BRB No. 05-0711 BLA

THEODORE BATEMAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 03/28/2006
	)	
Employer/Carrier-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 of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Mary Z. Natkin (Washington & Lee University Legal Clinic), Lexington, Virginia, for claimant.

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

Michelle S. Gerdano (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, 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 (96-BLA-1441) of Administrative Law Judge Stuart A. Levin awarding benefits on a living miner's 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 is the fourth time that this case has been before the Board.[1] In its most recent Decision and Order, the Board vacated the administrative law judge's finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and remanded the case to the administrative law judge for reconsideration of the medical opinions of Drs. Zaldivar and Renn and for consideration of all of the evidence relevant to 20 C.F.R. §718.202(a) in accordance with the decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-263-64 (2003). The Board also vacated the administrative law judge's determination that claimant established that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(c) and instructed the administrative law judge to consider the opinions of Drs. Amjad, Renn, and Zaldivar on remand. *Id*. at 1-265. The Board rejected employer's allegations of error regarding the administrative law judge's weighing of the medical opinions of Drs. Rasmussen, Bembalkar, and Fino pursuant to Sections 718.202(a)(4) and 718.204(c). *Id*. at 1-262, 1-264, 1-270, 1-273. The Board also held that contrary to employer's assertion, the alleged existence of a totally disabling nonrespiratory or nonpulmonary impairment did not preclude an award of benefits in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.[2]

On remand, the administrative law judge determined that claimant established the existence of pneumoconiosis under Section 718.202(a) and total disability due to pneumoconiosis under Section 718.204(c). Accordingly, benefits were awarded. Employer argues that the administrative law judge committed numerous errors when weighing the relevant evidence of record. Employer also argues that the Board erred in holding in its most recent Decision and Order that the Fourth Circuit has not adopted the Seventh Circuit's holding in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has responded with respect to

[1] A complete recitation of the relevant procedural history of this case can be found in *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-258-59 (2003).

[2] 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 West Virginia. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

employer's *Vigna* argument and urges the Board to reject it. Employer has filed a reply reiterating the arguments raised in its initial brief.

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 applicable 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).

In order to establish entitlement to benefits 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. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

When considering the evidence relevant to Sections 718.202(a)(4) and 718.204(c) on remand, the administrative law judge reiterated the findings affirmed by the Board – that Drs. Rasmussen and Bembalkar provided reasoned and documented opinions regarding the existence of pneumoconiosis and total disability due to pneumoconiosis. 2003 Decision and Order at 3-5. The administrative law judge determined that the opinions in which Drs. Fino and Zaldivar agreed that radiographic pneumoconiosis is present supported the conclusions reached by Drs. Rasmussen and Bembalkar. The administrative law judge discredited Dr. Renn's determination that claimant does not have clinical pneumoconiosis because it was contradicted by the weight of the x-ray evidence. The administrative law judge also discredited Dr. Renn's determination that claimant's chronic obstructive pulmonary disease (COPD) is unrelated to coal dust exposure for the reason set forth in his Decision and Order dated June 23, 2000 – which was that Dr. Renn's explanation of his finding was contradicted by the evidence of record. 2003 Decision and Order at 5.

Employer argues that the administrative law judge erred in finding that Dr. Zaldivar's opinion supports the conclusions reached by Drs. Rasmussen and Bembalkar. Employer also alleges that the administrative law judge erred in crediting Dr. Rasmussen's and Dr. Bembalkar's diagnoses because neither physician explained how claimant's coal dust exposure caused his COPD. Employer further maintains that the Board erred in holding otherwise in its prior Decision and Order.

We find no merit in employer's allegations of error. Pursuant to Section 718.202(a), the administrative law judge determined that the opinions of Drs. Rasmussen and Bembalkar supported both a finding of legal pneumoconiosis, in the form of COPD to which coal mine dust exposure was a significant contributing cause, and clinical

pneumoconiosis.[3] 2003 Decision and Order at 4; Director's Exhibit 15; Claimant's Exhibit 1; 20 C.F.R. §718.201(a)(1), (a)(2). Although employer is correct in stating that Drs. Fino and Zaldivar explicitly opined that claimant does not have legal pneumoconiosis, the administrative law judge provided valid rationales for discrediting this aspect of their opinions.

In its most recent Decision and Order, the Board held that the administrative law judge acted within his discretion as fact-finder in according little weight to Dr. Fino's opinion regarding the source of claimant's respiratory impairment, as the doctor's finding that claimant's impairment was variable and, therefore, unrelated to coal dust exposure, was contradicted by the objective evidence of record, which shows that claimant has consistently suffered from at least a mild impairment. *Bateman*, 22 BLR at 1-271; *see* 2003 Decision and Order at 5; 2002 Decision and Order at 12; Employer's Exhibits 2, 3. Because employer has not set forth any compelling argument for altering the Board's prior disposition, it now constitutes the law of the case and we decline to disturb it. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Lastly, contrary to employer's argument, the administrative law judge did not err by incorporating his prior finding regarding Dr. Fino's opinion into his most recent Decision and Order. The administrative law judge's finding was readily discernible, rational, and supported by substantial evidence.

Regarding the opinion in which Dr. Zaldivar ruled out any causal link between coal dust exposure and claimant's respiratory impairment, the Board held in a Decision and Order issued on August 14, 2001, that the administrative law judge rationally found that because no other physician of record diagnosed asthma or indicated that claimant was treated for asthma, Dr. Zaldivar's attribution of claimant's respiratory impairment entirely to this condition was entitled to little weight. The Board further determined that the administrative law judge acted within his discretion as fact-finder in determining that although Dr. Zaldivar opined that claimant's respiratory condition improved when he was hospitalized and placed on treatment for asthma, the record showed frequent hospitalizations of claimant and use of home oxygen without any sustained improvement in claimant's respiratory condition. *Bateman v. Eastern Associated Coal Corp.*, BRB No. 00-1012 BLA, slip op. at 5 (Aug. 14, 2001)(unpub.); *see* 2003 Decision and Order at 5;

[3] Pursuant to 20 C.F.R. §718.202(a)(1), clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition…." In contrast, legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment…[including] any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

2000 Decision and Order at 12; Employer's Exhibits 1, 5. Because employer has not set forth any meritorious arguments in support of changing the Board's prior disposition, it now constitutes the law of the case and we will not disturb it. *Brinkley*, 14 BLR at 1-150; *Bridges*, 6 BLR at 1-989. Moreover, the administrative law judge did not err in incorporating this finding by reference into his most recent Decision and Order, as the finding is completely explained, rational, and supported by substantial evidence.

Regarding Dr. Renn's opinion as to the etiology of claimant's respiratory impairment, in its August 2001 Decision and Order, the Board affirmed the administrative law judge's finding that the opinion in which Dr. Renn ruled out coal dust exposure as a cause of claimant's impairment was entitled to little weight. *Bateman v. Eastern Associated Coal Corp.*, BRB No. 00-1012 BLA, slip op. at 5 (Aug. 14, 2001)(unpub.). Dr. Renn stated that claimant's chronic bronchitis is consistent with a smoking-induced condition as claimant's cough appeared after he stopped smoking, whereas industrial bronchitis causes a cough only while the person is exposed to an irritant, such as coal dust. Dr. Renn also indicated that chronic bronchitis caused by cigarette use usually improves after the smoker quits and, occasionally, disappears entirely. The Board held that the administrative law judge acted within his discretion as fact-finder in determining that Dr. Renn's diagnosis was not well-documented, as the record indicates that claimant's chronic cough began in 1974 and claimant's respiratory condition did not improve after he quit smoking in 1992. *Id*.; 2003 Decision and Order at 5; 2000 Decision and Order at 12; Employer's Exhibits 3, 4. The Board's holding now constitutes the law of the case and we decline to alter it. *Brinkley*, 14 BLR at 1-150; *Bridges*, 6 BLR at 1-989. Lastly, the administrative law judge did not err in incorporating this finding by reference into his most recent Decision and Order, as the finding is completely explained, rational, and supported by substantial evidence.

In light of the foregoing, we affirm the administrative law judge's determination that the opinions of Drs. Rasmussen and Bembalkar outweigh the contrary opinions of record regarding the etiology of claimant's respiratory impairment and are, therefore, sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). Employer suggests that the Board revisit its prior holding affirming the administrative law judge's crediting of these opinions, but we will not do so, as employer has not set forth any persuasive argument in support of its request. *Brinkley*, 14 BLR at 1-150; *Bridges*, 6 BLR at 1-989. We also decline to address employer's arguments regarding the administrative law judge's previously affirmed finding of clinical pneumoconiosis under Section 718.202(a)(1), as employer demonstrates no exception to the law-of-the-case doctrine. *Id*. Substantial evidence supports the administrative law judge's finding that the x-rays and medical opinions weighed together established the existence of pneumoconiosis pursuant to Section 718.202(a). This finding is therefore affirmed.

With respect to the administrative law judge's finding that the opinions of Drs. Rasmussen and Bembalkar were sufficient to establish total disability due to pneumoconiosis pursuant to Section 718.204(c), employer contends that the administrative law judge did not reconsider the medical opinions of Drs. Amjad, Renn, and Zaldivar, as instructed by the Board, but rather, merely reiterated the findings that he had rendered in prior decisions. Employer also takes issue with the administrative law judge's reliance upon the opinions in which Drs. Rasmussen and Bembalkar attributed claimant's totally disabling impairment to coal dust exposure. Employer further maintains that the Board erred in rejecting its argument in its prior appeal that pursuant to the decisions in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), claimant is precluded from an award of benefits under the Act because he suffers from nonrespiratory and nonpulmonary impairments that are totally disabling.

These allegations of error have no merit. Although employer is correct in indicating that the administrative law judge incorporated findings that he had previously made, these findings are ascertainable in the record, fully explained, rational, and supported by substantial evidence. Moreover, as indicated above, the administrative law judge acted within his discretion in discrediting the opinions in which Drs. Fino, Zaldivar, and Renn ruled out any causal connection between coal dust exposure and claimant's totally disabling respiratory impairment. In the Decision and Order that is the subject of this appeal, the administrative law judge rationally determined that Dr. Amjad's statement, that claimant is totally disabled due to pneumoconiosis, was of little probative value because Dr. Amjad was merely restating the findings set forth by other physicians. *Hicks*, 138 F.2d at 533, 21 BLR at 2-335; 2003 Decision and Order at 5; 2000 Decision and Order at 12; Claimant's Exhibits 1, 3.

Because the Board previously affirmed the administrative law judge's crediting of Drs. Rasmussen's and Bembalkar's opinions as well-reasoned, well-documented, and supportive of claimant's burden under Section 718.204(c) and employer has not advanced any compelling argument for altering the administrative law judge's findings, we reject employer's allegations of error regarding the administrative law judge's reliance upon these opinions in his most recent Decision and Order. *Brinkley*, 14 BLR 1-147, 1-150; *Bridges*, 6 BLR 1-988, 1-989. We affirm, therefore, the administrative law judge's determination that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

Finally, we decline to address, on law-of-the-case grounds, employer's argument that the Fourth Circuit adopted the Seventh Circuit's holding in *Vigna* which precludes an award of benefits if a miner suffers from a totally disabling impairment that is not respiratory or pulmonary in nature. Employer has not set forth any compelling arguments

in support of altering the Board's prior holding that unlike the Seventh Circuit, the Fourth Circuit has not held that a disability from a nonpulmonary or nonrespiratory condition takes a claimant outside the scope of the Act. *Bateman*, 22 BLR at 1-266-67.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge