BRB No. 01-0822 BLA

EZRA FRALEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PETER CAVE COAL MINING COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
SHELL MINING COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Jennifer U. Toth (Eugene Scalia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Award of Benefits (98-BLA-

0879) of Administrative Law Judge Daniel J. Roketenetz rendered 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).[1] This case is before the Board for a second time. Initially, the administrative law judge concluded that the instant claim was a duplicate claim,[2] and found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000) by establishing the existence of pneumoconiosis through x-ray evidence. Considering the merits of entitlement, therefore, the administrative law judge concluded that claimant established the existence of pneumoconiosis pursuant to the x-ray and medical opinion evidence, found that claimant was entitled to the presumption that such pneumoconiosis arose out of coal mine employment, found that claimant established the presence of a totally disabling respiratory impairment by pulmonary function study and medical opinion evidence, and found that the evidence weighed in favor of a finding of total disability due to pneumoconiosis. Accordingly, benefits were awarded.

Subsequent to employer's appeal, the Board issued a Decision and Order affirming, in part, and vacating, in part, the administrative law judge's Decision and Order in *Fraley v. Peter Cave Coal Mining Co.*, BRB No. 99-1279 BLA (Nov. 24, 2000)(unpub.). The Board affirmed the administrative law judge's determinations: that the existence of pneumoconiosis was established by the preponderance of positive x-ray evidence by better qualified physicians, that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment as this finding was unchallenged on appeal, and that the pulmonary

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant's two previous claims were both denied by reason of abandonment. Director's Exhibits 51, 52. No evidence was submitted in conjunction with either of the previous claims. Director's Exhibits 51, 52.

function study evidence showed the existence of a totally disabling respiratory impairment. Further, because it affirmed the administrative law judge's finding that the existence of pneumoconiosis was established through x-ray evidence, the Board held that it need not address the administrative law judge's finding that the existence of pneumoconiosis was also established by medical opinion evidence. The Board, however, vacated the administrative law judge's determination that the medical opinion evidence showed the presence of a totally disabling respiratory impairment, and remanded the case for reconsideration of whether the medical opinion evidence showed the presence of a totally disabling respiratory impairment, with additional instructions to consider the non-qualifying blood gas study evidence together with the pulmonary function study evidence and medical opinion evidence before making a determination on total disability. The Board also held that, if reached, the administrative law judge must determine whether the evidence establishes that claimant's totally disabling respiratory impairment is due to pneumoconiosis.

On remand, the administrative law judge concluded that the medical opinion evidence demonstrated the presence of a totally disabling respiratory impairment and that the weight of all relevant evidence, like and unlike, established total disability. Decision and Order on Remand at 3-5. The administrative law judge further found that the evidence of record established that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Accordingly, benefits were again awarded.

On appeal, employer contends that the administrative law judge erred in finding: that the newly submitted evidence established a material change in conditions pursuant to Section 725.309(d); that the medical opinion evidence demonstrated the presence of a totally disabling respiratory impairment; and that the evidence established that claimant's totally disabling respiratory impairment was due to pneumoconiosis. Employer also contends that the Board erred in affirming the finding of the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and requests that the Board revisit that issue and vacate the administrative law judge's finding that pneumoconiosis was established pursuant to the x-ray evidence. Claimant responds urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge's finding on material change is fully supported by the record and in accordance with the law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, but takes no position on the merits of entitlement. In reply, employer reiterates its contentions.

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 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 first argues that the administrative law judge erred in finding a material change in conditions established because claimant failed to show a "worsening in his physical condition" subsequent to the denial of his prior claim. Employer's Brief at 14 n.3. This same contention, however, was raised by employer and rejected by the Board in the prior appeal. Noting that the administrative law judge properly considered the claim on the merits because the prior claim had been denied solely on procedural grounds as abandoned, without the submission or consideration of any evidence on the merits of entitlement, the Board held that any potential error by the administrative law judge in finding a material change in conditions established pursuant to 20 C.F.R. §725.309(d)(2000) in accordance with the standard enunciated in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994) was harmless. *Fraley*, slip op. at 4. The Board will not, therefore, revisit this issue. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Accordingly, employer's argument is rejected.

Employer next argues that the Board must reconsider the administrative law judge's finding that the x-ray evidence establishes the existence of pneumoconiosis because the administrative law judge ignored "internal inconsistencies" in the positive x-ray interpretations of Dr. Baker and Dr. Miller, Claimant's Exhibits 2, 4, which call into question the validity of their interpretations. Employer's Brief at 27. Employer argues that the administrative law judge's analysis of these x-ray interpretations contravenes the Board's holdings in *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc*) and *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*), which require the administrative law judge to consider internal inconsistencies which detract from the credibility of x-ray interpretations. Employer also argues that the administrative law judge erred in failing to address Dr. Hippensteel's opinion which also calls into question the validity of the positive x-rays.

The Board, however, previously rejected these contentions and held that the administrative law judge permissibly found the existence of pneumoconiosis established by x-ray evidence based on the weight of the x-ray interpretations by the most-qualified physicians which was classified as showing the existence of pneumoconiosis. *Fraley*, slip op. at 5; 20 C.F.R. §718.202(a)(1). Employer did not challenge this determination through a motion for reconsideration; nor has it identified intervening case law which would affect the Board's holding. Accordingly, we conclude that the Board's holding affirming the administrative law judge's finding that x-ray evidence establishes the existence of pneumoconiosis constitutes the law of the case and will not be disturbed. *See Gillen, supra*; *Brinkley, supra*; *Cochran, supra*; *see also Bridges, supra*.

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence demonstrated the existence of a totally disabling respiratory impairment. Specifically, employer contends that the administrative law judge erred in relying on Dr. Baker's diagnosis of a moderate respiratory impairment as support for a finding that claimant was totally disabled since nothing in Dr. Baker's opinion indicated that the physician was aware of the physical requirements of claimant's last coal mine employment. *See* Claimant's Exhibit 2. Employer's Brief at 18. Employer also contends that Dr. Baker's finding of a moderate respiratory impairment cannot be relied upon to establish total disability because it was neither explained nor documented, but was based on a single, disputed, pulmonary function study and a blood gas study showing only mild hypoxemia. Employer's Brief at 15-16. Employer further challenges the administrative law judge's reliance on the opinion of Dr. Fritzhand, that claimant suffered from a totally disabling pulmonary impairment, Director's Exhibit 12, because the administrative law judge failed to make any determination as to whether the physician's opinion was reasoned or documented. Employer's Brief at 19. Employer asserts, however, that the opinions of Drs. Castle, Hippensteel, Fino and Tuteur, that claimant did not suffer from a totally disabling respiratory impairment, Director's Exhibits 38, 48; Employer's Exhibits 1, 2, 5, constitute well-reasoned medical opinions and were improperly rejected because the doctors had not examined claimant. Employer also argues that the administrative law judge erred in discounting Dr. Fino's opinion because he found Dr. Fino had a restrictive view of the definition of pneumoconiosis since a determination of total disability is separate and wholly independent from a determination on causation. Additionally, employer argues that the opinions of Drs. Tuteur and Castle were impermissibly rejected solely because they did not review Dr. Baker's medical opinion and tests, when in fact, they had made extensive reviews of other medical data of record.

When this case was previously before the Board, the Board vacated the administrative law judge's determination that the medical opinion evidence supported a finding of total disability. When considering whether the medical opinions established total disability at Section 718.204, the administrative law judge relied upon the credibility determinations he had made when he found the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4). The Board held that the administrative law judge failed to explain why the opinion of examining physician, Dr. Baker, was entitled to more weight than the opinion of examining physician, Dr. Fino. The Board also declared that the failure of Dr. Fino to diagnose the existence of pneumoconiosis did not necessarily mean that his opinion of no disability was entitled to less weight. *Fraley*, slip op. at 9. The Board further held that the administrative law judge failed to give any reason why the opinions of non-examining physicians, Drs. Tuteur, Hippensteel, and Castle, were entitled to less weight. *Fraley*, slip op. at 9. Accordingly, the Board instructed the administrative law judge to address these issues on remand.

On remand, the administrative law judge permissibly concluded that the opinion of Dr. Baker was entitled to the greatest weight because Dr. Baker had examined claimant and, therefore, had greater first-hand knowledge of claimant's condition than those physicians who had not examined the claimant, *i.e.*, Drs. Castle, Hippensteel and Tuteur. Decision and Order on Remand at 4; *see Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *see also Peabody Coal Co. v. Groves*, 277 F.3d 834, BLR (6th Cir. 2002); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *cf*; *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). The administrative law judge also permissibly found that the opinions of Drs. Baker and Fritzhand were better supported by the underlying documentation of record and, thus, entitled to greater weight than the opinion of Dr. Fino. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-111 (6th Cir. 2000); *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

Employer's assertion that Dr. Baker's finding of a moderate respiratory impairment cannot support a finding of total disability because Dr. Baker was unaware of the exertional requirements of claimant's usual coal mine employment is rejected. In this case, Dr. Baker found that claimant had a moderate respiratory impairment based on the pulmonary function and blood gas study evidence. Dr. Baker went on, however, to opine that claimant was not physically able, from a pulmonary standpoint, to do his usual coal mine employment.[3] Accordingly, the administrative law judge's finding that Dr. Baker's opinion was sufficient to establish total disability is correct as the Board previously held. *See Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *see also Gillen*, *supra*; *Brinkley*, *supra*.

[3] The administrative law judge found that claimant worked in underground coal mining as a loading machine operator and truck driver. Decision and Order dated August 23, 1999; Transcript 14, 15. The Dictionary of Occupational Titles describes the physical demands of both these occupations as "medium." *Dictionary of Occupational Titles, Revised Fourth Edition*, at 917, 955.

Regarding Dr. Fritzhand's opinion, employer's contention that the administrative law judge failed to engage in sufficient analysis of that opinion is also rejected. Implicit in an administrative law judge's crediting of a medical opinion is a determination that the opinion is well-reasoned and well-documented. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-851 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984)(Smith, J. dissenting on other grounds); *see also Cornett, supra*. Significantly, employer makes no specific argument to show that the doctor's report is not reasoned and documented. Thus, employer's assertion regarding Dr. Fritzhand is tantamount to a request that the Board reweigh the evidence of record, a role outside its scope of review, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, based on the foregoing discussion, we conclude that the administrative law judge has complied with the Board's remand instructions. We, therefore, affirm the administrative law judge's determination that the medical opinion evidence supports a finding of total respiratory disability. *See* 20 C.F.R. §718.204(b)(2)(iv).[4]

Lastly, employer contends that the administrative law judge erred in finding that claimant established disability causation, *i.e.*, that pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory impairment. *See* 20 C.F.R. §718.204(c). Employer asserts that the administrative law judge's reliance on Dr. Baker's opinion, that claimant's totally disabling respiratory impairment was due to coal dust exposure and pneumoconiosis, Claimant's Exhibit 2, was erroneous because Dr. Baker's opinion was not well-reasoned as a matter-of-law. Specifically, employer asserts that the administrative law judge erred in failing to address Dr. Baker's reliance on a smoking history of three years when, in fact, claimant had testified to a longer smoking history. Dr. Baker indicated that claimant smoked for three years "total," and ceased smoking thirty-five to forty years ago. Dr. Baker also indicated uncertainty as to when claimant started smoking. Although claimant denied it, the evidence suggests a smoking history of twenty-eight to twenty-nine years. *See* Hearing Transcript at 25-28; Deposition of Claimant, Director's Exhibit 16, at 19-22. Employer asserts that Dr. Baker provided no specific reasons for his opinion regarding the cause of claimant's total respiratory disability. Instead, employer argues that Dr. Baker relied on objective tests which address only the existence of a respiratory impairment, not its cause. Employer's Brief at 23. Employer also contends that the administrative law judge failed to explain his reasons for rejecting the opinions of Drs.

[4] Insofar as employer's challenge at Section 718.204(b) only pertains to the medical opinion evidence, we affirm, as unchallenged, *see Skrack*, *supra*, the administrative law judge's finding that the weight of the relevant evidence, like and unlike, supports a finding of a totally disabling respiratory impairment. *See* 20 C.F.R. 718.204(b); *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

Tuteur, Hippensteel, and Castle, that even if claimant had pneumoconiosis, it did not contribute his totally disabling respiratory impairment. Director's Exhibit 48; Employer's Exhibit 1, 2, 5. Employer asserts that the administrative law judge's failure to explain the bases for rejecting these opinions is a violation of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor. *Id*. Further, employer contends that even if the administrative law judge's explanation regarding his rejection of these physicians' opinions were to meet the requirements of the APA, his rejection of their opinions as hostile to the Act or because they held a restrictive view of pneumoconiosis is contrary to established law.

The administrative law judge found that Dr. Baker's opinion was well-reasoned and well-documented and thus established that claimant's totally disabling respiratory impairment was due to pneumoconiosis, since it was based on objective test results and took into account claimant's "tobacco abuse." Decision and Order on Remand at 6. The administrative law judge found that the opinions of those "who [found] otherwise," were not credited for the same reasons they were discredited on the issue of total disability, *see* discussion, *supra*, and were also discredited because "their definition of pneumoconiosis appears to be more limited than the definition set forth" in the regulation at 20 C.F.R. §718.201(a).

In stating that Dr. Baker took into account claimant's "tobacco abuse," the administrative law judge failed to take into account the disparity between the physician's reliance on a three-year smoking history, Claimant's Exhibit 2, and claimant's testimony suggesting a lengthier smoking history of twenty-eight to twenty-nine years, *see* discussion, *supra*; Hearing Transcript at 25-28; Deposition of Claimant, Director's Exhibit 16 at 19-22. Because the relevant inquiry at Section 718.204(c) is the degree of contribution of claimant's pneumoconiosis to his totally disabling respiratory impairment, the existence of other hazardous exposures and the duration of such hazardous exposures is particularly relevant, *see Creech v. Benefits Review Board*, 841 F.2d 706, 11 BLR 2-86 (6th Cir. 1988); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995)(*en banc recon.*); *Horton v. Director, OWCP*, 7 BLR 1-446, 1-448 (1984); *Blackledge v. Director, OWCP*, 6 BLR 1-1060, 1-1063 (1984), and must be specifically addressed by the administrative law judge in the context of the medical opinions he purports to rely upon, *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). Accordingly, we vacate the administrative law judge's conclusion that Dr. Baker's opinion is supportive of a finding of causation at Section 718.204(c) and we remand the case for specific consideration of claimant's smoking history and the smoking history relied upon by the relevant opinions of record. Further, the administrative law judge must address Dr. Baker's specific conclusion that claimant's totally disabling respiratory

impairment was due to coal workers' pneumoconiosis. The administrative law judge has failed to explain what "objective testing...fully supports [the physician's] conclusions." Decision and Order on Remand at 14; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Accordingly, the administrative law judge must further explain his reasons for crediting Dr. Baker's opinion.

Additionally, the administrative law judge must provide specific bases for according less weight to the causation opinions of Drs. Fino, Tuteur, Hippensteel and Case. The administrative law judge's mere reference to prior findings regarding these opinions and a general statement that the opinions are based on a limited definition of pneumoconiosis and are hostile to the Act, Decision and Order on Remand at 6, does not constitute a statement of findings of fact and conclusions of law required by the APA. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 173, BLR (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69 (6th Cir. 1987). We, therefore, vacate the administrative law judge's findings at Section 718.204(c) and remand the case for further consideration as to whether pneumoconiosis is a substantially contributing cause of claimant's disability. 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand-Award of Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge