BRB No. 03-0544 BLA

CORBIN WRIGHT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MANNING COAL CORPORATION	)	
	)	DATE ISSUED: 05/28/2004
and	)	
	)	
KENTUCKY CENTRAL 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 of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

H. Brett Stonecipher (Ferreri & Fogle), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Howard Radzely, 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 the 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 (90-BLA-2381) of Administrative Law Judge Thomas F. Phalen, Jr. 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 involves a duplicate claim filed on March 22, 1989[2] and is before the Board for the fourth time. In an Order of Dismissal dated December 8, 1992, Administrative Law Judge Bernard J. Gilday, Jr. found that claimant's 1986 and 1989 claims were untimely filed pursuant to 20 C.F.R. §725.308 (2000). Accordingly, Judge Gilday dismissed claimant's case. By Decision and Order dated July 27, 1994, the Board vacated Judge Gilday's dismissal of the case and remanded it for a formal hearing and reconsideration of the timeliness issue pursuant to 20 C.F.R. §725.308 (2000). *Wright v. Manning Coal Corp.*, BRB No. 93-0838 BLA (July 27, 1994) (unpublished). The Board further instructed Judge Gilday that, if he found that the miner's claim was timely filed, he should determine whether claimant withdrew his 1986 claim pursuant to 20 C.F.R. §725.306 (2000), whereby the 1986 claim would be considered not to have been filed, or whether the claim should be considered to have been dismissed or denied by reason of abandonment pursuant to 20 C.F.R. §725.409 (2000). *Id.*

Claimant subsequently filed a motion for reconsideration of the Board's decision. By Decision and Order on Reconsideration dated December 23, 1996, the Board

[1] The Department of Labor (DOL) 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.

[2] The relevant procedural history of the instant case is as follows: Claimant initially filed a claim for benefits on March 24, 1986. Director's Exhibit 17. The district director denied the claim on August 27, 1986. *Id.* By letter dated September 24, 1986, claimant appealed the district director's decision and indicated his intent to submit additional evidence. *Id.* On September 29, 1986, the district director found that claimant's 1986 claim was untimely filed. *Id.* By letter dated November 4, 1986, claimant advised the Department of Labor that he did not intend to pursue his Federal black lung claim. *Id.* By Order of Dismissal dated November 7, 1986, the district director found that claimant's 1986 claim was untimely filed. *Id.* The district director also found that the evidence was insufficient to establish a finding of pneumoconiosis or a totally disabling respiratory impairment. *Id.* The district director, therefore, dismissed claimant's appeal in accordance with his request. *Id.* There is no indication that claimant took any further action in regard to his 1986 claim.

Claimant filed a second claim on March 22, 1989. Director's Exhibit 1.

modified its 1994 Decision and Order, holding, *inter alia*, that if the administrative law judge, on remand, found that the miner's claim was timely filed, he should address whether the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000) in accordance with the standard set out in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). *Wright v. Manning Coal Corp.*, BRB No. 93-0838 BLA (Dec. 23, 1996) (Decision and Order on Recon.) (unpublished).

Due to Judge Gilday's unavailability, Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) considered the claim on remand. After crediting claimant with nineteen years of coal mine employment, the administrative law judge determined that claimant's 1986 claim was timely filed. The administrative law judge further found that claimant's 1986 claim was not a pending, viable claim. Because the administrative law judge found that claimant's 1986 claim was abandoned, the administrative law judge considered claimant's 1989 claim to be a duplicate claim. Because the administrative law judge found that the evidence was sufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he considered claimant's 1989 claim on the merits. The administrative law judge found that the x-ray evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) (2000) and that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b) (2000). The administrative law judge also found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000) [3] and that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated March 28, 2000, the Board affirmed the administrative law judge's length of coal mine employment finding and his findings pursuant to 20 C.F.R. §§725.309 (2000), 718.202(a)(1) (2000) and 718.203(b) (2000) as unchallenged on appeal. *Wright v. Manning Coal Corp.*, BRB No. 99-0681 BLA (Mar. 20, 2000) (unpublished). The Board also affirmed the administrative law judge's finding that claimant's 1986 claim was timely filed. *Id.* The Board further affirmed the administrative law judge's findings that claimant's 1986 claim was abandoned and that his 1989 claim, therefore, was a duplicate claim. *Id.* Although the Board affirmed the administrative law judge's findings that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000), the Board vacated the administrative law judge's finding that the medical opinion evidence was sufficient to

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

establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000) and remanded the case for further consideration. *Id.* The Board further instructed the administrative law judge that if he found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000), he should determine whether claimant's total disability was due at least in part to pneumoconiosis. *Id.*

On remand for the second time, the administrative law judge found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). Weighing all of the relevant evidence, both like and unlike together, the administrative law judge found that the evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(c) (2000). The administrative law judge also found that the evidence was sufficient to establish that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated October 19, 2001, the Board affirmed the administrative law judge's "finding that Dr. Williams's opinion, even when considered in light of the contrary probative evidence, [was] sufficient to establish a totally disabling respiratory impairment." *Wright v. Manning Coal Corp.*, BRB No. 01-0215 BLA (Oct. 19, 2001) (unpublished). The Board, however, remanded the case to the administrative law judge for his consideration of whether the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to the revised disability causation standard set out at 20 C.F.R. §718.204(c). *Id.*

Employer filed a motion for reconsideration with the Board on November 19, 2001. Prior to any ruling on its motion for reconsideration, employer filed a petition for review with the United States Court of Appeals for the Sixth Circuit. Claimant filed a motion, requesting the Sixth Circuit to dismiss employer's petition for review for lack of jurisdiction. On March 14, 2002, the Board summarily denied employer's motion for reconsideration. *Wright v. Manning Coal Corp.*, BRB No. 01-0215 BLA (Mar. 14, 2002) (Order on Recon.) (unpublished). By Order dated March 26, 2002, the Sixth Circuit granted claimant's motion to dismiss employer's appeal for lack of jurisdiction. *Manning v. Wright*, No. 01-4327 (6th Cir. Mar. 26, 2002) (Order) (unpublished).

On remand for the third time, the administrative law judge found that the evidence was sufficient to establish that claimant's pneumoconiosis was "a substantially contributing cause of his totally disabling pulmonary impairment." Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge, in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), applied an improper standard. Employer also argues that the administrative law judge erred in finding the evidence sufficient to establish total disability pursuant to 20 C.F.R.

§718.204(b). The Director, Office of Workers' Compensation Programs, has filed a limited response, contending that the administrative law judge applied a proper disability causation standard in finding the evidence sufficient to establish that claimant's total disability was due to pneumoconiosis. Claimant has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

Employer contends that the administrative law judge's finding of a totally disabling respiratory impairment is "unsupported by the evidence of record." Employer's Brief at 2. The Board previously affirmed the administrative law judge's finding that "Dr. Williams's opinion, even when considered in light of the contrary probative evidence, [was] sufficient to establish a totally disabling respiratory impairment." *Wright v. Manning Coal Corp.*, BRB No. 01-0215 BLA (Oct. 19, 2001) (unpublished).

The law of the case doctrine is discretionary. *See Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988). The Board, however, has held that it will adhere to its initial decision when a case is on its second appeal unless there has been a change in the underlying factual situation; intervening controlling authority demonstrates the initial decision was erroneous; or the first decision was clearly erroneous and to let it stand would produce a manifest injustice. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989).

In his September 29, 2000 Decision and Order on Remand, the administrative law judge considered whether Dr. Williams's opinion[4] was sufficient to establish total

[4] Dr. Williams examined claimant on April 19, 1989. In a report dated April 19, 1989, Dr. Williams diagnosed: (1) COPD with 1/0 pneumoconiosis and pulmonary emphysema and (2) Coronary artery disease with angina (by history). Director's Exhibit 7. Dr. Williams attributed claimant's cardiopulmonary diagnosis to (1) smoking; (2) genetic; (3) allergens with intrinsic bronchitis and asthma; and exposure to coal dust. *Id.* Dr. Williams attributed claimant's cardiovascular disease to (1) genetic and (2) smoking. *Id.* Dr. Williams further stated that:

> [Claimant] has moderately severe impairment of the pulmonary system primarily due to his emphysema. He has heart disease and angina. I would classify this as functional class 2, therapeutic classification C. His heart disease would prevent him from doing strenuous work.

Director's Exhibit 7.

disability pursuant to 20 C.F.R. §718.204(c)(4) (2000). The administrative law judge stated that:

> Dr. Williams diagnosed and addressed the claimant's emphysema on both of his examinations. His report is thus more thorough than Dr. Baker's and entitled to more weight. In determining the impairment resulting from all of the claimant's pulmonary conditions, Dr. Williams considered the positive examination findings, the claimant's symptoms, and his histories, including that of wheezing and chronic bronchitis. Although the pulmonary function and arterial blood gas studies produced results within the normal range, Dr. Williams concluded that the claimant had a moderately severe impairment, primarily due to the emphysema. His conclusion does not, in any way, rest on the claimant not being further exposed to coal dust. I find Dr. Williams's opinion to be documented and well-reasoned.

2000 Decision and Order on Remand at 4 (footnote omitted).

The United States Court of Appeals for the Sixth Circuit has consistently held that the administrative law judge, as fact-finder, is to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the opinion is based, in determining whether the opinion is documented and reasoned. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Upon reexamination, we hold that the administrative law judge erred in failing to provide any basis for finding that Dr. Williams's finding of a moderately severe pulmonary impairment was sufficiently reasoned.[5] Because application of the law of the case

[5] In his report, Dr. Williams listed claimant's self-described complaints and symptoms. Director's Exhibit 7. However, there is no indication that Dr. Williams based his disability assessment on claimant's complaints and symptoms. Even if he had done so, it would have been an insufficient basis on which to make such an assessment. *See Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984) (A physician's recitation of symptoms does not establish the existence or severity of a respiratory or pulmonary impairment.). On physical examination, Dr. Williams noted that claimant's thorax and lungs were normal on inspection and palpation. Director's Exhibit 7. Although Dr. Williams noted that there was dullness on percussion at the bases and reduced breath sounds on auscultation, he did not indicate that his disability assessment was based upon these findings. *Id.*

doctrine would "work a manifest injustice" in this case, we hold that it is not controlling on the issue of total disability pursuant to 20 C.F.R. §718.204(b). We, therefore, vacate the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b) and remand the case for reconsideration. On remand, the administrative law judge is instructed to reconsider whether Dr. Williams's opinion that claimant suffers from a moderately severe pulmonary impairment is sufficiently reasoned.[6] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In light of our decision to vacate the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See Adams v. Director, OWCP* 886 F. 2d. 818, 13 BLR 2-52 (6th Cir. 1989).

If Dr. Williams had interpreted claimant's non-qualifying objective studies as revealing the existence of a pulmonary impairment, the administrative law judge could not have discredited his opinion solely because the studies that the doctor relied upon were non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). However, in this case, Dr. Williams did not interpret claimant's non-qualifying objective test results as demonstrating any type of pulmonary impairment.

[6] On remand, should the administrative law judge find that Dr. Williams's opinion is sufficiently reasoned, we reject employer's contention that the administrative law judge erred in determining that Dr. Williams's finding of moderately severe pulmonary impairment is sufficient to support a finding of total disability. Given the exertional requirements of claimant's usual coal mine employment, the administrative law judge reasonably determined that a finding of a moderately severe pulmonary is sufficient to support a finding of total disability. *See* 20 C.F.R. §718.204(b)(2)(iv); 2000 Decision and Order on Remand at 4-5.

Accordingly, the administrative law judge's 2003 Decision and Order on Remand awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge