BRB No. 05-0257 BLA

ROBERT E. SHEPHERD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
REDWORK DELTA MINING, INCORPORATED	)	DATE ISSUED: 12/16/2005
	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS' SELF-INSURANCE ASSOCIATION	)	
	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of 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.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order – Award of Benefits (2003-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). Based on the date of filing, January 22,

2001, the administrative law judge adjudicated this subsequent claim[1] pursuant to 20 C.F.R. Part 718, finding that the parties' stipulation that claimant had worked at least ten years in coal mine employment was supported by the record as claimant's history of coal mine employment form and Social Security earnings record showed ten years of coal mine employment for ABD and four years of coal mine employment for Redwork Delta Mining, Incorporated. Decision and Order at 3. The administrative law judge found that claimant's last coal mine employment was that of a shot fireman, which involved putting dynamite in a hole, wiring it up, and shooting it and that, prior to that, he had worked as a shuttle car operator, driving 50 to 60 trips daily. Decision and Order at 3; Hearing Transcript 11-12. The administrative law judge found the newly submitted evidence sufficient to establish the existence of total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c), and thereby, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Turning to the merits, the administrative law judge found that while the x-ray evidence failed to establish the existence of pneumoconiosis at Section 718.202(a)(1) and the existence of pneumoconiosis could not be established at Section 718.202(a)(2) and (3) as there was no biopsy evidence and none of the presumptions contained at Section 718.202(a)(3) was applicable in this living miner's claim, the existence of pneumoconiosis was established by the medical opinion evidence at 20 C.F.R. §718.202(a)(4). The

[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 second claim for benefits on January 24, 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 claimant established the existence of pneumoconiosis based on the new x-ray evidence and, therefore, established a material change in conditions. In considering the claim on the merits, Judge Mosser found the existence of pneumoconiosis established based on the x-ray evidence at 20 C.F.R. §718.202(a)(1) and that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment based on at least ten years of coal mine employment at 20 C.F.R. §718.203(b), but found that claimant failed to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(b) and (c).

On appeal, claimant argued that Judge Mosser erred in failing to find total disability established. The Board, while affirming Judge Mosser's finding, *inter alia*, that the existence of pneumoconiosis arising out of coal mine employment was established as unchallenged on appeal, nevertheless affirmed the denial of benefits as Judge Mosser properly found that total disability was not established. *Shepherd v. Redwork Delta Mining, Inc.*, BRB No. 93-0693 BLA (May 13, 1994) (unpub.).

administrative law judge further found claimant entitled to the presumption that his pneumoconiosis arose out of coal mine employment based on his ten years of coal mine employment at 20 C.F.R. §718.203(b), and that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c).[2] Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding the existence of pneumoconiosis and total disability due to pneumoconiosis established. Claimant and the Director, Office of Workers' Compensation Program, (the Director) are not participating 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

At the outset, we reject employer's argument concerning the respective radiological credentials of Drs. Baker and Dahhan since the administrative law judge's finding of legal pneumoconiosis at Section 718.202(a)(4) did not rest on that factor. *See* 20 C.F.R. §§718.201, 718.202(a)(1), (4). Rather, in finding the existence of legal pneumoconiosis established, the administrative law judge recognized that both Drs. Baker and Dahhan were internists and pulmonologists and gave greater weight to Dr. Baker's opinion because he found it better supported by its underlying documentation and more soundly reasoned. Decision and Order at 15-16. The administrative law judge credited Dr. Baker's opinion because, despite a non-qualifying blood gas study and a negative x-ray reading, it was supported by a qualifying pulmonary function study and an accurate coal mine employment and smoking history. The administrative law judge further noted that the fact that Dr. Baker was an internist and pulmonologist, increased the probative weight of his opinion. Decision

[2] Employer does not challenge the administrative law judge's finding that claimant is entitled to the rebuttable presumption that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b) based on his ten years of coal mine employment.

and Order at 15.

Regarding Dr. Dahhan's opinion, the administrative law judge found it deficient for four reasons: (1) the doctor's conclusion that there was no objective evidence of disability disregarded the fact that the pulmonary function study which he conducted on January 10, 2002 was qualifying; (2) the doctor's disability assessment was based on the erroneous determination that claimant's last usual coal mine employment was as a shuttle car operator, not a shot fireman; (3) the doctor's finding of a mild obstructive ventilatory defect due to smoking was based on a 54 year pack a day smoking history, which overestimated the administrative law judge's finding on smoking history by double; and (4) the doctor did not adequately discuss why claimant's mild obstructive defect was caused solely by cigarette smoking, without consideration of the objective data indicating the presence of pneumoconiosis.

The reasons given by the administrative law judge for according less weight to Dr. Dahhan's opinion, however, are insufficient without more meaningful discussion. Although the administrative law judge correctly noted that Dr. Dahhan was wrong to state there was no objective evidence of disability when, in fact, the January 10, 2002 pulmonary function study conducted by Dr. Dahhan resulted in qualifying values, a further review of Dr. Dahhan's report shows that he characterized claimant's performance on this pulmonary function study as less than optimal. A less than optimal performance can adversely affect the results obtained on pulmonary function study. Thus, Dr. Dahhan's finding that claimant had no objective evidence of respiratory impairment should be considered not only in light of the qualifying results of claimant's January 22, 2002 pulmonary function study, but also in light of Dr. Dahhan's opinion that those results were obtained as a result of less than optimal effort on claimant's part. Decision and Order at 15; *see Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Pulliam v. Drummond Coal Co.*, 7 BLR 1-846 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); *Runco v. Director, OWCP*, 6 BLR 1-945 (1984); *Houchin v. Old Ben Coal Co.*, 6 BLR 1-1141 (1984); *see also Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 n.4 (1993).

Further, the administrative law judge gave, as another reason for finding Dr. Dahhan's opinion entitled to less weight, the fact that the doctor relied on the erroneous finding that claimant's last coal mine employment was as a shuttle car operator, not a shot fireman. Even if the doctor incorrectly stated that claimant's last coal mine employment was as a shuttle car operator, not a shot fireman, however, it is not clear how such an error would affect Dr. Dahhan's finding that claimant was not totally disabled as the administrative law judge makes no findings as to whether there are differences in the exertional requirements of the two jobs. Decision and Order at 11-12; Hr. Tr. 11-12; Director's Exhibit 10; *see Cornett v.*

Benham Coal, Inc., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Aleshire v. Central Coal Co.*, 8 BLR 1-70 (1985); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984); *Stanley v. Eastern Assoc. Coal Co.*, 6 BLR 1-1157 (1984); *Shortridge v. Beatrice Coal Co.*, 4 BLR 1-534, 1-539 (1982).

Likewise, we are troubled by the administrative law judge's rejection of Dr. Dahhan's opinion because he relied on a smoking history that was more than double that found by the administrative law judge. Decision and Order at 15. Claimant testified at the hearing that Dr. Dahhan's finding of a 54 pack year smoking history was far in excess of claimant's actual smoking history. In considering the evidence relevant to claimant's smoking history the administrative law judge found that claimant testified to a smoking history of at least 50 years at the rate of one-quarter of a pack per day, or 12.5 pack years. The administrative law judge found that Dr. Baker stated a smoking history of approximately 54 years at the rate of one-half pack per day, or 27 pack years, while Dr. Dahhan reported a smoking history of one pack per day since the age of 14, or 54 pack years. Decision and Order at 7; Hr. Tr. 24-26; Director's Exhibits 8, 10. The administrative law judge concluded, therefore, that claimant's smoking history fell somewhere between 12.5 pack years based on claimant's testimony and 54 pack years based on Dr. Dahhan's report, with Dr. Baker's report of 27 pack years falling somewhere in between. Decision and Order at 7. Assuming that claimant would not overstate his smoking history, and noting that claimant offered specific testimony as to why Dr. Dahhan's smoking history of 54 pack years was erroneous, Hr. Tr. 24-26, the administrative law judge found Dr. Baker's opinion on claimant's smoking history to be most persuasive and therefore found that claimant had a smoking history of one-half pack per day for 54 years, or 27 pack years. Decision and Order at 7.

As employer contends, however, in rejecting Dr. Dahhan's opinion because it was based on a far greater smoking history than that to which claimant testified, the administrative law judge did not discuss the fact that the results of a carboxyhemoglobin test conducted by Dr. Dahhan indicated a smoker of more than a pack per day, contradicting claimant's testimony of only about a quarter pack per day.[3] The test results supported the doctor's finding of a far greater smoking history than that found by the administrative law judge. The administrative law judge must, accordingly, address and resolve this discrepancy and must determine whether Dr. Dahhan's opinion regarding the extent of claimant's

[3] At the hearing, claimant testified that although he told Dr. Dahhan he "first" smoked a cigarette at the age of 14, he never said that he regularly smoked as of that time. Instead, claimant testified that although he started smoking at the age of twenty during his time in the Marine Corps and smoked regularly since that time, on average he smoked only about "a quarter of a pack per day." Hr. Tr. 23-27.

smoking history was reasoned based on the data before him. *See Trumbo*, 17 BLR 1-85, 1-89 n.4; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Finally, the administrative law judge accorded less weight to Dr. Dahhan's opinion because he found that Dr. Dahhan did not discuss sufficiently the doctor's reasons for attributing claimant's obstructive defect to smoking, rather than coal mine employment. As discussed previously, however, Dr. Dahhan's opinion is based on examination, negative x-ray, non-qualifying blood gas study, qualifying pulmonary function study resulting from less than optimal effort, and a smoking history supported by the results of claimant's carboxyhemoglobin test. On remand, therefore, the administrative law judge must consider Dr. Dahhan's opinion in light of this underlying documentation. *See Clark*, 12 BLR at 1-155; *Marcum*, 11 BLR 1-23.

Accordingly, inasmuch as the administrative law judge has not sufficiently discussed his reasons for according less weight to Dr. Dahhan's opinion, we vacate the administrative law judge's award of benefits and remand the case to the administrative law judge to reconsider Dr. Dahhan's opinion along with the other evidence, in light of the above discussion.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is vacated and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to vacate the administrative law judge's award of benefits and remand the case for reconsideration. I would affirm the award of benefits. Contrary to employer's argument, the administrative law judge could properly accord lesser weight to Dr. Dahhan's opinion because the doctor stated that there was no objective evidence of disability, when, in fact, the pulmonary function study conducted by Dr. Dahhan resulted in qualifying values, *Laird v. Freeman United Coal Co.*, 6 BLR 1-883 (1984); *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Minnich v. Pagnotti Enterprises, Inc.*, 9 BLR 1-89, 1-90 n.1 (1986). The fact that Dr. Dahhan found that claimant's performance on this test was less than optimal does not require the administrative law judge to accord the test results less weight. Nothing in the regulations governing pulmonary function studies requires "optimal" effort on the part of the miner in order for a ventilatory study to be deemed valid; indeed, the Board has held that "fair" cooperation and comprehension are sufficient. *Laird*, 6 BLR 1-883.

Likewise, the administrative law judge did not err by according less weight to Dr. Dahhan's opinion based on the doctor's inaccurate finding that claimant's last coal mine work was that of a shuttle car operator, rather than that of a shot fireman. The effect of such an inaccuracy on the credibility of an opinion is for the administrative law judge to determine. Decision and Order – Award of Benefits at 11-12; Director's Exhibit 10 – Dahhan report. The United States Court of Appeal for the Sixth Circuit, within whose jurisdiction this case arises, has held that in black lung benefits cases, the administrative law judge should consider whether doctors testifying as to whether claimant is totally disabled have any knowledge of the exertional requirements of claimant's work. Federal Mine Safety and Health Act of 1977. Sec. 402(f)(A), as amended, 30 U.S.C.A. Sec. 902(f)(1)(A); 20 C.F.R. Sec. 718.204(b)(1), (c)(4); *Cornett v. Benham Coal, Inc.*, 327 F.3d 569 (6th Cir. 2000). Among the four reasons cited by the administrative law judge for finding Dr. Dahhan's opinion less probative as to the issue of total disability, the administrative law judge noted that it was clear from his report that Dr. Dahhan did not understand that claimant's last job was as a shot fireman. Specifically, Dr. Dahhan stated, "[a]ll of [claimant's] mining work was underground operating a shuttle car." Director's Exhibit 10 - Dahhan rpt., at 1. Indeed, claimant's uncontradicted testimony was that the job of shot firer included "carrying around maybe 50 or 60 pounds, or whatever you could get in the bag," 1992 Hr. Tr. at 19, whereas nothing can be found in the record or in Dr. Dahhan's report which demonstrates the lifting requirements of a shuttle car operator. After enumerating the duties of a shot fireman, the administrative law judge found that "[c]laimant's last coal mine duties were as a shot fireman, which involved putting dynamite in a hole, wiring it up, and shooting it." Decision and Order at 11. The administrative law judge implicitly found that if Dr. Dahhan did not know what claimant's job title or duties were, he could not have had

sufficient information in order to determine whether he was capable of doing that job. This is affirmable.

Additionally, contrary to employer's argument, the administrative law judge properly concluded that Dr. Dahhan's opinion was less probative because it was based on a finding of a fifty-four year pack a day smoking history which was specifically contradicted by claimant's testimony, and was more than double what the administrative law judge found. Dr. Dahhan found that claimant was a 68-year-old man (at the time of the examination in 2002) "who is a smoker of a pack per day since the age of 14 with a history of 54 pack years." Director's Exhibit 10, Dahhan rpt. at 1. He further reported a carboxyhemoglobin level was 5.4%, indicating a smoking individual of over a pack per day, (Ibid at 2) at the time he was tested in 2002. Further, nothing in the record, including Dr. Dahhan's report, suggests that a carboxyhemoglobin test reveals anything about one's smoking history 10, 20, or even 50 years ago. However, the administrative law judge reasonably credited claimant's testimony, in which he insisted that he had kept trying to explain to Dr. Dahhan that while he had smoked his first cigarette when he was 14, he had not actually started smoking until he entered the Marines when he was 20 years old and that even then, due to the nature of his duties in the Marine Corps and later in his coal mine employment, his smoking was often light. Hr. Tr. at 24-26. Confronted with three different versions of the smoking history, which ranged from claimant's testimony of 50 years at 1/4 pack a day (12.5 pack years), to Dr. Dahhan's assessment of a pack a day for 54 years (54 pack years), to Dr. Baker's report of 1/2 pack a day for 54 years (27 pack years), the administrative law judge reasonably accepted the midway point of 27 pack years; particularly, since he credited claimant's testimony that he had not started smoking regularly until he was 20 years old, in which case he could have only been smoking for 48 years at the time he saw Dr. Dahhan. This was a reasonable finding and I would affirm it. Hr. Tr. at 23-27. Accordingly, the administrative law judge permissibly determined that Dr. Dahhan's inaccurate smoking history undermined the reliability of his opinion. Decision and Order at 7; Director's Exhibits 8, 10; Hearing Transcript at 23-26; *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Hutchens v. Director, OWCP*, 8 BLR 1-16.

Finally, contrary to employer's argument, the administrative law judge properly found that Dr. Dahhan did not adequately discuss why he attributed claimant's mild obstructive defects solely to smoking, without giving any consideration to the miner's coal dust exposure. *See Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Accordingly, the administrative law judge properly gave greater weight to the opinion of Dr. Baker which he found to be better reasoned. *See Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *King*, 8 BLR 1-262 (1985); *Minnich*, 9 BLR 1-89, 1-90 n.1.

BETTY JEAN HALL
Administrative Appeals Judge