BRB No. 06-0123 BLA

ESTIL STILTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LONG CONSTRUCTION COMPANY	)	DATE ISSUED: 10/31/2006
	)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Before: McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (01-BLA-00468) of Administrative Law Judge Daniel F. Solomon awarding benefits on a subsequent 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 subsequent claim is on appeal to the Board for a second time.[1] In the administrative law judge's first decision on

[1] Claimant filed his first claim on March 30, 1983. That claim was denied by a Department of Labor Claims Examiner on July 29, 1983 because claimant failed to establish any of the elements of entitlement. Director's Exhibit 48. Claimant filed a second claim on January 27, 1999 which was denied on March 12, 1999 on the same basis. Director's Exhibit 47. No further action was taken until claimant filed the instant claim on June 2, 2000. Director's Exhibit 1.

this subsequent claim, he found that because the parties had stipulated to the existence of pneumoconiosis and that such pneumoconiosis arose, at least, in part, from coal mine employment, elements previously adjudicated against claimant, a material change in conditions was established pursuant to 20 C.F.R. §725.309. Therefore, the administrative law judge considered all of the evidence of record and found that claimant established a totally disabling respiratory impairment and that pneumoconiosis was, at least, a contributing cause of claimant's total disability, Decision and Order at 16-17. 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding of pneumoconiosis arising out of coal mine employment based on employer's concession, and therefore, found that claimant had established a material change in conditions. The Board also affirmed, as unchallenged, the administrative law judge's finding that total respiratory disability was established. The Board vacated, however, the award of benefits, and remanded the case for further consideration on disability causation because the administrative law judge did not adequately explain his rationale in weighing the relevant evidence. *Stiltner v. Long Construction Co.*, BRB No. 04-0459 BLA (Mar. 23, 2005)(unpub.). Specifically, the Board directed the administrative law judge to explain his basis for using pulmonary function study evidence and blood gas study evidence to credit Dr. Rasmussen's opinion over Dr. Fino's opinion, even though the administrative law judge had accorded less weight to Dr. Naeye's opinion, in part, because the doctor had not reviewed the pulmonary function study evidence. *Stiltner*, at 4. In addition, the Board held that, in according greater weight to the opinion of Dr. Robinette based on his status as claimant's treating physician and his "superior" qualifications, the administrative law judge failed to sufficiently explain the nature of Dr. Robinette's relationship to claimant and failed to explain why his qualifications were "superior" to those of Drs. Castle and Fino, when the record demonstrated that all three physicians possessed the same credentials, *i.e.*, they were Board-certified internists and pulmonologists. *Id.* Because the instant claim arises within the jurisdiction of the United States Court of Appeals of the Fourth Circuit, the Board instructed the administrative law judge to evaluate the physicians' opinions regarding the existence of pneumoconiosis in light of the holdings in *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2000) and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), and reconsider the medical opinion evidence consistent with the holdings in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

On remand, the administrative law judge credited, as reasoned, the opinions of Drs. Rasmussen and Robinette, which support a finding of disability causation, and he found that the rationale employed by Drs. Fino and Castle, who provided contrary opinions, was not as compelling. The administrative law judge discounted the opinion of Dr. Forehand on causation because the doctor failed to diagnose coal workers'

pneumoconiosis and because the doctor's opinion was based on a 1999 examination of claimant, a less recent examination than other examinations of claimant. The administrative law judge further found the causation opinion of Dr. Naeye, the pathologist who examined lung tissue slides at the time of claimant's 1995 pneumonectomy due to lung cancer, was "fatally flawed" as that physician did not find a totally disabling respiratory impairment contrary to the administrative law judge's own finding and the opinions of Drs. Castle, Fino, Rasmussen, Ranavaya, and Robinette. Further, the administrative law judge did not credit the opinions of Drs. Briggs, Sutherland, and Patel as they did not render opinions on causation and accorded little weight to the opinion of Dr. Modi as it was not reasoned. Decision and Order at 2, 8. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established disability causation.[2] Employer thus urges the Board to reverse the administrative law judge's award of benefits. Alternatively, employer seeks remand of the case and reassignment to a different administrative law judge. Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this 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 the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After reviewing the administrative law judge's Decision and Order on Remand, we must again vacate the award of benefits as the administrative law judge's analysis of the medical opinion evidence on causation again appears to be confused, inconsistent, and insufficiently explained.

[2] We reject employer's assertion, raised in a footnote, *see* Employer's Brief at 7, n.1, that claimant has failed to establish the existence of pneumoconiosis and therefore, a material change in conditions pursuant to 20 C.F.R. §725.309. Because employer's argument has been previously addressed and rejected by the Board, this holding constitutes the law of the case and is, therefore, controlling on this issue. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991); *Bridges v. Director, OWCP*, 6 BLR 1-988, 1-989 (1984); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990), *rev'd on other grounds, Peabody Coal Co. v. Brinkley*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).

Employer argues that the administrative law judge committed numerous errors in his analysis of the medical opinion evidence on causation. We agree. For example, as employer points out, *see* Employer's Brief at 9, the administrative law judge found Dr. Fino's opinion entitled to little weight because the administrative law judge considered it to have been contradicted by Dr. Castle's opinion, without explaining the basis of the contradiction. Decision and Order on Remand at 3. Further, despite this finding, the administrative law judge also determined that Dr. Castle's opinion was entitled to little weight: the physician "tried to rehabilitate his conclusion in his deposition testimony but could not account for the discrepancy in the functional findings," Decision and Order on Remand at 7. The administrative law judge apparently overlooked Dr. Castle's statement that claimant's blood gas study results were due to claimant's pneumonectomy and tobacco smoke-induced COPD. Employer's Exhibit 27. Furthermore, as employer observes, the administrative law judge improperly rejected Dr. Naeye's disability causation opinion, *i.e.*, that the miner's pneumoconiosis was too mild to cause any disability, Employer's Exhibit 1, because the administrative law judge perceived this conclusion as contradicting his finding of the existence of a totally disabling respiratory impairment which the Board previously affirmed. As employer argues, the administrative law judge failed to recognize that Dr. Naeye was not provided the results of pulmonary function studies; he did not opine that the miner was not disabled, but opined that, if claimant was disabled, pneumoconiosis would not be the cause of the disability. Accordingly, the administrative law judge has mischaracterized Dr. Naeye's medical conclusion. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985).

Fundamentally, this case turns on whether substantial evidence supports the administrative law judge's findings regarding the opinions of the expert witnesses. In the case at bar, we cannot hold that substantial evidence supports the conclusions of the administrative law judge as the administrative law judge has failed to provide adequate, well-reasoned explanations for his conclusions regarding several doctors. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269. Hence, we must vacate the administrative law judge Decision and Order on Remand awarding benefits and remand the case for further consideration in a manner consistent with our previously issued Decision and Order in this case.

Lastly, employer argues that this case should be referred to a different administrative law judge on remand to obtain a full, clear, well-reasoned discussion of the relevant evidence. Employer's Brief at 16. Reluctantly, we find merit in employer's request that the case should be reassigned. As the Fourth Circuit explained in another case, we conclude that "review of this claim requires a fresh look at the evidence . . . ." *Hicks*, 138 F.3d at 537, 21 BLR at 2-343; *see* 20 C.F.R. §§802.404(a), 802.405(a).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded to the Office of Administrative Law Judges for reassignment and further consideration consistent with this opinion.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge