BRB No. 03-0581 BLA

W. WAYNE IRWIN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NORTH CAMBRIA FUEL COMPANY	)	DATE ISSUED: 03/26/2004
	)	
and	)	
	)	
ROCKWOOD CASUALTY 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 Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Sean B. Epstein (Pietragallo, Bosick & Gordon), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (01-BLA-0440) of Administrative Law Judge Robert J. Lesnick rendered on a claim[1] filed pursuant to

[1] Claimant, W. Wayne Irwin, filed his application for benefits on July 7, 2000. Director's Exhibit 1.

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).[2] This case is before the Board for the second time.

In his initial Decision and Order, the administrative law judge credited claimant with 31.9 years of qualifying coal mine employment and concluded that the evidence of record established the existence of pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Considering the evidence relevant to disability causation, the administrative law judge accorded little weight to Dr. Bizousky's opinion because he was not clear as to what role pneumoconiosis played in claimant's disabling respiratory impairment, and he accorded little weight to Dr. Strother's opinion because it was hostile to the Act, i.e., Dr. Strother opined that simple coal workers' pneumoconiosis at claimant's level was rarely, if ever, totally disabling. Instead, the administrative law judge credited the opinion of Dr. Schaaf because it clearly stated that pneumoconiosis was a substantially contributing cause of the miner's total disability. Accordingly, benefits were awarded, to commence from July 1, 2001, the month in which the claim was filed.

Employer appealed the award of benefits to the Board. The Board affirmed the administrative law judge's determinations regarding the responsible operator, length of coal mine employment, the existence of pneumoconiosis, total respiratory disability, and onset date as unchallenged on appeal. The Board, however, agreed with employer that the administrative law judge erred in finding that Dr. Strother had rendered an opinion hostile to the Act inasmuch as Dr. Strother appeared to acknowledge the possibility that simple pneumoconiosis could be totally disabling. Hence, the Board vacated the administrative law judge's disability causation determination and remanded the case for the administrative law judge to reconsider Dr. Strother's opinion, and if reached, to reconsider the opinions of Drs. Strother and Schaaf. *Irwin v. North Cambria Fuel Co.*, BRB No. 02-0319 BLA (Sep. 22, 2002)(unpub.).

On remand, the administrative law judge found that Dr. Strother's opinion was not hostile to the Act inasmuch as it did not foreclose all possibility that simple pneumoconiosis could never be totally disabling. Nonetheless, the administrative law judge found Dr. Strother's opinion entitled to little weight because it was somewhat evasive, ambiguous, and conflicting. The administrative law judge credited Dr. Schaaf's opinion, which clearly stated that both pneumoconiosis and smoking contributed to the miner's total disability. The administrative law judge also found that Dr. Schaaf's opinion was supported by Dr.

[2] 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.

Bizousky's opinion. Accordingly, the administrative law judge found that claimant established total disability due to pneumoconiosis and awarded benefits.

On appeal, employer/carrier argue that the administrative law judge impermissibly exceeded the scope of the Board's remand instructions and ignored the law of the case doctrine when he credited the opinion of Dr. Bizousky. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, party-in-interest, has filed a letter indicating that he is not participating in this appeal.

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).

On appeal, the sole issue raised by employer is that the administrative law judge exceeded the scope of his authority and ignored the law of the case doctrine when, on remand, he credited Dr. Bizousky's opinion. Employer argues that a plain reading of the Board's remand Decision and Order shows that the Board instructed the administrative law judge to reconsider only the opinions of Drs. Schaaf and Strother and that the administrative law judge clearly exceeded the scope of these instructions when he credited the opinion of Dr. Bizousky. Employer asserts that because the Board held that it "was rational" for the administrative law judge to accord little weight to Dr. Bizousky's opinion, and claimant never filed a cross-appeal challenging that finding, the administrative law judge's discrediting of Dr. Bizousky's opinion constitutes the law of the case and cannot be revisited. Citing *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983), employer argues that a departure from the law of the case doctrine is only appropriate where a prior holding is "clearly erroneous" and its continued application would constitute a "manifest injustice," which has not been shown in this case. Claimant responds, arguing that the administrative law judge was merely rectifying a prior error concerning his own misunderstanding of Dr. Bizousky's report on remand and that this was a permissible exercise of his discretion.

It is well established that when the Board vacates an administrative law judge's decision it annuls or sets aside that decision, rendering it of no force or effect and returning the parties to *status quo ante* the administrative law judge's decision. That is, the parties resume their prior position with all rights, benefits, and/or obligations they had prior to the issuance of the administrative law judge's decision. *Dale v. Wilder Coal Co.*, 8 BLR 1-119, 1-120 (1985). The United States Court of Appeals for the Fourth Circuit has made clear that when the Board vacates an administrative law judge's finding and remands the case for reconsideration, the administrative law judge is free to reweigh all of the relevant evidence:

> The [Board] vacated the prior [administrative law judge's] finding and instructed the [administrative law judge] to reconsider the relevant evidence, with no instructions or assurances that the [administrative law judge] was to reach the same result. When the [Board] enters such a remand order, the [administrative law judge] may fully consider whether the claimant satisfied his or her burden of proving the element at issue . . . . The [administrative law judge] did not err when he reconsidered the weight of the relevant evidence, pursuant to the [Board's] order, on the second remand.

Lane v. Union Carbide Corp., 105 F.3d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997).

In the instant case, employer is correct that in its prior decision the Board held that it was rational for the administrative law judge to accord little weight to Dr. Bizousky's opinion because Dr. Bizousky was not clear as to whether he was attributing claimant's lung disease to cigarette smoking, coal dust exposure, or both. *Irwin*, BRB No. 02-0319 BLA, slip op. at 3. The Board also held that it was rational for the administrative law judge to credit Dr. Schaaf's opinion inasmuch as Dr. Schaaf was clear in stating that pneumoconiosis was a substantially contributing cause of the miner's total disability. *Ibid*. Ultimately, however, the Board vacated the administrative law judge's disability causation finding because the administrative law judge erroneously found that Dr. Strother's opinion was in conflict with the Act, when, in fact, Dr. Strother had acknowledged the possibility that simple pneumoconiosis could be totally disabling. Accordingly, the Board vacated the administrative law judge's determination that claimant had established disability causation pursuant to Section 718 and remanded the case for the administrative law judge to reconsider Dr. Strother's opinion and, if reached, to reconsider the opinions of Drs. Strother and Schaaf. *Ibid*.

A review of the administrative law judge's decision reveals that the administrative law judge has complied with the Board's remand instructions and has not exceeded the scope of those instructions by crediting Dr. Bizousky's opinion. As instructed by the Board, the administrative law judge reconsidered the opinion of Dr. Strother, found that it was not hostile to the Act and, therefore, reconsidered it along with Dr. Schaaf's opinion. In weighing these two opinions, by board-certified pulmonary specialists, the administrative law judge accorded less weight to the opinion of Dr. Strother because his responses to questions were evasive, ambiguous and conflicting, and more weight to the opinion of Dr. Schaaf as he had fully explained his opinion. After stating his previous finding that the opinion of Dr. Bizousky was entitled to less weight because Dr. Bizousky was unclear as to what role pneumoconiosis played in claimant's disabling respiratory impairment, the administrative law judge explained that a "[careful review of] the relevant evidence, in accordance with the Board's instructions," compelled him to modify his prior analysis of Dr. Bizousky's opinion. Decision and Order on Remand at 11. Acknowledging that, unlike Drs. Schaaf and Strother, Dr. Bizousky was not a Board-certified pulmonologist, the administrative law judge

nonetheless found that Dr. Bizousky's opinion, that claimant's totally disabling respiratory impairment was caused by restrictive and obstructive lung disease due to cigarette smoking and coal dust exposure, was entitled to "some weight" inasmuch as it was reasoned and documented. Substantial evidence supports this determination. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 162-163, 9 BLR 2-1, 2-7 (3d Cir. 1986); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Brown v. Director, OWCP*, 7 BLR 1-730, 1-733 (1985). Since the administrative law judge found that he had previously made a mistake in finding that Dr. Bizousky's opinion was not clear as to the role pneumoconiosis played in claimant's disability, he was free to correct that mistake on remand. *Lane*, 105 F.3d at 174, 21 BLR at 2-48. In doing so, he did not exceed the scope of the Board's remand order nor did he ignore the doctrine of law of the case. Accordingly, the administrative law judge reasonably explained his determination to credit Dr. Schaaf's opinion as buttressed by Dr. Bizousky's opinion over the contrary opinion of Dr. Strother. Because employer has not otherwise challenged the administrative law judge's credibility determinations, we affirm the administrative law judge's finding that claimant affirmatively established total disability due to pneumoconiosis pursuant to Section 718.204(c)(1), a requisite element of entitlement, inasmuch as this determination contains no reversible error, is rational, and is supported by substantial evidence. Accordingly, the administrative law judge's determination of entitlement is affirmed. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1(1986)(*en banc*).

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