BRB No. 08-0225 BLA

V.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/25/2008
	)	
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 Awarding Benefits on Remand of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

V.A., Dawson Springs, Kentucky, *pro se*.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Awarding Benefits on Remand (2003-BLA-06095) of Administrative Law Judge Alice M. Craft with respect to a subsequent 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 is the second time that this case has been before the Board. Administrative Law Judge Robert L. Hillyard issued the initial Decision and Order with respect to the subsequent claim and determined that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) or total disability due to pneumoconiosis at 20 C.F.R §718.204(c). In weighing the newly submitted medical opinions, Judge Hillyard found that the opinion in which Dr. Taylor diagnosed chronic obstructive pulmonary disease (COPD) caused, in part, by coal dust exposure, was entitled to "limited weight" because Dr. Taylor had been treating claimant for only three months when he rendered his opinion. 2005 Decision and Order at 7. Judge Hillyard also discredited Dr. Taylor's opinion because it was based on limited objective data. Judge Hillyard concluded that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and denied benefits.

Claimant appealed the denial of benefits and employer filed a cross-appeal, arguing that Judge Hillyard erred in excluding claimant's hospital and treatment records. The Board affirmed Judge Hillyard's finding that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis, but vacated his determination that claimant failed to establish a change in an applicable condition of entitlement, as Judge Hillyard had not separately addressed the issue of whether the newly submitted evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). The Board also held that employer was correct in asserting that the hospital and treatment records proffered by employer should have been admitted into the record. The Board remanded the case, therefore, with instructions to reconsider the newly submitted evidence relevant to the issue of total disability and to consider the evidence that was improperly excluded from the record. The Board also instructed the administrative law judge to determine whether all of the readings submitted by employer of a CT scan dated November 12, 2002 were admissible. [*V.A.*] *v. Island Creek Coal Co.*, BRB No. 05-0496 BLA (Feb. 28, 2006)(unpub.).

The case was reassigned to Judge Craft (the administrative law judge) on remand, as Judge Hillyard was no longer with the Office of Administrative Law Judges. The administrative law judge reviewed the excluded hospital and treatment records and

[1] Claimant filed his first application for benefits on February 16, 1999. Director's Exhibit 1. The district director denied the claim, indicating that claimant did not establish the existence of pneumoconiosis arising out of coal mine employment or that he was totally disabled due to pneumoconiosis. *Id*. The district director further noted, "although your pulmonary function tests meet the disability standard, the threshold requirement of black lung disease has not been met." *Id*. Claimant took no further action until he filed a subsequent claim on February 28, 2001. Director's Exhibit 2.

reconsidered whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). The administrative law judge determined that the newly submitted medical opinions of record supported a finding of pneumoconiosis under Section 718.202(a)(4). In so doing, she determined, based upon the evidence excluded by Judge Hillyard, that Dr. Taylor treated claimant for more than three months. Based upon her finding that the newly submitted medical opinions supported a finding of pneumoconiosis at Section 718.202(a)(4), the administrative law judge concluded that claimant established a change in an applicable condition of entitlement under Section 725.309. On the merits, the administrative law judge found that the evidence of record was sufficient to establish that claimant is totally disabled at Section 718.204(b)(2) and that pneumoconiosis is a substantial contributing cause of his total disability under Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

Employer argues on appeal that the administrative law judge's Decision and Order on Remand must be vacated, as the administrative law judge exceeded the scope of the Board's remand instructions by reconsidering whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis. Employer also contends that the administrative law judge did not properly weigh the medical opinions of Drs. Jarvis and Repsher. Claimant has responded and urges the Board to reject employer's allegations of error. The Director, Office of Workers' Compensation Programs (the Director), has also responded and maintains that in light of the Board's remand instructions, the administrative law judge properly addressed the issue of the existence of pneumoconiosis on remand.[2]

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.[3] 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).

[2] We affirm the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(3), that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), and that claimant proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit as the miner's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibits 1, 6.

Employer initially argues on appeal that the administrative law judge exceeded the scope of the Board's remand instructions by considering the issue of the existence of pneumoconiosis. In support of its argument, employer notes that the Board affirmed Judge Hillyard's determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). Employer also points to the fact that the Board instructed Judge Hillyard to reconsider only whether claimant could establish a change in an applicable condition of entitlement by proving that he is now totally disabled under Section 718.204(b)(2). The Director responds that the Board's remand order "implicitly understood that the issue of pneumoconiosis was not settled," because the Board instructed Judge Hillyard to consider the properly admissible CT scan evidence – which related to the existence of pneumoconiosis – on remand. Director's Letter Brief at 3. The Director also contends that Judge Hillyard's findings under Section 718.202(a) did not constitute "the law of the case," as the information in the excluded treatment records established that Judge Hillyard was incorrect in discrediting Dr. Taylor's diagnosis of legal pneumoconiosis because he had treated claimant for less than three months.

After consideration of employer's arguments and the Director's response, we hold that the administrative law judge did not err in addressing the issue of whether claimant established a change in an applicable condition of entitlement by proving that he has pneumoconiosis pursuant to Section 718.202(a). As indicated by the Director, the doctrine of "law of the case" does not apply to Judge Hillyard's findings under Section 718.202(a), as the treatment records excluded by Judge Hillyard contained information calling into question the accuracy of his finding that Dr. Taylor treated claimant for less than three months. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989). In addition, by including instructions in our prior Decision and Order directing Judge Hillyard to consider evidence that we indicated was relevant to the existence of pneumoconiosis, we reopened the issue of whether the newly submitted evidence was sufficient to establish the existence of pneumoconiosis. [*V.A.*], slip op. at 8. We reject, therefore, employer's contention that the administrative law judge erred in reconsidering this issue on remand. *See Youghiogheny and Ohio Coal Co. v. Milliken*, 200 F.3d 942, 22 BLR 2-46 (6th Cir. 1999)(An appellate court's mandate forecloses a lower court or an agency only from revisiting issues that the appellate court actually decided).

We also hold that there is no merit in employer's argument that the administrative law judge was required to deny benefits pursuant to Section 725.309(d), based upon her determination that claimant could not establish a change in an applicable condition of entitlement by proving that he is totally disabled under Section 718.204(b)(2). As indicated *supra*, slip op at 2 n.1, the district director explicitly stated that although the evidence submitted with claimant's initial claim supported a finding of total disability,

"the threshold requirement of black lung disease has not been met." Director's Exhibit 1. Thus, the administrative law judge properly found that the existence of pneumoconiosis is the applicable condition of entitlement in this subsequent claim. 20 C.F.R. §725.309(d)(2). To the extent that we held otherwise in our prior Decision and Order, our holding is modified.

We will now address employer's contention that the administrative law judge erred in discrediting the opinions of Drs. Jarvis and Repsher when weighing the medical opinions relevant to the existence of pneumoconiosis and total disability due to pneumoconiosis. Based upon an examination of claimant and a record review, Dr. Jarvis determined that although there was no evidence of coal workers' pneumoconiosis, claimant has severe COPD caused solely by cigarette smoking. Director's Exhibit 12; Employer's Exhibit 10. In response to a question regarding his rationale for identifying smoking as the sole cause of claimant's COPD, Dr. Jarvis stated:

> A combination of the history, physical examination, chest x-ray, [and] pulmonary function data all points in one direction. This is a fairly classic and typical and, unfortunately, all too common case. There's no evidence anywhere of coal workers' pneumoconiosis.

Employer's Exhibit 10 at 13. Dr. Jarvis further stated that claimant's symptoms and the results of his objective testing were indicative of "a classic case of smok[ing]-induced emphysema." *Id*. at 14. Dr. Jarvis closed his deposition by indicating that he was aware of the legal definition of pneumoconiosis and that claimant did not have a disease that fell within that definition. *Id*. at 15.

Dr. Repsher also examined claimant and performed a record review. Dr. Repsher reported that claimant does not have coal workers' pneumoconiosis, but is totally disabled by severe COPD caused by smoking. Employer's Exhibit 1. He based his determination regarding the etiology of claimant's COPD on claimant's pulmonary function studies, which showed obstruction without restriction, negative x-rays, and blood gas studies, which produced normal results. *Id*. Dr. Repsher stated that he excluded coal dust exposure as a cause of claimant's COPD because the amount of obstruction attributable to the inhalation of coal dust "is generally so small that it cannot be detected in an individual, but rather can only be detected in the statistical sense" and that "it would not be clinically significant because … you could not appreciate it by measuring the pulmonary function of an individual." Employer's Exhibit 9 at 4-5.

The administrative law judge discredited the opinions of Drs. Jarvis and Repsher, finding that:

> Neither offered any sufficient explanation why they discounted any role for coal dust. Dr. Jarvis[']s report and his deposition demonstrate that his

> focus was on the absence of evidence of clinical pneumoconiosis based on negative x-rays and CT scan. Dr. Repsher took the position that coal mine dust does not cause clinically significant obstructive disease, a position contrary to the premises underlying the regulations. Neither adequately explained why 26 years of coal dust exposure was not a factor in the Claimant's obstructive disease. Hence, I give their opinions little weight on the issue of legal pneumoconiosis.

Decision and Order on Remand at 25. Employer argues that the administrative law judge improperly gave claimant the benefit of a presumption that his COPD was aggravated by coal dust exposure by requiring Drs. Jarvis and Repsher to rule out coal dust exposure as a cause of claimant's COPD.

We hold that the administrative law judge acted within her discretion as fact-finder in according little weight to Dr. Jarvis's opinion that claimant's COPD was due entirely to cigarette smoking. Although claimant bears the burden of proving, by a preponderance of the evidence, that he has pneumoconiosis and is totally disabled by it, *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), when there is conflicting evidence, the administrative law judge must determine the weight to which each item of evidence is entitled. *See Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989). In assessing the probative value of Dr. Jarvis's opinion, that smoking was the sole cause of claimant's COPD, the administrative law judge permissibly determined that Dr. Jarvis "focus[ed] on the absence of evidence of clinical pneumoconiosis," and did not provide a rationale for excluding coal dust exposure as a causal factor.[4] Decision and Order on Remand at 25. As indicated, Dr. Jarvis stated that he based his opinion on the results of claimant's physical examination, chest x-rays, objective test results, and the absence of evidence of coal workers' pneumoconiosis, but did not provide an explanation of how these factors supported his conclusion that coal dust exposure played no role in claimant's COPD. The

---

[4] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

administrative law judge rationally determined, therefore, that Dr. Jarvis's opinion regarding the etiology of claimant's COPD was entitled to little weight under Sections 718.202(a)(4) and 718.204(c). *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993); Decision and Order on Remand at 25, 28. Accordingly, we affirm the administrative law judge's finding discrediting Dr. Jarvis's opinion under Sections 718.202(a)(4) and 718.204(c).

We also hold that the administrative law judge provided a valid rationale for giving little weight to Dr. Repsher's opinion at Sections 718.202(a)(4) and 718.204(c). The administrative law judge acted within her discretion as fact-finder in determining that Dr. Repsher relied upon his view that the inhalation of coal dust causes obstructive lung disease only in a statistical sense that is not measurable in an individual miner's case. Contrary to employer's assertion, the administrative law judge did not find that Dr. Repsher's opinion was "hostile" to the Act or regulations. Rather, the administrative law judge permissibly found that it was inconsistent with the premise underlying the amended definition of legal pneumoconiosis set forth in 20 C.F.R. §718.201(a)(2),[5] in which the Department of Labor recognized that coal dust exposure can cause measurable, clinically significant obstructive lung disease in an individual miner.[6] *See Gray*, 176 F.3d at 388, 21 BLR at 2-626; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo*, 17 BLR at 1-88-89 and n.4. We affirm, therefore, the administrative law judge's decision to discredit Dr. Repsher's opinion at Sections 718.202(a)(4) and 718.204(c).

---

[5] Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] In the preamble to the revised regulations, the Department of Labor stated:

> The Department has concluded … that the prevailing view of the medical community and the substantial weight of the medical and scientific literature supports the conclusion that exposure to coal mine dust may cause chronic obstructive pulmonary disease. Each miner must therefore be given the opportunity to prove that his obstructive lung disease arose out of his coal mine employment and constitutes "legal" pneumoconiosis.

65 Fed. Reg. 79923 (Dec. 20, 2000).

Because employer has not alleged any other error in the administrative law judge's weighing of the medical opinions at Sections 718.202(a)(4) and 718.204(c), we affirm her finding that the medical opinions of Drs. Baker, Taylor, and Holzknecht were sufficient to establish the existence of pneumoconiosis and total disability due to pneumoconiosis.

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

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____

ROY P. SMITH
Administrative Appeals Judge

_____

BETTY JEAN HALL
Administrative Appeals Judge