BRB No. 09-0706 BLA

CHARLES H. PHILLIPS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 06/30/2010
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

William P. Margelis and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand Awarding Benefits (2006-BLA-5917) of Administrative Law Judge Linda S. Chapman rendered on a claim filed on May 14, 2001, 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).[1] This case is before the Board for a third time. Claimant was initially awarded benefits by Administrative Law Judge Pamela Lakes Wood on December 31, 2003. Pursuant to employer's appeal, the Board affirmed Judge Wood's findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *Phillips v. Westmoreland Coal Co.*, BRB No. 04-0379 BLA, slip op. at 2 n.3 (Jan. 27, 2005) (unpub.). The Board also affirmed Judge Wood's finding that claimant had a smoking history of approximately fifteen years. *Id*. at 3. However, the Board held that Judge Wood erred in failing to explain the bases for the weight accorded the conflicting medical opinions pursuant to 20 C.F.R. §718.204(c). Thus, the Board remanded the case for further consideration.[2]

By Order dated May 20, 2005, Judge Wood determined that claimant had not received a complete pulmonary evaluation on the issue of disability causation and remanded the case to the district director to satisfy his obligation under the Act. A Proposed Decision and Order awarding benefits was subsequently issued by the district director on March 20, 2006, and the case was returned to the Office of Administrative Law Judges, where it was assigned to Judge Chapman (the administrative law judge). In a Decision and Order Awarding Benefits dated July 9, 2007, the administrative law judge credited claimant with thirty-eight and one-quarter years of coal mine employment, and found that employer had, in effect, conceded the existence of pneumoconiosis and total

[1] By Order dated March 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Black Lung Benefits Act (the Act) with respect to the entitlement criteria for certain claims. *Phillips v. Westmoreland Coal Company*, BRB No. 09-0706 BLA (Mar. 30, 2010) (unpub. Order). Employer and the Director, Office of Workers' Compensation Programs (the Director), respond and assert that Section 1556 does not apply to the claim, as it was filed prior to January 1, 2005. Based on the parties' responses, and our review, we hold that the recent amendments to the Act are not applicable, based on the filing date of the claim.

[2] The Director asserted that the administrative law judge erred in admitting evidence submitted by employer in excess of the evidentiary limitations, but also maintained that the administrative law judge's error could be deemed harmless, if the Board affirmed the award of benefits. *Phillips v. Westmoreland Coal Co.*, BRB No. 04-0379 BLA, slip op. at 5-6 (Jan. 27, 2005) (unpub.). In light of the Board's decision to vacate the award and remand the case for further consideration at 20 C.F.R. §718.204(c), the Board also instructed the administrative law judge to ensure that the parties' evidence was in compliance with 20 C.F.R. §725.414. *Id.* at 6.

disability, as employer acknowledged at the hearing that the only issue for adjudication was whether claimant's respiratory disability was due to pneumoconiosis. After weighing the conflicting evidence on the issue of disability causation, the administrative law judge found that claimant satisfied his burden to establish that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer appealed, and the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established thirty-eight and one-quarter years of coal mine employment. *See C.H.P.* [*Phillips*] *v. Westmoreland Coal Co.*, BRB No. 07-0880 BLA, slip op. at 2 n.4 (July 31, 2008) (unpub.). The Board, however, vacated the administrative law judge's award of benefits, holding that she erred in stating that Dr. Dahhan did not discuss the arterial blood gas study evidence; that she erred in concluding that Drs. Dahhan and Spagnolo provided no basis for their conclusions that claimant's disabling respiratory impairment was due entirely to smoking; that she failed to properly explain the weight accorded Dr. Forehand's opinion; and that she erred in relying on testimony provided in another case, as to the qualifications of Dr. Forehand, without following the proper procedure for taking judicial notice of facts. *Id*. at 7-10. Therefore, the Board remanded the case for further consideration of the medical opinions as to the issue of disability causation at 20 C.F.R. §718.204(c), taking into consideration the comparative qualifications of the physicians in determining the reliability of their opinions. *Id*. at 10. On June 17, 2009, the administrative law judge issued a Supplemental Decision and Order on Remand Awarding Benefits,[3] which is the subject of this appeal.

