BRB No. 02-0197 BLA

WALTER ELKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED:
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 of Fletcher E. Campbell, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane), Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (98-BLA-1251) of Administrative Law Judge Fletcher E. Campbell with respect to 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).[1] This is the fourth time that this case has been

[1]Claimant is the miner, Walter Elkins.

before the Board.[2] In its most recent Decision and Order, the Board addressed employer's appeal of an award of benefits under the regulations set forth in 20 C.F.R. Part 718.[3] The Board held that the administrative law judge did not err in considering all of the evidence of record in determining whether claimant had established a change in conditions or mistake of fact pursuant to 20 C.F.R. §725.309(d) (2000). The Board also affirmed the administrative law judge's determination that Dr. Rasmussen's opinion regarding the existence of pneumoconiosis and total disability due to pneumoconiosis was reasoned and documented.

The Board vacated the award of benefits, however, and remanded the case to the administrative law judge for consideration of whether two of Dr. Rasmussen's reports, dated September 20, 1995 and December 10, 1996, were part of the official record. In addition, the Board vacated the administrative law judge's determination that the opinions of Drs. Fino, Zaldivar, and Tuteur were entitled to little weight pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b) (2000). Finally, the Board instructed the administrative law judge to reconsider the evidence pertaining to the existence of pneumoconiosis in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), in which the court held that an administrative law judge must consider whether the evidence as a whole is sufficient to establish the existence of pneumoconiosis.[4] *Elkins v. Eastern Associated Coal Corp.*, BRB No. 00-0737 BLA (June 26, 2001)(unpub.).

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[2]The procedural history of this case is set forth in detail in *Elkins v. Eastern Associated Coal Corp.*, BRB No. 00-0737 BLA (June 26, 2001)(unpub.), slip op. at 2-4.

[3]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 (2001). Unless otherwise noted, all citations are to the amended regulations.

[4]This case arises within the jurisdiction of the United States Court of Appeals for

the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. Director's Exhibits 2, 29; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

On remand, the administrative law judge considered the opinions in which Drs. Fino, Tuteur, and Zaldivar stated that claimant does not have pneumoconiosis and the opinion in which Dr. Rasmussen diagnosed coal workers' pneumoconiosis and attributed claimant's obstructive impairment to cigarette smoking and coal dust exposure. The administrative law judge determined that the existence of pneumoconiosis was not established by a preponderance of medical opinion evidence. The administrative law judge found, therefore, that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a).[5] Accordingly, benefits were denied. Claimant argues in the present appeal that the administrative law judge should have discredited the opinions of Drs. Fino, Zaldivar, and Tuteur on the ground that these physicians relied upon assumptions that conflict with the Act and the regulations. Claimant further asserts that Dr. Rasmussen's opinion is sufficient to establish that claimant has pneumoconiosis and is totally disabled by the disease. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in response to claimant's appeal.

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. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one 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*).

In considering the medical opinions of record on remand pursuant to Section 718.202(a)(4), the administrative law judge stated that:

[5]In his prior Decision and Order, the administrative law judge found that pneumoconiosis was not established under 20 C.F.R. §718.202(a)(1)-(3). This finding was not challenged in employer's appeal to the Board.

> [In a prior Decision and Order], I found that the opinions of Drs. Zaldivar, Tuteur, and Fino were fatally infected by assumptions disfavored by relevant legal and medical authority. However, I have been reversed on this point and know of no other basis relating to the reasoning or documentation of the physicians' opinions to credit Dr. Rasmussen over the other three.
>
> Unfortunately, the rules under which I am required to evaluate evidence sometimes require me to ignore things that I know to be true. For example, some if not all of the physicians who rendered opinions in this case are in effect professional witnesses for claimants or employers. Even though I know this to be true to a moral certainty, because the record does not show it, I cannot rely on it. In addition, I have no basis on which to conclude that Dr. Rasmussen is more or less biased for reasons of party or class affiliation than are the other opinion physicians.

Decision and Order on Remand at 3 (citations and footnote omitted). Based upon this reasoning, the administrative law judge concluded that the medical opinion evidence does not support a finding of pneumoconiosis. *Id.* at 4. Claimant asserts that the administrative law judge was correct in initially finding that the opinions of Drs. Fino, Zaldivar, and Tuteur were contrary to the Act, inasmuch as they relied upon assumptions that refute the premises upon which the legal definition of pneumoconiosis is based.[6] *See* 20 C.F.R. §718.201(a)(2). Specifically, claimant asserts, incorrectly, that these physicians maintain that pneumoconiosis causes restriction, not obstruction; that unless there is x-ray evidence of coal dust deposition, pneumoconiosis does not cause a reduction in diffusing capacity consistent with an obstructive impairment; that the effects of pneumoconiosis are not reversible with the use of a bronchodilator; and that pneumoconiosis does not cause clinically significant emphysema.

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[6]20 C.F.R. §718.201(a)(2) provides that:

> "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

The Board addressed the propriety of the administrative law judge's determination that Drs. Fino, Zaldivar, and Tuteur expressed conclusions that were at odds with the Act in its prior Decision and Order. The Board held that inasmuch as the physicians did not state that pneumoconiosis cannot cause an obstructive impairment and did not assert that simple pneumoconiosis cannot be totally disabling, their opinions could not be construed as "in conflict with the spirit of the Act." *Elkins v. Eastern Associated Coal Corp.*, BRB No. 00-0737 BLA (June 26, 2001)(unpub.), slip op. at 9-11, *citing Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir.1995). Claimant has not advanced any new arguments regarding the Board's disposition of this issue nor has any new case law developed which requires the Board to alter its previous holding. Thus, the Board's holding constitutes the law of the case and will not be disturbed. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Furthermore, claimant does not challenge the administrative law judge's finding that he could not resolve the conflict between the medical opinions of record by referring to the bias of the physicians who submitted reports at employer's request nor does claimant allege error with respect to the administrative law judge's finding that Dr. Rasmussen's diagnosis of pneumoconiosis is not entitled to dispositive weight in light of the negative x-ray evidence of record and the superior qualifications possessed by Drs. Fino, Zaldivar, and Tuteur.[7] Decision and Order on Remand at 3 n. 3, 4 n. 4. We affirm, therefore, the administrative law judge's determination that the medical opinion evidence,

[7]Drs. Fino, Zaldivar, and Tuteur are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibits 29, 35, 55; Employer's Exhibits 2, 5. Dr. Rasmussen is Board-certified in Internal Medicine. Director's Exhibits 12, 32.

and the evidence of record as a whole, is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *See Compton*, *supra*. In light of the administrative law judge's finding that claimant did not prove that he is suffering from pneumoconiosis, an essential element of entitlement, we must also affirm the denial of benefits.[8] *See Trent*, *supra*; *Perry*, *supra*.

[8]Employer indicates that it continues to assert that the administrative law judge erred in considering claimant's second request for modification. Employer also states that the administrative law judge did not comply with the Board's remand instructions, as he did not consider whether Dr. Rasmussen's 1995 and 1996 reports were admissible. In light of our affirmance of the denial of benefits, however, we need not reach these issues since error, if any, by the administrative law judge is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge