

BRB No. 06-0948 BLA

J. C. C.)
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 Claimant-Respondent)
)
 v.)
)
 U.S. STEEL CORPORATION) DATE ISSUED: 09/14/2007
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 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 Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (2004-BLA-05331) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 second time. In the last appeal, the Board affirmed the administrative law judge's findings that claimant had established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and total respiratory disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c), but vacated his finding that claimant had established at least ten years of qualifying coal mine employment, as this finding resulted from an incorrect

application of the provisions at 20 C.F.R. §725.101(a)(43). As substantial evidence supported the administrative law judge's finding that the actual time claimant spent in qualifying coal mine employment totaled nine years and two months, the Board reversed the administrative law judge's finding that claimant was entitled to invocation of the rebuttable presumption at 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment. Consequently, the Board remanded this case to the administrative law judge for consideration of whether claimant has established, by a preponderance of the evidence, that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(c). *Cochran v. U.S. Steel Mining Co.*, BRB No. 05-0790 BLA (Mar. 29, 2006)(unpub.). On remand, the administrative law judge found the etiology of claimant's pneumoconiosis had been established at Section 718.203(c), and accordingly, benefits were awarded.

In the present appeal, employer challenges the administrative law judge's findings at Section 718.203(c).¹ Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer challenges the administrative law judge's finding of disease causality at Section 718.203(c), arguing that "the record is devoid of evidence of any causal connection, aside from assumption and speculation," Employer's Brief at 7, "fueled in Dr. Rasmussen's case by a belief that sufficient length of employment is established (eleven or more years) to invoke the presumption of a causal relationship." Employer's Brief at 8. Employer thus asserts that the record does not support a finding that etiology has been established by a preponderance of the evidence. *Id.* Employer's arguments are rejected.

¹ Employer also disagrees with the Board's affirmance of the administrative law judge's findings on the issues of the existence of pneumoconiosis and total disability due to pneumoconiosis in the last appeal, and "continues to press all of its assignments of error on this appeal, to preserve the same for purposes of any further appeal in this claim." Employer's Brief at 6. As employer has not set forth any valid exception to the law of the case doctrine, however, we adhere to our previous holdings regarding these issues. See *U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal Corp.*, 20 BLR 1-8 (1996); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Dr. Rasmussen opined, in pertinent part, that:

[t]he patient has a significant history of exposure to coal mine dust. He has x-ray changes consistent with pneumoconiosis. It is medically reasonable to conclude the patient has coalworkers' pneumoconiosis, which arose from his coal mine employment. The risk factors for this patient's disabling lung disease include his cigarette smoking and his exposure to a variety of occupational dusts and fumes including 11 years of coal mine employment, chemical [sic] in textile plants and possible exposure to toxins in school maintenance. All contribute. Occupational exposures including his coal mine employment are especially significant since he shows very marked impairment in oxygen transfer absent ventilatory impairment. . . .Coal mine dust exposure is known to cause impairment in oxygen transfer absent ventilatory impairment. [C]'s coal mine dust exposure is therefore a major contributing factor to his disabling lung disease.

Claimant's Exhibit 1 at 3-4; Decision and Order at 8-9. In finding etiology established, the administrative law judge credited claimant's uncontradicted testimony that all of his coal mine employment was spent in underground mining, and found that claimant reasonably related the onset of symptoms to his coal mine employment. Decision and Order on Remand at 2. The administrative law judge determined that the West Virginia Workers' Compensation Fund granted a 5% award for occupational pneumoconiosis on January 11, 1988, and found that the State determination substantiated a medical basis for claimant's disease etiology that was consistent with his employment history. *Id.*; Director's Exhibit 9. We note that employer does not challenge the administrative law judge's crediting of this evidence, but essentially requests a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). As Drs. Rasmussen and Forehand also affirmatively attributed claimant's pneumoconiosis to his coal mine employment, the administrative law judge acted within his discretion in crediting their opinions as well, and finding that etiology was established at Section 718.203(c).² Decision and Order on Remand at 2; Director's Exhibit 16; Claimant's Exhibit 1; *see Shoup v. Director, OWCP*, 11 BLR 1-110 (1987). The administrative law judge's findings pursuant to Section 718.203(c) are supported by substantial evidence, and thus are affirmed. Consequently, we affirm his award of benefits.

² Dr. Forehand opined that the most likely cause of claimant's abnormal blood gas test was evolving coal workers' pneumoconiosis from coal dust exposure, a normal chest x-ray notwithstanding. Director's Exhibit 16.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge