BRB No. 02-0815 BLA

HENRIETTA S. HAPNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	07/28/2003
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 Remand-Awarding Benefits of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Crandall, Pyles, Haviland & Turner), Charleston, West Virginia, for claimant.

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

Jeffrey S. Goldberg (Howard M. Radzely, Acting 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (1999-BLA-

0903) of Administrative Law Judge Robert J. Lesnick rendered 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).

[1] This case is before the Board for the second time. Previously, the Board held that the administrative law judge permissibly credited Dr. Rasmussen=s diagnosis of chronic obstructive pulmonary disease (COPD) due partially to coal mine dust exposure because the administrative law judge found that Dr. Rasmussen=s opinion was better reasoned than the contrary opinions and was supported by the opinion of the miner=s treating physician, Dr. Patel, diagnosing pneumoconiosis. *Hapney v. Peabody Coal Co.*, BRB No. 00-1072 BLA, slip op. at 4-5 (Aug. 30, 2001)(unpub.). Thus, the Board affirmed the administrative law judge=s finding that the existence of legal pneumoconiosis was established pursuant to 20 C.F.R. ''718.201, 718.202(a)(4). However, because the administrative law judge did not weigh the chest x-ray and medical opinion evidence together in determining whether the existence of pneumoconiosis was established, the Board vacated the administrative law judge=s finding pursuant to 20 C.F.R. '718.202(a) and remanded the case for him to weigh all of the relevant evidence together consistently with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Additionally, the Board vacated the administrative law judge=s finding that the miner was totally disabled due to pneumoconiosis and instructed him to consider the evidence under the Asubstantially contributing cause@ standard of revised 20 C.F.R. '718.204(c)(1). *Hapney*, slip op. at 7.

On remand, the administrative law judge weighed the chest x-rays and medical opinions together and found that, A[n]othwithstanding Claimant=s failure to establish clinical pneumoconiosis by a preponderance of the x-ray evidence,@ claimant established the existence of legal pneumoconiosis because Athe better reasoned medical opinion evidence establishes that the Claimant suffers from a chronic respiratory or pulmonary impairment which is significantly related to [her] dust exposure in coal mine employment.@ Decision and Order on Remand at 6. Turning to the issue of disability causation, the administrative law judge accorded greater weight to Dr. Rasmussen=s medical opinion because he found it to be better reasoned and Athe most persuasive@ opinion. Decision and Order on Remand at 9. The administrative law judge determined that Dr. Rasmussen=s opinion that coal mine dust exposure was a Asignificant contributing factor@ to the miner=s Adisabling chronic obstructive lung disease@, Claimant's Exhibit 7 at 4, established that pneumoconiosis was a substantially contributing cause of the miner=s total disability pursuant to 20 C.F.R. '718.204(c)(1). In so finding, the administrative law judge rejected employer=s argument that under the law of the United States Court of Appeals for the Fourth Circuit, within whose

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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.

jurisdiction this case arises, the miner=s pre-existing nonrespiratory disabilities barred her entitlement to black lung benefits. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the Board should reconsider its prior decision in *Hapney*, BRB No. 00-1072 BLA, because intervening law requires the administrative law judge to reconsider his finding that the existence of legal pneumoconiosis was established, and because the Board=s holding that the administrative law judge permissibly credited Dr. Rasmussen=s opinion was clearly erroneous. Employer further contends that the administrative law judge on remand erred in his weighing of the evidence when he found that the miner=s total disability was due to pneumoconiosis pursuant to 20 C.F.R. ' 718.204(c). Claimant responds, urging affirmance, and the Director, Office of Workers= Compensation Programs (the Director), responds, urging the Board to reject employer=s argument that the miner was precluded from establishing entitlement because of her pre-existing nonpulmonary disabilities. Employer has filed a reply brief reiterating its contentions.

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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 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that she 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).

Employer contends that *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, --- BLR --- (D.C. Cir. 2002) (*NMA v. DOL*), is intervening case law demonstrating that the administrative law judge impermissibly credited the opinion of Dr. Rasmussen to find the existence of legal pneumoconiosis established at Section 718.202(a)(4) in his initial Decision and Order. Employer's Brief at 17. Employer argues that in *NMA v. DOL*, the Director Aacknowledge[d] that >legal= pneumoconiosis@ is progressive in only eight percent of cases. Employer's Brief at 16. Thus, employer concludes, Dr. Rasmussen=s diagnosis of legal

[2] We affirm as unchallenged on appeal the administrative law judge=s finding that the relevant medical evidence weighed together established the existence of legal pneumoconiosis pursuant to 20 C.F.R. ' 718.202(a). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

pneumoconiosis, made years after the miner quit coal mine employment, conflicts with the Director=s admission that as a matter of science legal pneumoconiosis rarely progresses. Employer=s contention lacks merit.

Nowhere in *NMA v. DOL* did the Director state that legal pneumoconiosis is progressive only eight percent of the time. Rather, in the context of a challenge to Section 718.201(c), defining pneumoconiosis as a Alatent and progressive disease,@ the Director informed the court that Section 718.201(c) was intended to mean that pneumoconiosis can be progressive, not that it is always progressive. *NMA v. DOL*, 292 F.3d at 869 (Discussing agency=s construction of Section 718.201(c)). The court deferred to the Director=s interpretation and held that Section 718.201(c) was not arbitrary and capricious. *Id*. Contrary to employer=s contention, Dr. Rasmussen=s diagnosis of legal pneumoconiosis in this case does not conflict with the Director=s belief, expressed in *NMA v. DOL*, that pneumoconiosis may be progressive. Therefore, employer=s argument does not establish an exception to the law of the case doctrine. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

Employer next contends that the Board clearly erred in holding that the administrative law judge permissibly relied on Dr. Rasmussen=s diagnosis of legal pneumoconiosis, because Dr. Rasmussen=s opinion is unreasoned as a matter of law. Employer's Brief at 12-16. Employer=s contention lacks merit. In previously rejecting employer=s argument that Dr. Rasmussen=s opinion is unreasoned, the Board noted that Dr. Rasmussen based his opinion on coal mine employment and smoking histories, the miner=s medical history, a physical examination, and the results of objective testing. *Hapney*, slip op. at 4 and n.5. We note additionally that Dr. Rasmussen also based his opinion on a review of the medical opinions of Drs. Zaldivar and Fino, and a review of medical research articles. Claimant's Exhibit 7. Consequently, we reject employer=s contention that Dr. Rasmussen=s opinion is unreasoned. *See Compton*, 211 F.3d at 212, 22 BLR at 2-176 (The question is whether Athe totality of [the physician=s] report indicates that he reached a >reasoned medical opinion.=@) Thus, employer=s argument does not establish an exception to the law of the case doctrine. *Brinkley*, 14 BLR at 1-151; *Williams*, 22 BRBS at 237.

Employer argues that the Board clearly erred in affirming the administrative law judge=s finding of legal pneumoconiosis pursuant to Section 718.202(a)(4) because he provided an inadequate rationale for crediting the opinions of Drs. Rasmussen and Patel over those of Drs. Fino and Zaldivar. Employer's Brief at 18-24. Employer contends that the administrative law judge merely stated, without explanation, that Dr. Rasmussen=s opinion was more consistent with the miner=s complaints of shortness of breath, coal mine employment and smoking histories, abnormal chest x-rays, and qualifying pulmonary function studies. Employer's Brief at 18-20, citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 535, 21 BLR 2-323, 2-336-37, 2-340 (4th Cir. 1998)(Holding that a finding that a physician=s opinion was most consistent with miner=s complaints, coal mine employment

history, and test results was an insufficient rationale for crediting the opinion).

Contrary to employer=s contention, unlike the administrative law judge in *Hicks*, the administrative law judge herein provided an adequate rationale for his weighing of the medical evidence. After setting forth the conflicting medical opinions and the physicians= qualifications, the administrative law judge found that despite the Aimpressive credentials@ of Drs. Fino and Zaldivar, the opinion of Dr. Rasmussen was Amost persuasive@ because it was better reasoned and was supported by the opinion of the miner=s treating pulmonologist, Dr. Patel. [2000] Decision and Order at 12. The administrative law judge found that Dr. Rasmussen=s opinion was better reasoned because it was supported by pulmonary function studies Areveal[ing] only partial reversibility@ after the administration of bronchodilator medication. [2000] Decision and Order at 12. As the trier of fact, the administrative law judge Amust evaluate the evidence, weigh it, and draw his own conclusions.@ *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). The administrative law judge=s inference that the miner=s residual abnormality was consistent with a diagnosis of legal pneumoconiosis was not unreasonable. *See Mays v. Piney Mountain Coal Co*., 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting)(The Board will not substitute its inferences for those of the administrative law judge), *aff=d*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Additionally, the administrative law judge found, within his discretion, that Dr. Rasmussen=s opinion was more persuasive because it was Abuttressed by the opinion of Dr. Patel.@ [2000] Decision and Order at 12. Employer asserts that because Dr. Patel never expressly connected the miner=s COPD with coal mine dust exposure, his opinion cannot support Dr. Rasmussen=s opinion. Employer's Brief at 22. However, Dr. Patel diagnosed Apneumoconiosis,@ Claimant's Exhibit 9, and this was substantial evidence to support the administrative law judge=s finding that Dr. Patel=s opinion Asupport[ed] a finding of pneumoconiosis as defined in '718.201 . . . .@ [2000] Decision and Order at 12; *see Underwood*, 105 F.3d at 949, 21 BLR at 2-28. Finally, the administrative law judge took into account the physicians= respective qualifications and permissibly found that although Drs. Fino and Zaldivar possessed impressive qualifications, Drs. Rasmussen and Patel were Aalso well-credentialed.@[3] [2000] Decision and Order at 12; *see Hicks*, 138 F.3d at 546, 21 BLR at 2-341. Because review of the administrative law judge=s Decision and Order as a whole reflects that he provided a valid rationale for his weighing of the medical opinions, we reject employer=s contention. Therefore, employer=s argument does not establish an exception to the law of the case doctrine. *Brinkley*, 14 BLR at 1-151; *Williams*, 22 BRBS at 237.

Pursuant to Section '718.204(c), employer contends that the administrative law judge did not explain why he credited Dr. Rasmussen=s opinion to find that legal pneumoconiosis was a substantially contributing cause of the miner=s total disability. Employer's Brief at 25-

[3] Employer states that Dr. Patel=s qualifications Aare not alleged,@ Employer's Brief at 9, but Dr. Patel=s June 3, 1999 letter reflects his status as ADiplomate American Board of Pulmonary [D]isease.@ Claimant's Exhibit 9.

26. Contrary to employer=s contention, the administrative law judge validly explained that he found Dr. Rasmussen=s opinion persuasive A[f]or the reasons previously outlined, and affirmed by the Board@ for crediting Dr. Rasmussen=s diagnosis of legal pneumoconiosis--that Dr. Rasmussen=s opinion was better reasoned and was supported by the opinion of the miner=s treating pulmonologist, Dr. Patel. Decision and Order on Remand at 8; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85, 1-88-89 and n.4 (1993). Substantial evidence supports the administrative law judge=s finding that Dr. Rasmussen took into account the miner=s smoking, asthma, heart disease, and back injury, yet opined unequivocally that coal mine dust exposure was a Asignificant contributing factor@ to the miner=s Adisabling chronic obstructive lung disease.@ Claimant's Exhibit 7 at 4. Consequently, substantial evidence supports the administrative law judge=s finding that Apneumoconiosis, as defined in '718.201, had a material adverse effect on the Claimant=s respiratory or pulmonary condition,@ and thus was a substantially contributing cause of the miner=s total disability. Decision and Order on Remand at 8; *see* 20 C.F.R. '718.204(c)(1)(i).

Employer, however, contends that claimant Acannot qualify for black lung benefits@ because she was totally disabled by a back injury and heart disease prior to developing pneumoconiosis. Employer's Brief at 26-27. Employer asserts that the Fourth Circuit court, in *Hicks* and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), adopted the holding of the United States Court of Appeals for the Seventh Circuit, in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), that a claimant cannot establish total disability due to pneumoconiosis if he or she is totally disabled from a pre-existing nonrespiratory disability. Employer's Brief at 27-30; Employer=s Reply at 9-13. The Board has rejected the assertion that the Fourth Circuit has adopted the holding of the Seventh Circuit in *Foster* and *Vigna*. *Bateman v. Eastern Associated Coal Corp*., 22 BLR 1-255, 1-265-67 (2003). Therefore, we reject employer=s contention for the reasons stated by the Board in *Bateman*, and we affirm the administrative law judge=s finding that pneumoconiosis was a substantially contributing cause of the miner=s total disability pursuant to Section 718.204(c)(1).

Accordingly, the administrative law judge=s Decision and Order on Remand-Awarding Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge