BRB No. 06-0967 BLA

J.D.B.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RAG AMERICAN COAL COMPANY	)	
	)	DATE ISSUED: 09/24/2007
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 Second Remand – Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis, P.C.), Chicago, Illinois, for claimant.

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

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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 Second Remand – Awarding Benefits (00-BLA-0498) of Administrative Law Judge Rudolph L. Jansen rendered on a

duplicate claim, filed by claimant on August 27, 1998, 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 case is before the Board for a third time and has a lengthy history, which is set forth in our prior decision, and is incorporated by reference herein. *[J.D.B.] v. Rag American Coal Co.*, BRB No. 05-0290 BLA, slip op. at 6 (Mar. 14, 2006). Most recently, we vacated the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) because he failed to fully address the opinions of Drs. Fino and Tuteur that claimant's chronic obstructive pulmonary disease was due entirely to smoking. We specifically instructed the administrative law judge to "provide a basis for finding that any particular physician's views are not in accord with the medical and scientific literature [relied upon by the Department of Labor in promulgating the revised regulations] and then discuss how that impacted the physician's opinion with regard to this specific claimant." *Id*., slip op. at 8. If the administrative law judge determined that the opinions of Drs. Fino and Tuteur were credible, he was instructed to weigh that evidence against the conflicting opinions of Drs. Houser, Cohen, Hinkamp, and Carandang, to determine whether claimant satisfied his burden of establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. Because the administrative law judge's findings that claimant established a material change in conditions and total disability due to pneumoconiosis were predicated on his Section 718.202(a)(4) determination, we also vacated the administrative law judge's findings pursuant to 20 C.F.R. §§725.309 (2000) and 718.204(c). *Id*., slip op. at 8. The administrative law judge was instructed on remand to render new findings under those sections as necessary. *Id*.

In his Decision and Order on Second Remand issued on August 25, 2006, the administrative law judge concluded that he was unable to discern the extent to which either Dr. Fino or Dr. Tuteur relied on their own view of the medical literature in formulating their opinions as to the etiology of claimant's respiratory condition. He therefore found these doctor's opinions to be less credible and gave them less weight than claimant's experts, whose opinions he considered to be better reasoned and documented. The administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). The administrative law judge further found that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, citing *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), employer argues that ordinary principles of *res judicata* require the Board to find that claimant's pre-existing disability precludes benefits as a matter of law. Employer asserts that the record should be reopened to allow evidence of whether legal pneumoconiosis is latent and progressive in the absence of further coal dust exposure. Employer also contends that the administrative law judge erred in rejecting the opinions

of Drs. Fino and Tuteur in his analysis of the evidence at Sections 718.202(a)(4) and 718.204(c). Employer requests that the Board either reverse the award of benefits, or vacate the award and remand the case for reassignment to a different administrative law judge. Claimant responds urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to apply the law of the case doctrine to reject employer's assertions that legal pneumoconiosis cannot be latent and progressive, and that claimant is precluded from establishing entitlement to benefits because of the denial of claimant's prior claim for a "non-pneumoconiosis-related disability." Director's letter brief at 2. The Director maintains that claimant may be found entitled to benefits with respect to his duplicate claim if he establishes a material change in conditions as outlined in *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 21 BLR 2-113 (7th Cir. 1997) (*en banc*). The Director expresses "no opinion on employer's other arguments on appeal, or on the ultimate question of claimant's entitlement to benefits." Director's letter brief at 3. In a reply brief, employer reiterates its previous contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 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 establish 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; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that there has been a material change in conditions. 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that pursuant to Section 725.309(d) (2000), a miner "must show that something capable of making a difference has changed since the record closed on the first application." *Peabody Coal Co. v. Spese*, 117 F.3d 1001, 1008-09, 21 BLR 2-113, 2-127 (7th Cir. 1997) (*en banc*). Specifically, "a material change in conditions means either that the miner did not have black lung disease at the time of the first application but has since contracted it and become totally disabled by it, or that his disease has progressed to the point of becoming totally disabling although it was not at the time of the first application." *Sahara Coal Co. v. OWCP, [McNew]*, 946 F.2d 554, 556, 15 BLR 2-227, 2-229 (7th Cir. 1991).

In summary, the Board previously affirmed, as unchallenged on appeal, the administrative law judge's finding of twenty years of coal mine employment, and his determination that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a)(1)-(3). *[J.D.B.] v. Rag American Coal Co.*, BRB No. 02-0648 BLA, slip op. at 7-10 (Aug. 29, 2003)(unpub.). The Board has rejected employer's argument that the administrative law judge erred in applying the material change in conditions standard set out in *Spese. Id*., slip op. at 4-5. The Board has affirmed the administrative law judge's finding that Drs. Houser, Cohen, Hinkamp and Carandang provided reasoned and documented opinions that claimant suffers from chronic obstructive pulmonary disease due to smoking and coal dust exposure. *[J.D.B.] v. Rag American Coal Co.*, BRB No. 05-0290 BLA, slip op. at 6 (Mar. 14, 2006). The Board has also affirmed the administrative law judge's decision to assign additional weight to Dr. Cohen's opinion based on his superior expertise in pulmonary medicine, and his rejection of Dr. Renn's opinion, that claimant's chronic bronchitis and emphysema were due solely to smoking, based on Dr. Renn's failure to explain the basis for his conclusions. *Id.*, slip op. at 7-8.

In this appeal, employer resurrects an argument previously advanced in this case, namely that claimant is required to prove that he suffers from a latent and progressive form of legal pneumoconiosis. We have already considered this argument and rejected it as without merit. *[J.D.B.]*, BRB No. 05-0290 BLA, slip op. at 5; *see also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004) (*en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004) (*en banc*). Similarly, we have specifically rejected, as without merit, employer assertion that the administrative law judge erred in finding that benefits are not precluded under *Vigna*. *Id*., slip op. at 8. Because employer has not demonstrated any exception to the law of the case doctrine, we decline to revisit our holdings on those issues. *Brinkley v. Peabody Coal Co.*, 14 BLR 147 (1990).

Employer also challenges the administrative law judge's determination that claimant established the existence of legal pneumoconiosis and total disability due to pneumoconiosis, asserting that he erred in assigning less weight to the opinions of Drs. Fino and Tuteur as to the etiology of claimant's chronic obstructive pulmonary disease. On remand, we instructed the administrative law judge to consider whether Dr. Fino's diagnosis, that claimant did not have legal pneumoconiosis, was based on his view of the medical literature or on the medical evidence he cited in his report to support his opinion. [*J.D.B.*], BRB No. 05-0290 BLA, slip op. at 7. Similarly, we directed the administrative law judge to specifically discuss whether Dr. Tuteur based his findings on an assumption that pneumoconiosis is not progressive after cessation of coal mine employment, or whether the doctor reached his conclusions based on the evidence particular to this case. *Id.*

On remand, the administrative law judge outlined Dr. Fino's findings but rejected his opinion that claimant did suffer from legal pneumoconiosis because he found that it was not well-reasoned:

> Dr. Fino diagnosed claimant with COPD due solely to smoking. He explained that Claimant's obstructive defect is demonstrated in the small airways, which is indicative of a smoking-induced lung disease. Dr. Fino stated that although medical studies have shown that coal dust exposure can cause obstruction, the studies do not suggest that coal dust exposure causes significant obstruction. In addition, Dr. Fino reviewed and criticized various studies that analyzed coal dust exposure and obstructive lung disease. He discredited the majority of the studies due to "selection bias." The Department of Labor disagreed with Dr. Fino when it addressed many of these studies and Dr. Fino's viewpoint in the December 20, 2000 Amendments to the Act. 65 Fed. Reg. 79939-79942 (Dec. 20, 2000). As the Board directed, it must be determined if Dr. Fino based his opinion that Claimant's COPD was due solely to smoking was based on his view [sic] or the evidence of record.
>
> In his medical report, Dr. Fino listed the medical evidence that he considered then stated "[b]ased on review of the above information, it is my opinion that this man does not suffer from an occupationally acquired pulmonary condition as a result of coal mine dust exposure." However, later in his report, Dr. Fino discussed how the medical literature that was in conflict with Department of Labor findings supported his conclusions. Moreover, his discussion of legal pneumoconiosis intertwined with his findings regarding total disability due to pneumoconiosis. Dr. Fino ends his report with "conclusions" that do not contain specific reasoning. He fails to clearly explain whether his conclusions were based solely on the medical evidence in the record or the medical literature which is in conflict with the Department of Labor's findings. Because I cannot conclude that Dr. Fino's conclusions were not based in part on the medical literature, I assign his opinion less weight.

Decision and Order on Second Remand at 4-5.

The administrative law judge reached a similar conclusion with regard to Dr. Tuteur's opinion, and stated:

> As Dr. Tuteur allowed for the possibility that coal dust exposure can cause obstructive impairments, I continue to find that his opinion is not hostile to the Act. However, Dr. Tuteur expressed views in his opinion that diverge

> from the Department of Labor's findings noted above. In his medical report, Dr. Tuteur listed the medical evidence that he considered then stated "[b]ased on all the available data, those previously reviewed in conjunction with the initial Independent Medical Review as well as the data made available at this time it is with reasonable medical certainty that Mr. [J.B.] does not have clinically significant, or radiographically significant coal workers' pneumoconiosis or any other coal mine dust-induced disease process." However, Dr. Tuteur inconsistently followed this statement later in his report when he specifically addressed the relationship of coal mine employment and obstructive lung disease by incorporating medical literature that was in conflict with Department of Labor's findings to support his conclusions. Also, Dr. Tuteur's discussion of legal pneumoconiosis was combined with his findings regarding total disability due to pneumoconiosis. He terminates his report with "conclusions" that do not contain specific reasoning. Dr. Tuteur fails to clearly explain whether his conclusions were based solely on the medical evidence in [the] record or the medical literature in conflict with the Department of Labor's findings. Because I cannot conclude that Dr. Tuteur's conclusions were not based in part on the medical literature, I assign his opinion less weight.

Decision and Order on Second Remand at 5-6.

Employer's argument on appeal is three-fold. First, employer asserts that the opinions of Drs. Fino and Tuteur are not hostile to the Act because they do not opine that pneumoconiosis can never cause an obstructive lung disease. Employer's Brief in Support of Petition for Review at 14. Second, employer contents that the "evidence does not establish that these purportedly hostile opinions affected the doctors' diagnoses." *Id*. Third, employer asserts that the administrative law's determination that their opinions were unclear as to how they reached their diagnoses in this case is not supported by the language of their opinions. *Id*. We disagree.

Contrary to employer's contention, the administrative law judge did not reject the opinions of Drs. Fino or Tuteur because he found that their opinions were hostile to the Act. An administrative law judge may evaluate expert opinions in conjunction with the Department of Labor's discussion of sound medical science in the preamble to the revised regulations. *See Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). The preamble sets forth how the Department of Labor has chosen to resolve questions of scientific fact. 65 Fed. Reg. 79939-79942 (Dec. 20, 2000). A determination of whether a medical opinion is not supported by accepted scientific evidence, as determined by the Department of Labor, is a valid criterion in deciding whether to credit the opinion. Such a determination is different from finding an opinion hostile to the Act. *Zeigler Coal Co. v. OWCP* [*Griskell*], 490 F.3d 609, -- BLR --

(7th Cir. 2007), *citing Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001). If a doctor's opinion is premised on scientific evidence conflicting with the science credited by the Department of Labor, the administrative law judge may properly assign that opinion less weight. *Summers*, 272 F.3d at 483 n.7; 22 BLR at 2-281 n.7.

Furthermore, we disagree with employer that the administrative law judge somehow abused his discretion because he ultimately concluded that it was impossible to discern whether employer's experts based their findings on the medical evidence particular to this case, or whether their conclusions were grounded on their personal belief that the science credited by the Department of Labor was incorrect. Fundamentally, this case turns on whether substantial evidence supports the administrative law judge's findings regarding the credibility of the expert witnesses. *See generally Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Because the administrative law judge, as the trier-of-fact, was not satisfied that the diagnoses provided by Drs. Fino and Tuteur were credibly based on the particular medical evidence in this case and not the medical literature, he permissibly assigned those opinions less weight. *See Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). In contrast, the administrative law judge permissibly found that claimant established the existence of legal pneumoconiosis, and total disability due to pneumoconiosis, based on the documented and reasoned opinions of Drs. Houser, Cohen, Hinkamp, and Carandang. We therefore affirm the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c). *See Shores*, 358 F.3d at 490, 23 BLR at 2-26; *Roberts & Schaefer Co. v. Director, OWCP [Williams]*, 400 F.3d 992, 23 BLR 2-302 (7th Cir. 2005); *Blakeley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 2001); *see also Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Because we hold that the administrative law judge's decision is supported by substantial evidence, and therefore affirm the award of benefits, employer's request for reassignment of the case is moot.

Accordingly, the Decision and Order on Second Remand – Awarding Benefits of the administrative law judge is affirmed.

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