Employer challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Specifically, employer contends that the administrative law judge erred in crediting the opinions of Drs. Robinette and Forehand, that claimant is totally disabled due, in part, to coal dust exposure, over the contrary opinions of Drs. Dahhan and Spagnolo, that claimant's respiratory disability is due entirely to smoking. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to employer's appeal, unless specifically requested to do so by the Board.

[3] The administrative law judge issued a Decision and Order on Remand Awarding Benefits on April 8, 2009. However, after being advised that neither employer nor claimant received the briefing order, the administrative law judge issued an order vacating her Decision and Order on Remand Awarding Benefits and provided the parties thirty days to submit briefs. The administrative law judge then issued her Supplemental Decision and Order on Remand Awarding Benefits on June 17, 2009.

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.[4] 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).

On remand, the administrative law judge gave less weight to the opinions of Drs. Dahhan and Spagnolo because she found that they did not explain the basis for their opinion that claimant's respiratory condition was entirely due to smoking, with no contribution from claimant's coal dust exposure. The administrative law judge found that while Drs. Dahhan and Spagnolo relied on the reversibility of claimant's obstruction to support their opinions, they did not explain why the non-reversible portion of claimant's disability could not be due to both a combination of smoking and coal dust exposure. The administrative law judge also found that neither Dr. Dahhan nor Dr. Spagnolo addressed the etiology of claimant's severe hypoxemia on arterial blood gas testing, which the administrative law judge found was a significant component of claimant's respiratory disability. Conversely, the administrative law judge determined that Drs. Forehand and Robinette provided reasoned and documented opinions that were sufficient to establish that claimant is totally disabled due to pneumoconiosis. The administrative law judge explained:

> Although Dr. Spagnolo has impressive academic and professional qualifications, Dr. Robinette's and Dr. Forehand's resumes reflect that they are well-qualified to provide opinions in this matter. I find that the qualifications of Dr. Spagnolo and Dr. Dahhan, standing alone, do not compel me to accord more weight to their opinions over those of Dr. Robinette and Dr. Forehand.

Supplemental Decision and Order on Remand at 9. The administrative law judge concluded that the opinions of Drs. Forehand and Robinette, "that [claimant] suffers from a totally disabling gas exchange impairment due in significant part to his exposure to coal mine dust[,] are persuasive" and, thus, she accorded their opinions determinative weight. *Id*. The administrative law judge therefore found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

[4] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

Employer contends that the administrative law judge engaged in a selective analysis of the evidence and applied an inconsistent standard in assessing the credibility of the medical opinions, as to the cause of claimant's disabling respiratory impairment.[5] Employer contends that the administrative law judge erred in critcizing the opinions of Drs. Dahhan and Spagnolo, on the ground that they focused more on claimant's obstructive impairment and failed to "specifically isolate causes" for claimant's impairment in gas exchange, without applying the same level of scrutiny to claimant's experts. Employer's Brief at 9. Employer maintains that while Dr. Forehand noted that claimant had hypoxemia, "his diagnosis was [also] based on [claimant's] obstructive impairment, and he "never indicated that [claimant's] gas exchange impairment" was the most significant factor in claimant's respiratory disability. *Id*. Therefore, employer argues that his opinion should have likewise been rejected. Finally, employer contends that because neither Dr. Forehand nor Dr. Robinette had an accurate understanding of claimant's smoking history, the administrative law judge erred in relying on their opinions to find that claimant satisfied his burden of proof. Employer's arguments are rejected as they are without merit.

Initially, we note that the Board has already affirmed the administrative law judge's finding, based on her consideration of Dr. Robinette's treatment records and reports, that claimant's reduced diffusion capacity, hypoxemia and oxygen desaturation with exercise, were the most important components of his respiratory impairment. *Phillips,* BRB No. 07-0880 BLA, slip op. at 6. In light of the foregoing, it was reasonable for the administrative law judge to consider whether the physicians provided a reasoned and documented opinion as to the etiology of claimant's severe hypoxemia and oxygen desaturation on arterial blood gas testing.

[5] The administrative law judge considered the reports of Drs. Forehand, Robinette, Dahhan, and Spagnolo. Dr. Forehand opined that claimant has a totally disabling respiratory impairment due to a combination of his coal mine employment and smoking. Director's Exhibits 11, 82. Dr. Robinette, claimant's treating physician, opined that claimant has a disabling pulmonary disease directly related to pulmonary fibrosis due to occupational pneumoconiosis with oxygen desaturation, hypoxemia and a reduction of diffusion capacity. Claimant's Exhibit 2. Dr. Dahhan opined that claimant's "pulmonary disability has resulted from his hyperactive airway disease [bronchial asthma] and previous smoking habit with no evidence that his simple coal workers' pneumoconiosis had any impact on it." Employer's Exhibit 2; *see also* Director's Exhibit 27.. Dr. Spagnolo opined that claimant "does not have a pulmonary or respiratory impairment that has been aggravated in any way by the inhalation of coal mine dust" and opined that claimant's disabling respiratory condition was consistent with smoking. Employer's Exhibits 3, 4.

Contrary to employer's assertion, the administrative law judge permissibly found that while Drs. Dahhan and Spagnolo reported the results of claimant's blood gas testing, they did not discuss the etiology of those results, nor did they offer any specific explanation as to why they excluded coal dust exposure as a causative factor for claimant's hypoxemia.[6] Because the administrative law judge has discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, we see no error in her finding that Drs. Dahhan and Spagnolo did not sufficiently explain their opinions, in light of the blood gas study evidence. *See Milburn Colliery Co. v. Hicks*, 138 F. 3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Furthermore, we affirm the administrative law judge's decision to give less weight to the opinions of Drs. Dahhan and Spagnolo, based on their discussion of claimant's pulmonary obstruction. Contrary to employer's assertion, the administrative law judge properly found that Dr. Dahhan's disability causation opinion was contrary to the regulations, insofar as Dr. Dahhan made "explicit statements that [claimant's] bronchitis could not be due to his coal mine dust exposure, because it had been too long since he left the mines." Supplemental Decision and Order on Remand at 3; *see* 20 C.F.R. §718.201; *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987) (Pneumoconiosis is recognized as the latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

Moreover, the administrative law judge correctly found that Drs. Dahhan and Spagnolo specifically opined that claimant's respiratory disability was unrelated to coal dust exposure because his pulmonary function testing showed partial reversibility after a bronchodilator was administered. Supplemental Decision and Order on Remand at 4, 7. The administrative law judge, however, permissibly assigned less weight to their opinions because Dr. Dahhan did not address "the etiology of the non-reversible portion of [claimant's] obstructive impairment" and Dr. Spagnolo "did not address the question of whether [claimant's] significant history of coal mine dust exposure could also be a contributing factor in [his] severe airflow obstruction, even after reversal with bronchodilators." Supplemental Decision and Order on Remand at 6-7; *see*

[6] We reject employer's contention that the administrative law judge improperly shifted the burden of proof. We note that the Board has already rejected a similar assertion raised by employer in the prior appeal. *See C.H.P.* [*Phillips*] *v. Westmoreland Coal Co.*, BRB No. 07-0880 BLA, slip op. at 6 n.7 (July 31, 2008) (unpub.); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990).

Consolidation Coal Co. v. Swiger, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.); *Cannelton Industries, Inc. v. Director, OWCP* [*Frye*], Case No. 08-1232 (4th Cir. Apr. 5, 2004) (unpub.); *Barnes v. Director, OWCP*, 19 BLR 1-71 (1995) (Decision and Order on Reconsideration) (*en banc*). Accordingly, we affirm the administrative law judge's credibility findings with respect to Drs. Dahhan and Spagnolo pursuant to 20 C.F.R. §718.204(c).[7] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151.

Employer next argues that the administrative law judge erred in relying on Dr. Robinette's disability causation opinion because he had an inaccurate understanding as to the length of claimant's smoking history and did not discuss smoking as a potential cause of claimant's disabling respiratory impairment. Brief in Support of Petition for Review at 19-22. Contrary to employer's contention, the administrative law judge followed the Board's directive to address Dr. Robinette's opinion in light of his failure to specifically discuss the role of smoking in claimant's disability. The administrative law judge stated:

> Dr. Robinette's reports clearly reflect that he was aware that [claimant] had a significant history of smoking, of 30 to 35 pack years. In his letter to [claimant]'s attorney, dated February 12, 2005, Dr. Robinette discussed [claimant's] reports on his smoking history. But Dr. Robinette made it clear that the radiographic evidence clearly documented diffuse nodular interstitial disease, with reduction of [claimant's] diffusion capacity, and evidence of oxygen desaturation with exercise. He stated that [claimant's] pulmonary disability is the consequence of occupational pneumoconiosis, and not related to any specific airflow obstruction; his condition was chronic and irreversible. . . .
>
> Dr. Robinette's February 12, 2005 letter reflects his frustration with the focus on [claimant's] cigarette smoking history, when Dr. Robinette felt that [claimant's] pulmonary disability was not related to a specific airflow

[7] Employer asserts that the administrative law judge erred in concluding that Dr. Dahhan's arterial blood gas test was unreliable, to the extent that she found that the results were drawn "at the end of exercise" and not during exercise. Supplemental Decision and Order on Remand at 4. However, because the administrative law judge cited other alternate and permissible reasons for assigning Dr. Dahhan's opinion less weight, we consider error, if any, committed by the administrative law judge in discussing the reliability of Dr. Dahhan's blood gas study to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983).

> obstruction, but was the result of his underlying pulmonary fibrosis due to black lung disease, with oxygen desaturation.

Supplemental Decision and Order on Remand at 8. Thus, the administrative law judge concluded that "[a]lthough Dr. Robinette did not address the question directly, it is clear from a review of all of his notes and reports" that he was "aware of [claimant's] significant smoking history," in rendering his opinion in this case. *Id*. Because the administrative law judge acted within her discretion in assessing the credibility of Dr. Robinette's opinion, we affirm her decision to assign determinative weight to Dr. Robinette's opinion at 20 C.F.R. §718.204(c). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151.

Additionally, although employer contends that the administrative law judge erred in crediting Dr. Forehand's opinion, because he allegedly considered an inaccurate smoking history, the Board previously affirmed the administrative law judge's finding that Dr. Forehand's opinion is reasoned and documented as to the issue of disability causation.[8] *Phillips*, BRB No. 07-0880 BLA, slip op. at 10. Employer has demonstrated no exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting). Therefore, we conclude that the administrative law judge had discretion to rely on Dr. Forehand's opinion to find that claimant established his burden of proof at 20 C.F.R. §718.204(c).

Lastly, we reject employer's assertion that the administrative law judge erred in failing to consider the respective qualifications of the physicians in reaching her findings at 20 C.F.R. §718.204(c). Brief in Support of Petition for Review at 22-24. After

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[8] The administrative law judge addressed this issue in her 2007 Decision and Order and specifically found:

> Dr. Forehand's reports reflect that he was aware of [claimant's] smoking history, and that he took it into consideration. But the pattern of impairment which he stated cannot be caused by cigarette smoking alone is [claimant's] diffusion impairment and hypoxemia as reflected by his arterial blood gas studies, not his chronic bronchitis or obstructive impairment, as reflected on pulmonary function testing.

2007 Decision and Order Awarding Benefits at 13. The administrative law judge further found that "whether Dr. Forehand relied on a fifteen or a thirty[-]pack year history of smoking is immaterial in considering the cause of [claimant's] disabling gas exchange impairment." *Id*. at 13 n.7.

summarizing the qualifications of all the physicians, the administrative law judge found that "although Dr. Spagnolo has impressive academic and professional qualifications, Dr. Robinette's and Dr. Forehand's resumes reflect that they are well-qualified to provide opinions in this matter." Supplemental Decision and Order on Remand at 9. Contrary to employer's argument, an administrative law judge is not required to defer to a physician with superior qualifications. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In this case, the administrative law judge permissibly exercised her discretion and determined that "the qualifications of Dr. Spagnolo and Dr. Dahhan, standing alone, do not compel me to accord more weight to their opinions over those of Dr. Robinette and Dr. Forehand." Supplemental Decision and Order on Remand at 9; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Clark*, 12 BLR at 1-151.

The administrative law judge, as trier-of-fact, has discretion to make credibility determinations, and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Underwood v. Elkay Mining Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-31-32 (4th Cir. 1997); *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). Therefore we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability due to pneumoconiosis, based on the opinions of Drs. Robinette and Forehand, pursuant to 20 C.F.R. §718.204(c).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge