BRB No. 02-0166 BLA

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| RAYMOND ARNOLD WOLF | ) | |
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| Claimant- Respondent | ) | |
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| v. | ) | DATE ISSUED: |
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| D & L COAL COMPANY | ) | |
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| and | ) | |
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| WEST VIRGINIA COAL-WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
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| 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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Robert Weinberger, West Virginia Coal-Workers' Pneumoconiosis Fund, Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order on Remand ( 96-BLA-1034) of Administrative Law Judge Stuart A. Levin (the administrative law judge) 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] The case is before the Board for the third time. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).[2] Accordingly, the administrative law judge awarded benefits.

The procedural history of this case is as follows: Claimant filed his claim for benefits with the Department of Labor (DOL) on August 16, 1994. Director's Exhibit 1. DOL informally denied the claim on December 13, 1994, and again on May 25, 1995. Director's Exhibits 21, 29. Following a hearing, the administrative law judge issued on November 4, 1997, a Decision and Order in which he awarded benefits. Employer appealed to the Board. The Board vacated the administrative law judge's findings at Sections 718.202(a) (2000) and 718.204 (2000) because the administrative law judge improperly discounted the opinions of Drs. Renn and Fino, and remanded the case to him. *Wolf v. D & L Coal Co.*, BRB No. 98-0343 BLA (Dec. 16, 1998)(unpub.). On remand,

[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 they are found at 20 C.F.R. Parts 718, 722, 725 and 726. 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 total disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

the administrative law judge again awarded benefits in a Decision and Order dated September 15, 1999. Employer appealed to the Board, which vacated the administrative law judge's Decision and Order and remanded the case to the administrative law judge to reconsider his statement that Dr. Raver was claimant's treating physician. *Wolf v. D & L Coal Co.*, BRB No. 00-0166 BLA (Dec. 27, 2000)(unpub.). On January 8, 2001, claimant submitted a letter which the Board construed as a motion for reconsideration. This letter included additional statements by claimant in support of his position that Dr. Raver was claimant's treating physician. The Board denied claimant's request for reconsideration in an Order dated May 24, 2001 and remanded the case to the administrative law judge. Claimant then sent a second letter, dated September 5, 2001, to the administrative law judge, stating that "starting in the late 80's I received treatment at Dr. Raver's lung clinic and continue to be treated at this clinic as of this date....Dr. Raver examined me multiple times for my lung condition and I feel that his opinion should hold more weight than Dr. Renn who only examined me once and was not familiar with my work history." Claimant also attached a copy of the January 8, 2001 letter when he submitted this subsequent letter. The administrative law judge awarded benefits in a Decision and Order dated October 15, 2001, after finding that Dr. Raver was a treating physician of claimant, and crediting his opinion at Sections 718.202(a) and 718.204(b), (c). Carrier then filed the instant appeal with the Board.

On appeal, carrier challenges the administrative law judge's finding that Dr. Raver was one of claimant's treating physicians. Carrier also challenges the administrative law judge's determination to credit Dr. Raver's opinion when he found the evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and total respiratory disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Carrier contends that it was error for the administrative law judge to credit Dr. Raver's opinion and not to credit the opinion of Dr. Fino at both Section 718.202(a) (4) and Section 718.204(b), (c), as carrier asserts that Dr. Fino's opinion is documented and well reasoned. Claimant has not responded to the instant appeal. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief.

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

As the administrative law judge law judge credited the opinion of Dr. Raver[3] based

[3]Dr. Raver opined that claimant suffers from totally disabling chronic bronchotis

solely upon his status as claimant's treating physician at Section 718.202(a)(4) and Section 718.204(b), carrier's entire appeal is dependent upon whether the administrative law judge's finding that Dr. Raver was one of claimant's treating physicians can be affirmed. In its prior decision, the Board vacated the administrative law judge's finding that Dr. Raver was a treating physician on the basis that it violated the Administrative Procedure Act (APA), 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). In his motion for reconsideration dated January 8, 2001, claimant stated that Dr. Raver examined him "an abundant number of times." Thereafter, claimant submitted a statement dated September 5, 2001, that Dr. Raver examined him "multiple times." The administrative law judge, in his Decision and Order on Remand, did not consider these statements, but rather based his finding that Dr. Raver was claimant's treating physician, on claimant's testimony at the hearing, that although Dr. Shroff was claimant's treating physician, he also "saw" Dr. Raver. H. Tr. at 40; Decision and Order on Remand at 2. The Board previously remanded the case because the administrative law judge did not fully set forth his rationale for finding that Dr. Raver was claimant's treating physician, and thereby violated the APA. The fact that Dr. Raver "saw" claimant does not necessarily reflect that Dr. Raver is a treating physician of claimant.[4] As the testimony quoted by the administrative law judge is not,

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and obstructive airways disease, at least partially attributable to coal dust exposure. Director's Exhibits 28, 31.

[4] Carrier asserts that the administrative law judge's characterization of Dr. Raver as claimant's treating physician is inconsistent with his prior designation of Dr. Shroff as a treating physician of claimant. Carrier's Brief at 8. The administrative law judge initially found that Dr. Shroff was claimant's treating physician. We hold, however, that there is nothing inconsistent with this finding and a finding that Dr. Raver also treated claimant for a period of time, because it is possible for a claimant/miner to have more than one treating physician. *See Generally Tedesco v. Director, OWCP,* 18 BLR 1-403

by itself, enough to support such a finding, his Decision and Order on Remand is violative of the APA. *Wojtowicz v. Duquesne Light Co.* 12 BLR 1-162 (1989); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981).

There are documents contained in the case file forwarded to the Board by the Office of Administrative Law Judges which could, if credited, support the administrative law judge's finding that Dr. Raver is a treating physician, namely the statements by claimant in letters dated January 8, 2001 and September 5, 2001. The administrative law judge, however, did not rely upon these statements. In light of the foregoing, we vacate the administrative law judge's Decision and Order on Remand, and instruct the administrative law judge to consider whether the record should be reopened to admit the aforementioned letters into the record. In the event the administrative law judge reopens the record on remand, he must also consider whether to allow carrier an opportunity to file responsive evidence. He must then formally consider the letters, along with all of the other evidence relevant to the determination of whether Dr. Raver is one of claimant's treating physicians.

Carrier also argues that Dr. Raver's opinion is equivocal, internally inconsistent and not reasoned or documented. In the first appeal to the Board, the Board rejected employer's arguments that Dr. Raver's opinion was equivocal and internally inconsistent. *Wolf v. D & L Coal Co*., BRB No. 98-0343 BLA (Dec. 16, 1998)(unpub.), slip. op. at 3. As no exception to the law of the case doctrine is applicable, these findings now constitute the law of the case. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Since carrier's contention that Dr. Raver's opinion is not reasoned or documented is premised upon carrier's allegation that the opinion is equivocal and inconsistent, we reject this argument on similar grounds. *Id*.

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(1999); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Carrier next alleges that the administrative law judge improperly discredited Dr. Renn's opinion.[5] To the contrary, the administrative law judge credited Dr. Renn's opinion, but found it to be outweighed by Dr. Raver's opinion, on the basis that Dr. Raver treated the claimant. Decision and Order on Remand at 7, 8. Thus, we reject carrier's contention. *See Cochran v. Director, OWCP*, 16 BLR 1-101(1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Finally, carrier argues that the administrative law judge should not have credited the opinions of Drs. McCullough, Shroff and Bess as being corroborative of Dr. Raver's opinion. However, because carrier raises this contention for the first time in this third appeal to the Board, we reject it as untimely raised. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991) (Stage, J., dissenting).

[5]Dr. Renn opined that claimant does not have pneumoconiosis and that coal dust exposure did not cause his obstructive impairment. Director's Exhibits 34, 39

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is vacated, and the case is remanded for further proceedings consistent with this decision.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge