BRB No. 09-0731 BLA

DAN BAILEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOUBLE N CORPORATION	)	
	)	
and	)	
	)	DATE ISSUED: 07/28/2010
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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.

James D. Holliday, Hazard, Kentucky, for claimant.

William A. Lyons and W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Michelle S. Gerdano (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (08-BLA-5533) of Administrative Law Judge Thomas F. Phalen, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act).[1]

The administrative law judge credited claimant with eleven years of coal mine employment, as stipulated.[2] The administrative law judge found that claimant established the existence of clinical pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), and both clinical and legal pneumoconiosis[3] based on the medical opinion evidence, pursuant to 20 C.F.R. §718.202(a)(4). Additionally, the administrative law judge found that claimant's clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in excluding a 2008 medical report of Dr. Dahhan. Employer further asserts that the administrative law judge erred in his analysis of the medical evidence when he found that claimant established total respiratory disability pursuant to Section 718.204(b)(2), and total

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[1] The Director, Office of Workers' Compensation Programs, correctly states that the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, as claimant's claim was filed before January 1, 2005, on July 23, 2003. Director's Exhibit 2. Claimant agrees that the recent amendments do not apply to his claim.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 5. 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] Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Legal pneumoconiosis is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

disability due to pneumoconiosis pursuant to Section 718.204(c).[4] Claimant responds that employer voluntarily withdrew Dr. Dahhan's 2008 report at the hearing, and urges affirmance of the administrative law judge's decision awarding benefits. The Director, Office of Workers' Compensation Programs (the Director), submitted a letter in which he declined to file a substantive response brief. In a footnote, however, the Director argues that since employer withdrew Dr. Dahhan's report, the administrative law judge "could not refuse to admit that which was not offered into evidence; hence, there is no error." Director's Letter n.1.

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).

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).

Dr. Dahhan's 2008 Report

Employer contends that the administrative law judge erred in excluding a 2008 medical report of Dr. Dahhan that was submitted by employer. The record reflects that, contrary to employer's characterization, the administrative law judge did not exclude Dr. Dahhan's report; employer withdrew it. As summarized by the administrative law judge in his decision, before the hearing, employer submitted three medical reports in support of its affirmative case, one more than it was allowed under the evidentiary limitations, absent a showing of good cause.[5] 20 C.F.R. §§725.414(a)(3)(i), 725.456(b)(1); Decision

[4] Because the administrative law judge's findings that claimant established both clinical and legal pneumoconiosis, pursuant to 20 C.F.R. §718.202(a), and that his clinical pneumoconiosis arose out of coal mine employment, pursuant to 20 C.F.R. §718.203(b), are unchallenged on appeal, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[5] Specifically, employer designated as affirmative-case medical reports the 2003 physical examination report and 2004 supplemental report of Dr. Fino, the 2003 physical examination report and 2004 supplemental reports of Dr. Dahhan, and the 2008 physical examination report of Dr. Dahhan. Employer's Evidence Summary Form, October 8, 2008, at 5; Director's Exhibits 14, 16, 17, 45; Employer's Exhibit 1 (withdrawn exhibit).

and Order at 5 n.10. When proffering its evidence at the hearing, however, employer's counsel informed the administrative law judge that it was withdrawing one of those reports:

> Your Honor, the Employer had previously tendered, but will withdraw Exhibit 1, the 2008 report by Dr. Dahhan. We'll go with Director's Exhibit 14, a prior report by Dr. Dahhan. . . . I'm withdrawing that on my understanding that it exceeds the limits. However, I would like to reserve that issue just for purposes of appeal . . . .

2008 Hearing Transcript at 9-10.[6] The administrative law judge noted further that employer did not redesignate its evidence, or request permission to substitute Dr. Dahhan's 2008 report as one of its two affirmative medical reports. Decision and Order at 5-6 n.10. Since employer withdrew Dr. Dahhan's 2008 report, the administrative law judge did not consider it.

The administrative law judge committed no abuse of discretion in adhering to employer's designation of its evidence under the evidentiary limitations.[7] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*). Moreover, employer's arguments to the Board that Dr. Dahhan's 2008 report should have been admitted because it addressed the validity of Dr. Baker's 2008 pulmonary function study, because it was relevant to the issue of disability causation, and because it responded to Dr. Baker's most recent 2008 report, are arguments relevant to establishing "good cause" for exceeding the evidentiary limits, or for using Dr. Dahhan's 2008 report as rebuttal evidence to Dr. Baker's 2008 report. 20 C.F.R. §§725.414(a)(3)(ii); 725.456(b)(1). Employer could have proffered Dr. Dahhan's 2008 report, subject to objection, and made its "good cause" arguments to the administrative law judge, *see Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-145 (2006), or it could have identified Dr. Dahhan's report as rebuttal evidence. Instead, employer withdrew the report, on the record at the hearing. Detecting

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[6] Two hearings were held in this case. The first, in 2006, resulted in a remand to the district director for further evidentiary development. Director's Exhibit 45. The second hearing took place in 2008. We cite to the transcript of the second hearing.

[7] To the extent employer means to argue that the evidentiary limitations under which it saw the need to withdraw Dr. Dahhan's 2008 report are invalid, its argument lacks merit. *Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 297, 23 BLR 2-430, 2-460 (4th Cir. 2007); *Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 873-874, 23 BLR 2-124, 2-181 (D.C. Cir. 2002); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-58-59 (2004)(*en banc*), *vac'd on other grounds, sub nom. Sewell Coal Co. v. Director, OWCP*, 523 F.3d 257, 24 BLR 2-128 (4th Cir. 2008).

no abuse of discretion by the administrative law judge, we reject employer's allegation of error.

Total Disability

Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered four pulmonary function studies. The first three studies were administered in 2003. The September 5, 2003 pulmonary function study, administered by Dr. Baker as part of the complete pulmonary evaluation provided to claimant by the Department of Labor, was both valid and nonqualifying.[8] Director's Exhibit 10. Thereafter, Dr. Fino administered a pulmonary function study on December 5, and Dr. Dahhan administered another, on December 12, 2003. Both physicians, however, reported that the studies obtained were invalid for interpretation. Director's Exhibits 14, 16. Almost five years later,[9] Dr. Baker examined claimant at claimant's own expense, and, in connection with that examination, conducted a pulmonary function study dated August 19, 2008. This study was both valid and qualifying. Claimant's Exhibit 2.

The administrative law judge found that the September 5, 2003, nonqualifying pulmonary function study did not establish total disability. He further found that the two December 2003 studies were invalid. Turning to the August 19, 2008, qualifying pulmonary function study, the administrative law judge found that it merited greater weight than the September 5, 2003 nonqualifying study, because it was five years more recent and its qualifying nature was consistent with "the latent and progressive nature of

[8] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[9] After the hearing in 2006, the administrative law judge remanded the case to the district director for claimant to receive a complete pulmonary evaluation, as it appeared that the pulmonary function study conducted by Dr. Baker in 2003 was invalid. Director's Exhibit 45. On remand, the district director had Dr. Baker's September 5, 2003 pulmonary function study reviewed by a consulting physician, who opined that the study was valid, and the district director returned the case to the Office of Administrative Law Judges. Director's Exhibit 45 at 1, 9; Director's Exhibit 46. While the case was awaiting a second hearing, claimant submitted the August 19, 2008 physical examination report of Dr. Baker. Claimant's Exhibit 2. Employer submitted the September 25, 2008 physical examination report of Dr. Dahhan, which it later withdrew at the hearing on October 28, 2008.

pneumoconiosis." Decision and Order at 20. The administrative law judge therefore found that the pulmonary function study evidence established total disability.

Employer argues that the administrative law judge selectively analyzed the evidence by considering Dr. Baker's 2008 qualifying pulmonary function study "to the exclusion of" the remaining studies. Employer's Brief at 15. We disagree. The administrative law judge considered all four studies, and he reasonably accorded greater weight to the more recent, qualifying pulmonary function study. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). We therefore reject employer's allegation of error, and affirm the administrative law judge's finding pursuant to Section 718.204(b)(2)(i).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the medical reports of Drs. Baker, Dahhan, and Fino.[10] Initially, following the complete pulmonary evaluation in 2003, Dr. Baker diagnosed claimant with a mild impairment. Director's Exhibits 10, 15, 45. Dr. Dahhan stated that claimant is not totally disabled. Director's Exhibits 14, 17, 45. Dr. Fino opined that claimant has no respiratory impairment. Director's Exhibits 16, 45. In his most recent 2008 report, Dr. Baker opined that claimant is totally disabled by a moderate obstructive impairment. Claimant's Exhibit 2.

The administrative law judge gave less weight to Dr. Dahhan's opinion because he did not explain the inconsistency between his March 2004 report, in which he stated that claimant had a mild impairment but was not totally disabled, and his May 2004 report, in which he stated that claimant had no impairment. Decision and Order at 21-22. The administrative law judge found that Dr. Fino's opinion, that claimant had no impairment, was sufficiently well-documented and well-reasoned as of "the time of his opinion" in 2004, and he gave it "probative weight." Decision and Order at 22. The administrative law judge, however, accorded greater weight to Dr. Baker's 2008 assessment that claimant has a moderate obstructive impairment that is totally disabling, because the administrative law judge found it to be well-reasoned, and supported by the recent

[10] The administrative law judge also considered Dr. Chaney's opinion that claimant is totally disabled, but discounted it after determining that it was not well-reasoned or well-documented. Decision and Order at 22.

qualifying pulmonary function study.[11] The administrative law judge therefore found total disability established by the medical opinion evidence.

Employer argues that Dr. Baker's opinion is insufficient to establish total respiratory disability, because Dr. Baker merely advised against further dust exposure or, at best, diagnosed a mild impairment. Employer's Brief at 15-16. Employer's contention lacks merit. Dr. Baker diagnosed claimant with a moderate pulmonary impairment, based on a qualifying pulmonary function study, and opined that he is totally disabled. Claimant's Exhibit 2 at 2-3. We likewise reject employer's argument that the administrative law judge did not explain his basis for crediting the opinion of Dr. Baker over those of Drs. Dahhan and Fino. As discussed, the administrative law judge explained that he did not find Dr. Dahhan's opinion to be well-reasoned. Further, while he found Dr. Fino's opinion to be well-documented and reasoned, he permissibly accorded greater weight to Dr. Baker's 2008 report, because it was based on the most recent examination and testing of claimant, and thus was "likely to contain a more accurate evaluation of the miner's current condition." Decision and Order at 22; *see Cooley*, 845 F.2d at 624, 11 BLR at 2-149; *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-20 (2003). As substantial evidence supports the administrative law judge's finding pursuant to Section 718.204(b)(2)(iv), it is affirmed.

Employer argues further that the administrative law judge "ignored the preponderance of" the blood gas studies in finding that claimant is totally disabled. Employer's Brief at 16-17. This argument lacks merit. The administrative law judge considered the blood gas studies and found that they did not establish total disability, as all four were nonqualifying. Decision and Order at 20. After weighing the pulmonary function and blood gas studies, and the medical opinion evidence, the administrative law judge concluded that total disability was established based on a preponderance of the evidence. Decision and Order at 23. Substantial evidence supports the administrative law judge's permissible finding. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41, 17 BLR 2-16, 2-22 (6th Cir. 1993)(holding that blood gas studies are probative, but "cannot be seen as being a direct offset or 'contrary to' the findings of the pulmonary function evidence"); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987). We therefore affirm the administrative law judge's finding pursuant to Section 718.204(b)(2).

[11] The administrative law judge found that claimant's usual coal mine employment required heavy labor. Decision and Order at 21. Employer does not challenge this finding, which is therefore affirmed. *See Skrack*, 6 BLR at 1-711.

Disability Causation

Pursuant to Section 718.204(c), the administrative law judge considered the opinions of Drs. Baker, Dahhan, and Fino.[12] In his 2008 report, Dr. Baker stated that claimant's clinical and legal pneumoconiosis contribute to his total disability, and thus that claimant's total disability is due in "a significant, if not a major portion" to coal dust exposure. Claimant's Exhibit 2 at 3. Dr. Dahhan stated that claimant is not totally disabled. Director's Exhibits 14 at 3; 17 at 3; 45 at 173. Dr. Fino opined that claimant has no respiratory impairment. Director's Exhibits 16, 45.

The administrative law judge found that Dr. Baker's opinion was well-documented and well-reasoned because Dr. Baker considered claimant's coal mine employment and smoking histories, and cited medical literature to support his opinion. The administrative law judge discounted the opinions of Drs. Dahhan and Fino because their opinions were contrary to his finding that claimant is totally disabled.

Employer argues that the administrative law judge erred by failing to take into account Dr. Baker's inaccurate report of claimant's length of coal mine employment. Employer's Brief at 15. This argument lacks merit. Although Dr. Baker initially relied on a thirty-year underground coal mine employment history, Director's Exhibit 10 at 8, the doctor was subsequently informed that claimant was credited with only eleven years of coal mine employment. Director's Exhibit 15 at 2. Dr. Baker testified at deposition that his opinion would not change if claimant worked for eleven years. Director's Exhibit 45 at 98. Although Dr. Baker again reported, in his 2008 report, a thirty-year underground coal mine employment history, Claimant's Exhibit 2 at 1, he reviewed his records from a prior examination, indicating that claimant claimed twenty-two years of coal mine employment but was credited with eleven years of coal mine employment, and was thus aware that claimant's reported length of coal mine employment differed from

[12] Employer does not challenge the administrative law judge's analysis and weighing of Dr. Chaney's opinion at disability causation. Dr. Chaney related claimant's totally disabling pulmonary impairment to coal workers' pneumoconiosis and smoking. Director's Exhibit 13 at 1. The administrative law judge found that Dr. Chaney's opinion as to the cause of disability was "sufficiently well-reasoned and documented," and he accorded it "probative weight" as evidence that claimant's "coal workers' pneumoconiosis has a significant material effect on his respiratory status." Decision and Order at 24. Since employer does not challenge the administrative law judge's decision to rely, in part, on Dr. Chaney's opinion at disability causation, the administrative law judge's credibility determination is affirmed. *See Skrack*, 6 BLR at 1-711.

the amount with which he was credited.[13] Director's Exhibit 15 at 2; Claimant's Exhibit 2 at 3.

Employer also argues that the administrative law judge erred in discounting the opinions of Drs. Dahhan and Fino because their conclusions differed from the administrative law judge's finding that claimant is totally disabled. Employer also argues that the administrative law judge failed to consider the proper legal standard. Employer's Brief at 19-20.

We reject employer's arguments. Dr. Fino's opinion, that claimant has no impairment, is not relevant, as it does not address the cause of claimant's disability and, thus, the administrative law judge did not err in discounting it. Nor did the administrative law judge err in discounting Dr. Dahhan's opinion. In the 2004 report in which Dr. Dahhan diagnosed an impairment, he attributed claimant's mild obstruction only to smoking. Director's Exhibit 17 at 3. As such, his opinion is contrary to the administrative law judge's finding, at Section 718.202(a)(4), that claimant's obstructive lung disease is due, in part, to coal mine dust exposure, and therefore constitutes legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995).

Lastly, we reject employer's argument that the administrative law judge failed to consider the proper legal standard. The administrative law judge applied the proper legal standard, which is whether pneumoconiosis is a "substantially contributing cause" of claimant's total disability.[14] Decision and Order at 23, *quoting* 20 C.F.R. §718.204(c);

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[13] In any event, Drs. Dahhan and Fino both relied on a thirty-year underground coal mine employment history. Director's Exhibits 14 at 2; 16 at 3.

[14] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or

see also Adams v. Director, OWCP, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989)(holding that a miner "must affirmatively establish only that his totally disabling respiratory impairment . . . was due 'at least in part' to his pneumoconiosis."). Dr. Baker's 2008 opinion, credited by the administrative law judge as well-documented and reasoned, stated that both clinical coal workers' pneumoconiosis, and obstructive lung disease due, in part, to coal mine dust exposure "have an adverse effect on [claimant's] respiratory condition and contribute[] to his total pulmonary impairment . . . ." Claimant's Exhibit 2 at 3. Substantial evidence supports the administrative law judge's finding that claimant met his burden under Section 718.204(c), which we therefore affirm. Thus, we affirm the award of benefits.

> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). In the comments to the regulations, the Department of Labor made clear that in the standard enunciated in Section 718.204(c), the "Department meant only to codify the numerous decisions of the courts of appeals . . . ," citing with approval the Sixth Circuit's decision in *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989)("diagnosis of 'total disability resulting from a combination of pneumoconiosis, emphysema and chronic obstructive lung disease' sufficient)."

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge