that claimant's chronic obstructive

Remand at 3. Thus, relying on the opinion of Dr. Begley, claimant's treating physician, as supported by the opinion of Dr. Schaaf, the administrative law judge concluded that the preponderance of the reasoned and documented medical opinions established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Second Decision and Order on Remand at 4.

Employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Fino, and in crediting the opinions of Drs. Begley and Schaaf. Initially, we reject employer's contention that the administrative law judge erred in departing from his prior finding, as set forth in his April 14, 2008 decision, that Dr. Fino's opinion is well-reasoned and well-documented and entitled to significant weight. Employer's Brief at 6; Administrative Law Judge's April 14, 2008 Decision and Order at 4. Contrary to employer's argument, an administrative law judge is not bound by his prior finding that has been vacated by the Board. *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985); *see Bartley v. L&M Coal Co.*, 901 F.2d 1311, 1313, 13 BLR 2-414, 2-417 (6th Cir. 1990); *see also Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997).

In addition, as the administrative law judge permissibly concluded that Dr. Fino did not provide a convincing explanation for determining that coal dust exposure did not cause, contribute to, or aggravate, claimant's COPD, *see Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 211, 22 BLR 2-467, 2-481 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986), we need not address employer's assertion that the administrative law judge erred in characterizing Dr. Fino's opinion as being based on generalities. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 6-7.

We further reject employer's contention that Dr. Begley's opinion was not well-reasoned. Employer asserts that "Dr. Begley was not . . . aware of the actual extent of [claimant's] coal mine dust exposure." Employer's Brief at 7. Initially, we note that, in his prior decision dated April 14, 2008, the administrative law judge specifically found that Dr. Begley had an accurate understanding of claimant's coal mine employment history, and that finding has not been disturbed on appeal. Administrative Law Judge's April 14, 2008 Decision and Order at 2-3. Moreover, a determination of whether a medical opinion is reasoned is committed to the discretion of the administrative law judge. *See Kramer*, 305 F.3d at 211, 22 BLR at 2-481; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8.

pulmonary disease is due solely to smoking. Second Decision and Order on Remand at 2-3.

Employer next contends that the administrative law judge erred in finding that Dr. Schaaf's opinion was well-reasoned, asserting that the physician relied on an inaccurate smoking history. Employer's Brief at 7. The Board previously rejected employer's contention that Dr. Schaaf did not have an accurate understanding of claimant's smoking history. *Kelly v. PBS Coal, Inc.*, BRB No. 07-0180 BLA (Oct. 24, 2007), slip op. at 7 n.7. Employer has not set forth any valid exception to the law of the case doctrine, and merely restates its arguments from the prior appeal. We, therefore, adhere to our previous holding on this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

We, therefore, affirm the administrative law judge's permissible conclusion that the opinions of Drs. Begley and Schaaf outweigh the opinion of Dr. Fino, and that, therefore, claimant has established the existence of legal pneumoconiosis by a preponderance of the reasoned medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4).

Employer next challenges the administrative law judge's determination, pursuant to 20 C.F.R. §718.204(c), that the evidence establishes that claimant is totally disabled due to legal pneumoconiosis.

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge found:

Dr. Schaaf and Dr. Begley both concluded that the miner's legal pneumoconiosis is a substantially contributing cause of the miner's total disability and I find that their opinions are well reasoned and documented. I accord more weight to their opinions than to the less well reasoned opinion of Dr. Fino for the reasons previously stated. Moreover, although Dr. Fino found that the miner is not totally disabled due to pneumoconiosis, his opinion on total disability causation cannot be given any weight as he did not diagnose either clinical or legal pneumoconiosis.

Second Decision and Order on Remand at 4.

First, as the administrative law judge permissibly found the opinions of Drs. Begley and Schaaf sufficient to establish the existence of legal pneumoconiosis, the administrative law judge rationally relied on their opinions, that claimant's totally disabling impairment is due, in part, to coal dust exposure, to find that claimant is totally disabled due to legal pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), 718.204(c)(1). Moreover, contrary to employer's argument, the administrative law judge rationally discounted the opinion of Dr. Fino because he did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). *See*

Soubik, 366 F.3d at 234, 23 BLR at 2-99; Second Decision and Order on Remand at 4. We therefore affirm the administrative law judge's finding that legal pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge