BRB Nos. 07-0699 BLA
and 07-0699 BLA-A

D.S.	)	
	)	
Claimant-Petitioner Cross-Respondent	)	
	)	
v.	)	
	)	
SOUTH AKERS MINING COMPANY, LLC	)	DATE ISSUED: 04/29/2008
	)	
Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and cross-appeal of the Decision and Order Denial of Benefits and the Decision and Order on Request for Reconsideration of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Timothy J. Walker (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer.

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denial of Benefits and the Decision and Order on Request for Reconsideration (05-BLA-6306) of Daniel F. Solomon on a claim filed on September 22, 2004, 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). The administrative law judge accepted the parties' stipulation

that claimant worked for twenty-nine years in coal mine employment,[1] and found that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). The administrative law judge further found that claimant did not establish total disability under 20 C.F.R. §718.204(b). Accordingly, the administrative law judge denied benefits.

Claimant appeals, challenging the administrative law judge's weighing of the arterial blood gas studies and medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv). Specifically, claimant argues that the administrative law judge failed to state a valid reason for finding that Dr. Forehand's qualifying, resting blood gas study could not be accepted as qualifying evidence of total disability at 20 C.F.R. §718.204(b)(2)(ii), and challenges the administrative law judge's conclusion that he was unable to compare claimant's exertional requirements as a miner with the doctors' assessments of claimant's respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv). Claimant's Brief at 9-11. Employer responds in support of the administrative law judge's denial of benefits, and cross-appeals, arguing that the administrative law judge erred in discrediting Dr. Dahhan's opinion regarding whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv), solely because Dr. Dahhan did not diagnose pneumoconiosis. Employer's Brief at 7-8. Claimant replies urging affirmance of the administrative law judge's analysis of Dr. Dahhan's opinion. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.[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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203,

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[1] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-nine years of qualifying coal mine employment, and the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b). *See Coen v. Director*, *OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Relevant to the issue of total disability at 20 C.F.R. §718.204(b)(2)(ii), claimant asserts that the administrative law judge erred in failing to provide a rational reason for rejecting Dr. Forehand's valid, resting blood gas study that produced qualifying[3] results. Specifically, claimant argues that "[t]he [administrative law judge's] conclusion that a non-qualifying exercise value undermines the validity of the qualifying resting value is not reasoned, not allowed, and is contrary to the Regulations."[4] Claimant's Brief at 11.

In weighing the blood gas study evidence of record,[5] the administrative law judge stated:

> After a review of the entire record, I continue to find that the values expressed on the resting examination by Dr. Forehand are not dispositive. There are values expressed on exercise that undermine the validity of the resting testing, and without further explanation I can not accept them as qualifying. Moreover, the testing performed by Dr. Dahhan does not substantiate the initial resting values.

Decision and Order on Request for Reconsideration at 4.

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[3] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[4] Section 718.105(a) provides in relevant part:

> Blood-gas studies are performed to detect an impairment in the process of alveolar gas exchange. This defect will manifest itself primarily *either* at rest *or* during exercise.

20 C.F.R. §718.105(a) (emphasis added).

[5] The blood gas study evidence consists of: a November 4, 2004 study, conducted by Dr. Forehand, that produced qualifying results at rest and non-qualifying results upon exertion, Director's Exhibit 11; an evaluation of Dr. Forehand's study by Dr. Mettu, opining that the test was valid, *Id.*; and, an April 22, 2005 study, conducted by Dr. Dahhan, that produced abnormal, but non-qualifying, resting results and normal results upon exertion. Employer's Exhibits 1, 3.

We agree with claimant that the administrative law judge failed to state a valid reason for rejecting Dr. Forehand's blood gas study. Although it is within the administrative law judge's discretion to find a particular study more probative than another study, the administrative law judge must provide a rationale for according greater probative value to the results of one study over those of another. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-31-32 (1984); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-976, 1-977 (1980). In the instant case, the administrative law judge failed to explain his basis for finding the non-qualifying, exertional blood gas studies to be more probative than the qualifying resting studies, or for finding Dr. Dahhan's blood gas study to be more probative than Dr. Forehand's study. Therefore, we must vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(ii). Upon remand, the administrative law judge must reweigh the blood gas study evidence and explain his credibility findings. *See Director, OWCP v. Rowe*, 710 F.2d 251, 254-255, 5 BLR 2-99, 2-102 (6th Cir. 1983).

Claimant next challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(iv). Specifically, claimant argues that the administrative law judge failed to state a valid reason for rejecting Dr. Forehand's opinion. Claimant's Brief at 8. Claimant additionally argues that the administrative law judge did not adequately explain his inability to compare the exertional requirements of claimant's usual coal mine job as a working foreman with claimant's respiratory impairment. *Id*. at 11-12.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the record contains the medical opinions of Drs. Forehand and Dahhan, both of whom were aware of claimant's last coal mine job operating a scoop, drill, and cutting machine. Director's Exhibit 11; Employer's Exhibits 1, 3. Dr. Forehand diagnosed hypoxemia based on the qualifying, November 4, 2005, resting blood gas study, and opined that the hypoxemia "would prevent claimant from returning to [his] last coal mining job due to shortness of breath." Director's Exhibit 11 at 19, 20. Dr. Dahhan opined that claimant suffered from mild, non-disabling hypoxemia based on the non-qualifying results of the April 22, 2005 blood gas study. Employer's Exhibits 1, 3. In considering the opinions of Drs. Forehand and Dahhan at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated:

> [W]hen reading the record, I still can not determine the relationship from the hypoxemia to work. In assessing total disability under 20 C.F.R. §718.204(c)(4) (2000) and §718.204(b)(2)(iv) (2001), I am required to compare the exertional requirements of the claimant's usual coal mine employment with a physician's assessment of the claimant's respiratory impairment. As the [c]laimant was a foreman, although he did perform heavy labor on some jobs, I am unable to make the required comparison. Employer reminds [me] that although his arm had been amputated, [c]laimant had been working as a foreman.

> I still do not credit Dr. Dahhan's opinion, because in large part, he failed to diagnose pneumoconiosis, which is contrary to this record. However, I note that on Dr. Forehand's blood gas exercise study, improvement is noted. There may be a valid explanation, but it is not apparent.
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> The [c]laimant must prove total disability through a reasoned opinion by a preponderance of the evidence. Because he has failed to establish how the hypoxemia of record affects the [c]laimant's capacity to work, I find the [c]laimant has failed to establish total respiratory disability through either the testing or through a reasoned medical opinion.

Decision and Order on Request for Reconsideration at 4-5 (internal citations omitted).

Claimant's assertions of error have merit. As Dr. Forehand opined that claimant's hypoxemia was totally disabling and would prevent him from returning to his last coal mine employment, Director's Exhibit 11, the administrative law judge's failure to consider the opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv) was a material omission. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989). Further, as even a mild impairment can be disabling, the administrative law judge was required to compare the exertional requirements of claimant's usual coal mine employment with the physicians' assessments of claimant's respiratory impairment. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000). The administrative law judge did not make the comparison, however, and his finding that claimant previously worked as a foreman does not explain the administrative law judge's inability to make the comparison. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 BLR 2-261, 2-284 (6th Cir. 2005). For the aforementioned reasons, we vacate the administrative law judge's findings under 20 C.F.R. §718.204(b)(2)(iv). Upon remand, the administrative law judge is directed, pursuant to 20 C.F.R. §718.204(b)(2)(iv), to evaluate the probative value of Dr. Forehand's opinion; compare the exertional requirements of claimant's usual coal mine employment with the hypoxemia impairments diagnosed by Drs. Forehand and Dahhan; and, to explain his credibility findings. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Cornett*, 227 F.3d at 578, 22 BLR at 2-124; *Rowe*, 710 F.2d at 254-255, 5 BLR at 2-102.

Employer contends, on cross-appeal, that the administrative law judge erred in rejecting Dr. Dahhan's opinion regarding total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), solely because Dr. Dahhan did not diagnose pneumoconiosis. Specifically, employer states that "[t]here is no foundation or rationale to support a decision to discredit a physician's opinion on the *existence* or *extent* of impairment

because of that physician's opinion on whether or not pneumoconiosis is present." Employer's Brief at 7 (emphasis in original). We agree.

The existence of pneumoconiosis and total disability are independent inquiries. *See* 20 C.F.R. §§718.202(a), 718.204(b). The administrative law judge's finding that claimant has pneumoconiosis was based entirely on the x-ray evidence, while Dr. Dahhan based his opinion as to total disability upon claimant's blood gas studies and pulmonary function studies. Decision and Order Denial of Benefits at 7; Employer's Exhibits 1, 3. The fact that Dr. Dahhan's x-ray interpretation was contrary to the administrative law judge's finding at 20 C.F.R. §718.202(a)(1), therefore, does not undermine the probative value of the physician's disability opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv). Thus, upon remand, the administrative law judge is directed to consider the probative value of Dr. Dahhan's disability opinion at 20 C.F.R. §718.204(b)(2)(iv) independently from his opinion on the issue of pneumoconiosis.

Accordingly, the Decision and Order Denial of Benefits and the Decision and Order on Request for Reconsideration of the administrative law judge are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge