BRB No. 12-0334 BLA

BILLY SEXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY	)	
	)	DATE ISSUED: 04/12/2013
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 on Second Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

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

Emily Goldberg-Kraft (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand – Award of Benefits (2005-BLA-5890) of Administrative Law Judge Larry S. Merck, rendered on a subsequent claim filed on April 22, 2004, pursuant to the provisions of the Black Lung

Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the third time.[1] When this case was first before the Board, it affirmed, as unchallenged on appeal, the determination of Administrative Law Judge Thomas F. Phalen, Jr., that claimant had thirty-two years of coal mine employment. *B.S.* [*Sexton*] *v. Golden Oak Mining Co.*, BRB No. 07-0927 BLA, slip op. at 2 n.2 (Sept. 30, 2008) (unpub.). In its most recent Decision and Order, the Board affirmed the finding by Administrative Law Judge Merck (the administrative law judge) of a five-to-six pack-year smoking history, but vacated his determinations that claimant established total disability at 20 C.F.R. §718.204(b)(2)(i), (iv), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Sexton v. Golden Oak Mining Co.*, BRB No. 10-0736 BLA, slip op. at 3-7 (Mar. 28, 2011) (unpub.). The Board also vacated the administrative law judge's findings that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c) and remanded the case for further consideration. *Id*. at 8.

On remand, the administrative law judge again determined that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings at 20 C.F.R. §718.204(b)(2)(i), (iv), and 20 C.F.R. §725.309. Additionally, employer argues that the administrative law judge erred in crediting the medical opinions of Drs. Baker and Fino, and rejecting the opinions of Drs. Broudy and Dahhan under 20 C.F.R. §§718.202(a)(4) and 718.204(c). Employer further asserts that the administrative law judge's reliance on the preamble to the amended regulations as a criterion for evaluating the medical opinion evidence is contrary to law. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, urging the Board to reject employer's argument that the administrative law judge erred in referring to the regulatory

[1] The prior procedural history of this case is set forth in the Board's most recent Decision and Order. *Sexton v. Golden Oak Mining Co.*, BRB No. 10-0376 BLA, slip op. at 1-3 (Mar. 28, 2011) (unpub.). The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. 30 U.S.C. §§921(c)(4), 932(*l*); Director's Exhibit 1.

preamble when assessing the credibility of the medical opinion evidence on the issues of legal pneumoconiosis and disability causation.

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.[2] 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).

When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, the miner's prior claim was denied because the evidence was insufficient to establish the existence of pneumoconiosis arising out of coal mine employment, total disability, or total disability due to pneumoconiosis. Director's Exhibit 1. Therefore, claimant had to submit new evidence establishing at least one of the requisite elements of entitlement in order to obtain review of his subsequent claim on the merits. *See White*, 23 BLR at 1-3.

In considering the newly submitted evidence relevant to total disability at 20 C.F.R. §718.204(b)(2)(i), the administrative law judge acknowledged that the Board had not disturbed his prior finding that the pulmonary function studies dated May 24, 2004, May 25, 2004, July 29, 2004, and September 9, 2004, were invalid or unreliable. Decision and Order on Second Remand at 5; Director's Exhibits 11, 25, 27. The administrative law judge then noted that the Board had held that he was not required to reject the results of the May 26, 2004 pulmonary function study, which was performed in the course of Dr. Alam's treatment of claimant, on the ground that it was nonconforming.[3] Decision and Order on Second Remand at 6. As instructed by the

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

[3] The May 26, 2004 pulmonary function study produced qualifying results, both before and after bronchodilators were administered, but included only two flow-volume loops. Director's Exhibit 25. The comments associated with the study stated, "spirometry data is [sic] acceptable and reproducible . . . very difficult test for [claimant] . . . good effort although [claimant] became dizzy, but wanted to continue testing." *Id*.

Board, the administrative law judge addressed the conflict between the opinions of Drs. Alam and Dahhan regarding the adequacy of claimant's effort on this study.[4] *Id*.

The administrative law judge stated, "[a]lthough Dr. Dahhan is a highly-qualified internist and pulmonologist, he did not explain what evidence he relied upon when he concluded that [c]laimant gave poor effort on the test." Decision and Order on Second Remand at 7. The administrative law judge further noted that Dr. Dahhan's assessment of claimant's effort conflicted with the administering technician's report that claimant's effort was good. *Id*.; *see* Director's Exhibit 25. The administrative law judge stated, "as Dr. Dahhan failed to adequately explain the basis for his opinion, I give more weight on the issue of the validity of the May 26, 2004 [pulmonary function study] to the opinion of Dr. Alam and the administering technician." Decision and Order on Second Remand at 7. Based upon his determinations that the May 26, 2004 pulmonary function study was the only valid newly submitted study, and that it produced qualifying values both pre-bronchodilator and post-bronchodilator, the administrative law judge concluded that total disability was established at 20 C.F.R. §718.204(b)(2)(i). *Id*.

Employer argues that the administrative law judge erred in relying on the Board's decision in *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990), to credit the administering technician's assessment of claimant's effort over that rendered by Dr. Dahhan. Employer maintains that *Brinkley* is no longer good law, as the United States Court of Appeals for the Seventh Circuit vacated the Board's affirmance of the administrative law judge's determination that the administering technician's notations of good cooperation were equal in probative value to the contrary opinions of the consulting physicians. Employer's Brief at 14, *citing Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992), *vacating Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer's contentions are without merit. The Seventh Circuit's decision in *Brinkley* does not constitute binding precedent in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc). Moreover, even assuming that the Seventh Circuit's ruling is controlling, the administrative law judge's finding in this case is distinguishable. The *Brinkley* court emphasized that the consulting physicians based their

[4] Dr. Alam, who is Board-certified in Pulmonary Medicine, Critical Care Medicine and Internal Medicine, stated that claimant put forth good effort on the test and that the values were "acceptable and reproducible." Director's Exhibit 25. Dr. Dahhan, who is Board-certified in Pulmonary Medicine and Internal Medicine, opined that the "[s]pirometry from Dr. Alam's office showed invalid studies due to poor effort." Employer's Exhibit 1.

opinions regarding the adequacy of the miner's effort on an analysis of the tracings from the pulmonary function studies, while someone, presumably the administering technician, had merely circled "good" on reports of the studies. *Brinkley*, 972 F.2d at 883-84, 16 BLR at 2-132. In the present case, the administrative law judge did not rely solely upon the technician's notation that claimant's effort was good. Rather, he also cited Dr. Alam's opinion, that the pulmonary function study that he obtained on May 26, 2004 reflected good effort and produced results that were "acceptable and reproducible." Director's Exhibit 25; Decision and Order on Second Remand at 7. Furthermore, contrary to employer's suggestion, the administrative law judge provided a "justifiable reason" for rejecting Dr. Dahhan's opinion, i.e., that he did not adequately identify the basis for his determination that claimant gave poor effort. *Brinkley*, 972 F.2d at 883, 16 BLR at 2-131; *see Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); Decision and Order on Second Remand at 7. Because the administrative law judge's resolution of the conflict between the opinions of Drs. Alam and Dahhan regarding the validity of the May 26, 2004 pulmonary function study is rational and supported by substantial evidence, it is affirmed. Consequently, we affirm the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

In accordance with the Board's instructions, the administrative law judge next reconsidered Dr. Baker's opinion, that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2)(iv) and concluded that Dr. Baker "gave a thorough explanation as to why he still believed that these [nonconforming] tests were probative on the issue of total disability." Decision and Order on Second Remand at 10; Director's Exhibits 11, 24; Claimant's Exhibit 2 at 4-6. The administrative law judge further noted Dr. Baker's qualifications as a Board-certified pulmonologist and internist, and determined that Dr. Baker also based his opinion on his examination of claimant, which revealed decreased breath sounds bilaterally, and claimant's symptoms, including dyspnea in the presence of chronic bronchitis. Decision and Order on Second Remand at 11. The administrative law judge concluded that Dr. Baker's opinion was well-reasoned and well-documented and supported a finding of total disability. *Id.* Based on the administrative law judge's prior determinations that the contrary opinions of Drs. Broudy and Dahhan were entitled to little weight, he concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and that the newly submitted evidence, when weighed together, satisfied claimant's burden at 20 C.F.R. §718.204(b). *Id.*

Employer alleges that the administrative law judge erred in finding that Dr. Baker's diagnosis of a totally disabling impairment was adequately documented in light of his reliance upon nonconforming and, therefore, unreliable pulmonary function studies. Employer again cites the Seventh Circuit's decision in *Brinkley* in support of its argument. We reject employer's allegation of error, as the administrative law judge acted

within his discretion in finding persuasive Dr. Baker's explanation for his continued reliance on the results of the nonconforming pulmonary function studies. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. The administrative law judge rationally based his credibility finding on Dr. Baker's statements that the nonconforming results were consistent with claimant's history, physical condition, and symptoms of dyspnea and that claimant's ability to perform a valid study was hampered by his lung disease. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); Claimant's Exhibit 2 at 4-6. We therefore affirm the administrative law judge's finding that the newly submitted medical opinion evidence was sufficient to establish that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(iv) and that the newly submitted evidence, when considered as a whole, was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). We further affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See White*, 23 BLR at 1-3.

On the merits of entitlement, the administrative law judge reconsidered whether claimant established the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis under 20 C.F.R. §§718.202(a)(4) and 718.204(c).[5] Decision and Order on Second Remand at 12-23. The administrative law judge found that Dr. Baker's opinion, that claimant suffers from disabling legal pneumoconiosis and chronic obstructive pulmonary disease/chronic bronchitis, caused primarily by coal mine dust exposure and, to a lesser extent, smoking, was well-reasoned, well-documented, and entitled to full probative weight. *Id*. at 14-15, 23. The administrative law judge gave "some weight" to Dr. Fino's opinion, that coal dust exposure contributed to claimant's respiratory impairment, based on Dr. Fino's qualifications as a Board-certified pulmonologist and the documentation underlying his opinion. *Id*. at 16. The administrative law judge determined that the contrary opinions of Drs. Broudy, Dahhan and Forehand were entitled to less weight, because they did not adequately explain why the reversibility of claimant's impairment after the administration of bronchodilators supported the conclusion that coal dust exposure is not a contributing cause of claimant's

[5] To establish entitlement to benefits under 20 C.F.R. Part 718, a miner must establish that he has pneumoconiosis, that the pneumoconiosis arose out of his coal mine employment, and that he is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

impairment. *Id*. at 18, 21, 23. The administrative law judge further found that Drs. Broudy and Dahhan relied on premises contrary to the scientific view endorsed by the Department of Labor that pneumoconiosis is a latent and progressive disease and that coal dust exposure can cause significant obstructive lung disease in a manner similar to cigarette smoking. *Id*.

Employer asserts that the administrative law judge erred in finding that Dr. Baker's opinion was entitled to full probative weight, as Dr. Baker failed to provide details for his conclusions relating specifically to claimant. Employer maintains that Dr. Baker's opinion was speculative and conclusory, because the fact that coal dust could be a contributor to claimant's impairment does not require the conclusion that it was a contributor. Employer further contends that the administrative law judge did not provide valid reasons for discrediting the opinions of Drs. Broudy and Dahhan.[6] Employer also contends that the administrative law judge erred in giving some weight to Dr. Fino's opinion diagnosing legal pneumoconiosis, asserting that the doctor did not identify the basis for his diagnosis. We reject employer's allegations of error.

Contrary to employer's assertion, the administrative law judge rationally found that Dr. Baker's diagnosis of legal pneumoconiosis was well-documented and well-reasoned, as Dr. Baker explained his conclusions in detail and identified the evidence supporting his diagnosis, including claimant's "minimal smoking history and a long history of coal dust exposure." Claimant's Exhibit 2 at 8; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; Decision and Order on Second Remand at 7. Thus, the administrative law judge permissibly found that Dr. Baker's opinion, that claimant's coal dust exposure was the predominant cause of his disabling chronic obstructive pulmonary disease/chronic bronchitis, was entitled to full probative weight at 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *accord Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006).

In addition, the administrative law judge acted within his discretion in giving less weight to the opinions of Drs. Broudy and Dahhan, that claimant's chronic obstructive

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that Dr. Forehand's opinion, that cigarette smoking was the sole cause of claimant's impairment, was entitled to little probative weight because he did not explain how the underlying documentation supported his opinion. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Second Remand at 22-23; Director's Exhibit 1.

pulmonary disease was due to asthma and smoking, because the doctors failed to explain how the reversibility in claimant's bronchodilator response supports ruling out coal dust exposure as a contributor to claimant's impairment. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; Decision and Order on Second Remand at 18. We also reject employer's assertion that the administrative law judge erred by relying on the preamble to the amended regulations and the regulatory definition of legal pneumoconiosis as factors in assessing the credibility of the opinions of Drs. Broudy and Dahhan. The Sixth Circuit has held that an administrative law judge may discredit medical opinions on the ground that the physicians relied on premises that conflict with the prevailing view of medical science as determined by the Department of Labor and set forth in the preamble to the revised regulations.[7] *See A & E Coal Co. v. Adams*, 694 F.3d 798, 25 BLR 2-203 (6th Cir. 2012); *see also J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Finally, in light of the fact that the administrative law judge based his finding of legal pneumoconiosis on his crediting of Dr. Baker's opinion, error, if any, in the administrative law judge's decision to accord some weight to Dr. Fino's diagnosis of legal pneumoconiosis is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988).

Because the administrative law judge provided valid reasons for giving determinative weight to Dr. Baker's opinion, and for discrediting the opinions of Drs. Broudy and Dahhan, we affirm the administrative law judge's determination that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. As we have affirmed the administrative law judge's determination that the opinion of Dr. Baker is well-reasoned, and entitled to greater probative weight, on the

[7] The Department of Labor (DOL) concluded that "[e]ven in the absence of smoking, coal mine dust exposure is clearly associated with clinically significant airways obstruction and chronic bronchitis. *The risk is additive with cigarette smoking*." 65 Fed. Reg. at 79,940 (Dec. 21, 2000) (emphasis added). Citing to studies and medical literature reviews conducted by the National Institute for Occupational Safety and Health (NIOSH), the DOL quoted the following from NIOSH:

> [Chronic obstructive pulmonary disease] may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC. *Decrements in lung function associated with exposure to coal mine dust are severe enough to be disabling in some miners, whether or not pneumoconiosis is also present.*

65 Fed. Reg. 79,943 (Dec. 21, 2000) (emphasis added).

issue of whether claimant's totally disabling impairment was related to coal dust exposure at 20 C.F.R. §718.202(a)(4), we reject employer's assertion that the administrative law judge erred in finding that Dr. Baker's opinion is sufficient to establish disability causation at 20 C.F.R. §718.204(c). *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order on Second Remand at 25. We also affirm, therefore, the administrative law judge's determination that claimant satisfied his burden of proving that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c), we further affirm the administrative law judge's determination that claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Accordingly, the administrative law judge's Decision and Order on Second Remand – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge