BRB No. 06-0251 BLA

ROY R. HALL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	DATE ISSUED: 12/15/2006
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 Third Remand of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Roy R. Hall, Big Rock, Virginia, *pro se*.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Sarah M. Hurley (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Third Remand (99-BLA-1340) of Administrative Law Judge Daniel F Sutton denying employer's motion to reopen the record, and awarding benefits as of August 1, 1995, 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). This case is before the Board for the fifth time.

Claimant's application for benefits filed on August 28, 1995 was denied by Administrative Law Judge Frederick D. Neusner, based on findings that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but did not establish that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(c)(2000). Director's Exhibits 1, 42. Although claimant submitted an October 24, 1995 exercise blood gas study conducted by Dr. Forehand that was both qualifying[1] and valid, Director's Exhibits 13, 14, Judge Neusner credited a May 15, 1996 non-qualifying exercise blood gas study, along with Dr. Sargent's opinion that the 1995 blood gas study likely reflected a transient condition, to find that claimant was not totally disabled. Upon review of claimant's appeal, the Board affirmed Judge Neusner's decision denying benefits. *Hall v. Dominion Coal Corp.*, BRB No. 97-0766 BLA (Jan. 28, 1998)(unpub.); Director's Exhibits 52, 55.

Claimant timely requested modification. Director's Exhibit 56; *see* 33 U.S.C. §922, implemented by 20 C.F.R. §725.310(2000). In support of his modification request, claimant submitted a report of a February 4, 1998 blood gas study in which Dr. Forehand measured claimant's arterial blood oxygen at rest, during exercise, and after exercise. Director's Exhibit 70. The test yielded non-qualifying values at rest, qualifying values during exercise, and non-qualifying values two minutes after exercise. *Id*. Dr. Forehand compared these results with those of the blood gas study he conducted on October 24, 1995, which was non-qualifying at rest and qualifying during exercise. Finding the results of the two tests "essentially identical," Dr. Forehand concluded that "Mr. Hall has a totally and permanently disabling respiratory impairment of a gas exchange nature . . . ." Director's Exhibit 70 at 2. Dr. Forehand criticized the May 15, 1996 non-qualifying exercise blood gas study previously cited by Dr. Sargent and credited by Judge Neusner as proof of non-disability. Dr. Forehand pointed out that "[b]lood samples for arterial blood gas analysis must be drawn during exercise," not after exercise as was done on May 15, 1996. Director's Exhibit 70 at 2. Dr. Forehand further noted that on February 4, 1998, he took a sample of claimant's arterial blood two minutes after exercise "to demonstrate that the pO2 will rapidly return to the normal range after falling abnormally low during exercise." Director's Exhibit 70 at 1-2. Dr. Forehand thus rejected the previous opinions of Drs. Castle and Sargent questioning the October 1995 qualifying exercise blood gas study, and he concluded that "[i]f properly evaluated, . . . Mr. Hall's respiratory impairment is still present and is irreversible . . . as I have shown on two

[1] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. *See* 20 C.F.R. §718.204(b)(2)(i),(ii). A "non-qualifying" study exceeds those values.

occasions separate[d] by an interval of greater than two years." Director's Exhibit 70 at 2. Dr. Forehand opined that claimant's total disability is due to pneumoconiosis. *Id*.

Employer responded to claimant's modification request with the September 8, 1999 medical examination report of Dr. Castle, and the January 3, 2000 consultation report of Dr. Fino. Employer's Exhibits 1, 9. Both physicians opined that claimant was not totally disabled, based on pulmonary function studies, diffusion capacity tests, and prior blood gas studies.[2]

Administrative Law Judge Daniel F. Sutton found that no mistake in a determination of fact was established because Judge Neusner "properly evaluated and weighed the evidence of record as it existed before him" in finding that claimant was not totally disabled. [2000] Decision and Order Awarding Benefits at 4. The administrative law judge determined that the weight of the new blood gas study and medical opinion evidence submitted on modification established a change in conditions by demonstrating that claimant was totally disabled pursuant to 20 C.F.R. §718.204(c)(2),(c)(4)(2000). The administrative law judge additionally accorded greater weight to Dr. Forehand's new medical opinion and found that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, the administrative law judge awarded benefits. Because claimant did not establish a mistake in a determination of fact but rather a change in conditions pursuant to 20 C.F.R. §725.310(2000), the administrative law judge awarded benefits as of April 1998, the month in which claimant filed his modification request.

Upon review of employer's appeal, the Board rejected all of employer's allegations of error in the administrative law judge's weighing of the medical evidence and affirmed the findings that claimant established that he is totally disabled and that his total disability is due to pneumoconiosis. *Hall v. Dominion Coal Corp*., BRB No. 00-1083 BLA (Oct. 10, 2001)(unpub.). However, the Board held that the administrative law judge failed to consider whether the ultimate fact was correctly decided by Judge Neusner. [2001] *Hall*, slip op. at 13. The Board therefore remanded the case for the administrative law judge to reconsider the basis for granting modification, and to then set the onset date accordingly. In affirming the administrative law judge's determination that claimant was entitled to benefits, the Board rejected employer's argument that it was prejudiced by claimant's refusal to undergo a blood gas study with Dr. Castle:

[2] The record reflects that claimant declined to undergo a blood gas study during Dr. Castle's examination because he stated that he experienced discomfort after the February 1998 blood gas study by Dr. Forehand. Employer's Exhibit 1 at 3.

> [E]mployer does not allege, and a review of the record fails to indicate, that employer ever notified the administrative law judge that it had any problem obtaining evidence or at any time sought an order to compel claimant to undergo another blood gas study [footnote omitted] . . . . Consequently, employer waived its right . . . to have claimant undergo another blood gas study, and any right to Board review of the issue, by failing to object, before the administrative law judge, to the proffered evidence or to seek an order to compel claimant to undergo another blood gas study . . . .

[2001] *Hall*, slip op. at 9-10.

On remand, the administrative law judge found that "there was a mistake in Judge Neusner's determination that total respiratory disability was not established by either arterial blood gas study evidence pursuant to 20 C.F.R. §718.204(c)(2) or medical opinion evidence pursuant to 20 C.F.R. §718.204(c)(4)." [2002] Decision and Order on Remand at 7. Considering 20 C.F.R. §718.105(b)(2000), which provides that "[i]f an exercise blood-gas test is administered, blood shall be drawn during exercise," the administrative law judge found that Dr. Forehand's October 1995 and February 1998 exercise blood gas studies were properly conducted, whereas Dr. Sargent's May 1996 blood gas study incorrectly measured claimant's blood oxygen after exercise. The administrative law judge also considered Dr. Forehand's demonstration that claimant's arterial blood oxygen level rapidly returned to normal when it was sampled after exercise, even though it had dropped to a qualifying level during exercise. The administrative law judge found that "[g]iven this significant difference in test methodology, I conclude that the evidence does not show that the Claimant's condition improved after the 1995 study as found by Judge Neusner." [2002] Decision and Order on Remand at 7. The administrative law judge found the occurrence of a mistake in the prior determination "reinforced" by the new evidence submitted on modification, because Dr. Forehand's February 1998 blood gas testing "again produced qualifying results during exercise," and because Dr. Forehand "provided the well-reasoned and documented opinion . . . that the Claimant is permanently and totally disabled due to pneumoconiosis." *Id*. For the reasons set forth in his prior decision and affirmed by the Board, the administrative law judge found that Dr. Forehand's opinion outweighed those of Drs. Fino and Castle submitted on modification, and he concluded that "the ultimate fact of total disability due to pneumoconiosis was wrongly determined." [2002] Decision and Order on Remand at 8.

The administrative law judge found that the evidence did not establish the onset date, but merely demonstrated that claimant became totally disabled due to pneumoconiosis at some time prior to Dr. Forehand's October 25, 1995 examination and testing. Since there was no credited evidence that claimant was not totally disabled due to pneumoconiosis at any point subsequent to the filing date of his claim, the

administrative law judge set the onset date as August 1, 1995, the month in which claimant filed his claim for benefits.

Upon review of employer's appeal, the Board rejected employer's arguments that the administrative law judge misapplied the modification provision and improperly considered whether the 1996 non-qualifying blood gas study was technically valid. *Hall v. Dominion Coal Corp.*, BRB No. 02-0861 (Aug. 7, 2003)(unpub.). However, the Board was constrained to vacate the administrative law judge's mistake-in-fact and onset findings because he did not include the 1996 opinions of Drs. Castle and Sargent in his consideration of the evidence. [2003] *Hall*, slip op. at 8. Accordingly, the Board remanded the case to the administrative law judge for further consideration.

On October 23, 2003, while the case was pending on remand, employer moved to reopen the record and remand the case to the district director for further blood gas testing, because claimant had declined to undergo a blood gas study with Dr. Castle in 1998. The administrative law judge did not address employer's motion.

In a 2004 Decision and Order, the administrative law judge again found that there was a mistake in the initial finding that claimant did not establish total disability. The administrative law judge noted that employer "offered no evidence addressing Dr. Forehand's criticism of Dr. Sargent's reliance on an arterial blood sample drawn after cessation of exercise even though two experts, Drs. Castle and Fino, subsequently reviewed the medical reports," and submitted reports on modification. [2004] Decision and Order at 10. The administrative law judge noted further that neither Dr. Castle nor Dr. Sargent addressed the results of claimant's February 1998, qualifying blood gas study. The administrative law judge found that, although Dr. Castle stated that the 1996, non-qualifying blood gas study was an adequate test, this statement "d[id] not answer the question raised by Dr. Forehand as to whether one can validly rely on post-exercise readings to assess a claimant's ability to perform coal mine work when readings taken during exercise . . . indicate that he cannot." [2004] Decision and Order at 11. Because Drs. Castle and Sargent did not address this point, and because they relied on Dr. Sargent's May 1996 study, which the administrative law judge found "non-conforming under the Secretary's regulations," the administrative law judge gave "less weight" to their opinions than to "the well-reasoned and supported opinion from Dr. Forehand." *Id*. Accordingly, the administrative law judge again found that the ultimate fact of total disability due to pneumoconiosis was wrongly decided.

Additionally, the administrative law judge again found that the evidence did not establish the onset date, but merely reflected that claimant became totally disabled due to pneumoconiosis sometime before Dr. Forehand's October 25, 1995 examination. Since there was no credited evidence that claimant was not totally disabled due to

pneumoconiosis at any point subsequent to the filing date of his claim, the administrative law judge again awarded benefits as of as August 1, 1995.

Upon review of employer's appeal, the Board vacated the administrative law judge's Decision and Order and remanded the case for him to rule on employer's motion to reopen the record for further blood gas testing. *Hall v. Dominion Coal Corp*., BRB No. 04-0788 BLA (May 13, 2005)(unpub.). Consequently, the Board did not address the administrative law judge's onset finding.

On remand, the administrative law judge noted that in 2001 the Board held that employer waived its right to have claimant undergo another blood gas study. The administrative law judge found that this holding was the law of the case requiring denial of employer's motion to reopen the record for blood gas testing, unless employer established an exception to the law of the case doctrine. The administrative law judge found that employer did not establish an exception. In so doing, the administrative law judge also found that employer's motion to reopen the record for blood gas testing was a belated attempt to buttress its case. Accordingly, the administrative law judge denied employer's motion to reopen the record. He again ordered employer to pay benefits as of August 1, 1995.

On appeal, employer contends that the administrative law judge erred in denying its motion to reopen the record on the basis of the law of the case doctrine. Employer argues further that the administrative law judge erred in granting modification based on a mistake in a determination of fact. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response arguing that the administrative law judge erred in applying the law of the case doctrine, but contending that a remand may be unnecessary in view of the administrative law judge's finding that employer's motion to reopen the record lacked merit. Employer has filed reply briefs to both claimant's and Director's responses.

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).

Employer and the Director argue that because the Board in its 2001 decision did not decide whether employer could move to reopen the record, the administrative law judge on remand erred in applying the law of the case doctrine to rule on employer's motion. Employer's Brief at 12-15; Director's Brief at 5-6. We disagree. In 2001, we held that "employer waived its right . . . to have claimant undergo another blood gas

study . . . ." [2001] *Hall*, slip op at 10. We then affirmed the administrative law judge's entitlement findings. [2001] *Hall*, slip op. at 11. The subsequent remands have been for the administrative law judge to determine the onset date of claimant's entitlement, that is, whether modification was based on a change in conditions or a mistake in fact. Employer now seeks to have claimant undergo another blood gas study. In our last decision, we did not discuss claimant's argument that the administrative law judge's failure to address employer's motion was harmless, since the Board had already held that employer waived its right to further blood gas testing. Claimant's *Pro Se* Response Brief at 5-7, Nov. 29, 2004. Under these circumstances, we find no error in the administrative law judge's decision to apply the law of the case doctrine to our 2001 holding that employer waived its right to have claimant undergo another blood gas study. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting).

Moreover, the administrative law judge also found that employer's motion to reopen the record was an untimely attempt to correct its failure to raise a timely objection to claimant's refusal to undergo blood gas testing with Dr. Castle in 1998. [2005] Decision and Order on Remand at 9. The question of whether to reopen the record on remand in this case was a procedural matter within the administrative law judge's discretion. *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11, 1-21 (1999)(*en banc*). Employer has demonstrated no abuse of discretion by the administrative law judge in declining to reopen the record based on his stated rationale.

Employer's remaining arguments on this issue lack merit. Employer contends that the administrative law judge erred because Section 19(h) of the Longshore and Harbor Workers' Compensation Act, incorporated into the Act by 30 U.S.C. §932(a), entitles employer to a full examination and mandates that benefits be suspended if claimant refuses to cooperate. Employer's Brief at 16-17. Section 19(h) provides that claimant "shall submit to such physical examination . . . as the deputy commissioner may require," and that an employer's physician "may participate" in an examination. 33 U.S.C. §919(h). Thus, contrary to employer's contention, Section 19(h) authorizes the district director to order a physical examination; it does not afford employer an absolute right to an examination.

Employer also maintains that 20 C.F.R. §718.404(b)(2000) requires claimant to submit to examinations or tests where an issue is raised as to "the validity of the original adjudication of disability." 20 C.F.R. §718.404(b)(2000); Employer's Brief at 18. Employer does not explain how this provision applies, considering that in this case, claimant requested modification of an adjudication of non-disability. In any event, the record reflects that claimant submitted to an examination by employer's physician on modification in 1998. As discussed, he declined to undergo a blood gas study because of discomfort he told Dr. Castle he had experienced after Dr. Forehand's blood gas study.

Employer's Exhibit 1 at 3. As the administrative law judge on remand found, employer did not raise this issue with the administrative law judge until 2003. Therefore, we reject employer's allegations of error and we affirm the administrative law judge's decision to deny employer's motion to reopen the record. *See Troup*, 22 BLR at 1-21.

Regarding the administrative law judge's 2004 finding that there was a mistake in a determination of fact, employer alleges that the administrative law judge did not explain why he found the February 1998 blood gas study qualifying for total disability. Employer's Brief at 19-21. Employer raised this argument previously. We rejected it on the ground that the administrative law judge permissibly relied on Dr. Forehand's reasoned medical opinion interpreting the February 1998 exercise blood gas study results as demonstrating that claimant was totally disabled. [2001] *Hall*, slip op. at 9-10. The issue is therefore settled for purposes of this appeal. *See Brinkley*, 14 BLR at 1-151.

Employer alleges that the administrative law judge did not explain why he found that the February 1998 qualifying blood gas study results confirmed that the 1995 qualifying blood gas study was valid and demonstrated that claimant has been totally disabled all along, when, employer argues, the 1998 study shows improvement. Employer's Brief at 21-22. This argument lacks merit. Based on Dr. Forehand's opinion submitted on modification, the administrative law judge found that claimant's 1995 and 1998 qualifying exercise blood gas studies were properly conducted because claimant's blood was drawn during exercise, as required by 20 C.F.R. §718.105(b)(2000), whereas the 1996, non-qualifying blood gas study was non-conforming because claimant's blood was drawn after exercise. The administrative law judge accurately found that none of employer's physicians addressed Dr. Forehand's opinion invalidating the 1996 test, and explaining the need to draw claimant's blood during exercise. The administrative law judge acted within his discretion in analyzing the reasoning and documentation of the medical opinions. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). He explained why he found that there was a mistake in the initial decision that claimant was not totally disabled, and his finding is supported by substantial evidence and is in accordance with law. See 20 C.F.R. §718.105(b)(2000); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 201 n.3, 12 BLR 2-376, 2-380 n.3 (6th Cir. 1989).

Finally, employer argues that the administrative law judge did not weigh together all contrary probative evidence to determine whether claimant is totally disabled, and he did not account for Dr. Forehand's misdiagnosis of complicated pneumoconiosis. Employer's Brief at 23-27. The Board rejected both of these arguments previously, and affirmed the finding that claimant established that he is totally disabled due to pneumoconiosis. [2001] *Hall*, slip op. at 10-11. Consequently, these matters are no longer at issue. *See Brinkley*, 14 BLR at 1-151.

Therefore, we affirm the administrative law judge's determination that the grant of modification was based on a mistake in a determination of fact. *See* 20 C.F.R. §725.310(2000); *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994). Employer raises no specific challenge to the additional findings that the record did not establish the date of onset of claimant's total disability due to pneumoconiosis, and that claimant is entitled to benefits as of the filing date of his claim. We therefore affirm the administrative law judge's finding that the onset date is August 1, 1995. *See* 20 C.F.R. §725.503(b),(d).

Accordingly, the administrative law judge's Decision and Order on Third Remand is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge