

BRB Nos. 10-0344 BLA  
and 10-0344 BLA-A

JESSIE CHAFFIN	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
PETER CAVE COAL COMPANY	)	
	)	DATE ISSUED: 02/28/2011
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Third Decision and Order on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

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

Barry H. Joyner (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 and claimant cross-appeals the Third Decision and Order on Remand Awarding Benefits (2001-BLA-387) of Administrative Law Judge Linda S. Chapman, rendered on a duplicate 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).<sup>1</sup> This case is before the Board for the fourth time.<sup>2</sup> In its most recent Decision and Order, the Board vacated the administrative law judge's finding that claimant established that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and instructed the administrative law judge to reconsider the opinions of Drs. Wright and Ranavaya on remand. *J.C. [Chaffin] v. Peter Cave Coal Co.*, BRB No. 08-0714 BLA, slip op. at 5-7 (July 10, 2009) (unpub.). On remand, the administrative law judge determined that, despite Dr. Wright's reliance upon a smoking history that differed from that reported by claimant at the hearing, his 1998 opinion, identifying coal dust exposure as a major cause of claimant's totally disabling impairment, was reasoned and documented. The administrative law judge further found that Dr. Ranavaya's similar opinion was entitled to weight. The administrative law judge concluded, therefore, that claimant established that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge did not follow the Board's remand instructions in finding total disability due to pneumoconiosis established

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<sup>1</sup> We agree with claimant and the Director, Office of Workers' Compensation Programs, that the recent amendments, which became effective on March 23, 2010, do not apply, as all of the claims in this case were filed before January 1, 2005. Director's Exhibit 1.

<sup>2</sup> The complete procedural history of this case, as set forth in the Board's three prior decisions, is incorporated herein by reference. *J.C. [Chaffin] v. Peter Cave Coal Co.*, BRB No. 08-0714 BLA, slip op. at 1-2 n.1 (July 10, 2009) (unpub.); *Chaffin v. Peter Cave Coal Co.*, BRB 04-0888 BLA, slip op. at 2 n.1 (Sept.28, 2006) (unpub.); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-296 n.2 (2003). At this point in the proceedings, the Board has affirmed the administrative law judge's finding that the newly submitted x-ray evidence is sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and a material change in conditions under 20 C.F.R. §725.309 (2000). *Chaffin*, BRB No. 04-0888, slip op. at 5. The Board has also affirmed the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2) and that Dr. Zaldivar's opinion, that coal dust exposure played no role in causing claimant's pulmonary impairment, is entitled to little weight at 20 C.F.R. §718.204(c). *Chaffin*, BRB No. 04-0888, slip op. at 6.

under 20 C.F.R. §718.204(c). Employer urges reversal of the award of benefits or, in the alternative, requests that the Board vacate the award of benefits and remand the case to another administrative law judge.<sup>3</sup> In response, claimant urges the Board to reject employer's arguments and affirm the administrative law judge's award of benefits. Claimant has also filed a cross-appeal, contending that, if the Board vacates the award of benefits, the administrative law judge should credit the smoking history set forth in Dr. Wright's 1998 report, as it is consistent with the administrative law judge's finding regarding claimant's smoking history, which the Board affirmed. The Director, Office of Workers' Compensation Programs, has responded and states that he will not address the substantive issues raised in either 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 rational, supported by substantial evidence, and in accordance with applicable law.<sup>4</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

The fundamental issue that the Board instructed the administrative law judge to resolve on remand was whether the conflict between claimant's hearing testimony

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<sup>3</sup> On appeal, employer has also renewed its request to dismiss the claim, contending that, after the miner's death, substitution of a party in interest to pursue this claim is required by 20 C.F.R. §725.360. The Board rejected employer's arguments by Order dated September 30, 2008, and in its most recent Decision and Order. *Chaffin*, BRB No. 08-0714 BLA, slip op. at 3 n.3. In addition, employer has reiterated its challenge to the Board's affirmance of the administrative law judge's finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Because employer has not set forth any compelling argument for altering the Board's prior dispositions, they constitute the law of the case and we decline to disturb them. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

<sup>4</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989); Director's Exhibit 2.

regarding his smoking history and the smoking history recorded by Dr. Wright rendered Dr. Wright's 1998 opinion unreasoned on the issue of total disability causation pursuant to 20 C.F.R. §718.204(c). On appeal, employer does not dispute the administrative law judge's finding that the discrepancy between the smoking history on which Dr. Wright relied in his 1998 report, and the smoking history to which claimant testified, was not significant. Rather, employer asserts that, in crediting Dr. Wright's opinion, the administrative law judge failed to follow the Board's instructions and merely repeated the findings that the Board vacated in its most recent Decision and Order. Employer further contends that the administrative law judge's decision to accord probative weight to Dr. Wright's 1998 opinion, that coal dust inhalation was a significant contributing cause of claimant's severe pulmonary impairment, is in error, as Dr. Wright relied on an inaccurate smoking history. Employer's Brief at 12. In support of its position, employer asserts that, in an earlier report, dated December 2, 1989, Dr. Wright relied on a more accurate smoking history to conclude that coal dust exposure was not a contributing cause of claimant's lung disease.<sup>5</sup> Employer argues that, consequently, the 1989 report reveals that the 1998 report is not credible evidence on the issue of causation. Employer cites *Risher v. Director, OWCP*, 940 F.2d 327, 15 BLR 2-186 (8th Cir. 1991), to support its contention that an administrative law judge must discredit an opinion based on an inaccurate smoking history.

Our review of the record reveals that the administrative law judge did not merely reiterate her prior discussion of Dr. Wright's opinion. Instead, the administrative law judge rendered findings that were rational and supported by substantial evidence, and she complied with the Board's order to fully explain her determinations. Contrary to employer's assertion, the smoking history that Dr. Wright recorded in 1989 was not more accurate than the history he recorded in 1998. Employer's Brief at 12. In the report dated December 2, 1989, Dr. Wright noted that claimant smoked one-to-two packs of cigarettes per day for thirty-five years. Director's Exhibit 38-21. These figures conflict with claimant's hearing testimony, credited by the administrative law judge, in which he indicated that he had smoked one half a pack per day for twenty-seven years and one pack per day for five or six years.<sup>6</sup> Hearing Transcript at 27-28.

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<sup>5</sup> In a report dated December 2, 1989, Dr. Wright noted that claimant smoked one-to-two packs of cigarettes per day for thirty-five years. Director's Exhibit 38-21. Dr. Wright diagnosed chronic smoker's bronchitis with mild functional lung impairment and indicated that claimant's impairment was unrelated to coal dust exposure. *Id.*

<sup>6</sup> The Board has affirmed the administrative law judge's determination that claimant's hearing testimony was the most credible evidence regarding claimant's smoking history. *Chaffin*, BRB No. 04-0888 BLA, slip op. at 6.

Thus, in his 1989 report, Dr. Wright relied on a smoking history of between thirty-five and seventy years, whereas it was, in fact, between eighteen and one half and nineteen and one half pack years. As the administrative law judge observed, Dr. Wright's understanding of claimant's smoking history in 1998, of between seven and one half and fifteen pack years was much closer to the truth. Furthermore, in contrast to his 1998 report, Dr. Wright did not address, in his 1989 report, the fact that claimant quit smoking five years before his coal mine employment ended in 1988. Director's Exhibit 11. Hence, there is no merit to employer's contention that Dr. Wright's 1989 opinion is based on a more accurate smoking history and, therefore, undermines the credibility of his 1998 opinion. See *Kennellis Energies v. Director, OWCP [Ray]*, 333 F.3d 822, 22 BLR 2-591 (7th Cir. 2003) (The court affirmed the administrative law judge's decision to discredit a physician's opinion, that the miner's pulmonary problems were related entirely to smoking, where the miner's exposure to coal dust in his employment continued for two or three years after he had ceased smoking).

The administrative law judge's finding that Dr. Wright's 1998 opinion is reasoned and documented, despite the fact that it differs from his 1989 opinion, is also rational and supported by substantial evidence.<sup>7</sup> As the administrative law judge noted, in 1989, Dr. Wright reported that claimant's x-ray was not diagnostic of pneumoconiosis and that his pulmonary function and blood gas studies showed no evidence of obstruction, restriction, or hypoxemia. Third Decision and Order on Remand at 6; Director's Exhibit 38. The administrative law judge also indicated that, in his 1989 report, Dr. Wright stated that a diagnosis of pneumoconiosis, or any other occupational lung injury, could not be made and that claimant was able to perform his usual coal mine employment. *Id.* The administrative law judge correctly found that, in contrast, in his 1998 report, Dr. Wright obtained an x-ray that was read as positive for pneumoconiosis, a pulmonary function study showing a severe obstructive defect and a moderate restrictive defect with moderate improvement on bronchodilators. Third Decision and Order on Remand at 6; Director's Exhibit 11. Based upon these facts, the administrative law judge rationally concluded that the change in Dr. Wright's opinion over time is supported by the x-ray and the objective data he obtained in his 1998 examination of claimant. See *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir.1997).

Although employer does not dispute the administrative law judge's finding that the difference between claimant's smoking history, and Dr. Wright's understanding of that history in 1998, is not significant, employer contends, nevertheless, that the

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<sup>7</sup> In the report dated June 9, 1998, Dr. Wright diagnosed claimant as suffering from a severe pulmonary impairment, "which is in large part related to his dust inhalation." Director's Exhibit 11. Dr. Wright concluded that smoking was not a "substantial cause" of claimant's impairment, as claimant has "not smoked in fifteen years and [had] a mild smoking history before that time." *Id.*

administrative law judge was required to discredit Dr. Wright's 1998 opinion. Employer's reliance upon *Risher* to support its contention is misplaced. In *Risher*, the United States Court of Appeals for the Eighth Circuit affirmed the administrative law judge's discrediting of the opinion of a physician who determined that the miner's totally disabling impairment was caused by coal dust exposure. The court held that the administrative law judge acted rationally in rejecting the physician's opinion, based on the physician's belief "that the miner had smoked for fifteen years, whereas the evidence clearly shows that [the miner] had smoked for at least fifty years." *Risher*, 940 F.2d at 330-31, 15 BLR at 2-188. The facts in the present case are distinguishable, as the thirty-five year discrepancy between smoking histories in *Risher* is clearly significant, in contrast to the administrative law judge's determination in this case that the difference between the smoking history that Dr. Wright recorded in his 1998 opinion and that to which claimant testified at the hearing is not significant, a finding that employer has not challenged. Third Decision and Order on Remand at 4-5. We affirm, therefore, the administrative law judge's determination that Dr. Wright's 1998 opinion constitutes substantial evidence that claimant's is total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c). See *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (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); Third Decision and Order on Remand at 5.

Having affirmed the administrative law judge's determination to credit Dr. Wright's 1998 opinion, we need not address employer's contention that the administrative law judge erred in crediting Dr. Ranavaya's opinion. The administrative law judge has made plain that reliance on Dr. Ranavaya's opinion was not essential to her decision. Second Decision and Order on Remand at 5 n.4; see *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Finally, we reject employer's assertion that the probative value of Dr. Zaldivar's opinion, ruling out coal dust exposure as a cause of claimant's pulmonary impairment, is still at issue. The Board previously held that the administrative law judge rationally discredited Dr. Zaldivar's opinion at 20 C.F.R. §718.204(c), based on his failure to explain why he would not alter his opinion, even if claimant had pneumoconiosis. *Chaffin v. Peter Cave Coal Co.*, BRB 04-0888 BLA, slip op. at 6 (Sept. 28, 2006) (unpub.). Because employer has not set forth any compelling argument for altering the Board's prior disposition, it now constitutes the law of the case and we decline to disturb it. See *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, the administrative law judge's Third Decision and Order on Remand Awarding 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