BRB No. 08-0549 BLA

ROBERT L. STOVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/27/2010
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on RECONSIDERATION
Party-in-Interest	)	*EN BANC*

Appeal of the Decision and Order – Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

Helen H. Cox (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank 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, McGRANERY, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer has filed a timely motion for reconsideration *en banc* of the Board's Decision and Order issued on April 16, 2009 in the above-captioned case. In its decision,

the Board rejected employer's assertion that, because claimant's prior claim[1] was denied for failure to establish the existence of pneumoconiosis, and claimant had no further coal dust exposure, the doctrine of *res judicata* precluded claimant from entitlement to benefits. The Board affirmed the finding of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge), that the newly-submitted evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The Board rejected employer's argument that the administrative law judge improperly based his finding of pneumoconiosis on a presumption of latency or progression of the disease, noting that the regulations recognize pneumoconiosis as a progressive disease and do not require a showing that the miner suffers from a particular variety of latent and progressive pneumoconiosis. On the merits of entitlement, the Board affirmed the administrative law judge's credibility determinations in finding that the opinions of Drs. Baker and Simpao outweighed the contrary opinions of Drs. Repsher and Fino, and were sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the Board affirmed the administrative law judge's award of benefits. *R.L.S.* [*Stover*] *v. Peabody Coal Co.*, BRB No. 08-0549 BLA (Apr. 16, 2009)(unpub.).

In its motion for reconsideration *en banc*, employer again asserts that adjudication of this claim is barred by the doctrine of *res judicata*; that the administrative law judge improperly applied an irrebuttable presumption that pneumoconiosis is always latent and progressive; and that the evidence of record is insufficient to establish disability causation under Section 718.204(c). Employer also maintains that the administrative law judge's evaluation of the medical opinion evidence on the issue of disability causation does not accord with recent applicable case law. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments on reconsideration. Employer has filed a combined reply brief in support of its position.

Initially, we decline to revisit, on reconsideration, employer's argument that principles of *res judicata* bar adjudication of this claim, as this argument was previously addressed and rejected by the Board. Similarly, employer's argument that the miner's pneumoconiosis must be proven to be of a latent and progressive nature has no merit, *see*

[1] Claimant's first claim for benefits, filed on July 11, 1996, was denied by the district director on November 8, 1996, for failure to establish a totally disabling respiratory impairment caused by pneumoconiosis, and was, thereafter, administratively closed. Decision and Order at 2-3, 9; Director's Exhibit 1 at 2. Claimant took no further action until filing the current claim on July 21, 2005.

Greene v. King James Coal Mining, Inc., 575 F.3d 628, BLR (6th Cir. 2009); *Parsons v. Wolf Creek Collieries, Inc*., 23 BLR 1-29 (2004)(Order on Recon. *en banc*)(McGranery, J., concurring and dissenting), and raises no basis for reconsideration, as it merely restates employer's assertion, previously rejected by the Board, that the administrative law judge based his finding of pneumoconiosis on a presumption of latency or progression of the disease. *Stover*, slip op. at 3; *accord R.A.G. American Coal Co. v. Director, OWCP* [*Buchanan*], 576 F.3d 418, BLR (7th Cir. 2009). Consequently, we decline to alter our prior holdings, and reaffirm them.

Employer next argues that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a "differential diagnosis test" for evaluating medical expert opinions on the issue of causation, which affects the disposition of this case. Employer maintains that, in *Best v. Lowe's Home Centers, Inc*., 563 F.3d 171 (6th Cir. 2009), a toxic tort case issued on the same date as the Board's decision in this matter, the court addressed the proper test for reviewing physicians' differential diagnoses[2] for admissibility, reliability and probative value. Employer argues that the court specifically adopted a differential diagnosis test that rules in one or more causes using a valid methodology, and then uses diagnostic techniques to rule out alternative causes in order to reach a conclusion as to which cause of injury is most likely. Employer asserts that this test constitutes a new legal standard that is applicable to black lung claims under general standards for evaluating the credibility of medical opinion evidence. As Drs. Simpao and Baker attributed claimant's disabling impairment to both smoking and coal dust exposure, and the administrative law judge did not apply the differential diagnosis test enunciated in *Best*, employer contends that the Board must vacate the administrative law judge's finding of disability causation pursuant to Section 718.204(c) and remand this case for the administrative law judge to reevaluate the medical opinion evidence thereunder. Employer's Brief at 5-6. We disagree.

In *Best*, the district court judge had excluded the testimony of the petitioner's medical expert, whose causation opinion was based on a differential diagnosis methodology, as being too speculative, and entered summary judgment against petitioner because no other evidence of causation was presented. On appeal, the Sixth Circuit reviewed Rule 702 of the Federal Rules of Evidence regarding the admissibility of expert testimony, stressing the need, under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), for a reliable foundation for the expert evidence, and for

[2] Differential diagnosis is "[t]he method by which a physician determines what disease process caused a patient's symptoms. The physician considers all relevant potential causes of the symptoms and then eliminates alternative causes based on a physical examination, clinical tests, and a thorough case history." *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001).

consideration of whether the evidence is supported by scientifically valid methodology and reasoning. The court adopted the following differential diagnosis test:

> A medical-causation opinion in the form of a doctor's differential diagnosis is reliable and admissible where the doctor (1) objectively ascertains, to the extent possible, the nature of the patient's injury, . . . (2) "rules in" one or more causes of the injury using a valid methodology, and (3) engages in "standard diagnostic techniques by which doctors normally rule out alternative causes" to reach a conclusion as to which cause is most likely.

Best, 563 F.3d at 179, citing *In re Paoli Railroad Yard PCB Litigation*, 35 F.3d 717 (3d Cir. 1994). The court explained that it "recognizes differential diagnosis as 'an appropriate method for making a determination of causation for an individual instance of disease.'" *Id*. at 178, citing *Hardyman v. Norfolk & W. Ry. Co.*, 243 F.3d 255, 260 (6th Cir. 2001). Further, the court noted that an overwhelming majority of the courts of appeals agree that "a medical opinion on causation based upon a reliable differential diagnosis is sufficiently valid to satisfy the first prong [reliability] of the Rule 702 inquiry." *Id*., citing *Westberry v. Gislaved Gummi AB*, 178 F.3d 257, 263 (4th Cir. 1999). In determining reliability, the court observed that, to the extent that a doctor utilizes standard diagnostic techniques in gathering information, it is more likely that his methodology is reliable, and that "performance of physical examinations, taking of medical histories, and employment of reliable laboratory tests all provide significant evidence of a reliable differential diagnosis." *Id.* at 179, citing *Paoli Railroad Yard*, 35 F.3d at 758. The court stressed that its "function is not to determine whether the opinion is airtight and conclusively proves the cause of [petitioner's condition]. . . . [r]ather, the court's role as gatekeeper is to decide whether [the physician] performed his duties as a diagnosing physician to the professional level expected in his field," and that under this standard, the testimony met "the threshold level of admissibility under *Daubert*." *Id.* at 183-184. Accordingly, the court held that summary judgment was inappropriate, and remanded the case for adjudication.

We agree with the Director's position, that *Best* is neither applicable under the facts of this case, nor does it present a new standard for evaluating disability causation opinions in black lung cases. The administrative law judge in black lung adjudications is not bound by "common law or statutory rules of evidence, or by technical or formal rules of procedure, except as provided by 5 U.S.C. 554 and this subpart." 20 C.F.R. §725.455(b); *see Cline v. Westmoreland Coal Co.*, 21 BLR 1-69, 1-76 (1997). Further, the Federal Rules of Evidence do not apply to administrative proceedings, unless specifically provided by statute or regulation. *See Frilette v. Kimberlin*, 508 F.2d 205 (3d Cir. 1974). In cases involving the evaluation of medical opinions that attributed a miner's disabling respiratory impairment to smoking, or to coal dust exposure, or to both, where the physicians disagreed as to whether the role of each exposure could be differentiated, the Sixth Circuit has consistently upheld the administrative law judge's

credibility determinations, if supported by substantial evidence, where the adjudicator has examined "the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Subsequent to the issuance of *Best*, the Sixth Circuit issued its decision in *Greene*, 575 F.3d 628, 635, utilizing the *Rowe* standard, with no mention of a *Best* or a *Daubert* analysis. Thus, it does not appear that *Best* is applicable to causation analyses other than in the context of cases subject to Rule 702 of the Federal Rules of Evidence.

In the present case, employer raised no objection at the hearing to the admission into evidence of the reports of Drs. Baker and Simpao, *see* Hearing Transcript at 6, 8, and the administrative law judge properly evaluated the credibility of the conflicting medical opinions of record, based on their reasoning and underlying documentation. As the administrative law judge applied the appropriate standard in evaluating the evidence of record, and his findings comport with applicable Sixth Circuit case law, we reaffirm our prior holdings on the merits. Accordingly, we grant employer's motion for reconsideration *en banc*, but deny the relief requested by employer, and affirm the Board's Decision and Order of April 16, 2009.

Lastly, we address claimant's counsel's request for an attorney fee for work performed before the Board in the instant appeal, pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $375.00 for 2.5 hours of legal services at an hourly rate of $150.00. Employer has not submitted any objection to claimant's counsel's fee request. We find the requested fee reasonable in light of the services performed, and approve a fee of $375.00, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

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

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge