BRB No. 05-0713 BLA

CORBIN WRIGHT	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MANNING COAL CORPORATION	)	DATE ISSUED: 11/15/2005
	)	
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.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, 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,

[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

1989[2] and is before the Board for the fifth 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 *Wright v. Manning Coal Corp.*, BRB No. 93-0838 BLA (July 27, 1994) (unpublished).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 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*

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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.

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 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.*

[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).

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' 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" pursuant to the revised disability causation standard set out at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

By Decision and Order dated May 28, 2004, the Board, upon reexamination, held that the administrative law judge erred in failing to provide any basis for finding that Dr. Williams' finding of a moderately severe pulmonary impairment was sufficiently reasoned. *Wright v. Manning Coal Corp.*, BRB No. 03-0544 BLA (May 28, 2004) (unpublished). Acknowledging that it had previously affirmed the administrative law judge's finding that Dr. Williams' opinion 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 held that because application of the law of the case doctrine would "work a manifest injustice" in this case, the Board's prior finding was not

controlling on the issue of total disability pursuant to 20 C.F.R. §718.204(b). *Id.* The Board, therefore, vacated the administrative law judge's findings that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), and, in light of this decision, further vacated the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) and remanded the case for reconsideration. On remand, the administrative law judge was instructed to reconsider whether Dr. Williams' opinion that claimant suffers from a moderately severe pulmonary impairment is sufficiently reasoned to establish that claimant is totally disabled due to pneumoconiosis. Finally, rejecting employer's arguments to the contrary, the Board held that, assuming he again found Dr. Williams' opinion to be sufficiently reasoned, the administrative law judge had reasonably determined that Dr. Williams' diagnosis of a moderately severe pulmonary impairment is sufficient to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.* On remand for the fourth time, the administrative law judge found that the opinion of Dr. Williams was reasoned, and thus, sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2)(iv), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding the evidence, specifically Dr. Williams' opinion, sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Neither claimant nor the Director, Office of Workers' Compensation Programs, has 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 initially asserts that the administrative law judge again erred in finding Dr. Williams' opinion, that claimant suffers from a moderately severe pulmonary impairment, is sufficiently reasoned to support an award of benefits. We disagree.

In his May 23, 2005 Decision and Order on Fourth Remand, the administrative law judge considered whether Dr. Williams' 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:

disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge initially noted that in its May 28, 2004 decision, the Board concluded, *inter alia*, that:

> 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.[5]

2005 Decision and Order on Remand at 5, quoting *Wright v. Manning Coal Corp.*, BRB No. 03-0544 BLA (May 28, 2004) (unpublished).

The administrative law judge stated that he disagreed with the Board's conclusion and found that Dr. Williams did interpret claimant's non-qualifying test results as demonstrating pulmonary impairment. 2005 Decision and Order on Remand at 5. The

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> [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.

[5] The Board also stated:

> 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.

Wright v. Manning Coal Corp., BRB No. 03-0544 BLA (May 28, 2004) (unpublished).

administrative law judge noted that in 1986, Dr. Williams documented a mild pulmonary impairment and concluded that claimant had the respiratory capacity to perform his usual coal mine work, but in 1989 Dr. Williams documented a moderately severe respiratory impairment and concluded that claimant is totally disabled. 2005 Decision and Order on Remand at 6. Comparing the underlying evidence supporting each report, the administrative law judge acknowledged that the reports contained similarities, but found significant the fact that the pulmonary function and blood gas study results, while still non-qualifying, were lower in 1989 than in 1986. 2005 Decision and Order on Remand at 6. The administrative law judge stated that while Dr. Williams did not explicitly identify a change in claimant's condition that demonstrated that claimant was now totally disabled, there was nonetheless "a clear inference that Dr. Williams based his determination on the differences between the 1986 and 1989 reports, namely, the [arterial blood gas] and [pulmonary function study] results." 2005 Decision and Order on Remand at 6. The administrative law judge further stated that, in his opinion, Dr. Williams "did not have to specifically spell out that he based his decision on these test results" as his report contained the medical evidence to support his conclusion. 2005 Decision and Order on Remand at 5. In addition, the administrative law judge stated that it was clear to him that Dr. Williams did not base his opinion solely on claimant's complaints, but that he considered these complaints in light of results of his physical examination. 2005 Decision and Order on Remand at 5.

Employer specifically asserts that Dr. Williams' 1986 and 1989 pulmonary function study results are nearly identical, and that the PO2 blood gas value also remained nearly identical, and that, therefore, especially considering that claimant had aged three years between testing, the administrative law judge mischaracterized the evidence in stating that the 1989 results were lower. Employer's Brief at 10-11. In addition, employer asserts that the administrative law judge erred in inferring that Dr. Williams based his 1989 opinion on the change in objective study results, as Dr. Williams did not refer to his prior test results and there is no evidence in the record that the physician was even aware that he had previously examined claimant in 1986. Employer's Brief at 10. Employer also contends that the fact that the test results are so similar emphasizes the fact that Dr. Williams' opinion is unreasoned, as there is no basis for his change in opinion from no disability in 1986 to total disability in 1989, and further confirms that Dr. Williams' diagnosis of total disability "has virtually nothing to do with [claimant's] pulmonary problems" and is solely related to his heart disease. Employer's Brief at 11, 12.

Contrary to employer's arguments, while a review of Dr. William's 1986 and 1989 objective test results reveals that the FEV_1 value in both years was 91 percent of predicted, and the FVC result dropped only slightly from 104 to 103 percent of predicted between 1986 and 1989, claimant's MVV results dropped from 85 percent of predicted in 1986 to only 70 percent of predicted in 1989, and claimant's resting PCO2 and PO2 blood gas values, and exercise PCO2 values were all lower in 1989 than in 1986.

Director's Exhibits 6, 8, 17. In addition, the administrative law judge specifically acknowledged that the phrasing of Dr. Williams' opinion that claimant's "heart disease would prevent him from doing strenuous work" could be interpreted as one diagnosing total disability solely due to heart disease, but acted within his discretion in finding that, considering that Dr. Williams was responding to a question concerning impairment due to pulmonary disease, and taking the full context of the physician's report into account, Dr. Williams had determined that claimant is totally disabled from a pulmonary standpoint. Director's Exhibit 7; 2005 Decision and Order at 6 n. 3. Thus, as Dr. Williams specifically listed the results of his objective testing in both his 1986 and 1989 reports, as the administrative law judge's observation regarding the lower 1989 objective test results is supported by substantial evidence in the record, and as the administrative law judge fully set forth the basis for his conclusions after examining the validity of the reasoning of Dr. Williams' medical opinion in light of the studies he conducted and the objective indications upon which his opinion is based, we affirm the administrative law judge's determination that Dr. Williams' diagnosis of a moderately severe pulmonary impairment is sufficiently reasoned to support entitlement to benefits. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Employer next asserts that Dr. Williams' diagnosis of a moderately severe respiratory impairment is insufficient, as matter of law, to support a finding of total disability pursuant to 20 C.F.R. §718.204(b). Employer's Brief at 11. As noted above, in its prior decision the Board specifically rejected employer's contention, holding that given the exertional requirements of claimant's usual coal mine employment, the administrative law judge reasonably determined that Dr. Williams' diagnosis was sufficient to support a finding of total disability. While the law of the case doctrine is discretionary, s*ee Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988), employer has failed to demonstrate that there has been a change in the underlying factual situation, that 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). Therefore, we decline to revisit this issue.

Furthermore, as the administrative law judge's additional findings, that Dr. Williams' 1989 opinion supports a finding that claimant's totally disabling pulmonary impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), is supported by the record[6] and employer has not raised any specific allegations of error with respect to these findings, they are hereby affirmed. *See Adams v. Director, OWCP*, 886 F.2d 818,

[6] As noted above, Dr. Williams diagnosed COPD with 1/0 pneumoconiosis and pulmonary emphysema, attributed these cardiopulmonary diagnoses in part to coal dust exposure, and further stated that claimant's moderately severe pulmonary impairment, which the administrative law judge found was totally disabling, is primarily due to his emphysema. Director's Exhibit 7.

13 BLR 2-52 (6th Cir. 1989); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The law is well established that whether an opinion is reasoned and documented is a determination to be made by the fact finder based on the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical conclusion is based. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)*; Peabody Coal Co. v. Groves*, 277 F.3d 829, 834 (6th Cir. 2002)*; Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983). In this case the administrative law judge permissibly credited Dr. Williams' opinion that claimant is totally disabled due to pneumoconiosis. Consequently, we affirm the administrative law judge's award of benefits.

Claimant's counsel has submitted a complete, itemized statement requesting a fee for services performed in the prior appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $1,637.50 representing 5.25 hours of legal services at an hourly rate of $250.00, .50 hours of legal services at an hourly rate of $200.00, and 3.00 hours of legal services at an hourly rate of $75.00. We find the hourly rate requested by attorney Wolfe to be excessive in light of the services performed and hereby reduce the hourly rate of attorney Wolfe to $225.00. *See generally Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). In addition, as a request for approval of a fee before the Board may not include time spent in services at another level of the adjudication process, we deny counsel's request for a fee for the itemized services performed on June 13, 2003, July 3, 2003, July 15, 2003, August 11, 2003, April 4, 2004, April 16, 2004, and April 19, 2004. *See* 20 C.F.R §§725.366(a), 802.203(d). As the fee petition is otherwise in order, counsel is awarded a fee of $1,293.75 representing 5.25 hours of legal services at an hourly rate of $225.00 and 1.50 hours of legal services at an hourly rate of $75.00 to be paid directly to him by employer. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's 2005 Decision and Order on Remand awarding benefits is affirmed and claimant's counsel is awarded a fee of $1,293.75.

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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JUDITH S. BOGGS
Administrative Appeals Judge