BRB No. 06-0822 BLA

DONALD L. COUCH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GRIGSBY TRUCKING, INCORPORATED	)	
	)	
and	)	
	)	
TRAVELERS INSURANCE COMPANY	)	DATE ISSUED: 06/27/2007
	)	
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-Award of Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

J. Logan Griffith (Porter, Schmitt, Banks & Baldwin), Paintsville, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order-Award of Benefits (05-BLA-5364) of Administrative Law Judge Thomas F. Phalen, Jr., on a subsequent claim[1] filed pursuant

[1] Claimant's first claim for benefits, filed on March 6, 2000, was denied by an administrative law judge on May 10, 2002, because claimant did not establish the

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 credited claimant with fourteen years of coal mine employment based on the parties' stipulation.[2] Decision and Order at 3. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that the x-ray evidence developed since the prior denial of benefits established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge therefore determined that claimant established a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). On the merits of the claim, the administrative law judge found that the evidence established that the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge also found that the evidence established total disability and total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.204(b)(2) and 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in relying on Dr. Simpao's report to find that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[3] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response to employer's appeal.

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 by 30

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existence of pneumoconiosis. ALJ Exhibit 2. Claimant filed this claim on October 16, 2003. Director's Exhibit 2.

[2] Claimant's coal mine employment occurred in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

[3] Because employer does not challenge the administrative law judge's findings that the existence of pneumoconiosis and a change in an applicable condition of entitlement were established at 20 C.F.R. §§718.202(a)(1) and 725.309(d), or his findings that the pneumoconiosis arose out of coal mine employment and that total disability was established at 20 C.F.R. §§718.203(b), and 718.204(b)(2), we affirm them. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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, 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).

Pursuant to 20 C.F.R. §718.204(c), the administrative law judge considered the reports submitted in the current claim by Drs. Simpao, Dahhan, and Fino, and the reports submitted with the prior claim by Drs. Broudy and Baker. He discredited all the opinions but that of Dr. Simpao, and employer does not challenge the administrative law judge's reasons for discrediting its opinions.[4] We therefore turn to the administrative law judge's analysis of Dr. Simpao's opinion.

Dr. Simpao examined and tested claimant on November 3, 2003, and diagnosed "Coal Workers' Pneumoconiosis Category 1/0" based on an x-ray, diagnosed a severe impairment based on a pulmonary function study, and opined that claimant's "multiple years of coal dust exposure is medically significant in his pulmonary impairment." Director's Exhibit 18 at 38, 39. When considering Dr. Simpao's opinion, the administrative law judge stated:

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[4] The administrative law judge indicated that since he found claimant suffers from clinical pneumoconiosis, he would accord more weight to the more recent opinions diagnosing clinical pneumoconiosis and total disability when assessing the reliability of the opinions. Decision and Order at 17. Thus, the administrative law judge accorded less weight to the opinions of Drs. Baker, Broudy, Fino, and Dahhan. Specifically, the administrative law judge accorded less weight to Dr. Broudy's opinion because he did not diagnose clinical pneumoconiosis, or explain why he excluded coal dust exposure as a possible cause. The administrative law judge accorded Dr. Dahhan's opinion less weight, as he did not diagnose clinical pneumoconiosis, and found total disability was not due to pneumoconiosis based on impairment reversibility, even though the pulmonary function study produced qualifying values, post bronchodilator. The administrative law judge accorded Dr. Baker's 2000 opinion less weight, given its age, and because the preponderance of the x-ray evidence as it existed in 2000 did not support Dr. Baker's diagnosis of clinical pneumoconiosis. The administrative law judge found that Dr. Fino's opinion was not relevant to disability causation, as Dr. Fino did not find claimant totally disabled.

> Only Dr. Simpao diagnosed both clinical pneumoconiosis and offered a well-reasoned and documented opinion that Claimant suffered from a severe pulmonary impairment. Dr. Simpao went on to conclude that this impairment was caused by pneumoconiosis, and since he did not diagnose legal pneumoconiosis, I assume he could only be referring to clinical pneumoconiosis. I note, however, that the weight of the opinion is diminished due to the fact that he did not explain how smoking contributed to this condition, but since clinical pneumoconiosis and not legal pneumoconiosis is at issue, and since smoking history is more pertinent to the etiology of COPD, I find that this omission is not fatal. Also, while Dr. Simpao did not explicitly state that Claimant's pulmonary impairment was totally disabling, based on the fact that he labeled it a "severe impairment," and considering that the PFT values are qualifying, I find that he has implied that Claimant is totally disabled. As a result, despite the apparent deficiencies, I find that Dr. Simpao's report is sufficiently documented and reasoned to prove that Claimant's total disability was due to pneumoconiosis. Therefore, bolstered by his credentials as an internist and pulmonologist, I accord Dr. Simpao's opinion probative weight.

Decision and Order at 17.

Employer contends that the administrative law judge erred in finding Dr. Simpao's opinion well reasoned and documented evidence of disability causation, given the deficiencies in the opinion identified by the administrative law judge. We agree. Essentially, the administrative law judge mischaracterized Dr. Simpao's opinion. The administrative law judge specifically found that, "Dr. Simpao went on to conclude that this impairment was caused by pneumoconiosis, and since he did not diagnose legal pneumoconiosis, I assume he could only be referring to clinical pneumoconiosis." Decision and Order at 17. Dr. Simpao, however, actually stated that claimant's "impairment" was due to dust exposure ["multiple years of coal dust exposure is medically significant in his pulmonary impairment"]. Director's Exhibit 18 at 39. Based on this finding, Dr. Simpao could be diagnosing both legal and clinical pneumoconiosis, and thus, his opinion is unclear as to what is the cause of claimant's impairment. Therefore, contrary to the administrative law judge's finding, whether Dr. Simpao adequately considered smoking could be an important factor.[5] *See* 20 C.F.R. §718.201(a)(2).

[5] The administrative law judge reconciled the various smoking histories of record and found "approximately 14 pack-years of cigarette smoking." Decision and Order at 8.

Further, the administrative law judge did not explain the basis for his assumption that Dr. Simpao is referring to clinical pneumoconiosis, when he found that Dr. Simpao's failure to consider claimant's smoking history was "not fatal," as smoking history is relevant only when discussing legal pneumoconiosis. Thus, we hold that the administrative law judge's findings are not supported by substantial evidence. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989).

Finally, as employer argues, the administrative law judge erred in according additional weight to Dr. Simpao's opinion based on his credentials as a Board-certified internist and pulmonologist; Drs. Broudy and Dahhan are also Board-certified internists and pulmonologists. We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.204(c), and remand this case for reweighing of the relevant evidence. If, on remand, the administrative law judge finds that the evidence does not establish total disability due to pneumoconiosis, a necessary element of entitlement under Part 718, benefits must be denied.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision to remand this case to the administrative law judge for further consideration. Based on the administrative law judge's permissible analysis of the medical evidence, I would affirm the award of benefits.

Employer's sole argument is that the administrative law judge erred in relying on Dr. Simpao's opinion once the administrative law judge identified areas in which it might have been better explained. But contrary to employer's argument, there is nothing wrong with the administrative law judge pointing out weaknesses in a physician's opinion, and explaining why he still found the opinion to be sufficiently credible.

Contrary to employer's contention, Dr. Simpao was aware of claimant's smoking history, and the administrative law judge reasonably explained that he found that Dr. Simpao's failure to discuss how smoking contributed to claimant's condition was not "fatal," because at issue was the causal contribution of claimant's clinical pneumoconiosis, whereas smoking history was "more pertinent to the etiology of COPD . . . ." Decision and Order at 17. The administrative law judge's credibility determination makes sense, considering that Dr. Simpao diagnosed Coal Workers' Pneumoconiosis 1/0 and a severe impairment, and opined that claimant's "multiple years of coal dust exposure is medically significant in his pulmonary impairment."

Director's Exhibit 18 at 39. That is, regardless of the role of claimant's smoking history in claimant's impairment, the administrative law judge reasonably found Dr. Simpao's opinion sufficiently reasoned to establish that clinical pneumoconiosis is a substantially contributing cause of claimant's total disability, in that it has "a material adverse effect on [claimant's] respiratory or pulmonary condition," or "materially worsens" a pulmonary impairment caused by another disease. 20 C.F.R. §718.204(c)(1)(i), (ii); *see Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001).

Further, it is for the administrative law judge to determine whether a physician's opinion is reasoned and documented. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). In the instant case, the administrative law judge found Dr. Simpao's opinion sufficiently reasoned and documented, not **well** reasoned and documented, which is not inconsistent with the deficiencies he noted in the opinion. Therefore, I conclude that Dr. Simpao's opinion constitutes substantial evidence upon which the administrative law judge permissibly based his conclusions.

Thus, I would hold that the administrative law judge permissibly found Dr. Simpao's opinion sufficiently reasoned and documented to establish that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Consequently, I would affirm the award of benefits.

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BETTY JEAN HALL
Administrative Appeals Judge