BRB No. 09-0756 BLA

CECIL PARSONS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WOLF CREEK COLLIERIES	)	DATE ISSUED: 09/30/2010
	)	
and	)	
	)	
ZIEGLER COAL COMPANY	)	
	)	
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 Third Remand - Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, Kentucky, for claimant.

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

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Third Remand - Award of Benefits (2001-BLA-0248) of Administrative Law Judge Larry S. Merck rendered on a duplicate claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for the fourth time.[3] Pursuant to the last appeal filed by employer, the Board rejected employer's argument that the administrative law judge should have applied the law of the United States Court of Appeals for the Sixth Circuit to this case, rather than that of the United States Court of Appeals for the Fourth Circuit. *C.P.* [*Parsons*] *v. Wolf Creek Collieries*, BRB No. 07-0921 BLA, slip op. at 4 (July 30, 2008)(unpub). Specifically, the Board declined to reconsider its prior holding that the law of the Fourth Circuit applies in this case, as employer did not demonstrate an exception to the law of the case doctrine. *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip op. at 5. The Board then affirmed the administrative law judge's findings that the new evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thus, that the new evidence established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).[4] *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip op. at 6-7. Further, on the merits, the Board affirmed the administrative law judge's finding that the evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip

[1] Claimant filed his first claim on October 26, 1988. Director's Exhibit 34. It was finally denied by the district director on May 23, 1989. *Id*. Claimant filed this claim on April 5, 2000. Director's Exhibit 1.

[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 full procedural history of this case is set forth in the Board's prior decisions in *Parsons v. Wolf Creek Collieries*, BRB No. 02-0188 BLA (Dec. 13, 2002) (unpub.) (Dolder, J., concurring and dissenting), *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(Motion for Recon.)(*en banc*)(McGranery, J., concurring and dissenting), *Parsons v. Wolf Creek Collieries*, BRB No. 05-0933 BLA (July 18, 2006)(unpub.), and *C.P.* [*Parsons*] *v. Wolf Creek Collieries*, BRB No. 07-0921 BLA, slip op. at 2 n.1 (July 30, 2008)(unpub.)(Board also noted that reassignment was made to the current administrative law judge).

[4] The revisions to the regulation at 20 C.F.R. §725.309 apply only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2.

op. at 7.

The Board also held that the prior administrative law judge's finding that claimant's pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) was undisturbed by the Board and remained in effect. *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip op. at 8 n.8. In addition, the Board held that its affirmance of the prior administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) remained in effect, based on the law of the case doctrine. *Id*. However, the Board held that the administrative law judge impermissibly determined that the prior administrative law judge's finding that claimant was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c) was still in effect, even though the Board had not disturbed it. *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip op. at 7. Rather, the Board stated that the effect of its decision, in the prior appeal, was to vacate the prior administrative law judge's finding at 20 C.F.R. §718.204(c).[5] *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip op. at 7-8. Hence, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the evidence thereunder. *C.P.* [*Parsons*], BRB No. 07-0921 BLA, slip op. at 8. On remand, the Board instructed the administrative law judge to determine whether pneumoconiosis was a substantially contributing cause of claimant's total disability at 20 C.F.R. §718.204(c). *Id*. The Board again rejected employer's repeated contention that, on remand, the administrative law judge must consider whether claimant's disabling back condition precluded his entitlement to benefits. *Id*.

On remand, the administrative law judge found that the evidence established that claimant was totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the law of the Sixth Circuit applies to this case. Employer also contends that the administrative law judge should have reconsidered his prior findings that the evidence established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2)(iv). Employer asserts that the administrative law judge relied on disability assessments of claimant that were based on claimant's back condition and his respiratory condition. Further, employer challenges the administrative law judge's

[5] Specifically, in the Board's prior decision, the Board vacated the prior administrative law judge's award of benefits and declined to address, as premature, employer's allegations of error regarding the prior administrative law judge's finding that claimant's disability was due to pneumoconiosis at 20 C.F.R. §718.204(c), based on its determination that a remand was required for consideration of whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *C.P.* [*Parsons*] *v. Wolf Creek Collieries*, BRB No. 07-0921 BLA, slip op. at 7 (July 30, 2008)(unpub).

finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds by letter, arguing that employer's assertions regarding the issues of pneumoconiosis, total disability, and the effect of claimant's non-pulmonary impairments are without merit because the Board's prior decisions regarding these issues are the law of the case.[6] Director's Response at 1-2.

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

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Initially, we decline to revisit our prior holding that the law of the Fourth Circuit, rather than that of the Sixth Circuit, applies to this case, as we are not persuaded that the law of the case doctrine in inapplicable, or that an exception has been demonstrated. *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999)(*en banc*). We also decline to revisit our holdings affirming the findings that the new evidence established a material change in conditions at Section 725.309 (2000), that the evidence on the merits established the existence of pneumoconiosis at Section 718.202(a)(4), and that the evidence on the merits established a totally disabling respiratory impairment at Section 718.204(b)(2)(iv), as we are not persuaded that the law of the case doctrine in inapplicable, or that an exception has been demonstrated. *Braenovich*, 22 BLR at 1-246; *Troup*, 22 BLR at 1-21-22.

Next, we will address employer's contention that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge considered the newly submitted

[6] Subsequent to the issuance of the administrative law judge's Decision and Order on Third Remand, amendments to the Act, which became effective on March 23, 2010, were enacted, affecting claims filed after January 1, 2005. Employer and the Director, Office of Workers' Compensation Programs, responded to the Board's May 10, 2010 Order, which permitted the parties to submit supplemental briefing in this claim to address the impact, if any, of the 2010 amendments in this case. Because all of claimant's claims were filed before January 1, 2005, the recent amendments to the Act do not apply in this case.

opinions of Drs. Younes, Lafferty, Zaldivar, Tuteur, and Loudon,[7] as well as the previously submitted opinions of Drs. Broudy, Mettu, Fritzhand, and Vuskovich.[8] The

[7] In a report dated April 26, 2000, Dr. Younes opined that claimant's chronic obstructive pulmonary disease related to occupational dust exposure caused his moderate to severe obstructive respiratory impairment, which would prevent him from doing his last coal mine employment. Director's Exhibit 9.

In a report dated June 12, 2000, Dr. Lafferty noted that claimant was previously awarded Social Security benefits on the basis of his disability related to his lumbar spine and coal workers' pneumoconiosis, and then opined that he continues to treat claimant for complaints related to his disability caused by his lungs and low back. Director's Exhibit 12. Dr. Lafferty further noted, "I have seen no evidence to suggest that either his pulmonary or lumbar condition has improved to the point that would allow him to return to work[,]" but rather, "his pulmonary function appears to be in a progressive state of decline." *Id*.

In a report dated October 4, 2000, Dr. Zaldivar diagnosed a mass in claimant's right lung. Employer's Exhibit 1. During a deposition dated May 16, 2001, Dr. Zaldivar opined that claimant has sarcoidosis, rather than simple or complicated pneumoconiosis. Employer's Exhibit 10. Dr. Zaldivar explained that sarcoidosis has no known cause. *Id*. Dr. Zaldivar also opined that claimant's respiratory impairment was caused by his sarcoidosis. *Id*.

In a report dated February 19, 2001, Dr. Tuteur diagnosed a form of pneumoconiosis related to the chronic inhalation of silica dust, rather than coal dust, and opined that claimant was totally disabled from a combination of low back problems and respiratory problems, which arose from his steel foundry employment, and not his coal mine employment. Employer's Exhibit 2. During a deposition dated May 7, 2001, Dr. Tuteur opined that claimant has a silicotic pneumoconiosis unrelated to coal workers' pneumoconiosis and, although he could not entirely exclude coal dust exposure from causing the respiratory impairment, he opined that such exposure did not cause physiological impairment or abnormalities. Employer's Exhibit 9.

In a report dated March 20, 2001, Dr. Loudon opined that a coal workers' pneumoconiosis diagnosis could not be made because of the uncertain etiology of the lung mass, and that, while he found that the miner is totally disabled, he was uncertain whether the impairment arose out of coal mine employment. Employer's Exhibit 3.

[8] In a report dated December 2, 1988, Dr. Broudy opined that claimant does not suffer from coal workers' pneumoconiosis and retained the respiratory capacity to perform his last coal mine employment. Director's Exhibit 34.

administrative law judge gave full probative weight to opinions of Drs. Younes and Lafferty because he found that they were well-reasoned and well-documented. Decision and Order on Third Remand at 7-8. However, the administrative law judge gave less weight to the opinions of Drs. Zaldivar and Tuteur because he found that their opinion that claimant does not have legal pneumoconiosis was inconsistent with his finding that the evidence established this disease. *Id*. at 8-9. In addition, the administrative law judge gave little weight to Dr. Loudon's opinion because he found that it was equivocal.[9] *Id*. at 9. Further, the administrative law judge gave little probative weight to the opinions of Drs. Broudy, Mettu, Fritzhand, and Vuskovich because he found that they were more than ten years older than the medical opinions submitted in the duplicate claim, and because he found that they contradicted his findings with regard to the issues of pneumoconiosis and total disability.[10] *Id*. at 9-10. Hence, based on his determination to give the most weight to the opinions of Drs. Younes and Lafferty, the administrative law judge found that the preponderance of the evidence established that claimant was totally disabled due to pneumoconiosis.

Employer argues that the administrative law judge failed to comply with the Administrative Procedure Act (APA)[11] by relying on impermissible reasons to credit the

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In a report dated November 3, 1988, Dr. Mettu opined that claimant does not suffer from coal workers' pneumoconiosis and showed no signs of respiratory or pulmonary impairment. *Id*.

In a report dated November 29, 1988, Dr. Fritzhand diagnosed coal workers' pneumoconiosis and opined that claimant was capable of performing his last coal mine employment. *Id*.

In a report dated January 10, 1989, Dr. Vuskovich opined that claimant does not have pneumoconiosis and that he was not impaired in his respiratory or pulmonary function. *Id*.

[9] No party challenges the administrative law judge's weighing of Dr. Loudon's opinion.

[10] Similarly, no party challenges the administrative law judge's weighing of the opinions of Drs. Broudy, Mettu, Fritzhand, and Vuskovich.

[11] The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

opinions of Drs. Younes and Lafferty. Contrary to employer's assertion, the administrative law judge properly found that Dr. Younes's opinion was well-reasoned and well-documented, given that "[the doctor's] opinion is supported by the occupational and smoking histories of record, and is based on a physical examination of [c]laimant and objective medical testing." Decision and Order on Third Remand at 7; *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10. 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Further, the administrative law judge properly found that Dr. Lafferty's opinion was well-reasoned and well-documented, based on the doctor's statements regarding claimant's condition. *Mays*, 176 F.3d at 762 n.10. 21 BLR at 2-603 n.10; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21-22; *Lucostic*, 8 BLR at 1-47; *Fuller*, 6 BLR at 1-1294. Thus, we reject employer's assertion that the administrative law judge violated the APA by relying on impermissible reasons to credit the opinions of Drs. Younes and Lafferty.

Employer also argues that the administrative law judge substituted his opinion for that of Dr. Lafferty. We disagree. In finding that Dr. Lafferty's opinion was a reasoned and documented opinion that claimant's pneumoconiosis contributed to his disability, the administrative law judge stated:

> [Dr. Lafferty] attributed [c]laimant's disability to his lumbar condition and pneumoconiosis. Dr. Lafferty did not provide a breakdown of the degree to which each condition contributed to [c]laimant's disability; however, he found "no evidence to suggest that either [claimant's] pulmonary or lumbar condition has improved to the point that would allow him to return to work. In fact, his pulmonary function appears to be in a progressive state of decline." (DX 12). Although Dr. Lafferty does not specifically identify pneumoconiosis as a "contributing cause" to [c]laimant's disability, he did identify "disability of [claimant's] lungs," and noted that his pulmonary condition had not improved to the point that [c]laimant could return to work. Based on these statements, I find Dr. Lafferty's opinion a reasoned and documented opinion that [c]laimant's disability was contributed to by his pneumoconiosis.

Decision and Order on Third Remand at 7-8. It is within an administrative law judge's discretion, as the trier-of-fact, to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Based on the particular facts in this case, the administrative law judge reasonably inferred that Dr. Lafferty opined that claimant's pneumoconiosis contributed to his disability. *Maddaleni*, 14 BLR at 1-140; *Lafferty*, 12 BLR at 1-192; *Stark*, 9 BLR 1-37. Thus, we reject employer's assertion that the

administrative law judge substituted his opinion for that of Dr. Lafferty.

Finally, employer argues that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Tuteur. As noted above, the administrative law judge gave less weight to the disability causation opinions of Drs. Zaldivar and Tuteur because he found that they conflicted with his finding that claimant has legal pneumoconiosis. In *Mays*, 176 F.3d at 761, 21 BLR at 2-601, *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), and *Hobbs v. Clinchfield Coal Co.* [*Hobbs II*], 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995), the Fourth Circuit court held that physicians' opinions, that claimant does not have clinical pneumoconiosis, do not necessarily contradict an administrative law judge's finding that claimant has legal pneumoconiosis. In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), and *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995), however, the Fourth Circuit court held that opinions in which a physician finds, contrary to an administrative law judge's determination, that the miner has neither legal nor clinical pneumoconiosis, cannot be credited unless the administrative law judge identifies "specific and persuasive reasons for concluding that the doctor's judgment" on causation "does not rest upon her disagreement with the [administrative law judge's] finding . . . ." *Scott*, 289 F.3d at 269, 22 BLR at 2-384, *quoting Toler*, 43 F.3d at 116, 19 BLR at 2-83. Here, the administrative law judge's prior finding that the evidence established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a) is the law of the case. However, neither Dr. Zaldivar nor Dr. Tuteur opined that claimant has legal pneumoconiosis. Thus, we reject employer's assertion that the administrative law judge erred in discounting the disability causation opinions of Drs. Zaldivar and Tuteur. *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order on Third Remand – Award of Benefits 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