BRB No. 03-0135 BLA

DON JEAN MORGAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/31/2003
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand - Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John H. Shumate, Jr., Mount Hope, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (Howard M. Radzely, Acting 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 on Remand - Awarding Benefits (1988-BLA-2430) of Administrative Law Judge Daniel L. Leland 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 has been before the Board previously and has a lengthy procedural history as set forth in the Board's prior Decision and Order. *Morgan v. Peabody Coal Co.*, BRB No. 01-0727 BLA, slip op. at 2, n.2 (Jun. 28, 2002) (unpub.). In that decision, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to reevaluate the medical evidence pursuant to Section 718.202(a)(4). In particular, the Board vacated the administrative law judge's weighing of the medical opinions by the West Virginia Occupational Pneumoconiosis Board (WVOPB) and Drs. Rasmussen, Gajendragadkar, and S. Hasan, holding that the administrative law judge had not adequately discussed his rationale for crediting these opinions.[2] Consequently, the Board remanded the case for

[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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The Board, however, affirmed the administrative law judge's decision to accord

the administrative law judge to render a specific determination of whether these opinions are reasoned and documented. *Morgan*, slip op. at 6-7. Furthermore, the Board rejected employer's challenges to the administrative law judge's findings under Section 718.204(c) and affirmed the administrative law judge's disability causation findings. *Morgan*, slip op. at 7.

On remand, the administrative law judge again awarded benefits, finding that the medical opinions of Drs. Rasmussen and Gajendragadkar are well reasoned and documented and, thus, sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4). The administrative law judge therefore found that, based on the physicians' opinions, claimant has established the existence of pneumoconiosis. Furthermore, the administrative law judge stated that he adhered to his earlier finding that claimant has established that his pneumoconiosis is a contributing cause of his total disability and that the onset date of total disability was October 1, 1987. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the medical evidence of record sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4). In addition, employer contends that the administrative law judge erred in failing to consider the medical opinion of Dr. Zaldivar under Section 718.202(a)(4), and then failed to weigh all types of relevant evidence together pursuant to the holding of the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Lastly, employer requests that the Board reconsider its prior affirmance of the administrative law judge's findings under Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with employer that the administrative law judge erred in his weighing of the medical opinions of Drs. Rasmussen and Gajendragadkar, as he failed to adequately discuss his findings. However, the Director urges that the Board reject employer's remaining arguments as lacking merit.

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

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little weight to the opinions of Drs. Zaldivar and M. Hasan at 20 C.F.R. §718.202(a)(4). *Morgan v. Peabody Coal Co.*, BRB No. 01-0727 BLA, slip op. at 3, n.3 and 6, n.5 (Jun. 28, 2002) (unpub.). Additionally, the Board affirmed the administrative law judge's findings that the medical evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3). *Id*., slip op. at 3, n.3.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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 contains no reversible error. On appeal, employer contends that the administrative law judge erred in finding that the medical opinions of Drs. Rasmussen and Gajendragadkar are sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4).[3] Employer maintains that these physicians' diagnoses are insufficient to constitute legal pneumoconiosis under the applicable standard, and that the administrative law judge cited impermissible rationales in support of his reliance on their opinions. We disagree.

With regard to the opinion of Dr. Rasmussen, employer asserts that the opinion is speculative, unexplained and unsupported by the documentary evidence. The Director agrees that the administrative law judge provided an insufficient analysis of Dr. Rasmussen's opinion because he failed to discuss and weigh the physician's mistaken belief that claimant's x-ray evidence was positive for pneumoconiosis. These arguments lack merit.

In concluding that the evidence was sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge acted within his discretion in finding Dr. Rasmussen's opinion to be the most persuasive and entitled to determinative weight based on its documentation and reasoning. Decision and Order at 3. The administrative law determined that Dr. Rasmussen's diagnosis of a respiratory impairment related to coal dust exposure and smoking was well-reasoned and supported by its underlying documentation, *i.e.*, physical examinations of claimant, chest x-ray, pulmonary function testing and blood gas studies, and employment and social histories. Decision and Order at 3; Director's Exhibits 13, 22, 23, *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In addition, the administrative law judge addressed and rejected employer's argument that Dr.

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[3] The parties do not challenge the administrative law judge's weighing of the medical opinions of Dr. S. Hasan and the WVOPB and his finding that these opinions are insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Therefore, these findings are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Rasmussen's opinion should be discredited because his diagnosis of coal workers' pneumoconiosis was based on a positive chest x-ray, while a preponderance of the x-ray evidence was previously found to be negative for pneumoconiosis. Decision and Order at 3 n.4. Contrary to employer's and the Director's contentions, the administrative law judge fully discussed Dr. Rasmussen's opinion, that claimant had both coal workers' pneumoconiosis and chronic bronchitis, and, within a reasonable exercise of his discretion as fact-finder, credited the physician's diagnosis of chronic bronchitis due to smoking and coal dust exposure as supportive of a finding of legal pneumoconiosis. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *Collins*, 21 BLR 1-181; *Clark*, 12 BLR 1-149; *see also* 20 C.F.R. §718.201; *Nance v. Benefits Review Board*, 861 F.2d 68, 12 BLR 2-31 (4th Cir. 1988).

With regard to Dr. Gajendragadkar's opinion, employer contends that the administrative law judge erred in finding that the physician's diagnosis of chronic obstructive pulmonary disease (COPD) constituted a diagnosis of legal pneumoconiosis. Contrary to employer's contention, however, the administrative law judge accurately determined that Dr. Gajendragadkar diagnosed COPD and also related that condition to claimant's coal mine employment. Thus, within a reasonable exercise of his discretion, the administrative law judge found that Dr. Gajendragadkar's diagnosis is supportive of a finding of legal pneumoconiosis under the purview of Section 718.201. Decision and Order at 3-4; Director's Exhibits 22, 28; 20 C.F.R. §718.201; *Nance*, 861 F.2d 68, 12 BLR 2-31; *see also Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Employer further contends, and the Director concurs, that the administrative law judge erred in according enhanced weight to Dr. Gajendragadkar's opinion, based on his status as claimant's treating physician, without adequate explanation. Employer's and the Director's arguments are without merit. In evaluating this opinion, the administrative law judge determined that the physician stated that claimant had been his patient since 1983, and that Dr. Gajendragadkar examined claimant and reviewed the medical reports of Dr. Rasmussen before rendering his opinion. Decision and Order on Remand at 3. The administrative law judge did not improperly accord an automatic preference to the opinion, but rather considered the physician's treating physician status as a factor along with the documentation underlying the opinion, and then acted within his discretion in crediting the opinion as well reasoned. Decision and Order on Remand at 4; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Employer further contends that the administrative law judge erred in failing to consider the contrary medical opinion of Dr. Zaldivar under Section 718.202(a)(4), and then erred in failing to weigh all types of relevant evidence together at Section 718.202(a) in accordance with *Compton*, 211 F.3d 203, 22 BLR 2-162. Employer's arguments lack support in the record. In his Decision and Order on Remand issued on March 28, 2001,

the administrative law judge determined that Dr. Zaldivar was the only physician of record who ruled out a diagnosis of pneumoconiosis, and the administrative law judge found that Dr. Zaldivar's opinion was entitled to minimal weight because it was based on a purely medical, not legal, definition of pneumoconiosis.4 The administrative law judge further found that the preponderance of the medical opinion evidence established the existence of pneumoconiosis at Section 718.202(a)(4), and after considering all of the evidence at Section 718.202(a), the administrative law judge concluded that claimant established the existence of pneumoconiosis. On appeal, the Board affirmed the administrative law judge's finding that the medical opinion of Dr. Zaldivar was entitled to little weight at Section 718.202(a)(4), and this holding is governed by the law of the case doctrine and will not be disturbed. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). The Board remanded the case specifically for the administrative law judge to further explain his decision to credit the opinions by the WVOPB and Drs. S. Hasan, Rasmussen and Gajendragadkar by making a determination as to whether the opinions are reasoned and documented. *See Morgan*, slip op. at 3 n.3, 6 n.5. On remand, the administrative law judge determined that the opinions of Drs. Rasmussen and Gajendragadkar were reasoned and documented, and that a preponderance of the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). Decision and Order on Remand at 3-4. The administrative law judge explicitly considered each physician's diagnosis in relation to the legal definition of pneumoconiosis, noting that he had previously found that the x-ray evidence did not establish clinical pneumoconiosis. Decision and Order on Remand at 3, n. 4. The administrative law judge again determined, however, that evidence that does not establish clinical pneumoconiosis is not evidence against establishing legal pneumoconiosis, which

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4 Although employer did not challenge the administrative law judge's weighing of Dr. Zaldivar's opinion in its last appeal to the Board, employer now argues that Dr. Zaldivar did not limit his inquiry to claimant's negative x-rays, but also considered the source of claimant's obstructive impairment and affirmatively linked the low diffusing capacity and resting hypoxemia to claimant's obesity and smoking-induced bronchitis. Employer's Brief at 19. Employer's arguments, however, were not timely raised and the administrative law judge thus adhered to his previous determination that Dr. Zaldivar's opinion was entitled to little weight. Decision and Order on Remand at 2, n. 1. Moreover, employer's brief quotes from Dr. Zaldivar's report that "[i]n this instance I do not have an explanation for all of the abnormalities found….but because the chest xray is negative for pneumoconiosis, the problems are found are not the result of coal worker's pneumoconiosis….therefore I am able to state with a reasonable degree of medical certainty that [claimant's] impairment is not related, nor the result of his mine work, because [claimant] does not have pneumoconiosis." Employer's Brief at 11; Director's Exhibit 26.

includes a broader category of respiratory or pulmonary impairments arising out of coal mine employment, *see Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), and reasonably concluded that claimant established the existence of pneumoconiosis at Section 718.202(a). Decision and Order on Remand at 2-4;*see Compton*, 211 F.3d 203, 22 BLR 2-162. The administrative law judge's findings pursuant to Section 718.202(a) are supported by substantial evidence and thus are affirmed.

Finally, employer requests that the Board reconsider its prior affirmance of the administrative law judge's disability causation finding pursuant to Section 718.204(c). Employer contends that the administrative law judge, in his earlier decision, erred in finding that pneumoconiosis was a necessary cause of claimant's total disability, arguing that claimant suffered from non-respiratory disabilities which rendered claimant totally disabled and, thus, benefits are precluded under the Act. Employer's Brief at 19-24. In addition, employer argues that the administrative law judge erred in his specific finding that Dr. Rasmussen's opinion is sufficient to establish disability causation pursuant to Section 718.204(c). The Board, in its two previous decisions, has addressed and rejected these arguments and affirmed the administrative law judge's findings under Section 718.204(c). *Morgan*, BRB No. 01-0727 BLA, slip op. at 7; *Morgan v. Peabody Coal Co.*, BRB No. 98-0129 BLA, slip op. at 4-5 (Oct. 7, 1998)(unpub.). Therefore, the Board's prior disposition of this issue constitutes the law of the case, as employer has advanced no new argument in support of altering the Board's previous holding, and no intervening case law has contradicted the Board's resolution of this issue.[5] *See Coleman*, 18 BLR 1-9; *Brinkley*, 14 BLR 1-147; *Bridges*, 6 BLR 1-988. Consequently, we reject employer's arguments, and affirm the administrative law judge's award of benefits.

[5] Moreover, the Board recently addressed the issue of the applicability of the holdings of the United States Court of Appeals for the Seventh Circuit in *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994) and *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995) to cases arising in the Fourth Circuit and rejected employer's argument that the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995) and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) adopted the Seventh Circuit's holdings in *Vigna* and *Foster*. *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255 (2003).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge