BRB No. 03-0143 BLA

ROY E. RATLIFF	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 10/31/2003
Employer-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 Awarding Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Roy E. Ratliff, Grundy, Virginia, *pro se.*

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (99-BLA-0122) of Administrative Law Judge Daniel F. Sutton (the administrative law judge) on claimant's request for modification of 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 claimant's second request for modification, filed

[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

February 18, 1998. Director's Exhibit 140. The administrative law judge originally denied claimant's request for modification by Decision and Order dated June 3, 1999. The administrative law judge found that claimant established total respiratory disability at 20 C.F.R. §718.204(c) (2000)[2] and thus established a change in his condition since the prior denial at 20 C.F.R. §725.310 (2000). On the merits of the claim, the administrative law judge found, however, that the evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202. Subsequently, the Board considered claimant's appeal in *Ratliff v. Dominion Coal Corp.,* BRB No. 99-0981 BLA (Aug. 31, 2000)(unpublished). Therein, the Board affirmed the administrative law judge's denial of benefits on the merits of the claim based on claimant's failure to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). The Board, however, further affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant established total respiratory or pulmonary disability at 20 C.F.R. §718.204(c) (2000) and thus established a change in conditions on modification at 20 C.F.R. §725.310 (2000). *Ratliff,* slip op. at 4 n.2.

Board's Decision and Order on Reconsideration

Claimant filed, without the benefit of counsel, a request for reconsideration *en banc* of the Board's Decision and Order in *Ratliff*, which the Board granted. In its decision on reconsideration, the Board amended its Decision and Order in *Ratliff* and remanded the case. *Ratliff v. Dominion Coal Corp.,* BRB No. 99-0981 BLA (Sept. 28, 2001)(unpublished Decision and Order on Reconsideration *En Banc*)(Dolder, J. dissenting.) The Board held that, contrary to claimant's arguments, the administrative law judge acted within his discretion by crediting Dr. Fino's opinion and by holding that the fact that Dr. Fino was not licensed in the Commonwealth of Kentucky at the time he examined claimant did not compel exclusion of Dr. Fino's opinion from the record. With regard to the administrative law judge's findings on the merits of the claim, the Board held that the administrative law judge erred in stating that Administrative Law Judge Clement J. Kichuk found that the preponderance of the originally submitted x-ray evidence was "negative." *Ratliff*, Decision and Order on Reconsideration at 7. The Board stated:

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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 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 review, it is unclear whether Judge Kichuk, or the administrative law judge, ever considered whether the claimant's evidence satisfied the preponderance standard, but appears that upon reaching what they believed to be the point of equipoise, they may have halted their inquiry short of deciding whether claimant's x-ray evidence preponderated and/or whether they thought the evidence to be, at least, equally probative, *see LeMaster v. Imperial Colliery Co.*, 73 F.3d 358, 20 BLR 2-20 (4th Cir. 1995). The fact that the original x-ray reports were "equivocal" and/or conflicting or that the newly submitted x-rays were "essentially in equipoise" does not establish, in and of itself, that they were "negative" or positive, *see Le Master, supra.* Thus, it is not clear whether the positive x-ray on which Dr. Forehand, in part, relied was "contrary" to the weight of the x-ray evidence.

Ratliff, Decision and Order on Reconsideration at 8. The Board also held, on reconsideration, that the administrative law judge did not weigh all the relevant evidence together at 20 C.F.R. §718.202 on the merits of the claim. *Id.* at 8-9. The Board thus amended its August 31, 2000 Decision and Order in *Ratliff*, to vacate the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1) and (a)(4) and to remand the case for further consideration of the relevant evidence pursuant to *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). *Id.* at 9. The Board included instructions for the administrative law judge to reconsider the weight and credibility of Dr. Forehand's opinion and to resolve certain conflicts in the record at 20 C.F.R. §718.202(a)(4). *Id.* Judge Dolder dissented from the majority opinion, indicating that she would affirm the administrative law judge's denial of benefits as supported by substantial evidence.

Administrative Law Judge's Decision and Order on Remand

On remand, the administrative law judge awarded benefits. He found that while the x-ray evidence of record failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), the medical opinion evidence of record established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In so finding, the administrative law judge determined that Dr. Forehand, by relating claimant's ventilatory abnormality and respiratory impairment to his history of coal mine employment, "diagnosed a condition encompassed within the definition of legal pneumoconiosis in addition to finding that Ratliff suffers from clinical or coal worker[s'] pneumoconiosis." Decision and Order on Remand at 7-8. Weighing all the relevant evidence of record pursuant to *Compton*, the administrative law judge further found that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a), that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203 and that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

Employer's Appeal

On appeal, employer contends that the administrative law judge erroneously found (1) that Dr. Forehand's opinion supports a finding of legal pneumoconiosis and (2) that Drs. Dahhan and Fino did not adequately address the issue of legal pneumoconiosis. Employer also contends that the administrative law judge did not weigh together all of the evidence relevant to the issue of the existence of pneumoconiosis, as instructed by the Board. Employer further contends that the administrative law judge, on remand, committed reversible error by considering the issue of disability causation. Employer notes that Judge Kichuk made a finding, in his denial of claimant's first request for modification, that *even if* total disability were established, the medical opinions of Drs. Dahhan, Stewart and Fino establish that any pulmonary or respiratory condition is due to asthma and not to an occupationally related disease. Judge Kichuk's June 10, 1996 Decision and Order at 13 (emphasis added), Director's Exhibit 129. Employer contends that this finding by Judge Kichuk constitutes the law of the case. Employer also contends that the administrative law judge's finding of the existence of pneumoconiosis related to claimant's coal mine employment on remand, fails to take into account Judge Kichuk's finding that claimant has asthma. Claimant responds in support of the decision below. The Director, Office of Workers' Compensation Programs, has not filed a brief in the 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, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Administrative Law Judge's Weighing of Record Evidence Regarding Existence of Pneumoconiosis

Employer contends that while the administrative law judge properly found that the x-ray evidence of record fails to establish the existence of pneumoconiosis, he failed to weigh this objective evidence against the weight of the medical opinion evidence, as required under *Compton*. Citing the requirement in *Compton*, that the administrative law judge must weigh together all categories of relevant evidence, the administrative law judge stated:

> Although I find that the x-ray and medical opinion evidence is insufficient to establish that Ratliff suffers from clinical pneumoconiosis, I also find that this negative evidence does not outweigh the medical opinion evidence establishing the presence of legal pneumoconiosis since the two categories of evidence, *i.e.*, x-rays and medical opinions bearing on the presence of clinical pneumoconiosis versus medical opinions regarding the existence of

> legal pneumoconiosis, address different questions. Therefore, I conclude, after weighing all of the relevant evidence, that a preponderance of the evidence establishes that Ratliff suffers from pneumoconiosis as that term is defined in the Act and regulations.

Decision and Order on Remand at 12. These findings by the administrative law judge on remand refute employer's contention that the administrative law judge failed to weigh all the relevant evidence of record together at 20 C.F.R. §718.202 pursuant to *Compton*.[3] We, therefore, reject employer's argument that the administrative law judge's consideration of the evidence was inconsistent with *Compton*.

Administrative Law Judge's Weighing of Medical Opinion Evidence

Employer contends that the administrative law judge erred in weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4). The administrative law judge initially found it appropriate to give greater weight to the more recent opinions of Drs. Forehand, Fino and Dahhan in light of the fact that claimant established a change in conditions. The administrative law judge then considered the Board's remand instruction that he resolve conflicts in the medical evidence regarding whether claimant's condition showed reversibility on objective testing. The administrative law judge credited Dr. Dahhan's finding that claimant's disabling obstructive ventilatory defect "demonstrates variable responses to bronchodilator therapy as demonstrated by Dr. Forehand's [April 17, 1998 pulmonary function] study that showed the FEV1 rising from 61% to 70% of predicted…" Employer's Exhibit 3. The administrative law judge found that Dr. Dahhan's treatment of the issue of whether the pulmonary function studies demonstrate reversibility, "is the more detailed and better supported by specific references to the test data than the opinions from Drs. Forehand and Fino. Thus, I find that the pulmonary function study results of record tend to support Drs. Fino and Dahhan more than they do Dr. Forehand." Decision and Order on Remand at 10. The administrative law judge found, however, that Drs. Forehand, Fino and Dahhan focused on the reversibility factor as determinative of whether claimant has *clinical* pneumoconiosis and thus, the evidence of reversibility "has diminished significance" in determining whether claimant has legal pneumoconiosis. *Id.* at 10-11.

The administrative law judge then determined that the medical opinion evidence established the existence of legal pneumoconiosis. He indicated that Dr. Forehand's reasoned diagnosis of a respiratory impairment arising out of claimant's coal mine employment, or legal pneumoconiosis, "is not outweighed" by the most contrary

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[3] We affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(3) as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

probative evidence, namely the opinions of Drs. Fino and Dahhan. Decision and Order on Remand at 11. The administrative law judge found that although Dr. Fino testified that he understood the definition of legal pneumoconiosis and used that definition in formulating his opinions, "his assertion is belied by his own words. He consistently referred to 'coal workers' pneumoconiosis' in both his report and deposition testimony and concentrated on explaining why the objective findings are inconsistent with coal workers' pneumoconiosis and typical of asthma." Decision and Order on Remand at 11. The administrative law judge further found that Dr. Dahhan "similarly referred to findings which he described as atypical of 'occupational pneumoconiosis' but very consistent with asthma and hyperactive airway disease." *Id.*. The administrative law judge stated:

> Neither Dr. Fino nor Dr. Dahhan addressed the etiology of their asthma diagnosis as they both appear to have assumed that asthma is perforce something quite difference from and unrelated to a condition caused by exposure to coal mine dust. Thus, they saw no need to discuss the cause of Ratliff's asthma. Instead, they assumed that by diagnosing asthma, they were excluding pneumoconiosis. The problem with their reasoning is they only excluded clinical pneumoconiosis since conditions such as asthma, albeit falling outside of the medical or clinical definition of pneumoconiosis, are encompassed within the substantially broader legal definition, provided that they arise out of coal mine employment. [citations omitted.]

Decision and Order on Remand at 11. The administrative law judge indicated that for these reasons, he found that the opinions of Drs. Fino and Dahhan "are not equivalent to a medical diagnosis of no respiratory or pulmonary impairment related to or aggravated by dust exposure in the mines," and carry little probative weight in opposing Dr. Forehand's reasoned finding of legal pneumoconiosis. *Id.*

Employer specifically argues that the administrative law judge offered no valid reason for discrediting the opinions of Drs. Fino and Dahhan that claimant has asthma unrelated to his coal mine employment and that his impairment is due thereto. We find merit in employer's contention that the administrative law judge erred in determining that the opinions of Drs. Fino and Dahhan do not amount to opinions that claimant does not have pneumoconiosis or any resulting impairment because neither physician specified a cause for claimant's asthma. Drs. Fino and Dahhan each opined that claimant does not have clinical pneumoconiosis or any condition or impairment that arose out of his coal mine employment. Director's Exhibit 151, Employer's Exhibits 3, 7. Dr. Fino indicated that asthma is a "disease of the general population" and is distinct from an abnormality due to cigarette smoking or coal mine dust in that "[I]t has reversible obstruction."

Employer's Exhibit 7 at 12. Dr. Fino further testified that asthma is not caused or aggravated by pneumoconiosis or exposure to coal mine dust, but the symptoms of asthma may worsen in any type of situation, including exposure to a dusty environment. *Id.* at 27. Dr. Fino indicated that he could rule out exposure to coal mine dust as a cause or aggravating factor in claimant's condition. *Id.* at 31. Dr. Dahhan opined that claimant's disabling obstructive ventilatory defect did not result from coal dust exposure or coal workers' pneumoconiosis and is partially responsive to bronchodilator therapy "associated with air trapping on volumetric measurements as well as normal diffusion capacity. All of these parameters are typical hallmarks for the entity known as hyperactive airway disease or bronchial asthma…" Employer's Exhibit 3. Drs. Fino and Dahhan diagnosed no condition or impairment related to claimant's coal mine employment, and thereby determined that claimant does not have medical or legal pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a). Thus, we hold that the administrative law judge erred in determining that the medical opinions of Drs. Fino and Dahhan "are not equivalent to a medical diagnosis of no respiratory or pulmonary impairment related to or aggravated by dust exposure in the mines" and thus that these opinions "carry little weight in opposing Dr. Forehand's reasoned finding of legal pneumoconiosis." Decision and Order on Remand at 11.

Given the administrative law judge's error in weighing the opinions of Drs. Fino and Dahhan against the contrary opinion of Dr. Forehand, we vacate the administrative law judge's finding regarding the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Moreover, the administrative law judge relied on his credibility determinations at 20 C.F.R. §718.202(a)(4) to accord determinative weight to Dr. Forehand's opinion that coal workers' pneumoconiosis is the sole factor contributing to claimant's respiratory impairment. Decision and Order on Remand at 12. Consequently, we further vacate the administrative law judge's finding on disability causation at 20 C.F.R. §718.204(c). On remand, the administrative law judge must reconsider the credibility and weight of the medical opinions of record to determine whether they are sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and, if reached, to determine whether they are sufficient to establish that claimant's disability is due

to his pneumoconiosis at 20 C.F.R. §718.204(c).[4] *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).

Propriety of Administrative Law Judge's Consideration of Disability Causation Issue on Remand

To avoid possible error on remand, we now address employer's other contentions on appeal. Employer argues that the administrative law judge erred in reconsidering the issue of disability causation on remand at 20 C.F.R. §718.204(c), thereby failing to follow Judge Kichuk's "prior finding" that claimant's impairment is due to his asthma which is unrelated to his coal mine employment. Employer notes that Judge Kichuk found, in his June 10, 1996 Decision and Order denying claimant's *first* request for modification based on a finding of no total disability at 20 C.F.R. §718.204(c) (2000), that "*even if* total disability were established, the persuasive and well documented reports of Drs. Dahhan, Stewart and Fino clearly establish that any pulmonary or respiratory condition present is due to asthma and not an occupationally related disease." Judge Kichuk's June 10, 1996 Decision and Order at 13 (emphasis added), Director's Exhibit 129. Employer argues that since Judge Kichuk's statement was the final determination of the disability causation issue, it constitutes the law of the case and thus, the administrative law judge erred in determining this issue on remand.

We find no merit in employer's contention that the administrative law judge erred in failing to take into account that Judge Kichuk made a disability causation "finding," and that such finding constitutes the law of the case. The rule of law of the case is a discretionary rule of practice, based on the policy that once

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[4] Employer contends that the administrative law judge erred in finding that Dr. Forehand's opinion supports a finding of legal pneumoconiosis. Dr. Forehand diagnosed coal workers' pneumoconiosis due to claimant's exposure to coal dust. Director's Exhibit 145. Dr. Forehand also found an obstructive ventilatory pattern, and opined that claimant's coal workers' pneumoconiosis is the sole factor contributing to his respiratory impairment. *Id.* Dr. Forehand subsequently indicated that claimant's chest x-ray showed coal workers' pneumoconiosis and that claimant's ventilatory abnormalities are consistent with coal workers' pneumoconiosis. Claimant's Exhibit 3. Given that Dr. Forehand opined that claimant has ventilatory abnormalities consistent with pneumoconiosis, in addition to finding that claimant has coal workers' pneumoconiosis, we reject employer's argument that the administrative law judge erred in finding the opinion to be supportive of a finding of legal pneumoconiosis. 20 C.F.R. §§718.201, 718.202(a)(4).

an issue is litigated and decided, the matter should not be relitigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). When, in 1997, the Board affirmed Judge Kichuk's denial of claimant's first request for modification, filed in 1986, Director's Exhibit 1, the Board based its decision on its *affirmance of Judge Kichuk's finding that claimant failed to establish total disability at 20 C.F.R. §718.204(c) (2000). Ratliff v. Dominion Coal Corp.*, BRB No. 96-1252 BLA (May 23, 1997)(unpublished), Director's Exhibit 139. The Board did not therein address Judge Kichuk's statement that *even if* total disability were established, the medical reports of Drs. Dahhan, Stewart and Fino establish that any condition is due to asthma and not to any occupationally related disease. *Id.* Moreover, Judge Kichuk's statement is expressed in the alternative and was not a definitive determination of the disability causation issue. We, therefore, reject employer's arguments that the administrative law judge on remand erred in failing to follow Judge Kichuk's statement on disability causation in his June 1996 Decision and Order or that this statement constitutes the law of the case.

Administrative Law Judge's Resolution of Conflicts in Medical Evidence

Employer next contends that the administrative law judge, in resolving certain inconsistencies in the record, as he was directed to do by the Board, substituted his opinion for those of the medical experts. The administrative law judge credited Dr. Dahhan's finding that claimant's pulmonary function studies show variable response to bronchodilator therapy and some improvement in claimant's condition. The administrative law judge found:

> [Dr. Dahhan's] treatment of this issue is the more detailed and better supported by specific references to the test data than the opinions from Drs. Forehand and Fino. Thus, I find that the pulmonary function study results of record tend to support Drs. Fino and Dahhan more than they do Dr. Forehand. However, I further find that inasmuch as it is clear that all three physicians focused on the reversibility factor as determinative of whether Ratliff suffers from clinical pneumoconiosis, the evidence of reversibility or variability has diminished significance on this record in determining whether Ratliff suffers from legal pneumoconiosis.

Decision and Order on Remand at 10-11.

Employer specifically argues that the administrative law judge improperly interpreted the importance of the objective evidence, thereby discrediting the opinion of Dr. Fino by substituting his opinion for that of the medical experts. Employer's contentions have merit. The administrative law judge cited to no medical opinion in the record to support his determination that the evidence of

reversibility or variability in claimant's pulmonary function studies has "diminished significance" in determining whether claimant suffers from legal pneumoconiosis. The administrative law judge thus improperly substituted his opinion for those of the medical experts. *Marcum v. Director, Office of Workers' Compensation Programs*, 11 BLR 1-23 (1987). On remand, the administrative law judge must make findings that comport with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), which requires that the administrative law judge set forth the reasons and bases for his findings and conclusions on all issues of fact and law.

Administrative Law Judge's Consideration of Clinical and Legal Pneumoconiosis

Employer next argues that both Drs. Fino and Dahhan considered claimant's condition in terms of both clinical and medical pneumoconiosis, and that the administrative law judge erred in determining otherwise. Employer also argues that the administrative law judge did not fully consider the conflicting medical opinion evidence. The record shows that Drs. Fino and Dahhan each opined that claimant does not have clinical pneumoconiosis or any condition or impairment that arose out of his coal mine employment. Director's Exhibit 151, Employer's Exhibits 3, 7. Thus, employer correctly contends that the physicians each considered whether claimant had both clinical and legal pneumoconiosis. 20 C.F.R. §718.201. In reconsidering the weight of the medical opinion evidence on remand on the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis at 20 C.F.R. §§718.202(a)(4) and 718.204(c), the administrative law judge must base his findings on a proper characterization of the record before him. 20 C.F.R. §725.477.

Accordingly, we affirm in part and vacate in part the administrative law judge's Decision and Order on Remand Awarding Benefits, and remand the case to the administrative law judge for further findings consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge