BRB No. 98-0685 BLA

JAMES C. ENDICOTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
JEWELL SMOKELESS COAL CORPORATION	)	DATE ISSUED: 8/6/99
	)	
	)	
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 Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Lawrence L. Moise, III (Vinyard & Moise), Abingdon, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-4159) of Administrative Law Judge Thomas F. Phalen, Jr. (the administrative law judge) 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). Claimant filed a claim for benefits on February 5, 1981. Director's Exhibit 1. In the initial Decision and Order in this case, Administrative Law Judge Giles J. McCarthy found that claimant established seventeen and one-quarter years of

qualifying coal mine employment, but failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(2). Judge McCarthy found, however, that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.305. Judge McCarthy then found that employer established rebuttal of the presumption pursuant to Section 718.305. Accordingly, benefits were denied. On appeal, the Board affirmed Judge McCarthy's finding regarding the length of claimant's coal mine employment as unchallenged on appeal, vacated the administrative law judge's finding pursuant to Section 718.305(d) and remanded the case for reconsideration of the opinions of Drs. Buddington, Claustro, Robinette and Berry, along with the opinions of record that indicate that claimant does not suffer from pneumoconiosis, to determine if employer rebutted the presumption pursuant to Section 718.305(d). *Endicott v. Jewell Smokeless Coal Corp.*, BRB No. 89-2341 BLA (Jan. 29, 1991)(unpub.). In response to a motion for reconsideration, the Board reversed its summary affirmance of Judge McCarthy's finding regarding invocation pursuant to Section 718.305 and instructed the fact-finder on remand to determine whether claimant's employment was at a surface mine, and if so, to determine whether the conditions at the surface mine were substantially similar to the conditions in an underground mine. The Board then rejected employer's allegation that claimant was not a miner under the Act, reaffirmed its holdings regarding the opinions of Drs. Berry and Claustro, reversed its prior holdings regarding the opinions of Drs. Buddington and Robinette, and remanded the case for consideration of all of the relevant medical evidence with regard to rebuttal at Section 718.305(d). *Endicott v. Jewell Smokeless Coal Corp.*, BRB No. 89-2341 BLA (Sep. 22, 1992)(*en banc*)(unpub.).

On remand, Administrative Law Judge Charles P. Rippey concluded that claimant did not have pneumoconiosis and that, consequently, the presumption at Section 718.305 was rebutted. Accordingly, benefits were denied. On appeal, the Board vacated Judge Rippey's finding that employer established rebuttal of the Section 718.305 presumption and remanded the case for reconsideration of the evidence of record on this issue. The Board further instructed Judge Rippey to determine whether the conditions of claimant's surface coal mine employment are comparable to the conditions of an underground mine. *Endicott v. Jewell Smokeless Coal Corp.*, BRB No. 93-1951 BLA (Nov. 23, 1994)(unpub.).

On remand, Judge Rippey found that claimant's above ground coal mine work was comparable to his work as an underground miner and reaffirmed his previous denial of benefits. Claimant then appealed the denial of benefits to the Board. The Board vacated Judge Rippey's comparability finding pursuant to Section 718.305 and remanded the case for the fact-finder to determine whether the mines which employed claimant were underground or surface mines and, if

necessary, to determine whether the surface mine conditions are comparable to underground mine conditions. The Board also affirmed Judge Rippey's weighing of Dr. Claustro's opinion but vacated its prior holdings concerning the opinions of Drs. Buddington and Garzon and remanded the case for the fact-finder to reevaluate the opinions of Drs. Buddington and Garzon and to determine whether employer has established rebuttal of the Section 718.305 presumption based on all of the relevant evidence of record. *Endicott v. Jewell Smokeless Coal Corp.*, BRB No. 95-1942 BLA (Jan. 28, 1997)(unpub.).

On remand, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (a)(2). The administrative law judge further found that the presumptions at 20 C.F.R. §§718.304 and 718.306 are not applicable to this claim. However, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 718.305(a) and that employer failed to rebut the presumption. The administrative law judge also found that claimant was exposed to sufficient dust in his surface coal mine employment for that employment to be substantially similar to underground coal mine employment. Accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in determining that claimant's surface mine work was comparable to underground mine work and that the administrative law judge erred in failing to properly consider the medical evidence of record for purposes of rebuttal pursuant to Section 718.305. Claimant responds urging affirmance of the award of benefits.[1] The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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 into the

[1]Employer filed its Petition for Review and Brief on March 23, 1999. Claimant filed a Motion to File Papers Out of Time on January 7, 1999, requesting that the Board accept claimant's response brief. We grant the motion and accept the response brief, which was filed on December 15, 1998, as part of the record. 20 C.F.R. §§802.212(a), 802.217(a).

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in making his comparability finding pursuant to Section 718.305(a) because the record contains no evidence that claimant's work as a truck driver was comparable to that of an underground miner, because the administrative law judge only addressed claimant's work during a four year period of his seventeen and one quarter years of coal mine employment and because claimant's testimony regarding his work conditions is not sufficient to establish that the work conditions were comparable. Employer's Brief at 11-15. The presumption of total disability due to pneumoconiosis at Section 718.305 is available in claims filed before January 1, 1982 where the miner worked at least fifteen years in underground mining or comparable surface mining.[2] The Board has held that in order to establish that his surface mine conditions are comparable to underground conditions, claimant must establish that the conditions existing at the surface coal mine work site are substantially similar to the conditions found in an underground mine. *McGinnis v. Freeman United Coal Mining Co.*, 10 BLR 1-4 (1987); *Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100 (1987).

In the instant case, the administrative law judge considered claimant's testimony regarding his work with Jewell Smokeless Coal Corporation from 1976-1980, in which he stated that he worked "in the tipple, working around the check out, working in the head house, shoveling beltlines, driving a slate truck." In describing his work with Jewell Smokeless, claimant testified that he was exposed to coal dust which was visible in the air and that the conditions were such that "you about smother to death about all the time." Hearing Transcript at 10-11. The administrative law judge also considered the coal mine employment history that claimant related to his various physicians, all of whom listed over twenty years of coal mine employment, and the coal mine employment history that claimant reported on his form CM-911a. On that form, claimant indicated that his work involved the extraction of coal, hauling core, preparation of coal and transporting coal. He listed

[2]The Board affirmed the administrative law judge's finding that claimant established seventeen and one-quarter years of qualifying coal mine employment in its first Decision and Order. *Endicott v. Jewell Smokeless Coal Corp.*, BRB No. 89-2341 BLA (Jan. 29, 1991)(unpub.).

his job titles as coal truck driver, "tipple work" and car dropper. Director's Exhibit 2.

The administrative law judge found that, "after carefully reviewing the transcript, employment records, and physicians' opinions," claimant worked in surface coal mining for the majority of his coal mine employment and that his work was comparable to underground employment. Decision and Order on Remand at 8. Stating that claimant's testimony was the most probative evidence, the administrative law judge acted within his discretion in finding that claimant was exposed to sufficient coal dust in his surface coal mine employment with Jewell Smokeless from 1976 to 1980 to be substantially similar to underground coal mine employment.[3] *Id; Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *McGinnis, supra; Wagahoff, supra; see also Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). We reject employer's contention that claimant's testimony concerning his work with Jewell Smokless, that the work at the tipple was quite dusty and that he "about smother[ed] to death," is insufficient to prove comparability to underground mine work because the testimony merely described claimant's reaction to coal dust. Rather, we hold that substantial

[3] The administrative law judge noted that claimant testified that:

> From 1976 to 1980, except for four or five months when he was out of work due to a heart attack, he drove a slate truck and worked at the tipple, spending most of his nine hour day at the tipple. He was constantly exposed to coal dust. He testified that he "picked slate" from the coal and cleaned under the belts that carried the coal. He also drove the slate truck about a mile from the slate pile to the top of the mountain; he would dump the slate and return to the tipple.

Decision and Order at 8.

evidence supports the administrative law judge's finding that claimant's surface mine work from 1976 to 1980 was substantially similar to underground employment. *See generally McGinnis v. Freeman United Coal Mining Co.,* 10 BLR 1-4 (1987).

Employer also argues that the only work period specifically addressed by the administrative law judge for purposes of determining comparability is the period from 1976 to 1980. Employer notes that a proper comparability determination for purposes of Section 718.305(a) requires an evaluation of claimant's entire work history to determine whether he accumulated a full fifteen years of underground or "comparable" work. We agree.

In finding that "claimant worked in surface mining for the majority of his coal mine employment and that his work was comparable to underground employment," the administrative law judge indicated that he considered claimant's testimony as well as the miner's work history form and the physician's statements regarding claimant's coal mine employment. Decision and Order at 8; Hearing Transcript at 10-11, 17, 27-28. However, the testimony cited by the administrative law judge described the conditions of claimant's employment as a truck driver with Jewell Smokeless from 1976 to 1980 only. Claimant did not testify at the hearing concerning the specific conditions under which he worked in his other surface mining and it does not appear that the administrative law judge considered any evidence regarding the specific conditions under which the miner worked for any period other than 1976 to 1980.[4] Thus, we vacate the administrative law judge's finding that claimant met his burden of establishing comparability of conditions in his surface mining to underground mining and remand the case for the administrative law judge to determine whether claimant has established that he worked for *at least 15 years* in underground mining or surface mining that is substantially similar to underground conditions as required under Section 718.305.[5] *See Wagahoff, supra.*

Employer next contends that the administrative law judge erred in weighing

[4]The administrative law judge merely noted that claimant reported on his Form CM-911a that he had sixteen different jobs in the coal mining industry and that this form revealed that "claimant was involved mostly in the process of extracting, preparing, and transporting coal." Decision and Order at 8. The administrative law judge further noted that claimant's positions included coal truck driver, tipple work, and car dropper. *Id.*

[5]At the hearing, claimant testified that he worked for about 18 years in coal mining and that about eight years were spent working underground. Hearing Transcript at 10.

the opinions of Drs. Byers and Garzon when considering rebuttal of the Section 718.305 presumption. In order to rebut the Section 718.305 presumption, the party opposing entitlement must establish either that claimant does not have pneumoconiosis or that claimant's impairment did not arise out of, or in connection with, his coal mine employment. 20 C.F.R. 718.305(a); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44 (1988), *aff'd sub nom. Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989)(unpub.); *Defore v. Alabama By-Products*, 12 BLR 1-27 (1988).

Regarding Dr. Byers' report, employer contends that the administrative law judge erred in assigning this opinion less weight. Dr. Byers, in a report dated June 2, 1986 and a deposition dated May 31, 1988, opined that claimant does not have pneumoconiosis and that he has a significant pulmonary impairment that is not related to coal worker's pneumoconiosis. Employer's Exhibits 3, 10. Dr. Byers opined that the main cause of claimant's "dyspnea" and exertional fatigue was angina pectoris. Dr. Byers stated that the "presence of significant carboxyl hemoglobin suggest an ongoing contact with noxious fumes that could be causing ongoing bronchial irritation (etiologic for chronic bronchitis)." Employer's Exhibit 10. Dr. Byers further stated that he suspected that claimant was a heavy smoker. Dr. Byers also noted in his deposition that claimant did not have nicotine stains on his fingers nor did he smell of tobacco smoke when he was in the physician's office. Employer's Exhibit 3 at 28.

The administrative law judge found that Dr. Byers's opinion was insufficient to support a finding that claimant does not have pneumoconiosis or that his condition did not arise in whole or in part out of his coal dust exposure. The administrative law judge initially stated that Dr. Byers's opinion was not entitled to great weight on the issue of whether claimant is totally disabled due to coal workers' pneumoconiosis because Dr. Byers relied solely on a negative x-ray in finding that claimant does not have pneumoconiosis. Decision and Order at 13. In further discussing Dr. Byers's opinion, the administrative law judge found that Dr. Byers based his opinion that claimant's respiratory condition was due, apparently solely, to cigarette smoking upon an erroneous evaluation of claimant's elevated carboxylhemoglobin test. Decision and Order on Remand at 17. He noted that Dr. Byers testified that claimant denied smoking and demonstrated no other evidence of smoking, such as yellow fingers or the smell of smoke on his clothing. *Id.* The administrative law judge further stated that Dr. Byers pursued no other evidence that the high carbon monoxide levels were due to some other source of carbon monoxide, such as a home heating unit or an automobile. *Id.* The administrative law judge then stated that "an elevated carboxyhemoglobin or carbon monoxide reading only raises the possibility of cigarette smoking as its source, and is, even then, by no means

conclusive in proving that claimant's cigarette smoking would be the sole source of his respiratory or pulmonary disease." *Id.* The administrative law judge then found that "the denial of smoking coupled with the lack of any other objective evidence to support a conclusion of smoking, such as yellow fingers or clothes smelling of smoke, in addition to the failure to rule out other sources of carbon monoxide poisoning, means that Dr. Byers has not provided the medical evidence necessary to conclude that claimant's respiratory or pulmonary disease has a source other than his 17-22 years of coal dust exposure." *Id.* The administrative law judge also found Dr. Byers' opinion regarding the relationship of claimant's respiratory or pulmonary disease to coal mine employment is not well-reasoned, well-documented, or "better supported by the objective medical evidence." *Id.*

We agree with employer that the administrative law judge has not provided a rational basis for discrediting Dr. Byers's opinion. The interpretation of medical data is a medical determination and an administrative law judge may not substitute his opinion for that of a physician, as was done in the present case. *See generally Marcum v. Director, OWCP,* 11 BLR 1-23 (1987). Moreover, the administrative law judge erred in requiring the physician to rule out other sources for claimant's carbon monoxide levels, such as a home heating unit or his automobile.[6] *See generally Tanner v. Freeman United Coal Co.,* 10 BLR 1-85 (1987). Furthermore, we agree with employer that the administrative law judge has not provided an adequate basis for his statement that claimant had 17-22 years of coal dust exposure, and therefore the administrative law judge erred in finding that Dr. Byers had not provided the medical evidence necessary to conclude that claimant's respiratory or pulmonary impairment "had a source other than his 17-22 years of coal dust exposure." Decision and Order at 17. Finally, employer is correct in arguing that the administrative law judge erred in stating that Dr. Byers relied solely upon a negative x-ray in finding that claimant does not have coal workers' pneumoconiosis as Dr. Byers also relied upon the results of his physical examination and blood gas studies. Employer's Exhibit 3; Decision and Order at 13. We therefore vacate the administrative law judge's finding with regard to Dr. Byers's opinion. On remand, the administrative law judge should consider whether Dr. Byers's opinion is reasoned and documented.[7]

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[6]The specific etiology of claimant's totally disabling respiratory impairment need not be established by the party opposing entitlement and employer must be found to have rebutted the Section 718.305 presumption if it establishes that the totally disabling respiratory impairment did not arise out of, or in connection with, coal mine employment. *See Tanner v. Freeman United Coal Co.,* 10 BLR 1-85 (1987).

[7]A medical opinion is documented if it sets forth the clinical findings, observations, facts and other data upon which the physician based his opinion and a medical

Employer next contends that the administrative law judge erred in rejecting Dr. Garzon's opinion. Dr. Garzon, in a record review dated January 28, 1988, opined that there is no solid evidence for a radiological diagnosis of pneumoconiosis and that claimant has coronary heart disease, epilepsy, anxiety, and depression which are not correlated to coal dust exposure. He further opined that claimant's lung disease is primarily chronic obstructive pulmonary disease with recurrent episodes of asthmatic bronchitis as shown by the varied pO2 values in claimant's arterial blood gas study. He continued that claimant's pulmonary function study suggests a mild obstructive defect and stated that this "would be expected in a smoker; pneumoconiosis causes a restrictive defect, with decrease in all lung volumes. It is worthy of note that Dr. Byers found a carboxyl hemoglobin of 7.8%, consistent with significant carbon monoxide contact, as seen in chronic smokers." Employer's Exhibit 8. Dr. Garzon concluded by stating that claimant's chronic obstructive pulmonary disease and asthmatic bronchitis were not related to his coal dust exposure. Employer's Exhibit 8.

Upon considering Dr. Garzon's opinion, the administrative law judge stated that:

> This opinion is given the least weight of these physicians. He never examined Claimant, and based his coal dust exposure on Dr. Byers' carboxyhemoglobin evaluation. Therefore, I find this opinion is poorly reasoned, poorly documented, and not supported by the objective medical evidence.

Decision and Order on Remand at 18. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held in *Milburn Colliery Co. v. Hicks,* 138 F.3d 524, 21 BLR 2-324 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 269 (4th Cir. 1997), that the administrative law judge should not "mechanistically credit, to the exclusion of all other testimony," the testimony of an examining or treating physician solely because the doctor personally examined the claimant. *Hicks,* 138 F.3d at 441, 21 BLR at 2-274-275; *Akers,* 131 F.3d at 441, 21 BLR at 2-335. The court further held that the administrative law

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opinion is considered reasoned if the physician explains how the opinion's documentation supports his conclusions. *Fields v. Island Creek Coal Co.,* 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.,* 6 BLR 1-1291 (1984).

judge has a statutory obligation to consider all of the relevant evidence bearing upon the existence of pneumoconiosis and its contribution to the miner's disability. *See Hicks, supra; Akers, supra.*

In the instant case, the only reason given by the administrative law judge for discrediting Dr. Garzon's opinion, other than the fact that he did not examine claimant, was that he based his "coal dust exposure on Dr. Byers' carboxyhemoglobin evaluation." Decision and Order on Remand 18. While Dr. Garzon noted Dr. Byers' carboxyhemoglobin findings, he also provided other reasons for his findings regarding the existence of pneumoconiosis and its contribution to the miner's disability, such as claimant's arterial blood gas study and pulmonary function study results. Because the administrative law judge does not address these other aspects of Dr. Garzon's opinion and because he does not provide an explanation for why Dr. Garzon's failure to examine claimant diminishes his opinion, we vacate the administrative law judge's finding pursuant to Section 718.305(a) and remand the case for the administrative law judge to reconsider Dr. Garzon's opinion. *See Hicks, supra; Akers, supra.*

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part, vacated in part and remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge