BRB No. 03-0509 BLA

LEE E. PENO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SKY HAVEN COAL COMPANY	)	
	)	
and	)	
	)	
ROCKWOOD INSURANCE COMPANY	)	
	)	DATE ISSUED: 04/26/2004
and	)	
	)	
INSERVCO INSURANCE SERVICES, INCORPORATED	)	
	)	
Employer/Carriers-Petitioners	)	
	)	
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 – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James R. Schmitt (Schmitt & Coletta P.C.), Carnegie, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer and Rockwood Insurance Company.

Barry H. Joyner (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer and Rockwood Insurance Company (employer) appeals the administrative law judge's Decision and Order on Remand – Awarding Benefits[1] 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 is before the Board for the second time. In his initial Decision and Order, the administrative law judge noted that employer stipulated to seventeen years of coal mine employment and the existence of pneumoconiosis arising out of coal mine employment. The administrative law judge denied benefits, however, based on his finding that the evidence failed to establish the existence of a totally disabling respiratory impairment. The administrative law judge also found that even if claimant had established that he was disabled, the evidence failed to establish that his total disability was due to pneumoconiosis. Decision and Order – Denying Benefits.

The Director, Office of Workers' Compensation Programs (the Director), filed a Motion for Reconsideration. On reconsideration, the administrative law judge agreed with the Director that the administrative law judge erred in considering the issue of total disability because employer had stipulated to its existence. Regarding the issue of disability causation, the administrative law judge concluded that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. Decision on Motion for Reconsideration (2001).

On employer's appeal, the Board rejected employer's contention that it had not conceded the issue of a totally disabling respiratory impairment. The Board also rejected employer's contention that the administrative law judge erred in reconsidering his prior

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[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

decision, and held that there was no error by the administrative law judge in revisiting his credibility determinations regarding the medical opinion evidence on reconsideration. However, the Board vacated the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis, as the administrative law judge had not articulated his rationale for determining that Dr. Illuzzi's opinion is reasoned. The Board, therefore, remanded the case for the administrative law judge to determine whether Dr. Illuzzi's opinion is a reasoned medical opinion. *Peno v. Sky Haven Coal Co.*, BRB No. 02-0233 BLA (Oct. 21, 2002)(unpub.).

On remand, the administrative law judge considered Dr. Illuzzi's opinion and found it to be a well-reasoned and well-documented medical opinion and found it sufficient to establish that claimant is totally disabled due to pneumoconiosis. The administrative law judge, therefore, awarded benefits.

On appeal, employer asserts that the administrative law judge's Decision and Order on Reconsideration, issued on September 21, 2001, was erroneous. Employer also asserts that the administrative law judge erred in his 2003 Decision and Order on Remand, by crediting the opinion of Dr. Illuzzi. Claimant and the Director both respond, urging affirmance of the administrative law judge's award of benefits.

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. 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).

As an initial matter, we consider employer's assertions regarding the administrative law judge's Decision and Order on Reconsideration issued on September 21, 2001. Employer maintains that it was error for the administrative law judge to accept "the premise that the claimant may have been totally disabled from a pulmonary standpoint." Employer's Brief at 4. In addition, employer contends that in his Decision and Order on Reconsideration (2001), the administrative law judge erred by ignoring his prior findings and credibility determinations regarding the medical opinion evidence.

The Board previously held that the administrative law judge did not err in revisiting his earlier credibility determinations on reconsideration, and the Board rejected employer's contention that it had not conceded the issue of a totally disabling respiratory impairment. In order for the Board to alter its previous holding, employer must set forth an exception to the law of the case doctrine, *i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in a manifest injustice. *See Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996);

Coleman v. Ramey Coal Co., 18 BLR 1-9 (1993); *see also Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting). Since employer has not set forth any valid exception to the law of the case doctrine, we adhere to our previous holdings on these issues and we decline to address employer's contentions. *See Coleman*, 18 BLR 1-9; *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

We now turn to employer's assertions regarding the administrative law judge's consideration of Dr. Illuzzi's opinion. Employer asserts that Dr. Illuzzi's opinion is unreasoned because the physician does not explain why he believes that claimant's impairment is related to his lung disease rather than his smoking history, and because this opinion is silent as to what contribution claimant's smoking history made to his overall impairment. Further, employer maintains that Dr. Illuzzi has not adequately explained his diagnosis.

After considering Dr. Illuzzi's opinion,[2] the administrative law judge stated:

> Dr. Illuzzi's opinion is based on his physical examination of Claimant and the results of several objective tests that were performed on the same date, and thus it is well-documented. In addition, I find that the underlying documentation supports Dr. Illuzzi's conclusions. Both the arterial blood gas test and the cardiac stress test support Dr. Illuzzi's conclusion that Claimant was totally impaired because he could not maintain adequate oxygen levels during physical exertion, and thus Dr. Illuzzi's conclusion is supported by objective medical testing. This finding is not affected by my previous determination that the arterial blood gas evidence was insufficient to establish total disability under §718.204(c)(2). For these reasons, I find that Dr. Illuzzi's opinion is well-reasoned. Further, as I previously found, Dr. Illuzzi considered both the length of Claimant's coal mine employment and his smoking history before concluding that all of Claimant's impairment was due to his interstitial pulmonary fibrosis.

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[2] Dr. Illuzzi examined claimant and noted a coal mine employment history of twenty-four years and noted that claimant smoked a pipe from 1972 through 1995, and an occasional cigarette, which he summarized as a "fairly heavy" smoking history. Director's Exhibit 8. Dr. Illuzzi diagnosed interstitial pulmonary fibrosis due to coal dust exposure, and opined that claimant is "completely impaired" and "cannot maintain adequate oxygen levels during physical exertion." Director's Exhibit 8. In response to the question asking the extent to which the diagnosed condition contributed to claimant's impairment, Dr. Illuzzi indicated "100%." Director's Exhibit 8.

> I find that Dr. Illuzzi's report establishes that Claimant is totally disabled due to pneumoconiosis.

2003 Decision and Order on Remand at 2 (citations omitted).[3]

The administrative law judge is charged with evaluating the medical evidence and determining whether the opinions are reasoned and documented, and the relative weight to be accorded to each opinion, s*ee Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The Board has held that in order to be considered documented, a medical opinion must set forth the clinical findings, observations and facts upon which the physician based his diagnosis. In order to be considered reasoned, the documentation underlying a medical opinion must support the physician's assessment of the miner's health. *See Fields*, 10 BLR 1-19.

After reviewing the administrative law judge's findings, the evidence of record, and the assertions made on appeal, we hold that the administrative law judge permissibly determined that Dr. Illuzzi's opinion is well-documented, as the administrative law judge correctly noted that the physician's opinion details his physical examination of claimant and it includes the results of several objective tests. In addition, we hold that the administrative law judge, as the finder-of-fact, permissibly determined that the physician's assessment of claimant's health was supported by his objective medical tests. *See Fields*, 10 BLR 1-19. We reject employer's contention that Dr. Illuzzi's opinion must be found to be unreasoned because the physician does not specifically address what contribution claimant's smoking history made to claimant's overall impairment. A review of Dr. Illuzzi's opinion indicates that he was aware of claimant's smoking history, but nonetheless attributed claimant's disability to coal dust exposure. Director's Exhibit 8. Consequently, we affirm the administrative law judge's reliance on the opinion of Dr. Illuzzi at Section 718.204(c).

Employer also asserts that Dr. Solic is the only physician of record to provide a rational opinion as to the etiology of claimant's impairment. In his Decision and Order on Reconsideration (2001), the administrative law judge stated that Dr. Solic's opinion

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[3] We note that the administrative law judge refers to evaluating the blood gas study evidence regarding total respiratory disability at 20 C.F.R. §718.204(c). The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), however, is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

regarding the cause of claimant's disability could not be credited because it was based on the premise that claimant did not suffer from a pulmonary impairment. *See* Decision and Order on Reconsideration (2001). Although the Board did not specifically affirm this finding in its prior Decision and Order, such a holding is implicit in the Board's instructions to the administrative law judge, which limited the administrative law judge's inquiry on remand to determining whether Dr. Illuzzi's opinion is reasoned. In addition, the Board is prohibited from reweighing the evidence. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). We, therefore, affirm the administrative law judge's finding that the evidence establishes that claimant's disability was due to his pneumoconiosis pursuant to Section 718.204(c).

Accordingly, the administrative law judge's 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