

BRB No. 97-1750 BLA

LEON W. BEASLEY)
)
 Claimant-Respondent)
)
 v.)
)
 E & B COAL COMPANY)
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand-Awarding Benefits of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (88-BLA-184) of Administrative Law Judge Frederick D. Neusner awarding benefits 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). This case has a lengthy procedural history. In his original Decision and Order issued on January 30, 1989, the administrative law judge credited claimant with twenty years of qualifying coal mine employment, and adjudicated the claim, filed on January 23, 1987, pursuant to the provisions at 20 C.F.R. Part 718. The administrative law judge found that the weight of the evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c)(1), (4). Accordingly, benefits were awarded.

On appeal, the Board initially affirmed the administrative law judge's findings at Sections 718.202(a)(1) and 718.203(b) as unchallenged on appeal, and affirmed his findings at Section 718.204 as supported by substantial evidence. *Beasley v. E & B Coal Co.*, BRB No. 89-0812 BLA (Dec. 19, 1990)(unpublished). Upon employer's motion for reconsideration, however, the Board vacated its affirmance of the administrative law judge's findings at Section 718.204 and remanded this case for the administrative law judge, in determining whether total respiratory disability was established, to specifically discuss the bases for any findings regarding the exertional requirements of claimant's usual coal mine employment, and then to compare those requirements with any physical limitations set forth in the medical opinions. The Board instructed the administrative law judge to place the burden of proof on claimant to establish total disability by a preponderance of the evidence, and to re-evaluate the evidence relevant to causation at Section 718.204(b) under the standard enunciated by the United States Court of Appeals for the Seventh Circuit, wherein jurisdiction of this case arises, in *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990). *Beasley v. E & B Coal Co.*, BRB No. 89-0812 BLA (Oct. 11, 1991) (unpublished).

In his Decision and Order After Remand, issued on June 1, 1992, the administrative law judge again found the weight of the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(b), (c), and consequently awarded benefits.

On appeal, the Board rejected employer's argument that the administrative law judge erred in taking judicial notice of the exertional requirements of claimant's usual coal mine employment as described in the Department of Labor's *Dictionary of Occupational Titles*, and affirmed the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204. *Beasley v. E & B Coal Co.*, BRB No. 93-1354 BLA (May 17, 1994)(unpublished). Following the issuance of the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251 (1994), however, the Board granted employer's motion for reconsideration and vacated the administrative law judge's causation findings pursuant to Section 718.204(b), as they were based on application of the "true doubt" rule which is no longer valid, and remanded the case for reconsideration of the evidence thereunder. *Beasley v. E & B Coal Co.*, BRB No. 93-1354 BLA (June 28, 1996)(unpublished).

In his Decision and Order on Remand issued on August 13, 1997, the administrative law judge found the weight of the evidence established causation pursuant to Section 718.204(b), thus benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings

pursuant to Sections 718.202(a)(1) and 718.204(b), (c), and requests that this case be assigned to a different administrative law judge if remand is appropriate. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to 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 applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially asserts that the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1), affirmed as unchallenged on appeal prior to the issuance of *Greenwich Collieries, supra*, must be vacated because it was based on "true doubt," and thus is inconsistent with current law. We agree. Although claimant argues that employer's challenge to the administrative law judge's finding of pneumoconiosis must be rejected as it was not timely raised, a review of the record reveals that employer adequately preserved this issue,¹ and a remand to apply an intervening Supreme Court decision in pending litigation comports with Seventh Circuit case law. See *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995). We therefore vacate the administrative law judge's findings at Section 718.202(a)(1),

¹ Employer's brief in support of its motion for reconsideration, filed with the Board following issuance of the Supreme Court's decision in *Greenwich Collieries, supra*, noted that the administrative law judge's findings at Sections 718.202(a)(1) and 718.204(b) were based on "true doubt." Employer urged the Board to reverse the administrative law judge's finding of causation at Section 718.204(b) as a matter of law, which would result in a denial of benefits rather than necessitate a remand. Upon the Board's remand of the case for further findings pursuant to Section 718.204(b), employer filed a motion for leave to file a brief clarifying the issues on remand, which the administrative law judge denied on March 26, 1992.

and remand this case for reconsideration of the evidence thereunder consistent with *Greenwich Collieries*. If, on remand, the administrative law judge finds that claimant has failed to establish the existence of pneumoconiosis at Section 718.202(a)(1), he must determine whether the weight of the evidence is sufficient to establish pneumoconiosis pursuant to Section 718.202(a)(2)-(4).

Employer next contends that the administrative law judge erred in finding the evidence established total disability due to pneumoconiosis at Section 718.204. Specifically, employer again challenges the administrative law judge's use of judicial notice to ascertain the exertional demands of claimant's usual coal mine employment and his finding of total respiratory disability at Section 718.204(c). Employer also maintains that the administrative law judge erred in relying on the opinions of Drs. Chiou and Myers to support his finding of causation at Section 718.204(b), and argues that while the administrative law judge did not utilize the phrase "true doubt" in his opinion on remand, his analysis did not change and thus is based on an invalid principle. Employer's Brief at 14-20.

Inasmuch as the Board previously affirmed the administrative law judge's use of judicial notice and his finding that the weight of the evidence established total respiratory disability at Section 718.204(c), and because no exception to the law of the case doctrine has been demonstrated, we decline to revisit these issues. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). We also reject employer's contention that causation was not established as a matter of law because the evidence at Section 718.204(b) was "tied." Contrary to employer's argument, the administrative law judge did not find the conflicting evidence equally probative, but credited the opinion of Dr. Myers, buttressed by the opinion of Dr. Chiou, over the contrary opinion of Dr. Tuteur. Decision and Order on Remand at 2, 3. Because the administrative law judge's credibility determinations may have been tainted, however, by his finding that employer conceded the issue of the existence of pneumoconiosis, we vacate the administrative law judge's findings at Section 718.204(b) for reconsideration of the evidence relevant to causation under the applicable Seventh Circuit standard on remand. See *Hawkins, supra*; *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990).

Lastly, we reject, as unsupported by the record, employer's argument that the administrative law judge's failure to consider briefs on remand from employer and refusal to follow the law has resulted in a "stalemated posture," necessitating reassignment of this case to a different administrative law judge. The administrative law judge has consistently followed the Board's instructions on remand, and adverse rulings, by themselves, are not sufficient to show bias on the part of the administrative law judge. See generally *Orange v. Island Creek Coal Co.*, 786 F.2d

724, 8 BLR 2-192 (6th Cir. 1986); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is vacated, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge