

BRB No. 10-0649 BLA

GLEN L. COLLINS)
)
 Claimant-Respondent)
)
 v.)
)
 JAMES RIVER COAL SERVICE) DATE ISSUED: 07/26/2011
 COMPANY)
)
 and)
)
 JAMES RIVER COAL COMPANY)
)
 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 on Remand of John P. Sellers, III,
Administrative Law Judge, United States Department of Labor.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton
PLLC), Pikeville, Kentucky, for employer/carrier.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals
Judges.

PER CURIAM:

James River Coal Service Company (James River Coal) appeals the Decision and
Order on Remand (07-BLA-5067) of Administrative Law Judge John P. Sellers, III,
awarding benefits on modification of a claim filed pursuant to the provisions of Title IV
of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public 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 This case is before the Board for the second time. In the original Decision and Order dated February 7, 2008, Administrative Law Judge Thomas F. Phalen, Jr., considered employer's petition for modification of the district director's decision awarding benefits. Judge Phalen found that claimant was a miner, that he worked at least 28 years in coal mine employment, and that James River Coal was properly designated as the responsible operator. Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Part 718, Judge Phalen found that claimant did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Judge Phalen therefore found that the evidence established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Further, Judge Phalen found that remand of the case for a complete pulmonary evaluation was unwarranted, as he did not find that Dr. Rasmussen's opinion was totally insufficient to constitute an opportunity to substantiate the claim and the well-reasoned and well-documented opinions of Drs. Broudy and Dahhan were sufficient to make a determination as to the existence of pneumoconiosis. Accordingly, Judge Phalen granted James River Coal's request for modification and denied benefits. Furthermore, in a subsequent Decision and Order dated March 7, 2008, Judge Phalen denied the request for reconsideration by the Director, Office of Workers' Compensation Programs (the Director).

In response to claimant's appeal, the Board vacated both Judge Phalen's order granting James River Coal's request for modification at 20 C.F.R. §725.310 and his denial of benefits, and remanded the case for Judge Phalen to consider whether James River Coal satisfied its burden of disproving either the existence of pneumoconiosis or a totally disabling respiratory impairment.² *G.C. [Collins] v. James River Coal Service*

¹ The pertinent procedural history of the case is as follows: Claimant filed his claim on March 17, 2005. Director's Exhibit 2. In a Proposed Decision and Order dated December 27, 2005, the district director awarded benefits. Director's Exhibit 29. By letter dated March 7, 2006, James River Coal Service Company (James River Coal) requested modification of the award of benefits. Director's Exhibit 41. In a Proposed Decision and Order dated July 25, 2006, the district director denied James River Coal's request for modification based on its failure to establish a change in conditions or a mistake in a determination of fact. Director's Exhibit 44. Following James River Coal's request for a formal hearing, Director's Exhibit 45, the case was transferred to the Office of Administrative Law Judges, Director's Exhibit 48.

² The Board noted that the administrative law judge's statements demonstrated that he improperly placed the burden of establishing modification on claimant. *G.C. [Collins] v. James River Coal Service Co.*, BRB No. 08-0535 BLA, slip op. at 3 n.2 (Feb. 27, 2009)(unpub.).

Co., BRB No. 08-0535 BLA, slip op. at 3-4 (Feb. 27, 2009)(unpub.). The Board noted that Judge Phalen found that Dr. Dahhan's opinion, that claimant's lung condition was attributable to cigarette smoking, was supported by his bronchodilator response on a pulmonary function study. The Board also noted that Dr. Dahhan found that claimant's response to bronchodilator treatment indicated that his respiratory defect was partially reversible, and that this finding was inconsistent with the permanent adverse effects of coal dust on the respiratory system. However, the Board further noted that Judge Phalen did not address the fact that Dr. Dahhan subsequently acknowledged that coal dust exposure can cause a partially reversible obstructive ventilatory impairment. Hence, the Board instructed Judge Phalen to "address the effect of this apparent inconsistency on the probative value of Dr. Dahhan's opinion." *G.C. [Collins]*, BRB No. 08-0535 BLA, slip op. at 4. Further, after noting that Judge Phalen should address the significance of Dr. Rasmussen's comments regarding the validity of the March 23, 2006 arterial blood gas study conducted by Dr. Dahhan during exercise, the Board instructed Judge Phalen to address all of the relevant evidence regarding the reliability of the arterial blood gas study evidence, including Dr. Rasmussen's assessment of the March 23, 2006 study. *G.C. [Collins]*, BRB No. 08-0535 BLA, slip op. at 4-5.

On remand, the case was reassigned to Judge Sellers (the administrative law judge), who found that James River Coal failed to establish that claimant was not a coal miner, as defined by the Act and regulations, when it employed him. After crediting claimant with 25 years of coal mine employment, the administrative law judge found that James River Coal was the properly designated responsible operator. Although the administrative law judge found that James River Coal established the absence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), (2), he found that James River Coal failed to establish the absence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge also found that James River Coal failed to establish that claimant was not totally disabled from a respiratory impairment at 20 C.F.R. §718.204(b). Further, the administrative law judge found that James River Coal failed to rule out a causal connection between claimant's pneumoconiosis and his total disability at 20 C.F.R. §718.204(c). The administrative law judge therefore found that James River Coal failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310. Accordingly, the administrative law judge denied James River Coal's request for modification and awarded benefits.

On appeal, James River Coal contends that the administrative law judge erred in failing to remand the case for further evidentiary development regarding the nature of claimant's employment because of the change in law at Section 1556 of the recently enacted Patient Protection Affordable Care Act (PPACA). James River Coal also challenges the administrative law judge's finding that the medical opinion evidence did not show that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Further, James River Coal challenges the administrative law judge's findings that the

evidence did not show that claimant does not have a total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv), and that the evidence did not show that claimant's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). Neither claimant, nor the Director, has filed a brief in this 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 supported by substantial evidence, is rational, and is in accordance with applicable law.³ 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).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish 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 (1989).

Under Section 22 of the Longshore and Harbor Workers' Compensation Act (Longshore Act), 33 U.S.C. §922, as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), the fact-finder may, on the ground of a change in conditions or a mistake in a determination of fact, reconsider the terms of an award or denial of benefits. See 20 C.F.R. §725.310. The intended purpose of allowing modification based on a mistake in a determination of fact is to vest the fact-finder "with broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted."⁴ *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); see *Old Ben Coal Co. v. Director, OWCP [Hilliard]*, 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002); *Director, OWCP v. Drummond Coal Co. [Cornelius]*, 831 F.2d 240, 10 BLR 2-322 (11th Cir. 1987).

³ The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 3, 5. Accordingly, the law of the United States Court of Appeals for the Sixth Circuit is applicable. See *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

⁴ Modification of a claim does not automatically flow from a finding that a mistake was made in an earlier determination; it should be granted only where doing so will render justice under the Act. See *Banks v. Chi. Grain Trimmers Ass'n*, 390 U.S. 459, 464 (1968) (the purpose of modification under the Longshore Act, also applicable to the Black Lung Act, is to "render justice."); *Sharpe v. Director, OWCP*, 495 F.3d 125, 128, 24 BLR 2-56, 2-66 (4th Cir. 2007).

Initially, we will address James River Coal's contention that the administrative law judge erred in failing to remand the case for further evidentiary development regarding the nature of claimant's employment because of the change in law at Section 1556 of the recently enacted PPACA. James River Coal asserts that claimant's work in reclamation does not qualify as coal mine employment. James River Coal also asserts that, even if it qualified as coal mine employment, the conditions of claimant's work in reclamation were not substantially similar to those of an underground coal mine.

The administrative law judge noted that James River Coal conceded that it employed claimant from 1971 to 1996, but contested that claimant's work in reclamation qualified as coal mine employment. Further, after noting that the district director found that claimant worked as a coal miner for 25 years, the administrative law judge stated that "[James River Coal], as the proponent of modification, bears the burden of proof of disproving this finding." Decision and Order on Remand at 6. As noted by the administrative law judge, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has adopted a situs-function test in determining whether an individual is a "miner" under the Act.⁵ *Director, OWCP v. Consolidation Coal Co.*, [Petracca], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). In determining that the situs prong was satisfied, the administrative law judge found that James River Coal failed to establish that claimant worked in an area that fell outside of the definition of a coal mine. Regarding the function prong, the administrative law judge noted that "the focus of the inquiry is whether the worker's function is integral to the extraction or preparation of coal as opposed to the delivery and commercial use of the processed coal."⁶ Decision and Order on Remand at 7. The administrative law judge found that claimant testified that his work in reclamation required him to backfill close to the pits and along the roads where trucks transported coal.⁷ The administrative law judge

⁵ The Sixth Circuit has held that the situs portion of the two-prong test requires that a person's work occurred in or around a coal mine or coal preparation facility. *Director, OWCP v. Consolidation Coal Co.*, [Petracca], 884 F.2d 926, 931, 13 BLR 2-38, 2-41-42 (6th Cir. 1989). The Sixth Circuit has also held that an individual meets the function requirement if his or her work was necessary and integral to the extraction or preparation of coal. *Id.* Further, the Sixth Circuit has held that "[t]hose whose tasks are merely convenient but not vital or essential to production and/or extraction are generally not classified as 'miners.'" *Falcon Coal Co. v. Clemons*, 873 F.2d 916, 922, 12 BLR 2-271, 2-278 (6th Cir. 1989).

⁶ The administrative law judge stated that "the [c]laimant's work was clearly not involved with the delivery and commercial use of the processed coal." Decision and Order on Remand at 7.

⁷ The administrative law judge stated that "[claimant's] testimony indicates that

also found that claimant's work as an inspector, sampler, and supervisor of reclamation was more than a mere convenience to James River Coal, but was, in fact, integral to the health and safety, maintenance and functioning of the mining operation. The administrative law judge additionally found that there was no evidence to substantiate James River Coal's assertion that claimant was not exposed to coal mine dust during his work in reclamation.⁸ The administrative law judge therefore found that James River Coal, as the proponent of modification, failed to establish that claimant was not a coal miner, as defined by the Act and regulations, when it employed him.

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. In this case, the administrative law judge noted that the instant claim was filed on March 21, 2005. The administrative law judge nonetheless stated:

Even if it were to be found applicable, however, the 15-year presumption would not substantially alter the analysis in this modification. The burden of proof already has shifted to [James River Coal] as the proponent of modification. On modification, the burden is on [James River Coal] to disprove at least one of the essential elements of entitlement.

Decision and Order on Remand at 3. Hence, the administrative law judge found that a remand of the case to further develop evidence in response to the PPACA was not justified, would cause further unnecessary delay, and was not consistent with the efficient administration of the Act.

Because the administrative law judge reasonably found that the PPACA did not significantly affect the analysis in this case on modification, *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we reject James River Coal's assertion that the

even the reclamation component of his work took place in close proximity to active mining operations, as opposed to an isolated area that had completely shut down or been abandoned." Decision and Order on Remand at 7.

⁸ The administrative law judge noted that claimant testified that he was exposed to coal mine dust for 60% to 75% of the time that he worked in reclamation. Decision and Order on Remand at 7.

administrative law judge erred in failing to remand the case for further evidentiary development regarding the nature of claimant's employment.

Next, we address James River Coal's contentions on the merits. Specifically, James River Coal contends that the administrative law judge erred in weighing the medical opinion evidence on the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). The administrative law judge considered the reports of Drs. Koura, Rasmussen, Dahhan, and Broudy. Dr. Koura diagnosed chronic obstructive pulmonary disease (COPD). Claimant's Exhibit 1. Dr. Rasmussen opined that claimant has legal pneumoconiosis. Director's Exhibit 10. By contrast, Dr. Dahhan opined that claimant does not have legal pneumoconiosis. Director's Exhibit 13. Dr. Broudy opined that claimant does not have a chronic lung disease or respiratory impairment caused by coal dust exposure. Employer's Exhibit 5.

The administrative law judge found that "Dr. Rasmussen's report supports, rather than disproves, the fact that the [c]laimant has a form of legal pneumoconiosis." Decision and Order on Remand at 20. The administrative law judge discredited Dr. Dahhan's opinion because Dr. Dahhan attributed claimant's respiratory impairment entirely to smoking, based on the reversibility of the impairment but subsequently conceded that coal dust exposure can cause a reversible impairment. The administrative law judge also discredited Dr. Dahhan's opinion because Dr. Rasmussen's opinion regarding the validity of the exercise arterial blood gas study conducted by Dr. Dahhan suggested that Dr. Dahhan was not fully aware of the nature and extent of claimant's impairment. Further, the administrative law judge discredited Dr. Broudy's opinion because "Dr. Broudy does not provide any rationale whatsoever for his conclusion that the [c]laimant's obstructive airways disease was due to his cigarette smoking and that no disease or impairment had 'arisen' as a result of his exposure to coal mine dust for over twenty years." *Id.* at 22. In addition, the administrative law judge gave little or no weight to Dr. Koura's opinion because Dr. Koura did not render an opinion that linked claimant's COPD to coal dust exposure. Hence, the administrative law judge found that James River Coal did not establish the absence of legal pneumoconiosis.

James River Coal asserts that the administrative law judge erred in discrediting Dr. Dahhan's opinion that claimant does not have legal pneumoconiosis because he required it to satisfy too high a standard by ruling out the *possibility* that coal dust contributed to claimant's pulmonary condition. In a March 24, 2006 report, Dr. Dahhan opined that claimant does not have legal pneumoconiosis because his obstructive ventilatory defect demonstrated response to bronchodilator administration and he had already been treated with bronchodilator agents. Director's Exhibit 13. Dr. Dahhan noted that these findings were inconsistent with the permanent adverse effects of coal dust on the respiratory system. *Id.* Further, during a May 1, 2006 deposition, Dr. Dahhan opined that claimant's mild pulmonary impairment was due to smoking, and not the inhalation of coal dust,

because his pulmonary impairment was not a fixed defect, as it demonstrated response to bronchodilator administration and he was being treated by his physician with multiple bronchodilator agents. Employer's Exhibit 2 (Dr. Dahhan's Deposition at 10-11). However, Dr. Dahhan subsequently stated that coal dust exposure can cause a partially reversible obstructive ventilatory defect. Employer's Exhibit 2 (Dr. Dahhan's Deposition at 14). The administrative law judge found that Dr. Dahhan's credibility was affected by his statements regarding claimant's partially reversible obstructive defect. After noting that Dr. Dahhan did not explain the basis for his contradictory statements, the administrative law judge stated:

I find it to be very discrediting particularly where, as here, [James River Coal] has the burden of proof. Since I assume that Dr. Dahhan did not misspeak, I interpret his deposition testimony to mean that it is not medically impossible for coal dust to cause or partly cause, a reversible impairment. Significantly, Dr. Dahhan did not advance any other compelling rationale for distinguishing between an impairment due to coal exposure and one due to cigarette smoking.

Decision and Order on Remand at 21. Thus, the administrative law judge permissibly discredited Dr. Dahhan's opinion because it is contradictory, *i.e.*, Dr. Dahhan proffered inconsistent findings regarding the cause of a reversible impairment in his written report and deposition testimony. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12 (1984); *see also Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). Consequently, we reject James River Coal's assertion that the administrative law judge erred in discrediting Dr. Dahhan's opinion that claimant does not have legal pneumoconiosis, because he required it to satisfy too high a standard by ruling out the *possibility* that coal dust contributed to claimant's pulmonary condition.

James River Coal also asserts that the administrative law judge erred in discrediting Dr. Dahhan's opinion that claimant does not have legal pneumoconiosis because Dr. Dahhan did not adequately evaluate the complete nature of claimant's lung impairment. Specifically, James River Coal asserts that Dr. Dahhan did not respond to Dr. