BRB No. 03-0250 BLA

CALEB EUGENE TEDDER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEXTET MINING COMPANY	)	DATE ISSUED: 10/31/2003
	)	
and	)	
	)	
UNDERWRITERS SAFETY AND CLAIMS	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

John S. Sowards, Jr. (Wilson, Sowards, Polites & McQueen), Madisonville, Kentucky, for claimant.

Samuel J. Bach (Morton & Bach), Henderson, Kentucky, for employer.

Barry H. Joyner (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (01-BLA-1224) of Administrative Law Judge Robert L. Hillyard rendered 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).[1] The administrative law judge credited claimant with thirty-four years of coal mine employment and considered the claim under 20 C.F.R Part 718 based on the filing date. After considering the evidence of record, the administrative law judge found the evidence insufficient to establish either the existence of pneumoconiosis or total disability due to pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in not finding the existence of pneumoconiosis and total disability established. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director) responds, taking no position on the ultimate question of entitlement to benefits, but agreeing that the administrative law judge erred in his consideration of both the existence of pneumoconiosis and total disability.

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 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*).

Claimant first argues that the administrative law judge erred in according less weight to Dr. Chavda's opinion of pneumoconiosis because the x-ray evidence of record, including the x-ray Dr. Chavda relied on, was negative for the existence of pneumoconiosis. Claimant contends that Dr. Chavda's opinion was based on additional

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[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

factors and further argues that positive x-ray evidence is not required to establish the existence of pneumoconiosis as defined by the Act. Claimant also argues that the administrative law judge erred in according less weight to the opinions of Drs. Anderson, Westerfield and Myers because they relied on positive x-ray readings inasmuch as these doctors also relied upon other factors, *e.g.*, history, examination, and pulmonary function studies, in finding that claimant had pneumoconiosis. Instead, claimant argues that the administrative law judge should have accorded little weight to the opinion of Dr. O'Bryan because Dr. O'Bryan did not adequately explain why claimant's thirty-four years of coal mine employment played no role in his impairment, especially in light of the fact Dr. O'Bryan relied on a sixty plus year smoking history when the administrative law judge found only a thirty-five year smoking history.

In finding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a)(4), the administrative law judge accorded the greatest weight to the opinion of Dr. O'Bryan and less weight to the opinion of Dr. Chavda, as well as the opinions of Drs. Anderson, Westerfield, and Myers because Dr. O'Bryan specifically identified the studies he relied upon and the conclusions he reached were "consistent with the underlying objective evidence." Decision and Order at 13. The administrative law judge accorded less weight to the opinion of Dr. Chavda because Dr. Chavda read an x-ray as negative. The administrative law judge also found that pulmonary function studies, relied on by Dr. Chavda, are not diagnostic of the presence or absence of pneumoconiosis. Although the administrative law judge noted that Dr. Chavda also considered examination and history as a basis for his diagnosis of pneumoconiosis, the administrative law judge nonetheless noted that Dr. O'Bryan's opinion was entitled to greater weight as it was better-supported by the underlying evidence. Decision and Order at 12.

Additionally, the administrative law judge accorded less weight to the opinion of Dr. Anderson because Dr. Anderson relied on an x-ray showing category 2/1 pneumoconiosis when the administrative law judge found that the x-ray evidence was negative for the existence of pneumoconiosis and when Dr. Anderson, while noting claimant's smoking history, failed to explain how claimant's smoking history affected his diagnosis of pneumoconiosis. Thus, the administrative law judge properly found that Dr. Anderson's opinion was not well-reasoned or supported by the medical evidence. Likewise, the administrative law judge accorded less weight to the opinions of Drs. Westerfield and Myers because, although these doctors took histories, conducted examinations, and administered pulmonary function studies, the administrative law judge found that they listed their positive x-ray readings as the sole basis for their diagnoses of pneumoconiosis. Thus, the administrative law judge accorded less weight to the opinions of Drs. Anderson, Westerfield and Myers because they provided no reasoning for their diagnoses other than positive x-ray readings. The administrative law judge's findings regarding the opinions of Drs. Anderson, Westerfield, and Myers were reasonable. *See*

Cornett v. Benham Coal Inc., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985).

The administrative law judge's findings regarding the opinions of Drs. Chavda and O'Bryan must, however, be vacated and the case remanded for further consideration of their opinions at Section 718.202(a)(4) inasmuch as Dr. Chavda, in addition to finding the existence of pneumoconiosis, also found the presence of a restrictive and obstructive impairment that was due to coal mine employment. Because this finding could, if credited, establish the existence of pneumoconiosis as defined by the Act, *see* 20 C.F.R. §718.201, the administrative law judge must address and consider this portion of Dr. Chavda's opinion. 20 C.F.R. §718.201; *see Cornett*, 227 F.3d at 575, 22 BLR at 2-121; *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 304, 9 BLR 2-221, 2-224 (6th Cir. 1987)(recognizing distinction between legal and clinical pneumoconiosis); *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-706 (1985). Likewise, while pulmonary function studies may not establish the existence of coal workers' pneumoconiosis, they are relevant to Dr. Chavda's finding that claimant suffered from a respiratory impairment arising out of coal mine employment and to the overall credibility of his opinion. *See Cornett*, 227 F.3d 575, 22 BLR 2-120; *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). Further, the administrative law judge must explain how Dr. O'Bryan's opinion is better supported than Dr. Chavda's, since Dr. Chavda also fully discussed his findings. *See* Chavda Deposition-Director's Exhibit 36(c). Likewise, inasmuch as the administrative law judge relied on Dr. O'Bryan's opinion that claimant's obstructive impairment was due to smoking and Dr. O'Bryan emphasized that claimant had a sixty year smoking history, Employer's Exhibit 1,[2] when in fact the administrative law judge found that claimant had only a thirty-five year smoking history and a thirty-four year coal mine employment history, we also remand the case for the administrative law judge to reconsider Dr. O'Bryan's opinion. *Tackett*, 7 BLR at 1-706, *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996).

Claimant next argues that the administrative law judge erred in not finding total disability by relying on the opinion of Dr. O'Bryan and the six year old reports of Drs. Anderson, Westerfield, and Myers rather than the valid January 11, 2001 and January 19, 2001 pulmonary function studies which produced qualifying values and which more accurately reflect claimant's present respiratory condition.

[2] In an earlier report, Dr. O'Bryan stated that claimant had a forty-three year smoking history. Director's Exhibit 36.

In finding that claimant failed to establish total disability, the administrative law judge, while noting that two of the four pulmonary function studies were qualifying, also noted that the blood gas studies were non-qualifying and that the medical opinions did not establish total disability due to pneumoconiosis. The administrative law judge, therefore, found that the medical evidence, when considered together as a whole, failed to establish total disability. Decision and Order at 16-17. Earlier in his Decision and Order however, the administrative law judge found that Dr. Chavda had found that claimant was totally disabled (due to pneumoconiosis and smoking) and that Dr. O'Bryan had found that claimant was totally disabled (due to cigarette smoking). Thus, even though Dr. O'Bryan found claimant to be totally disabled due to smoking, not pneumoconiosis, the administrative law judge erred in finding his opinion was one that had found that claimant was not totally disabled. *Tackett*, 7 BLR at 1-706. On remand, then the administrative law judge must also consider whether the evidence establishes a totally disabling respiratory impairment and then consider, if reached, whether pneumoconiosis was a substantially contributing cause of the total disability. 20 C.F.R. §§718.204(b), (c). Further, on remand, the administrative law judge should consider the age of the evidence in assessing its probative value. *See* 20 C.F.R. §718.201(c); *Crace v. Kentland-Elkhorn Coal Corp.*, 109 F.3d 1163, 21 BLR 2-73 (6th Cir. 1997).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits is vacated 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

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ROY P. SMITH
Administrative Appeals Judge

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PETER A. GABAUER, Jr.
Administrative Appeals Judge