BRB No. 04-0942 BLA

LASTEL LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 09/30/2005
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of Decision and Order on Remand – Denial of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Ronald K. Bruce, Madisonville, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denial of Benefits (01-BLA-0649) of Administrative Law Judge Thomas F. Phalen, Jr. on a claim[1] filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of

[1]Claimant filed his first claim on October 23, 1989. Director's Exhibit 40. The district director denied that claim on April 2, 1990 for failure to establish any element of entitlement. Director's Exhibit 40-14.

1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[2] Claimant filed this subsequent claim on March 7, 2000. Director's Exhibit 1. On original consideration, the administrative law judge found that the newly submitted evidence established total respiratory or pulmonary disability, one of the elements of entitlement previously adjudicated against claimant, and thus established a material change in conditions. 20 C.F.R. §§718.204(b)(2); 725.309 (2000). Considering all of the relevant evidence of record, however, the administrative law judge found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly benefits were denied. Claimant appealed, asserting that the administrative law judge should have found that the medical opinions of the examining physicians of record established the existence of legal pneumoconiosis. The Board, in *Lewis v. Island Creek Coal Co.,* BRB No. 03-0215 BLA (Oct. 24, 2003)(unpublished), affirmed the administrative law judge's findings that the existence of pneumoconiosis was not established at 20 C.F.R. §718.202(a)(1)-(3),[3] as they were unchallenged on appeal. *Lewis*, slip op. at 2 n.2. The Board also affirmed, as unchallenged on appeal, the administrative law judge's finding that the newly submitted evidence established total disability and, therefore, a material change in conditions. *Id.*; *see* 20 C.F.R. §§718.204(b)(2), 725.309 (2000). The Board further vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(4), and remanded the case for reconsideration of the medical opinions on the issue of legal pneumoconiosis thereunder. *Id.* at 5.

On remand, the administrative law judge reconsidered the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). He found that six of the eleven medical opinions of record were "probative of the presence or absence of legal pneumoconiosis." Decision and Order at 11. The administrative law judge determined that five of the six probative medical opinions, namely those rendered by Drs. Lombard, Morgan, Castle, Jarboe and Jarvis, do not include diagnoses of legal pneumoconiosis, and outweigh Dr. Houser's contrary opinion that includes a diagnosis of legal pneumoconiosis. Accordingly, benefits were denied.

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[2]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.

[3]The administrative law judge also found that the medical opinion evidence did not establish clinical pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See* Administrative Law Judge's Decision and Order dated October 30, 2002. This finding was not challenged on appeal. Rather, only the findings with respect to legal pneumoconiosis were challenged by claimant.

Claimant appeals, contending the administrative law judge erred in finding that the medical opinion evidence does not establish legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's finding at 20 C.F.R. §718.202(a)(4). The Director, Office of Workers' Compensation Programs, has not 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 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, Hinchman & Grylls Associates, Inc.,* 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements of entitlement precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant initially argues that the administrative law judge, in considering the issue of legal pneumoconiosis at 20 C.F.R. §718.204(a)(4), should have accorded greater weight to the opinions of examining physicians over those by reviewing physicians. Claimant also argues that the administrative law judge should not have credited Dr. Jarvis's negative opinion on the issue of legal pneumoconiosis. Because the Board previously affirmed the administrative law judge's reliance on the opinions of reviewing physicians,[4] as well as his reliance on Dr. Jarvis's opinion, s*ee Lewis,* slip op. at 3-4, we hold that these findings constitute the law of the case. Because claimant has argued no exception to the law of the case doctrine, we decline to revisit our prior holdings in response to these arguments. *See Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

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[4]The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an administrative law judge need not defer to the opinions of examining physicians. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). Thus, contrary to claimant's argument, the administrative law judge was not required to accord greater weight to the opinions of examining physicians. *See Lewis v. Island Creek Coal Co.,* BRB No. 03-0215 BLA (Oct. 24, 2003)(unpublished), slip op. at 4.

Claimant next argues that the administrative law judge on remand erred by making findings regarding the credibility and weight of certain medical opinions, that differ from his pertinent findings in his October 30, 2002 Decision and Order. Specifically, claimant notes that the administrative law judge found the opinions of Drs. Traughber, Simpao and Baker to be well-reasoned and well-documented in his 2002 Decision and Order, and argues that the administrative law judge improperly "reversed" himself on remand by finding these opinions to be neither reasoned nor documented. Claimant's Brief at 12-14. We do not find persuasive claimant's assertion of error on the administrative law judge's part in reconsidering the credibility and weight of these opinions on remand. The Board, in *Lewis*, identified several errors in the administrative law judge's consideration of the medical opinion evidence on the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Lewis,* slip op. at 3-5. The Board thus vacated the administrative law judge's finding, made in his 2002 Decision and Order, that the existence of legal pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4). *Id.* at 5. In so doing, the Board returned the parties to the *status quo ante* that finding by the administrative law judge. *See Dale v. Wilder Coal Co.,* 8 BLR 1-119 (1985). Moreover, the Board indicated, in *Lewis*, that it remanded the case for the administrative law judge to reconsider the medical opinion evidence at 20 C.F.R. §718.202(a)(4). *Lewis*, slip op. at 5. Based on these facts, we hold that the administrative law judge, in considering the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) on remand, acted within the Board's remand instructions when he reassessed the credibility and weight of the medical opinions, including those of Drs. Traughber, Simpao, and Baker. We, therefore, reject claimant's assertion of error by the administrative law judge in this regard.

Claimant additionally argues that the administrative law judge should have relied on the opinions of Drs. Traughber, Simpao, and Baker to find the existence of legal pneumoconiosis, instead of relying on the contrary opinions of record to find legal pneumoconiosis not established at 20 C.F.R. §718.202(a)(4). Claimant's arguments, however, amount to a request to reweigh the evidence, which the Board is not empowered to do. *Anderson v. Valley Camp of Utah, Inc.,* 12 BLR 1-111 (1989). Claimant cites to no persuasive, supporting legal authority and merely describes the medical opinion evidence of record, making his own assertions as to what evidence is or is not credible. Moreover, substantial evidence supports the administrative law judge's weighing of the medical opinions at 20 C.F.R. §718.202(a)(4). Specifically, the administrative law judge correctly noted that Dr. Traughber did not diagnose legal pneumoconiosis, Decision and Order at 6-7; *see* Director's Exhibit 40-10, permissibly found that Dr. Simpao's opinion is not sufficiently clear, *see Justice v. Island Creek Coal Company*, 11 BLR 1-91 (1988), and properly found that Dr. Baker's opinion is unsupported and based on an inaccurate cigarette smoking history, Decision and Order at 10-11; *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985). Further, the administrative law judge properly determined that a preponderance of the medical

opinions, including the opinions of Drs. Lombard, Morgan, Castle, Jarboe and Jarvis, outweigh the contrary evidence and establish that claimant does not have legal pneumoconiosis. 20 C.F.R. §718.202(a)(4); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

Based on the foregoing, we affirm the administrative law judge's finding that the medical opinion evidence of record fails to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because claimant has not established the existence of pneumoconiosis, an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *See Trent,* 11 BLR at 27; *Perry,* 9 BLR at 1-5.

Accordingly, the administrative law judge's Decision and Order on Remand – Denial of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge