BRB No. 10-0206 BLA

JUNIOR SIZEMORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DONNA KAYE COAL COMPANY	)	
	)	DATE ISSUED: 12/21/2010
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Second Decision and Order on Remand of Daniel F. Solomon, 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.

Michelle S. Gerdano (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: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Second Decision and Order on Remand (04-BLA-6267) of Administrative Law Judge Daniel F. Solomon awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30

U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case, involving a subsequent claim filed on December 31, 2002,[1] is before the Board for the third time. In the initial decision, the administrative law judge, after crediting claimant with at least twenty years of coal mine employment,[2] found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309. On the merits, the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b). Although the administrative law judge found that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he found that the remaining evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4). Weighing all of the relevant evidence together, the administrative law judge found the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge further held that the evidence did not establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), as unchallenged on appeal.[3] *Sizemore v. Donna Kay Coal Co.*, BRB No. 06-0654 BLA (May 31, 2007) (unpub.). Because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the Board held

[1] Claimant's previous claim for benefits, filed on August 21, 1990, was denied by an administrative law judge on June 26, 1992, because claimant did not establish the existence of pneumoconiosis or the existence of a totally disabling pulmonary impairment. Director's Exhibit 1. The Board subsequently affirmed the denial of benefits. *Sizemore v. Donna Kay Coal Co.*, BRB No. 92-2267 BLA (Apr. 26, 1994) (unpub.). There is no indication that claimant took any further action in regard to his 1990 claim.

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 7. 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 Board similarly affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 and 718.204(b), as unchallenged on appeal. *Sizemore v. Donna Kaye Coal Co.*, BRB No. 06-0654 BLA (May 31, 2007) (Boggs, J., concurring and dissenting) (unpub.).

that the holdings in *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), that an administrative law judge must weigh all of the relevant evidence together pursuant to 20 C.F.R. §718.202(a), are not applicable. *Id*. Consequently, the Board held that the administrative law judge erred in weighing the x-ray, biopsy, CT scan, and medical opinion evidence together pursuant to 20 C.F.R. §718.202(a). *Id.* The Board, therefore, reversed the administrative law judge's finding that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* Because the administrative law judge's consideration of the evidence regarding disability causation was affected by his weighing of all of the relevant evidence together at 20 C.F.R. §718.202(a), the Board vacated his finding pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration.[4] *Id.*

On remand, the administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board rejected employer's contention that the administrative law judge was barred from making a different length of coal mine employment finding than that credited by the administrative who adjudicated his prior claim. *J.S.* [*Sizemore*] *v. Donna Kaye Coal Co.*, BRB No. 08-0581 BLA (May 27, 2009) (unpub.). The Board held that the administrative law judge properly relied upon a coal mine employment history of "at least twenty years," and affirmed the administrative law judge's finding that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). *Id.* However, the Board vacated the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and remanded the case for further consideration.[5] *Id.*

---

[4] The Board summarily denied employer's motion for reconsideration. *Sizemore v. Donna Kay Coal Co.*, BRB No. 06-0654 BLA (Nov. 30, 2007) (Order) (*en banc*) (unpub.).

[5] The Board declined to address employer's challenge to its reversal of the administrative law judge's finding that the evidence, overall, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The Board held that its previous ruling constituted the law of the case with regard to this issue. *J.S.* [*Sizemore*] *v. Donna Kaye Coal Co.*, BRB No. 08-0581 BLA (May 27, 2009) (Boggs, J., concurring and dissenting) (unpub.).

On remand for the second time, the administrative law judge found 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.

On appeal, employer contends that the administrative law judge erred in reconsidering the length of claimant's coal mine employment. Employer also argues that the Board erred in vacating the administrative law judge's finding that the evidence, overall, did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer further contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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*).

Impact of the Recent Amendments

By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[6] The parties have responded, and correctly state that the recent amendments to

[6] Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time his death, he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to his claim because it was filed before January 1, 2005.

Total Disability Due to Pneumoconiosis

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's award of benefits is supported by substantial evidence, consistent with applicable law, and contains no reversible error.[7] In considering whether the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c),[8] the administrative law judge permissibly found that Dr. Baker's opinion, that claimant's total disability is due to both clinical pneumoconiosis and cigarette smoking, was better reasoned than the opinions of Drs. Rosenberg and Dahhan, that claimant's total disability is due solely to cigarette smoking.[9] *See Director,*

[7] We decline to address employer's contention that the administrative law judge erred in reconsidering the length of claimant's coal mine employment, or employer's contention that the administrative law judge erred in not weighing all of the evidence of pneumoconiosis together pursuant to 20 C.F.R. §718.202(a). The Board previously rejected these contentions of error. *Sizemore*, BRB No. 08-0581 BLA, slip op. at 4-5. The Board's previous holdings on these issues constitute the law of the case and govern the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

[8] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

[9] Employer argues that Dr. Baker did not attribute claimant's total disability to his clinical pneumoconiosis. Employer's Brief at 21. The Board previously held that the

OWCP v. Rowe, 710 F.2d 251, 255, BLR 2-99, 2-103 (6th Cir. 1983); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Director's Exhibit 10; Employer's Exhibits 1, 3. As directed to do so, the administrative law judge, on remand, considered the significance of the fact that Dr. Baker relied upon an underestimated smoking history,[10] but ultimately permissibly determined that it did not undermine Dr. Baker's opinion that, while cigarette smoking may have been the predominant cause of claimant's total disability, his coal mine dust exposure was also a contributing factor.[11] *Rowe*, 710 F.2d at 255, 5 BLR 2-99 at 2-103; Second Decision and Order on Remand at 6. The administrative law judge also permissibly questioned the opinions of Drs. Rosenberg and Dahhan, that claimant's total disability is due solely to smoking, because neither physician adequately explained how he eliminated claimant's coal mine dust exposure as a cause of his total disability. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Second Decision and Order on Remand at 6. We, therefore, affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

"record reflects that Dr. Baker opined that clinical pneumoconiosis contributes fully to claimant's total disability." *Sizemore*, BRB No. 08-0581 BLA, slip op. at 7. The Board's previous holding on this issue constitutes the law of the case and governs the Board's determination. *See Brinkley*, 14 BLR at 1-150-51; *Bridges*, 6 BLR at 1-989-90.

[10] While the administrative law judge found that the evidence established that claimant had a smoking history of at least sixty pack-years, Dr. Baker relied upon a forty-two pack year smoking history. Second Decision and Order on Remand at 4; Director's Exhibit 10.

[11] Contrary to employer's contention, the administrative law judge adequately explained why he accorded less weight to Dr. Baker's disability causation opinion in his initial decision, explaining that it was based upon his finding, since reversed, that claimant did not suffer from clinical pneumoconiosis. Second Decision and Order on Remand at 6.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in part and dissenting in part:

For the reasons stated in my two previous dissents, I would have the administrative law judge analyze all of the relevant evidence regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a), as this evidence affects the disability causation analysis and the crediting of the physicians' opinions at 20 C.F.R. §718.204(c).

Additionally, I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), given the administrative law judge's failure to consider the specific reasons that Dr. Rosenberg provided for his opinion that claimant's coal mine dust exposure did not contribute to his total disability. Employer's Exhibits 4, 6.

I concur in all other respects with the majority's decision.

JUDITH S. BOGGS
Administrative Appeals Judge