BRB No. 09-0852 BLA

ELMER BATES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY, INCORPORATED	)	DATE ISSUED: 09/30/2010
	)	
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 of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

James D. Holiday, Hazard, Kentucky, for claimant.

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

Jonathan Rolfe (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (04-BLA-5694) of Administrative Law Judge Pamela Lakes Wood awarding benefits on a claim 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). This case involves a claim filed on July 18, 2002, and is before the Board for the third time. In the initial decision, the administrative law judge, after crediting claimant with 27.94 years of coal mine employment,[1] found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge further found that the medical opinion evidence established the existence of legal pneumoconiosis,[2] in the form of chronic obstructive pulmonary disease (COPD) due to both smoking and coal mine dust exposure, pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *E.B.* [*Bates*] *v. Golden Oak Mining Co.*, BRB No. 06-0929 BLA/S (Aug. 28, 2007) (unpub.). However, the Board vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[3] and remanded the case for further consideration. *Id.* In light of this holding, the Board also vacated the administrative law judge's finding of disability causation pursuant to 20 C.F.R.

[1] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

[2] "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[3] Ordinarily, the Board's affirmance of an administrative law judge's finding that the x-ray evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1) would obviate the need for the Board to address the administrative law judge's separate finding regarding whether the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the Board recognized that the administrative law judge's finding of legal pneumoconiosis was critical to her disability causation finding at 20 C.F.R. §718.204(c). Consequently, the Board found it necessary to review the administrative law judge's finding of legal pneumoconiosis pursuant to Section 718.202(a)(4).

§718.204(c).[4] *Id.*

On remand, the administrative law judge found that the evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board held that the administrative law judge failed to follow its previous remand instruction to reconsider the medical opinion evidence in its entirety pursuant to 20 C.F.R. §718.202(a)(4). *E.B.* [*Bates*] *v. Golden Oak Mining Co.*, BRB No. 08-0441 BLA (Mar. 24, 2009) (unpub.). The Board, therefore, vacated the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration. *Id.* The Board also vacated the administrative law judge's finding that the evidence did not establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.*

On remand for the second time, the administrative law judge adopted her original analysis that was set forth in her Decision and Order of August 10, 2006, and found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), as well as total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in improperly requesting the Board to reconsider its 2007 Decision and Order. Employer also contends that the administrative law judge erred in crediting Dr. Baker's opinion pursuant to 20 C.F.R. §718.202(a)(4). Claimant and the Director, Office of Worker's Compensation Programs (the Director), respond in support of the administrative law judge's award of benefits. In separate reply briefs, employer reiterates its previous contentions of error. Claimant's counsel has also filed a complete, itemized statement requesting a fee for services performed during the two previous appeals to the Board pursuant to 20 C.F.R. §802.203.

[4] The Board affirmed the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), as unchallenged on appeal. *E.B.* [Bates] *v. Golden Oak Mining Co.*, BRB No. 06-0929 BLA/S (Aug. 28, 2007) (unpub.).

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

Impact of the Recent Amendments

By Order dated August 25, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims.[5] Claimant has responded. Claimant correctly states that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to his claim because it was filed before January 1, 2005.

Legal Pneumoconiosis

The central issue in this case is whether the medical opinion evidence establishes the existence of legal pneumoconiosis, in the form of COPD due, in part, to coal mine dust exposure. While Dr. Baker opined that claimant's COPD was due to both coal mine dust exposure and cigarette smoking, Director's Exhibit 8, Dr. Fino attributed claimant's COPD exclusively to his cigarette smoking. *Id.* Although Dr. Westerfield opined that claimant's COPD was due to cigarette smoking, he stated that he could not rule out a contribution from claimant's coal mine dust exposure. Employer's Exhibits 1 at 19.

[5] Section 1556 reinstated Section 411(c)(4) of the Act, which provides that, if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, then there shall be a rebuttable presumption that such miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time his death, he was totally disabled by pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)).

Procedural History

In her initial decision, the administrative law judge credited Dr. Baker's opinion, that claimant's COPD was due in part to his coal mine employment, over the contrary opinions of Drs. Fino and Westerfield. Although the administrative law judge found that the opinions of Drs. Fino and Westerfield were "not entirely 'hostile'" to the Act, she accorded less weight to their opinions because she found that the doctors based their opinions on assumptions contrary to the regulations. 2006 Decision and Order at 17. The administrative law judge, therefore, found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.* at 18.

Pursuant to employer's appeal, the Board initially rejected employer's contention that the administrative law judge erred in relying upon Dr. Baker's medical opinion to support a finding of legal pneumoconiosis at Section 718.202(a)(4). The Board held that substantial evidence supported the administrative law judge's finding that Dr. Baker's opinion, that claimant's COPD was due to both coal mine dust exposure and cigarette smoking, was sufficiently reasoned. *Bates*, BRB No. 06-0929 BLA/S, slip op. at 3-4. The Board held, however, that the administrative law judge applied an improper legal standard in her consideration of the opinions of Drs. Fino and Westerfield, stating that:

> Under Sixth Circuit law, in order to reject a medical opinion as hostile to the Act, the administrative law judge must determine: that the physician's opinion is inconsistent with congressional intent; that it is absolute, *e.g.* forecloses all possibility that simple pneumoconiosis can be disabling; and that the physician's predisposed belief forms the primary basis for his conclusion. *Adams v. Peabody Coal Co.*, 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987). The administrative law judge did not apply this standard in her decision. Consequently, we must vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) and remand this case for the administrative law judge to reconsider the physicians' opinions in their entirety, applying the Sixth Circuit standard.

Bates, BRB No. 06-0929 BLA/S, slip op. at 4.

The Board, therefore, vacated the administrative law judge's finding pursuant to 20 C.F.R. §§718.202(a)(4), and remanded the case for further consideration.

On remand, the administrative law judge stated that in her initial decision she had not found that the opinions of Drs. Fino and Westerfield were "hostile to the Act." 2008 Decision and Order on Remand at 5. In fact, the administrative law judge noted that the opinions of Drs. Fino and Westerfield could not be hostile to the Act under the precedent

of the United States Court of Appeals for the Sixth Circuit, since neither physician foreclosed all possibility that simple pneumoconiosis could be disabling. *Id.* at 5-6. The administrative law judge interpreted the Board's 2007 decision as holding that, if she did not find the opinions of Drs. Fino and Westerfield hostile to the Act, she was required to credit their opinions. *Id.* at 6. Based on this understanding, the administrative law judge found that Dr. Baker's opinion, that claimant suffered from legal pneumoconiosis, had to be reevaluated along with the contrary opinions of Drs. Fino and Westerfield. *Id.* The administrative law judge found that the medical opinion evidence, regarding whether claimant's COPD was due in part to his coal mine dust exposure, was "at best, in equipoise." *Id.* at 7. The administrative law judge, therefore, found that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id.*

Pursuant to claimant's appeal, the Board clarified its decision, stating that, contrary to the administrative law judge's understanding, it "did not hold that the only valid basis that was available to the administrative law judge for discounting the opinions of Drs. Fino and Westerfield was to find that their opinions were hostile to the Act." *Bates*, BRB No. 08-0441 BLA, slip op. at 5. The Board, therefore, vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4), and remanded the case for further consideration. *Id.* The Board instructed the administrative law judge, on remand, to "address not only the physicians' ultimate diagnoses, but whether their opinions [were] reasoned in light of the explanations for their conclusions, the documentation underlying their medical judgments, the regulations, and the evidence as a whole." *Id.* at 5-6.

On remand for the second time, the administrative law judge stated:

> Taking another look at all of the evidence and reevaluating it under the Board's most recent decision, I find that my original analysis in my initial decision was correct. Accordingly, I adopt my analysis, as set forth in my 23-page Decision and Order Granting Benefits of August 10, 2006. Accordingly, benefits are again awarded.

Decision and Order on Second Remand at 3.

Discussion

Employer contends that the administrative law judge, in her most recent decision, "has, in effect requested that the Board reconsider its August 28, 2007 decision." Employer's Brief at 4. As the Director notes, the administrative law judge "responded to the Board's specific request in the least tedious manner possible by adopting her initial

analysis. Having the [administrative law judge] rewrite the same analysis in a slightly different form would serve no purpose at all." Director's Brief at 5.

Employer further contends, however, that the administrative law judge's original analysis of the medical evidence pursuant to 20 C.F.R. §718.202(a)(4) cannot be affirmed, since in its 2007 decision, the Board held that the administrative law judge erred in finding that Drs. Fino and Westerfield based their opinions on assumptions that are contrary to the Act. Employer's Brief at 4. We disagree. Employer's statement mischaracterizes the Board's original basis for vacating the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4). In its 2007 decision, the Board vacated the administrative law judge's finding of legal pneumoconiosis because the Board believed, based on the administrative law judge's reference to hostility, that the administrative law judge had failed to properly determine whether the opinions of Drs. Fino and Westerfield were "hostile to the Act." However, subsequent to the Board's 2007 decision, the administrative law judge has clarified her decision, stating that she had not found that the opinions of Drs. Fino and Westerfield were hostile to the Act.

In her original decision, the administrative law judge accorded less weight to Dr. Fino's opinion because it was based on an assumption contrary to the regulations, *i.e.*, that coal mine dust exposure does not contribute to COPD in the absence of significant fibrosis. 2006 Decision and Order at 17; Director's Exhibit 8. The administrative law judge accorded less weight to Dr. Westerfield's opinion because the doctor failed to account for the progressive nature of pneumoconiosis. *Id*. The administrative law judge also accorded less weight to the opinions of Drs. Fino and Westerfield because they did not adequately explain why claimant's coal mine dust exposure could not have contributed to his COPD. 2006 Decision and Order at 18. Because employer does not challenge the administrative law judge's reasons for according less weight to the opinions of Drs. Fino and Westerfield, these findings are affirmed. *Skrack v. Island Creek Co.*, 6 BLR 1-710 (1983).

We also reject employer's contention that the administrative law judge erred in her consideration of Dr. Baker's opinion. The Board previously held that the administrative law judge permissibly determined that Dr. Baker's opinion, that claimant's COPD was due in part to his coal dust exposure, was adequately reasoned. The Board's previous holding on this issue constitutes the law of the case and governs the Board's determination. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Consequently, we decline to address employer's contentions of error in regard to the administrative law judge's consideration Dr. Baker's opinion.[6] We, therefore, affirm the administrative law judge's finding that the medical

[6] Contrary to employer's contention, the Sixth Circuit court's decision in *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 641-42, 24 BLR 2-199 (6th Cir. 2009),

opinion evidence establishes the existence of legal pneumoconiosis, in the form of COPD due to coal mine dust exposure. 20 C.F.R. §718.202(a)(4).

Because employer does not challenge the administrative law judge's finding that the evidence establishes that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), this finding is also affirmed. *Skrack*, 6 BLR at 1-711.

Attorney Fee

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed during the two appeals to the Board pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a fee of $6,525.00 for 21.75 hours of legal services at an hourly rate of $300.00. No objections to the fee petition have been received. The Board finds the fee to be reasonable in light of the services performed, and approves a fee of $6,525.00, to be paid directly to claimant's counsel by employer.[7] 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

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does not constitute an intervening change in law exception to the Board's application of the law of the case doctrine. In *Greene*, the Sixth Circuit set forth the standard for determining whether a pulmonary evaluation is complete. In that case, the Sixth Circuit held that Dr. Baker's opinion satisfied the Department of Labor's obligation to provide the miner with a complete pulmonary evaluation, even though the administrative law judge declined to credit Dr. Baker's opinion that the miner suffered from pneumoconiosis. *Greene*, 575 F.3d at 642, 24 BLR at 2-221. In affirming the administrative law judge's decision to discredit Dr. Baker's opinion, the court did not hold that the administrative law judge had been required to discredit it. Instead, the Sixth Circuit emphasized that the determination as to whether a physician's report is sufficiently documented and reasoned is a credibility matter for the administrative law judge to decide. *Greene*, 575 F.3d at 635, 24 BLR at 2-210.

Employer also contends that the administrative law judge did not address the effect of a 2009 "Agreed Order" between Dr. Baker and the Kentucky Board of Medical Licensure on the credibility of Dr. Baker's opinion. Because this issue was not raised before the administrative law judge, we decline to consider it. *Lyon v. Pittsburg & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984).

[7] An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding 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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REGINA C. McGRANERY
Administrative Appeals Judge