

BRB No. 07-0726 BLA

B.Y. )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 CALICO COAL COMPANY ) DATE ISSUED: 07/30/2008  
 )  
 and )  
 )  
 OLD REPUBLIC INSURANCE )  
 COMPANY )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand Awarding Benefits (2000-BLA-00097) of Administrative Law Judge Alice M. Craft rendered on a duplicate claim<sup>1</sup>

---

<sup>1</sup> Claimant filed an initial claim for benefits on July 6, 1994, which was denied by Administrative Law Judge Sheldon Lipson on the ground that claimant failed to establish

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).<sup>2</sup> This case is before the Board for a second time. In her Decision and Order dated November 4, 2002, the administrative law judge credited claimant with thirty and one-half years of coal mine employment and found, based on the newly submitted evidence, that claimant established the existence of pneumoconiosis and a material change in conditions pursuant to 20 C.F.R. §§718.202(a), 725.309 (2000).<sup>3</sup> Reviewing all of the record evidence on the merits of entitlement, the administrative law judge further found that claimant established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(b), (c). Accordingly, benefits were awarded.

Employer appealed, and the Board affirmed the administrative law judge's award of benefits. [*B.Y.*] *v. Calico Coal Co.*, BRB No. 03-0180 BLA (Nov. 21, 2003) (unpub.) (Smith, J., dissenting). Employer subsequently filed a motion for reconsideration *en banc*. The Board granted employer's motion and, upon further reflection on the administrative law judge's findings at Section 718.202(a)(4) and 718.204(c), held that the administrative law judge had "not sufficiently articulated her reasons for discounting Dr. Fino's medical opinion" that claimant did not have pneumoconiosis and was not totally disabled due by pneumoconiosis. [*B.Y.*], BRB No. 03-0180 BLA, slip op. at 2 (Sept. 30, 2004) (Decision and Order on Reconsideration *En Banc*) (unpub.). Thus, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to further consider Dr. Fino's opinion pursuant to Section 718.202(a)(4) and 718.204(c), and to specifically explain the bases for the weight she accorded his opinion. *Id.*

On remand, the administrative law judge credited the opinion of Dr. Rasmussen over that of Dr. Fino and found that claimant established the existence of legal

---

the existence of pneumoconiosis. Director's Exhibit 37. Claimant appealed, and the Board affirmed the denial of benefits. [*B.Y.*] *v. Calico Coal Co.*, BRB No. 97-0837 BLA (Nov. 21, 1997) (unpub.); Director's Exhibit 37. Claimant took no further action until he filed his duplicate claim on April 14, 1999. Director's Exhibit 1.

<sup>2</sup> 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.

<sup>3</sup> The revised regulation at 20 C.F.R. §725.310 does not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

pneumoconiosis at Section 718.202(a)(4), and total disability due to pneumoconiosis pursuant to Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that administrative law judge erred in discrediting Dr. Fino's opinion at Sections 718.202(a)(4) and 718.204(c). Employer also asks the Board to revisit its prior affirmance of the administrative law judge's credibility determinations with respect to the opinions of Drs. Rasmussen, Tuteur, Hippensteel, and Stewart. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

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, 363 (1965).

Initially, we note that the Board has affirmed the administrative law judge's finding that claimant established a material change in conditions pursuant to Section 725.309(d) and a totally disabling respiratory impairment pursuant to Section 718.204(b). [B.Y.], BRB No. 03-0180 BLA (Nov. 21, 2003), slip op. at 6. The Board previously rejected employer's assertion that the administrative law judge erred by failing to perform a merits review, noting that she properly considered all of the record evidence in rendering her findings on entitlement. *Id.* With respect to the administrative law judge's credibility determinations, the Board affirmed her finding that Dr. Rasmussen's opinion, that claimant suffers from legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure, and that claimant is totally disabled by legal pneumoconiosis, is reasoned and documented, and entitled to greater weight than the contrary opinions of Drs. Hippensteel, Tuteur, Castle, and Stewart, that claimant does not have legal pneumoconiosis and is not totally disabled by that disease. *Id.* at 6-7.

Although employer requests that the Board revisit its prior affirmance of the weight accorded the opinions of Drs. Rasmussen, Hippensteel, Tuteur, Castle, and Stewart, employer has not set forth any valid exception to the law of the case doctrine,<sup>5</sup>

---

<sup>4</sup> 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 Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 37.

<sup>5</sup> The doctrine of "the law of the case" is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter; therefore, it is the practice of courts generally to refuse to reopen in a later

*i.e.*, a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Therefore, we deny employer's request. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

On remand, the only issue to be resolved by the administrative law judge was the weight to accord Dr. Fino's opinion, in comparison to Dr. Rasmussen's opinion, pursuant to Sections 718.202(a)(4) and 718.204(c). On remand, in considering whether claimant established the existence of legal pneumoconiosis, the administrative law judge gave "some weight" to Dr. Fino's opinion, that claimant had no respiratory disease due to coal dust exposure, but ultimately determined that Dr. Rasmussen provided a "better supported, documented, and comprehensive opinion," that claimant has COPD due to both smoking and coal dust exposure. Decision and Order on Remand at 5. Thus, the administrative law judge found that claimant established the existence of legal pneumoconiosis based on Dr. Rasmussen's opinion under Section 718.202(a)(4). Decision and Order on Remand at 5. Weighing all of the evidence together, the administrative law judge further found that claimant satisfied his burden to establish the existence of pneumoconiosis pursuant to Section 718.202(a). *Id.* at 5-6.

Employer contends that the administrative law judge gave impermissible reasons for assigning Dr. Fino's opinion less weight at Section 718.202(a)(4). We disagree. Dr. Fino reviewed claimant's medical records, noting that claimant had a forty-year smoking history of one pack of cigarettes per day and a coal mine employment history of thirty-three and a half years. Employer's Exhibits 7, 17 at 12-13. In a report dated February 16, 2000, Dr. Fino opined that there was no objective evidence to support a diagnosis of clinical pneumoconiosis. As to the issue of legal pneumoconiosis, Dr. Fino stated:

[Claimant's] clinical picture is one of a severe decrease in the diffusing capacity, a severe decrease in the pO<sub>2</sub> with exercise, and the development of an obstructive abnormality with reversibility [based on the pulmonary function testing]. The obstruction is consistent with smoking. However, the combination of the decrease in the diffusion, a drop in pO<sub>2</sub> and reversible obstruction suggests a vasculitis of the lungs such as Churg-Strauss arteritis – this is a condition unrelated to the inhalation of coal mine dust.

---

action what has been previously decided in the same case. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000) (*en banc*) (Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer's Exhibit 7. In a supplemental report dated July 25, 2000, Dr. Fino opined that the miner developed a reversible obstructive ventilatory impairment attributable to smoking, and that he was totally disabled. Employer's Exhibit 13 Dr. Fino was deposed on January 11, 2001 and explained that COPD due to coal dust exposure causes reductions in the FEV1 value during pulmonary function testing. Employer's Exhibit 17 at 14. Because claimant did not have a reduction in his FEV1 until five years after he left coal mine employment, Dr. Fino opined that the miner did not have COPD due to coal dust exposure. *Id.* at 15. Dr. Fino attributed claimant's obstruction to smoking and the use of a medication called Atenolol, a beta blocker for individuals with heart problems. *Id.* at 20-21. Dr. Fino also stated that if one were to give back to claimant the potential loss of respiratory function that was due to coal dust exposure, he would still be totally disabled from a respiratory or pulmonary standpoint as a result of smoking. *Id.* at 27-28.

In weighing the conflicting medical opinions of Drs. Fino and Rasmussen<sup>6</sup> at Section 718.202(a)(4), as directed by the Board, the administrative law judge noted that it was "proper to discount a physician's opinion that overwhelmingly focuses on clinical rather than legal pneumoconiosis." Decision and Order on Remand at 5, citing *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.). The administrative law judge correctly observed that Dr. Fino "consistently notes [that claimant has an] obstructive abnormality with negative x-ray interpretations."<sup>7</sup> Decision and Order on Remand at 5. Since the absence of clinical pneumoconiosis does

---

<sup>6</sup> Dr. Rasmussen examined claimant on June 14, 1999 and diagnosed clinical pneumoconiosis by x-ray. Director's Exhibit 6. Dr. Rasmussen also diagnosed chronic obstructive pulmonary disease (COPD), which the doctor attributed to claimant's history of smoking one pack of cigarettes per day from 1956 until 1997 and his coal mine employment history of thirty-three and one-half years. *Id.*; Claimant's Exhibit 3. Based on the pattern of claimant's respiratory impairment, which he described as a mild ventilatory impairment with marked impairment in oxygen transfer, Dr. Rasmussen specifically opined that coal dust exposure was the more significant risk factor for the development of claimant's COPD. Claimant's Exhibit 3.

<sup>7</sup> Dr. Fino testified that while pneumoconiosis can cause a reduction in diffusion capacity, as demonstrated in this case, "the reduction in diffusion that occurs . . . [is] associated with significant pneumoconiosis radiographically." Employer's Exhibit 17 at 18. Dr. Fino stated that, based on his "reading of seven or eight films that [do] not show pneumoconiosis," he could not attribute claimant's reduction in diffusion to coal dust exposure. *Id.* Additionally, when asked whether coal dust exposure can cause a purely obstructive respiratory impairment, Dr. Fino stated that it could be explained that "the amount of obstruction is related to the amount of fibrosis, "which is directly correlated to the amount of coal content in the lungs, which is directly related to the radiographic abnormality." Employer's Exhibit 17 at 33.

not necessarily preclude a finding of legal pneumoconiosis, the administrative law judge permissibly questioned whether Dr. Fino's opinion, that claimant did not have COPD due to coal dust exposure, was influenced by his negative x-ray findings for clinical pneumoconiosis. *See Island Creek Coal Co. v Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000).

Additionally, Dr. Fino testified that coal dust-related pneumoconiosis causes a fixed respiratory condition/impairment that is not susceptible to bronchodilator medication, while "a response to bronchodilator can be seen in smoking-related [respiratory] conditions." Employer's Exhibit 17 at 20. As noted by the administrative law judge, however, Dr. Fino also acknowledged that claimant had a fixed obstructive respiratory condition that is not responsive to bronchodilator. Decision and Order on Remand at 5; Claimant's Exhibit 17 at 40.

Contrary to employer's assertion, insofar as the pulmonary function tests disclose that claimant has an obstructive respiratory condition that is not completely responsive to bronchodilator,<sup>8</sup> the administrative law judge reasonably found that Dr. Fino, in attributing claimant's respiratory condition entirely to smoking, failed to adequately address "why coal dust exposure does not also contribute to the claimant's abnormal fixed obstructive pulmonary condition." Decision and Order on Remand at 5; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Swiger*, 98 Fed. Appx. at 237.<sup>9</sup> Because the administrative law judge has discretion as the trier-of-fact to render credibility determinations, we affirm her decision to assign Dr. Fino's

---

<sup>8</sup> The administrative law judge previously found that while none of the pulmonary function studies were qualifying, both Drs. Rasmussen and Fino agreed that claimant was totally disabled from performing heavy manual labor based on the results of the non-qualifying tests, which disclosed an obstructive respiratory impairment. Decision and Order Granting Benefits (Nov. 4, 2002) at 26.

<sup>9</sup> We recognize that unpublished decisions are not considered binding precedent in the Fourth Circuit. *See* Local Rule 36(c) of the Fourth Circuit ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing *res judicata*, collateral estoppel, or the law of the case."). Our holding is not based exclusively upon the Fourth Circuit's unpublished decision in *Consolidation Coal Co. v. Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.). Rather, we base our holding upon a review of this administrative law judge's decision, wherein she reasonably explained why she did not find Dr. Fino's opinion to be persuasive, in light of the pulmonary function study evidence showing a fixed obstructive respiratory condition, and Dr. Fino's reliance on the x-ray evidence to discount a diagnosis of legal pneumoconiosis. Decision and Order on Remand at 5.

opinion less weight as to the existence of legal pneumoconiosis at Section 718.202(a)(4). See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); see also *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because the Board previously affirmed the administrative law judge's finding that Dr. Rasmussen's diagnosis of COPD due, in part, to coal dust exposure is reasoned and documented, [*B.Y.*], BRB No. 03-0180 BLA (Nov. 21, 2003), slip op. at 6, we reject employer's contention that the administrative law judge erred in finding Dr. Rasmussen's opinion to be sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Therefore, we affirm, as rational and supported by substantial evidence, the administrative law judge's finding at Section 718.202(a)(4), and her determination that claimant satisfied his burden to establish the existence of pneumoconiosis, overall, at Section 718.202(a). *Compton*, 211 F.3d at 211, 22 BLR at 2-1.

Pursuant to Section 718.204(c), employer argues that the administrative law judge failed to give proper reasons for discounting Dr. Fino's opinion as to whether claimant is totally disabled by legal pneumoconiosis. We disagree. Contrary to employer's assertion, the administrative law judge acted within her discretion, in finding Dr. Fino's opinion that claimant's respiratory disability may be due to vasculitis to be equivocal. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order on Remand at 8. Moreover, since Dr. Fino is not of the opinion that claimant has any respiratory disease arising from coal dust exposure (legal pneumoconiosis), the administrative law judge reasonably assigned Dr. Fino's opinion less weight on the issue of disability causation. See *Hicks*, 138 F.3d 524, 21 BLR 2-323; *Toler v. Eastern Associated Coal Company*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-382-383 (4th Cir. 2002); Decision and Order on Remand at 8. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability due to pneumoconiosis based on the reasoned opinion of Dr. Rasmussen pursuant to Section 718.204(c). See *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 603 n.10 (4th Cir. 1999); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 8.

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

SO ORDERED.

---

ROY P. SMITH  
Administrative Appeals Judge

---

REGINA C. McGRANERY  
Administrative Appeals Judge

---

BETTY JEAN HALL  
Administrative Appeals Judge