BRB No. 01-0726 BLA

DONALD L. CRANOR	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
PEABODY COAL COMPANY	)	
	)	
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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Edward Waldman (Eugene Scalia, 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 Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1996-BLA-467) of Administrative Law Judge Mollie W. Neal awarding benefits 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. Claimant filed a claim for benefits on January 11, 1995. Director's Exhibit 1. In a Decision and Order issued on July 25, 1997, the administrative law judge accepted the parties' stipulation that claimant established twenty-eight years of coal mine employment, Hearing Transcript at 9, and based on the date of filing, adjudicated this claim pursuant to 20 C.F.R Part 718. On the merits, the administrative law judge found the evidence of record sufficient to establish the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(1), 718.203(b)(2000), and also sufficient to demonstrate the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b),(c) (2000). Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's award of benefits. *Cranor v. Peabody Coal Co.,* BRB No. 97-1668 BLA (Aug. 20, 1998) (unpub.). In response to employer's Motion for Reconsideration, the Board affirmed the administrative law judge's findings pursuant to Sections 718.202(a)(1), 718.204(b),(c) (2000), but remanded the case for the administrative law judge to reconsider the record evidence, particularly the comments included with Dr. Sargent's x-ray readings, pursuant to Section 718.203(b) (2000), and to determine whether employer established rebuttal of the presumption that claimant's pneumoconiosis arose out of his coal mine employment. *Cranor v. Peabody Coal Co.,* 22 BLR 1-2 (1999).

On November 30, 2000, the administrative law judge issued a Decision and Order on Remand, again finding that employer failed to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment, and benefits were again awarded. Employer thereafter submitted a Motion for Reconsideration since employer's counsel had not been served with a copy of the administrative law judge's briefing order, and also submitted a Motion to Reopen the Record. On January 18, 2001, the administrative law judge entered an Order vacating her prior Decision and Order, but denying the Motion to Reopen the Record. Following the submission of briefs by the parties, the administrative law judge again awarded benefits in a Decision and Order issued on May 15, 2001, finding that

[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, 725 and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

employer failed to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b) (2000).

On appeal, employer challenges the findings of the administrative law judge regarding the cause of claimant's pneumoconiosis pursuant to Section 718.203(b) (2000) and total disability pursuant to Section 718.204(c) (2000).[2] Claimant and the Director, Office of Workers' Compensation Programs, respond, urging affirmance of the Decision and Order of the administrative law judge as supported by substantial evidence.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove 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 (2000). 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*).

[2]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), is now found at 20 C.F.R. §718.204(b) (2001), while the provision pertaining to disability causation previously set out at 20 C.F.R. §718.204 (b) (2000), is now found at 20 C.F.R. §718.204(c) (2001).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand of the administrative law judge is supported by substantial evidence, and that there is no reversible error contained therein. Employer initially contends that the administrative law judge's refusal to reopen the record on remand violated employer's due process rights. Specifically, employer contends that the Board's Decision and Order on Reconsideration constitutes a change in law such that the administrative law judge was required to reopen the record to allow employer to introduce evidence responsive to the new standard, as required by the holding of the Sixth Circuit in *Harlan Bell Coal Co. v. Lemar,* 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990).[3] We find no merit in employer's arguments. Although intervening case law which changes the governing legal standard requires that the parties affected be given an opportunity to respond by submitting additional arguments or evidence, the holding in our prior Decision and Order on Reconsideration did not overrule any prior case law or alter the burden of proof. *See Peabody Coal Co. v. White,* 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager,* 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), *Lemar, supra; Tackett v. Benefits Review Board,* 606 F.2d 640, 10 BLR 2-93 (6th Cir. 1986). We merely held that under the regulatory scheme set forth in 20 C.F.R. Part 718, Dr. Sargent's comments, that the disease entity that he classified as pneumoconiosis under the ILO-U/C system was "not coal workers' pneumoconiosis" and had an unknown etiology, were relevant to the cause of claimant's pneumoconiosis at Section 718.203(b), rather than the existence of pneumoconiosis pursuant to Section 718.202(a). Director's Exhibit 13; Decision and Order on Reconsideration at 4-5.[4]

Employer also contends that the administrative law judge applied an incorrect standard in reaching her determination that reopening the record was unnecessary, arguing that she believed that she could only reopen the record if a change in law had occurred, rather than considering whether a manifest injustice would result if the record were not reopened. Employer further asserts that the administrative law judge failed to provide a rationale regarding this issue which satisfies the requirements of the Administrative Procedure Act (the APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33

[3]Since the miner's last coal mine employment took place in the Commonwealth of Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4]We further find no merit in employer's contention that the administrative law judge erred by relying on the holding in *Adams v. Director, OWCP,* 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989), despite the administrative law judge's incorrect citation, as the court clearly sets forth the burden of proof at Section 718.203 in this decision. *Adams, supra.*

U.S.C. §919(d) and §932(a). We reject this argument. As the administrative law judge did not find that a change in law had occurred, she was not required to consider whether denying employer's request to reopen the record would result in manifest injustice to employer. *Lemar*, *supra*. Moreover, as the administrative law judge has provided a rational basis for her determination, we find no indication that the administrative law judge's explanation fails to satisfy the requirements of the APA. Decision and Order on Remand Awarding Benefits at 3; Order Granting Employer's Motion to Reconsider and Denying Motion to Reopen the Record at 2; *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Accordingly, we affirm the administrative law judge's refusal to reopen the record in the instant case.

Employer also argues that requiring consideration of Dr. Sargent's comments regarding the source of claimant's pneumoconiosis at Section 718.203(b) (2000) shifts the burden of proof to employer and that addressing Dr. Sargent's comments regarding his x-ray classification is inconsistent with the requirements of Section 718.202(a)(4). We fully addressed these allegations, and found them without merit, in our Decision and Order on Reconsideration. Inasmuch as employer has not identified a compelling reason for altering our holdings and no intervening case law has been issued, our prior holdings constitute the law of the case and will not be disturbed. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22; *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

With respect to the administrative law judge's findings under Section 718.203(b) (2000), employer argues that the administrative law judge erred by crediting the opinions of Drs. Simpao and Baker who diagnosed the existence of pneumoconiosis arising out of coal mine employment. Director's Exhibit 11; Claimant's Exhibits 1, 2. The Decision and Order on Remand indicates that the administrative law judge accorded determinative weight to the reports of Drs. Simpao and Baker on the grounds that their diagnoses are well supported by their x-ray readings, the duration of claimant's coal dust exposure, and the objective medical evidence. Decision and Order on Remand Awarding Benefits at 4. We hold that the administrative law judge's preference for these physician's opinions, despite the fact that their radiological qualifications do not equal those of Dr. Sargent,[5] is not inconsistent with her crediting of the x-ray readings provided by the best qualified readers at Section 718.202(a)(1) (2000). At Section 718.203(b), the administrative law judge was required to

[5]The record indicates that Dr. Baker is a B reader, Dr. Simpao has no specialized radiological qualifications, and Dr. Sargent is a B reader and a Board-certified radiologist. Claimant's Exhibit 2; Director's Exhibits 13, 14, 21, 30-32. A B reader is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination by the National Institute of Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E) (2001); 42 C.F.R. §37.51; *Mullins, supra; Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

consider both Dr. Sargent's comments on his x-ray reading and the relevant medical opinions regarding this issue, not just the qualifications of the x-ray readers of record.[6] 20 C.F.R. §718.203(b) (2000).

We further reject employer's assertion that the administrative law judge erred by finding the reports of Drs. Simpao and Baker consistent with claimant's coal dust exposure since this fact does not establish the existence of pneumoconiosis, and creates an irrebuttable presumption that claimant's pneumoconiosis arose out of his coal mine exposure. The record indicates, and the administrative law judge found, that these physicians relied on their x-ray readings and objective test results, in addition to the length of claimant's coal mine employment, in reaching their conclusions. Director's Exhibit 11; Claimant's Exhibits 1, 2.

We also find no merit in employer's contention that the reports of Drs. Simpao and Baker are unreasoned and undocumented because they failed to specifically state why they attributed the changes on claimant's x-ray readings to his coal dust exposure rather than his use of cigarettes or exposure to asbestos. A physician is not required to rule out other possible causes of the x-ray changes before reaching a diagnosis. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127 (1987); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). In addition, both of these physicians indicated that they were aware of claimant's smoking history and asbestos exposure during the course of his coal mine employment. Thus, the administrative law judge was not precluded from according weight to these opinions and her Decision and Order does not violate the requirements of the APA. *Wojtowicz, supra; Hall, supra*.

Finally, we reject employer's contention that the administrative law judge erred by rejecting the opinions of Drs. Fino and O'Bryan, based on their failure to diagnose the existence of pneumoconiosis, since an administrative law judge may accord less weight to a medical opinion regarding the cause of claimant's condition where the physician's underlying premise, that the miner did not have pneumoconiosis, is inaccurate. *Trujillo v.*

[6]We decline to address employer's arguments regarding the administrative law judge's finding that Dr. Sargent's x-ray reading was equivocal and his failure to weigh Dr. Fino's x-ray reading, as we previously held that these errors were harmless and these rulings constitute the law of the case. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984)

Kaiser Steel Corp., 8 BLR 1-472 (1986). Accordingly, we hold that substantial evidence supports the administrative law judge's finding that employer failed to rebut the presumption that claimant's pneumoconiosis arose from his coal mine employment pursuant to Section 718.203(b) (2000). Her determination is, therefore, affirmed.

Pursuant to Section 718.204(c)(4) (2000), employer contends that the administrative law judge erred by crediting the opinions of Drs. Simpao and Baker, that claimant's respiratory impairment prevented him from performing his usual coal mine work. Director's Exhibit 11; Claimant's Exhibits 1, 2. Specifically, employer argues that neither of these physicians were aware of the exertional requirements of claimant's usual coal mine work and that this finding conflicts with the intervening holding in *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) which requires that the instant case be remanded, and the record reopened for the introduction of new evidence. This contention is without merit. In *Cornett*, the court held that an administrative law judge could not rely on a physician's opinion that the miner is not totally disabled without considering whether the doctor was aware of the exertional requirements of claimant's usual coal mine work. In the present case, however, the administrative law judge did not rely on the ultimate conclusions of Drs. Baker and Simpao regarding total disability, but rather compared their assessments of claimant's moderate respiratory ability to the exertional requirements of claimant's coal mine employment, and rationally determined that claimant's impairment prevented him from performing the requirements of his former position as a bull dozer operator. July 25, 1997 Decision and Order Awarding Benefits at11-15; *see Cross Mountain Coal Co., Inc, v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996). Thus, it is not relevant whether these physicians were aware of claimant's specific job requirements. *See Looney v. Jim Walters Resources, Inc.*, 6 BLR 1-361 (1983). We additionally hold that *Cornett* did not change existing law, but merely reiterated the principle that an administrative law judge may discredit a physician's opinion where that physician is unaware of claimant's job requirements. *See Newland v. Consolidation Coal Co.*, 6 BLR 1-286 (1984); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984). Accordingly, we hold that substantial evidence supports the administrative law judge's determination that claimant established total respiratory disability, and this finding is affirmed. The award of benefits is also, therefore, affirmed.

Lastly, claimant's counsel has requested an attorney fee for work performed before the Board on the instant appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $787.50 for 6.30 hours at an hourly rate of $125.00. Employer has not submitted any objection to claimant's counsel's fee request. The Board finds the requested fee to be reasonable in light of the services performed and hereby approves a fee of $787.50, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge