BRB No. 06-0855 BLA

ROBERT E. SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REDWORK DELTA MINING, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 08/29/2007
	)	
Employer/Carrier-Petitioners	)	
	)	
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 – Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

S. Parker Boggs (Buttermore & Boggs, P.S.C.), Harlan, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (03-BLA-5615) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a subsequent 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, and involves a subsequent claim filed by claimant on January 22, 2001.[1] In his Decision and Order dated November 9, 2004, the administrative law judge credited claimant with at least ten years of coal mine employment and found that his last coal mine employment was as a shot fireman. The administrative law judge determined that the newly submitted evidence was sufficient to establish that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and therefore, that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Reviewing all of the record evidence on the merits of claimant's entitlement, the administrative law judge determined that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Employer filed an appeal with the Board, alleging that the administrative law judge erred in rejecting Dr. Dahhan's opinion. The Board agreed with employer that the reasons provided by the administrative law judge for assigning less probative weight to Dr. Dahhan's opinion required further explanation. *Shepherd v. Redwork Delta Mining, Inc.*, BRB No. 05-0257 BLA (Dec. 16, 2005) (unpub.) (Hall, J., dissenting.). The Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b)(2), and 718.204(c), and remanded the case to the administrative law judge with instructions: 1) that he reconsider Dr. Dahhan's opinion that claimant was not totally disabled, in light of the doctor's statement that the January 10, 2002 pulmonary function study, while qualifying for total disability, showed less than optimum effort; 2) that he

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[1] Claimant filed his first claim for benefits on July 20, 1973, which was denied by the district director on October 30, 1980, because claimant failed to establish any of the required elements of entitlement. Director's Exhibit 1. Claimant filed a duplicate claim for benefits on January 23, 1990, which was denied by Administrative Law Judge Donald W. Mosser. In a Decision and Order issued on November 30, 1992, Judge Mosser found that the newly submitted x-ray evidence established the existence of pneumoconiosis and, therefore, he found that claimant had established a material change in conditions pursuant to 20 C.F.R. §725.309(2000). In considering the claim on the merits, Judge Mosser determined that while claimant established the existence of pneumoconiosis arising out of coal mine employment, the evidence was insufficient to prove that claimant was totally disabled due to pneumoconiosis. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), 718.204(b) and (c)(2000), and thus affirmed the denial of benefits. *Shepherd v. Redwork Delta Mining, Inc.*, BRB No. 93-0693 BLA (May 13, 1994) (unpub.). Claimant took no further action with regard to the denial of his duplicate claim until he filed the instant, subsequent claim on January 22, 2001. Director's Exhibit 3.

reconsider Dr. Dahhan's disability opinion after resolving the specific work requirements of claimant's usual coal mine work; 3) that he reconsider Dr. Dahhan's opinion in light of the results of the carboxyhemoglobin test conducted by Dr. Dahhan, indicating that claimant was a smoker of more than one-half pack per day, which test results employer maintains are in contradiction of claimant's hearing testimony as to the extent of his smoking habit; and 4) that he reconsider Dr. Dahhan's opinion in light of the underlying documentation supporting his conclusions. *Id.* at 5-8.

On remand, in his Decision and Order dated July 10, 2006, the administrative law judge determined that claimant suffered from a totally disabling respiratory impairment; and therefore, that claimant had established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge credited Dr. Baker's opinion over Dr. Dahhan's opinion, and found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. §§718.202(a)(4), 718.204(b)(2), and 718.204(c), and the weight he accorded Dr. Dahhan's opinion. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

After reviewing the administrative law judge's Decision and Order on Remand, the relevant evidence, and the arguments raised by employer on appeal, we affirm, as supported by substantial evidence, the administrative law judge's award of benefits. We specifically reject employer's assertion that the administrative law judge failed to comply with the Board's remand instructions, and that he erred in the weight he accorded Dr. Dahhan's opinion on the relevant issues of entitlement.

On remand, the administrative law judge first addressed Dr. Dahhan's disability opinion in light of the qualifying pulmonary function study dated January 10, 2002. The administrative law judge noted that he had previously rejected Dr. Dahhan's disability opinion under 20 C.F.R. §718.204(b)(2)(iv), because he found Dr. Dahhan's conclusion, that there was no objective evidence of claimant's disability, to be inconsistent with the pulmonary function test obtained during Dr. Dahhan's examination on January 10, 2002,

which revealed qualifying values for total disability under the regulations. Decision and Order on Remand at 4. However, in accordance with the Board's remand instruction, the administrative law judge reconsidered whether Dr. Dahhan's statement, that claimant had put forth less than optimal effort in performing the January 10, 2002 test, lent credence to Dr. Dahhan's opinion that claimant was not totally disabled. The administrative law judge, however, permissibly determined that it did not. He specifically found:

> While Dr. Dahhan noted that Claimant was unable to hold his breath for 10 seconds, he made no mention that Claimant was coughing during the test. In addition, despite Dr. Dahhan's critique of the [pulmonary function test] he administered, I note that at no time did he state this study was invalid, but instead, he affirmatively relied on it as support for his conclusions….Therefore, as is within my discretion, I find that the January 2002 [pulmonary function test] was conforming despite the fact that Claimant's cooperation was only "fair," and his effort was "less than optimal." [Director's Exhibit 10].

Decision and Order on Remand at 3-4. Because the administrative law judge permissibly concluded that the January 10, 2002 pulmonary function study was both conforming[2] and qualifying, we see no error in his reliance on that test as demonstrating objective evidence of claimant's total disability. Decision and Order on Remand at 4. Thus, we affirm the administrative law judge's finding that "based on the conflict between Dr. Dahhan's medical report and the qualifying [pulmonary function test] values, the weight accorded his total disability determination is significantly diminished." *Id*.

Moreover, contrary to employer's contention, the administrative law judge permissibly assigned less weight to Dr. Dahhan's opinion, that claimant was not totally disabled from performing his usual coal mine work, because he found that Dr. Dahhan did not have an accurate understanding of the exertional requirements of claimant's last

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[2] The quality standards for pulmonary function studies are found at 20 C.F.R. §718.103. The standards require that the studies be accompanied by three tracings of each test performed, FEV_1, FVC, and MVV. The standards also require that a statement signed by the physician or technician indicate the following: (1) date and time of test; (2) name, claim number, age, height, and weight of the claimant; (3) name of the technician; (4) signature of the physician supervising the test; (5) the claimant's ability to understand the instructions, ability to follow directions, and degree of cooperation in performing the tests; (6) paper speed; (7) name of the instrument used; (8) whether a bronchodilator was used; and (9) that the test is in compliance with the quality standards. 20 C.F.R. §718.103(b).

coal mine job as a shot fireman. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (*en banc recon*.). In accordance with the Board's directive, the administrative law judge found that claimant last worked as a shot fireman, and he credited claimant's testimony that the job required daily lifting of up to sixty pounds. Decision and Order on Remand at 4 n.6; Hearing Transcript at 11. Because Dr. Dahhan erroneously reported that claimant's last coal mine job was as a shuttle car operator, which the administrative law judge inferred from claimant's testimony did not require daily lifting, the administrative law judge concluded that Dr. Dahhan did not understand the physical demands of claimant's actual job, and reasonably questioned the validity of Dr. Dahhan's total disability assessment. *See Cornett*, 227 F.3d at 578; 22 BLR at 2-124. Thus, the administrative law judge properly exercised his discretion in discounting Dr. Dahhan's opinion on the issue of total disability under Section 718.204(b)(2)(iv). *Id*.

The administrative law judge found that Dr. Baker, in contrast to Dr. Dahhan, understood the exertional requirements of claimant's usual coal mine work, and that he offered a reasoned opinion that claimant was not totally disabled. The administrative law judge also properly found that Dr. Baker's opinion was better supported by the qualifying pulmonary function study evidence, including Dr. Dahhan's January 10, 2002 pulmonary function test. Thus, we affirm the administrative law judge's credibility determinations with respect to the medical opinions at 20 C.F.R. §718.204(b)(2)(iv). Because the administrative law judge properly found that the weight of the more credible evidence established that claimant was totally disabled by a respiratory or pulmonary impairment, we affirm his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). Since claimant established total disability based on the newly submitted evidence, he also established a change in an applicable condition of entitlement. *See Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999) (*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987).

We now turn to employer's assertions of error with respect to the administrative law judge's findings on the merits. Contrary to employer's contention, the administrative law judge followed the Board's instruction that he discuss the probative value of Dr. Dahhan's opinion as to the existence of pneumoconiosis at 20 C.F.R §718.202(a)(4) and disability causation at 20 C.F.R. §718.204(c). The administrative law judge properly noted that in his prior decision, he accorded less weight to Dr. Dahhan's opinion regarding the etiology of claimant's respiratory condition, since he found that Dr. Dahhan had over-estimated the amount of cigarettes that claimant smoked. The administrative law judge also acknowledged that he was instructed by the Board to reconsider his smoking history determination in light of "the fact that the results of a carboxyhemoglobin test obtained by Dr. Dahhan indicated a smoker of more than a pack per day, which contradicted claimant's testimony that he smoked only about a quarter pack per day," *see Shepherd*, BRB No. 05-0257 BLA at 5. Decision and Order on

Remand at 5. In reconsidering this issue on remand, the administrative law judge credited claimant's testimony that it takes him two to three days to smoke a pack of cigarettes, which equated to one-half pack per day, and was consistent with the history recorded by Dr. Baker. *Id*. The administrative law judge thus found that claimant smoked one-half pack of cigarettes per day for fifty-four years, or twenty-seven pack years. Decision and Order on Remand at 5. Turning to the carboxyhemoglobin level reported by Dr. Dahhan, the administrative law judge noted that while this is "objective evidence that generally supports a finding that [c]laimant could have smoked as much as a pack of cigarettes the day preceding the January 10, 2002 examination," he found that the results did not take into account the possibility of second-hand smoke or other environmental factors. *Id*. He also found that the test "does not prove that [claimant] always smoked or continues to smoke one pack per day." Decision and Order on Remand at 5. Thus, because the administrative law judge did not consider the test to be credible evidence that claimant smoked more than one-half pack per day, he found that Dr. Dahhan's "smoking calculation was erroneous when considered in conjunction with the other evidence of record" and reasonably assigned less probative weight to Dr. Dahhan's opinion regarding the etiology of claimant's chronic obstructive pulmonary disease and whether claimant suffered from legal pneumoconiosis. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); Decision and Order on Remand at 5-6.

Finally, contrary to employer's contention, the administrative law judge complied with the Board's directive that he reconsider Dr. Dahhan's opinion, that claimant's obstructive defect was due to smoking, in light of the underlying documentation supporting his conclusion. Decision and Order on Remand at 6. The administrative law judge stated that Dr. Dahhan's opinion attributing claimant's chronic obstructive pulmonary disease to smoking was documented and reasoned, but that the doctor did not persuasively explain how the objective test results and physical examination findings supported his conclusion that smoking was the sole cause of claimant's chronic obstructive pulmonary disease. *Id*. Since Dr. Dahhan did not explain, to the satisfaction of the administrative law judge, why claimant's respiratory condition could not also be due to coal dust exposure, as opined by Dr. Baker, the administrative law judge had discretion to assign Dr. Dahhan's causation opinion less weight. Decision and Order on Remand at 6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988) (*en banc*). In addition, the administrative law judge reasonably gave diminished weight to Dr. Dahhan's conclusion, that claimant's obstructive ventilatory defect was due to a smoking habit of sufficient duration to cause the "development of an airway obstruction in a susceptible individual," since the conclusion was based upon generalities, rather than specifically focusing upon claimant's condition. Decision and Order on Remand at 6; Director's Exhibit 10; *see Knizer v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985).

In weighing the evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge rationally found that Dr. Baker's diagnosis of a respiratory condition due, in part, to coal dust exposure satisfied the regulatory definition of legal pneumoconiosis under 20 C.F.R. §718.201. Because the administrative law judge found that Dr. Baker's opinion, diagnosing legal pneumoconiosis, was reasoned and documented, the administrative law judge had discretion to rely on Dr. Baker's opinion to find that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Cornett*, 227 F.3d at 576-577, 22 BLR at 2-121-122; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985); Decision and Order on Remand at 7-8; Director's Exhibit 8. We affirm this finding as supported by substantial evidence.

Lastly, the administrative law judge considered whether claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge properly assigned less weight to Dr. Dahhan's opinion that claimant was not totally disabled due to pneumoconiosis as the physician opined that claimant did not have pneumoconiosis, contrary to the administrative law judge's finding. Decision and Order on Remand at 8; Director's Exhibit 10. This was proper. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLA 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989). In contrast, the administrative law judge found that Dr. Baker offered a reasoned opinion that claimant's respiratory disability was due to both smoking and coal dust exposure and, therefore, he properly concluded that claimant had satisfied his burden of proving total disability due pneumoconiosis under 20 C.F.R. §718.204(c). Decision and Order on Remand at 8. We, therefore, affirm the administrative law judge's finding that claimant is totally disabled due to pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits is affirmed.

SO ORDERED.

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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