BRB No. 02-0568 BLA

JAMES BLEVINS BARRETT Claimant-Petitioner v. GREAT WESTERN COAL, INCORPORATED and HARTFORD ACCIDENT AND INDEMNITY COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED:_____ DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James Blevins Barrett, Grays Knob, Kentucky, *pro se*.

Walter A. Ward and Gregory L. Little (Clark & Ward), Lexington, Kentucky, for employer/carrier.

Michael J. Rutledge (Howard 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order - Denying Benefits (01-BLA-0278) of Administrative Law Judge Joseph E. Kane 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).[2] The administrative law judge noted that the instant case involved a duplicate claim,[3] and he found the newly submitted evidence insufficient to establish the existence of pneumoconiosis, total respiratory impairment and a material change in conditions. Accordingly, benefits were denied.

Employer/carrier responds to claimant's appeal, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), as the party-in-interest, urges that the Board vacate the administrative law judge's denial, asserting that the administrative law judge erred by rejecting Dr. Baker's opinion and also erred in accepting Dr. Dahhan's opinion concerning both the existence

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[1]Claimant's Notice of Appeal was filed by Ron Carson of Stone Mountain Health Services. In the Board's letter acknowledging claimant's appeal, the Board advised the parties that claimant would be considered to be representing himself. *See* Letter dated May 17, 2002; *Shelton v. Claude V. Keene Trucking Co.*, 19 BLR 1-88 (1995).

[2]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.

[3]Claimant filed his initial application for benefits in 1991. Director's Exhibit 32. Benefits were denied by the claims examiner on March 12, 1992, because the evidence did not establish the existence of pneumoconiosis, that the disease was caused in part by claimant's coal mine employment, or that he was totally disabled by the disease. Director's Exhibit 32.

of pneumoconiosis and total disability.

In an appeal by a claimant filed without the assistance of counsel, the Board will consider the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). The Board's scope of review is defined by statute. If the findings of fact and conclusions of law of the administrative law judge 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 Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.309(c) (2000) provides that a duplicate claim is subject to automatic denial on the basis of the prior denial, unless there is a determination of a material change in conditions since the denial of the prior claim.[4] 20 C.F.R. §725.309(d) (2000). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in assessing whether a material change has been established, an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If claimant establishes the existence of that element, then he has demonstrated, as a matter of law, a material change in conditions and the administrative law judge must then consider whether all the evidence, including the evidence submitted with claimant=s prior claim, supports a finding of entitlement to benefits. *Id.*

[4]The amendments to the regulation at 20 C.F.R. §725.309 (2000) do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R.§725.2

In evaluating the newly submitted evidence to determine whether it establishes the existence of pneumoconiosis, the administrative law judge considered all of the x-ray interpretations and the readers' qualifications and found that "the great weight of the x-ray evidence demonstrates that pneumoconiosis is not present in the miner." Decision and Order at 10. The newly submitted evidence contains thirteen interpretations of five x-rays. Director's Exhibits 6, 23, 25, 26, 34, 35; Joint Exhibit 1. Of these, twelve interpretations were negative while one was positive. The one positive reading was made by a physician who is qualified as a B reader. Director's Exhibit 6. Ten of the negative interpretations were made by physicians who are either B readers or both B readers and Board-certified radiologists.[5] Director's Exhibits 6, 25, 26, 34, 35; Joint Exhibit 1. Because the administrative law judge considered both the quality and the quantity of the x-ray evidence in finding it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we affirm the administrative law judge's finding that the newly submitted x-ray evidence is insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1), as this finding is supported by substantial evidence.[6] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

The administrative law judge found the medical opinion evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge stated that Dr. Baker's report diagnosing pneumoconiosis, dated March 28, 2000, is not a reasoned medical judgment, based on the administrative law judge's determination that Dr. Baker's diagnosis of pneumoconiosis "is clearly based only upon the doctor's x-ray interpretation and Claimant's history of coal dust exposure." Decision and Order at 11. The administrative law judge found that Dr. Baker's letter, dated June 16, 2000, "merely reiterates his previous findings, and, more importantly, does not demonstrate a basis for his determination of pneumoconiosis other than those already discussed." Decision and Order at 11. The administrative law judge found

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[5]The qualifications of two of the physicians who provided negative interpretations are not contained in the record. Director's Exhibit 23; Unnumbered Exhibit.

[6]We also affirm the administrative law judge's finding that the existence of pneumoconiosis is not established pursuant to 20 C.F.R. §718.202(a)(2) or (a)(3). As the administrative law judge found, the record does not contain any biopsy evidence, or any evidence of complicated pneumoconiosis in this living miner's claim filed in 2000. *See* 20 C.F.R. §§718.202(a)(2), (a)(3), 718.304, 718.305, 718.306.

Dr. Dahhan's contrary opinion to be "substantially well reasoned and well documented, and…grant[ed] it probative weight, although not full probative weight." Decision and Order at 11.

The Director asserts that the administrative law judge erred by mischaracterizing Dr. Baker's opinion.[7] We agree. The administrative law judge found that Dr. Baker's opinion does not constitute a reasoned medical opinion because the physician's diagnosis of pneumoconiosis "is clearly based only upon the doctor's x-ray interpretation and Claimant's history of coal dust exposure." Decision and Order at 11. Contrary to the administrative law judge's finding that Dr. Baker's diagnosis was based exclusively on an x-ray interpretation and claimant's history of coal dust exposure, Dr. Baker's report indicates that he administered an x-ray, a blood gas study and a pulmonary function study in connection with his examination. Director's Exhibit 6. Further, in his letter to the claims examiner dated June 16, 2000, Dr. Baker references claimant's x-ray interpretations, the pulmonary function study and blood gas study reports, as well as claimant's smoking history and his exposure to coal dust. *Id.* Consequently, we hold that the administrative law judge mischaracterized Dr. Baker's diagnosis of pneumoconiosis when he found it based solely on an x-ray interpretation and a history of coal dust exposure, *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000), and we vacate the administrative law judge's finding at Section 718.202(a)(4). Moreover, the administrative law judge has not considered Dr. Baker's diagnosis of legal pneumoconiosis, *i.e.,* COPD and chronic bronchitis due to coal dust exposure and cigarette smoking and must do so on remand. Director's Exhibit 6; *see generally Cornett*, *supra*.

Turning to Dr. Dahhan's opinion, the Director asserts that the administrative law judge did not scrutinize the physician's logic, specifically the reasons given by Dr. Dahhan for his opinion that coal dust exposure

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[7]Dr. Baker examined claimant in 2000 and diagnosed coal workers' pneumoconiosis due to coal dust exposure; COPD with moderate defect, chronic bronchitis, and hypoxemia, all due to coal dust exposure and cigarette smoking; and chest pain. Dr. Baker opined that claimant suffers a moderate impairment due to cigarette smoking and coal dust exposure. Director's Exhibit 6. In a letter to the claims examiner dated June 16, 2000, Dr. Baker noted his x-ray interpretation, as well as the interpretations of other radiologists, claimant's pulmonary function study and blood gas study results, in addition to referring to claimant's coal mine employment and cigarette smoking history, and opined that claimant has a moderate obstructive airway disease which "could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure." *Id.*

does not contribute to claimant's lung disease.[8] The Director argues that Dr. Dahhan's reasons are not rational.

Because the administrative law judge has not specifically considered Dr. Dahhan's rationale, particularly the physician's comments regarding the responsiveness of claimant's lung condition to treatment and the impact of the cessation of claimant's exposure to coal mine dust, before finding the opinion to be well reasoned and documented, we vacate the administrative law judge's reliance on Dr. Dahhan's opinion. On remand, the administrative law judge must specifically consider Dr. Dahhan's rationale in determining whether this opinion is reasoned and documented and the administrative law judge must fully explain his consideration of this opinion and the weight he accords it.

We now turn to the issue of total disability at 20 C.F.R. §718.204(b). The administrative law judge determined that of the four pulmonary function studies of record, three produced qualifying values. Of these, the administrative law judge found that one of the qualifying pulmonary function studies is non-conforming, and that two of the qualifying pulmonary

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[8]Dr. Dahhan examined claimant and reviewed the medical evidence. He concluded that there is insufficient objective data to justify a diagnosis of coal workers' pneumoconiosis. Dr. Dahhan diagnosed chronic obstructive lung disease but did not identify any etiology of this disease. Dr. Dahhan opined that there is no evidence of total or permanent pulmonary disability, but stated that claimant's obstructive ventilatory defect resulted from his lengthy smoking habit, not coal workers' pneumoconiosis or coal dust exposure. Dr. Dahhan stated:

> Mr. Barrett's obstructive ventilatory defect did not result from coal dust exposure or coal workers' pneumoconiosis. He has not had any exposure to coal dust since 1995, a duration of absence sufficient to cause cessation of any industrial bronchitis that he may have had. Also, his obstructive ventilatory defect is being treated with multiple bronchodilators, indicating that his treatment physician believes that his condition is responsive to such therapy. This finding is inconsistent with the permanent adverse affects of coal dust on the respiratory system.

Unmarked Exhibit.

function studies are conforming. The administrative law judge also noted that the two blood gas studies of record did not yield qualifying results. Decision and Order at 14. The administrative law judge considered the opinions of Drs. Dahhan and Baker and found that they weigh "heavily against a finding of total disability." *Id.* at 16. The administrative law judge accorded probative weight to Dr. Dahhan's opinion and the administrative law judge found that Dr. Baker's opinion is not well-reasoned and accorded it no probative weight. In weighing all of the newly submitted evidence regarding disability, the administrative law judge concluded that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b).

The newly submitted evidence contains the results of four pulmonary function studies, three of which yielded qualifying results. *See* Director's Exhibit 6; Unmarked Exhibit. Dr. Burki validated the qualifying results of the April 28, 2000 study and invalidated the March 28, 2000 study, which yielded non-qualifying results. Director's Exhibit 6. The record also contains two newly submitted blood gas studies, both of which yielded non-qualifying results. Director's Exhibit 6; Unmarked Exhibit.

Although the administrative law judge accurately summarized the pulmonary function study evidence, his finding that it "may suggest total disability," Decision and Order at 18, is not a sufficient finding for the Board to review. On remand, the administrative law judge must provide a definite finding regarding the pulmonary function study evidence at 20 C.F.R. §718.204(b)(2)(i). The administrative law judge found that the blood gas study evidence does not support claimant's burden of establishing total disability. Inasmuch as the newly submitted blood gas study evidence is all non-qualifying, we affirm the administrative law judge's finding that it does not support claimant's burden of demonstrating total disability at 20 C.F.R. §718.204(b)(2)(ii).[9]

[9]In addition, the administrative law judge properly found that 20 C.F.R. §718.204(b)(2)(iii) is inapplicable in this case because the record does not contain evidence of cor pulmonale with right-sided congestive heart failure.

The administrative law judge gave no weight to Dr. Baker's opinion of total disability.[10] First, the administrative law judge determined that this opinion is not well-reasoned because although the physician addressed the FEV1 result, he did not address the entirety of the non-qualifying March pulmonary function study which, the administrative law judge found, compromised his reasoning. Second, the administrative law judge accorded little weight to Dr. Baker's opinion because the physician did not compare the exertional requirements of claimant's coal mine employment with the level of impairment he identified which, the administrative law judge found, undermined the physician's conclusion that claimant is unable to perform coal mine employment. Third, the administrative law judge found that Dr. Baker's opinion is not well-reasoned because the physician relies solely on a "questionable medical exam" to support his conclusion that claimant is moderately impaired." Decision and Order at 17. The administrative law judge found that Dr. Baker noted doubts regarding claimant's effort on the pulmonary function study and that Dr. Burki invalidated the pulmonary function study results.

The Director challenges the administrative law judge's finding that Dr. Baker's opinion is not well-reasoned. Specifically, the Director asserts that the administrative law judge mischaracterized the basis of Dr. Baker's disability opinion when he found the physician's opinion of total disability based solely on the FEV1 results. In addition, the Director notes that the administrative law judge erred by failing to consider that prior to writing his

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[10]Dr. Baker opined that claimant has a moderate impairment which is due to cigarette smoking and coal dust exposure, and indicated that claimant does not have the respiratory capacity to perform the work of a coal miner, noting that claimant's FEV1 value was less than 60%. Director's Exhibit 6. In a subsequent letter to the claims examiner, Dr. Baker stated:

> The symptom complex could all be due to cigarette smoking or could be due to a combination of cigarette smoking and coal dust exposure. Coal dust exposure will cause bronchitis, obstructive airway disease and may cause resting arterial hypoxemia. He has had a significant history of dust and it is felt it probably contributes to some extent in an undefineable (sic) proportion to his pulmonary complaints.

Director's Exhibit 6.

June 16, 2000 opinion, Dr. Baker administered a second pulmonary function study which yielded qualifying values, and was validated by another physician,

A review of Dr. Baker's reports supports the Director's assertion. In Dr. Baker's March 28, 2000 opinion, he opined that claimant has a moderate impairment "with decreased FEV1, chronic bronchitis, decreased PO2, and Coal Workers' Pneumoconiosis." Director's Exhibit 6. Dr. Baker also indicated that claimant does not have the respiratory capacity to perform the work of a coal miner. *Id.* Prior to writing a letter, dated June 16, 2000, to the claims examiner, Dr. Baker administered a pulmonary function study which yielded qualifying values. *Id.* In the June 16, 2000 letter Dr. Baker stated "He still has moderate obstructive airway disease….Pulmonary function studies show moderate obstructive defect. Arterial blood gases revealed mild resting arterial hypoxemia." *Id.* As it appears that in rendering his opinion concerning disability, Dr. Baker has relied upon more than just the FEV1 results of a pulmonary function study, we hold that the administrative law judge erred in discrediting Dr. Baker's opinion on this basis. *See Cornett, supra.* In addition, the administrative law judge erred by not acknowledging that Dr. Baker considered new objective testing prior to writing his June 2000 opinion, and we instruct the administrative law judge to consider this point on remand.

The Director also challenges the administrative law judge's discrediting of the opinion of Dr. Baker because the physician did not compare the exertional requirements of claimant's coal mine employment with the degree of impairment he diagnosed.[11] We agree with the Director that the administrative law judge erred in discrediting Dr. Baker's opinion on this basis. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, requires the administrative law judge to consider whether a physician who opines that a claimant is *not* totally disabled has knowledge of the exertional requirements of the claimant's job. *See Cornett, supra*; *see also Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). The court has not required this analysis of medical opinions where the physician opines that a claimant is totally disabled, as the administrative law judge required of Dr. Baker. Consequently, we vacate the administrative law judge's finding in this regard.

[11]Dr. Baker opined that claimant suffered a moderate impairment and stated that claimant does not have the respiratory capacity to perform the work of a coal miner. Director's Exhibit 6. It was reasonable for the administrative law judge to consider Dr. Baker's opinion as an opinion of total disability. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

The Director also challenges the administrative law judge's reliance upon Dr. Dahhan's opinion to find that claimant has not established total disability. Specifically, the Director argues that Dr. Dahhan's opinion does not conclude that claimant is not totally disabled, and the Director asserts that the administrative law judge mischaracterized this opinion. In addition, the Director notes that the administrative law judge did not consider whether this case complies with the requirement in *Lane*, that the administrative law judge must consider whether the physician finding that claimant is not disabled had knowledge of the exertional requirements of his coal mine employment.

Dr. Dahhan stated:

> Due to poor performance on spirometry testing, direct measurement of [claimant's] ventilatory capacity is not possible. However, all other parameters of his respiratory system indicate no evidence of total or permanent pulmonary disability including the clinical examination of the chest, lung volume measurements and diffusion capacity with both being normal, arterial blood gas measurements and chest x-ray.

Unmarked Exhibit.

We agree with the Director that Dr. Dahhan's opinion is not an affirmative finding that claimant is not totally disabled. Consequently, we vacate the administrative law judge's finding in this regard, and instruct the administrative law judge, on remand, to reconsider Dr. Dahhan's opinion. If the administrative law judge finds that it is Dr. Dahhan's opinion that claimant is not totally disabled, the administrative law judge must better explain this finding. In addition, the administrative law judge must consider whether Dr. Dahhan's opinion satisfies the requirement of *Cornett* and *Lane* that a physician who opines that a claimant is not totally disabled must display knowledge of the exertional requirements of the claimant's coal mine job.

Therefore, we vacate the administrative law judge's finding that the newly submitted evidence does not establish the existence of pneumoconiosis or total disability, as well as the administrative law judge's finding that claimant has not established a material change in conditions pursuant to Section 725.309 (2000).

If, on remand, the administrative law judge finds that claimant has established a material change in conditions pursuant to 20 C.F.R. §725.309 (2000), he is instructed to consider entitlement on the merits based on all of

the evidence of record. *See* 20 C.F.R. §§718.202, 718.203 and 718.204.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge