BRB No. 07-0921 BLA

C.P.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	
	)	
and	)	
	)	
ZEIGLER COAL	)	DATE ISSUED: 07/30/2008
	)	
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 - Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 the Decision and Order on Remand – Award of Benefits (01-BLA-0248) of Administrative Law Judge Larry S. Merck rendered on a duplicate 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). This case has been before the Board previously.[1] In the most recent appeal, the Board initially rejected employer's arguments relevant to the applicable circuit court law, the latency and progressivity of pneumoconiosis pursuant to 20 C.F.R. §718.201(c), and whether pre-existing disabling conditions precluded claimant's entitlement, as these arguments had been rejected previously and employer had demonstrated no exceptions to the law of the case doctrine.[2]

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[1] In the initial appeal, the Board affirmed Administrative Law Judge Daniel J. Roketenetz's findings that claimant failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, or the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), but established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and thus established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The Board further affirmed Judge Roketenetz's findings that claimant failed to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i)-(iii), but established total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c) and, therefore, established entitlement to benefits. [*C.P.*] *v. Wolf Creek Collieries*, BRB No. 02-0188 BLA (Dec. 13, 2002)(unpub.)(Dolder, J., concurring and dissenting). Pursuant to employer's request for reconsideration, the Board modified its prior decision to vacate and remand for further consideration Judge Roketenetz's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c) and 725.309 (2000). [*C.P.*] *v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*)(McGranery, J., concurring and dissenting). Following Judge Roketenetz's award of benefits on remand, and employer's appeal thereof, the Board again vacated, and remanded Judge Roketenetz's findings at 20 C.F.R. §§718.202(a)(4), 718.204(c) and 725.309 (2000). [*C.P.*] *v. Wolf Creek Collieries*, BRB No. 05-0933 BLA (July 18, 2006)(unpub.). The complete procedural history of this case, set forth in the Board's prior decisions, is incorporated herein by reference.

[2] The doctrine of the "law of the case" is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.,* 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Specifically, "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California,* 460 U.S. 605, 618 (1983); *see also Brinkley v. Peabody Coal Co.,* 14 BLR 1-147, 1-150-51 (1990); *Williams v. Healy-Ball-Greenfield,* 22 BRBS 234 (1989)(Brown, J., dissenting). Exceptions to the law of the

[*C.P.*] *v. Wolf Creek Collieries*, BRB No. 05-0933 BLA (July 18, 2006)(unpub.); *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990). Regarding the merits of entitlement, the Board affirmed Administrative Law Judge Daniel J. Roketenetz's determination that the opinions of Drs. Lafferty, Younes, and Kim diagnosing the existence of pneumoconiosis were well-reasoned and well-documented, but held that Judge Roketenetz failed to explain his rationale for crediting their opinions over the well-reasoned and well-documented opinion of Dr. Zaldivar, that claimant does not have pneumoconiosis. [2006] [*C.P.*], slip op at 4-5. Therefore, the Board vacated Judge Roketenetz's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 725.309(d) (2000).[3] In light of the Board's determination to remand, the Board declined to address employer's additional allegations of error regarding Judge Roketenetz's finding that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), vacated the award of benefits, and remanded the case for further consideration.[4] [2006] [*C.P.*], slip op. at 5-6.

On remand, the case was reassigned, without objection, to Administrative Law Judge Larry S. Merck (the administrative law judge). The administrative law judge found that the medical evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, therefore, demonstrated a material change in conditions as required by 20 C.F.R. §725.309(d) (2000). Decision and Order on Remand at 8-9. Reviewing the entire record, the administrative law judge found that the evidence established the existence of pneumoconiosis. Decision and Order on Remand at 10. The administrative law judge further found that the Board had not vacated any of Judge Roketenetz's additional findings, and that, therefore, the prior findings that claimant's pneumoconiosis arose out of coal mine employment, that claimant is totally disabled, and that his total disability is

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case doctrine include: 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); *see also Stewart v. Wampler Bros. Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall and Nelson, JJ., concurring and dissenting).

[3] The amendments to the regulation at 20 C.F.R. §725.309 do not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[4] The Board declined to address, as premature, claimant's request for attorney's fees for work performed before the Board.

due to pneumoconiosis, were still in effect. Decision and Order on Remand at 10. Accordingly, the administrative law judge determined that claimant had established all elements of entitlement, and awarded benefits.

On appeal, employer initially renews its prior argument that the law of the United States Court of Appeals for the Sixth Circuit is applicable to this case. Employer also asserts that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and, therefore, established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Employer further contends that the administrative law judge erred in concluding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), and asserts that claimant is precluded from establishing total disability due to pneumoconiosis by a pre-existing, disabling back condition. Employer also continues to assert that the Board's application of the regulation at 20 C.F.R. §718.201(c)[5] to permit the administrative law judge to rely on the more recent evidence, provides an impermissible presumption of latency and progressivity of pneumoconiosis to claimants, and shifts the burden of proving non-progressivity or non-latency to employer. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments regarding the applicable circuit court law, the latency and progressivity of pneumoconiosis, and the alleged preclusive effect of pre-existing, non-respiratory impairments.

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).

Initially, we reject employer's contention that the administrative law judge should have applied the law of the Sixth Circuit to this case, rather than that of the United States Court of Appeals for the Fourth Circuit. As the Director correctly asserts, the Board considered this argument previously and found it to be without merit. [*C.P.*] *v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(*en banc*)(McGranery, J., concurring and dissenting); [*C.P.*] *v. Wolf Creek Collieries*, BRB No. 02-0188 BLA (Dec. 13.

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[5] The revised regulation at 20 C.F.R. §718.201(c) provides that "'pneumoconiosis' is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure." The United States Court of Appeals for the District of Columbia Circuit has held that the revised regulation is not impermissibly retroactive. *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002).

2002)(unpub.)(Dolder, J., concurring and dissenting). Because employer demonstrates no exception to the law of the case doctrine, we decline to reconsider our prior holding on this issue. *Brinkley*, 14 BLR at 1-150-51.

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish 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; *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986)(*en banc*).

In this duplicate claim filed on March 29, 2000, claimant must establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), since the denial of his previous claim. In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996)(*en banc*), the Fourth Circuit held that in order to establish a material change in conditions, claimant must establish by a preponderance of the evidence developed subsequent to the denial of the previous claim, at least one of the elements of entitlement previously adjudicated against him. Claimant's first claim was denied because he did not establish either the existence of pneumoconiosis or a totally disabling respiratory impairment. Director's Exhibit 34. Thus, the evidence developed in this claim must establish one of these elements of entitlement for claimant to obtain review of the merits of his claim.

Employer contends that the administrative law judge erred in finding a material change in conditions established at 20 C.F.R. §725.309 (2000), based upon his finding that the newly submitted evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Specifically, employer asserts that the administrative law judge improperly credited the opinions of Drs. Lafferty and Younes that claimant has pneumoconiosis, that the administrative law judge provided invalid reasons for discounting the contrary opinion of Dr. Zaldivar, and that the administrative law judge failed to weigh all of the relevant evidence together, consistent with the requirements of *Compton v. Island Creek Coal Co.*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000).[6]

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[6] On appeal, no party challenges the administrative law judge's determination to accord lesser probative value to the otherwise well-documented and well-reasoned opinion of Dr. Kim, that claimant has pneumoconiosis, because Dr. Kim's qualifications are not contained in the record. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 7.

Initially, we reject employer's allegation that the administrative law judge erred in considering the reports of Drs. Lafferty and Younes, diagnosing claimant with pneumoconiosis, to be documented and reasoned medical opinions. Employer's Brief at 14. The Board rejected these arguments previously, and because employer demonstrates no exception to the law of the case doctrine, we decline to reconsider our prior holdings on this issue. *Brinkley*, 14 BLR at 1-150-51; [2006] [*C.P.*], slip op. at 4 ; [2002] [*C.P.*], slip op. at 4-5. We further reject, as without merit, employer's assertion that the administrative law judge erred in discounting the opinion of Dr. Zaldivar. Employer's Brief at 16-17. Contrary to employer's argument, the administrative law judge did not discredit Dr. Zaldivar's opinion for failing to offer an opinion with absolute certainty, but reasonably concluded that Dr. Zaldivar's statement, that he could not diagnose sarcoidosis without a biopsy, "cast[] some doubt" on the physician's opinion that the lesions present in claimant's lungs were due to sarcoidosis, and not pneumoconiosis.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). Additionally, there is no merit to employer's contention that the administrative law judge "simply announced," without explanation, that he was according the opinions of Drs. Lafferty and Younes full probative weight. Employer's Brief at 14. Rather, as discussed above, the administrative law judge properly explained why he found that, although Drs. Lafferty, Younes, Kim and Zaldivar had all offered well-reasoned and well-documented opinions, the opinions of Drs. Zaldivar and Kim were entitled to less probative weight than the opinions of Drs. Lafferty and Younes. Decision and Order on Remand at 8. Moreover, contrary to employer's argument, the administrative law judge specifically stated that he had weighed all new evidence together, like and unlike, consistent with *Compton*, 211 F.3d at 211, 22 BLR at 2-174, and acted within his discretion in according the greatest weight to the probative medical opinions of Drs. Lafferty and Younes. Decision and Order on Remand at 8-9. The

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[7] Dr. Zaldivar initially examined claimant in 2000, at which time he diagnosed simple pneumoconiosis, ½, and complicated pneumoconiosis, Category B. After reviewing additional medical records, Dr. Zaldivar testified at deposition that he had revised his diagnosis to one of sarcoidosis. Employer's Exhibit 10 at 26. Dr. Zaldivar opined that the progression of claimant's lung lesions on x-ray and computerized tomography scan was too rapid to be causally related to coal dust, and that, apart from pneumoconiosis, sarcoidosis is "the only disease that can give an appearance like this." Employer's Exhibit 10 at 27. However, Dr. Zaldivar subsequently stated that he would need an open biopsy or a thoroscopic biopsy in order to diagnose sarcoidosis. Employer's Exhibit 10 at 42.

administrative law judge's finding that the weight of the newly developed evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) is supported by substantial evidence and is, therefore, affirmed. Consequently, we affirm the administrative law judge's finding that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *See* [*Rutter*], 86 F.3d at 1362, 20 BLR at 2-235.

We also affirm, as supported by substantial evidence, the administrative law judge's finding that the weight of the medical evidence, old and new, established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). Considering the old and new medical evidence together, including the x-ray and computerized tomography scan interpretations, biopsy evidence, and medical opinions, the administrative law judge permissibly accorded determinative weight to the more recent opinions of Drs. Lafferty and Younes, developed in 2000, as a more accurate representation of claimant's medical condition, than was the medical evidence developed in 1988 and 1989 in support of claimant's prior claim. Decision and Order on Remand at 9-10; 20 C.F.R. §718.201(c); *see Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-8 (1999)(*en banc*). In affirming this finding, we decline to revisit, as law of the case, our prior holding that the administrative law judge's reliance on the more recent medical evidence represents a proper application of the regulation at 20 C.F.R. §718.201(c). [*C.P.*], 23 BLR at 1-34-35; *Brinkley*, 14 BLR at 1-150-51. Therefore, employer's arguments on this issue are rejected.

Employer next contends that, having found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge failed to address whether, assuming claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), claimant has established that his disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 17-18. Employer's argument has merit. After concluding that claimant established the existence of pneumoconiosis, the administrative law judge did not address the other elements of entitlement, finding that Judge Roketenetz's remaining findings, that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), and that his disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), had not been disturbed by the Board, and, therefore, were still in effect. As employer correctly asserts, however, in the prior appeal, in light of the determination that a remand was required for further consideration of whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the Board vacated the award of benefits and declined to address, as premature, employer's allegations of error with respect to Judge Roketenetz's finding that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). [2006] [*C.P.*], slip op. at 5-6. Thus, while admittedly unclear, the effect of

the Board's prior holding was to vacate Judge Roketenetz's findings at 20 C.F.R. §718.204(c).[8]

Therefore, we again remand this case to the administrative law judge for evaluation and weighing of the medical opinion evidence relevant to the issue of the cause of claimant's disability pursuant to 20 C.F.R. §718.204(c). However, we again reject employer's repeated contention that, on remand, the administrative law judge must consider whether claimant's disabling back condition precludes his entitlement to benefits. [2002] [*C.P.*], slip op. at 4-5; *Brinkley*, 14 BLR at 1-150-51. On remand, the administrative law judge must determine, consistent with the standards set forth in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-374 (4th Cir. 2002) and *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), whether pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c).

Finally, we note that claimant's counsel has submitted a statement requesting a fee for services performed before the Board between October 19, 2000 and November 20, 2002, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $7,350.00 for twenty-one hours of legal services at an hourly rate of $350.00. Employer objects, asserting that the Board does not have jurisdiction over the time charges from October 19, 2000 through November 14, 2001, and on January 21, 2002, as these fees were generated by work performed before the administrative law judge, and not the Board. For the remaining time entries, employer asserts that both the hourly rates and the time claimed are excessive and should be reduced. In light of our remand of this case for further findings on the merits of the claim at 20 C.F.R. §718.204(c), we need not address claimant's counsel's fee request at this juncture. We note, however, that as employer contends, most of the time entries are for work that was performed before the administrative law judge. The Board is not authorized to approve these time entries because they are not for services performed before the Board. *See* 33 U.S.C. §928(c). If, on remand, the administrative law judge again awards benefits, claimant may submit a

[8] The administrative law judge correctly found, and employer does not contest, that Judge Roketenetz's findings at 20 C.F.R. §718.203(b) were undisturbed by the Board and remain in effect. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 10. The administrative law judge also correctly found that Judge Roketenetz's finding that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) was affirmed by the Board and remains in effect. *See* [2002] [*C.P.*], slip op. at 8; Decision and Order on Remand at 10. To the extent employer continues to challenge the finding of total disability, we decline to revisit, as law of the case, our prior holding on this issue. *Brinkley*, 14 BLR at 1-150-51; Employer's Brief at 18 n.7.

revised fee petition for attorney's fees for work performed before the Board. *See* 20 C.F.R. §802.203(d)(providing that the fee petition "shall include only time spent on services performed while the appeal was pending before the Board.").

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed in part, and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

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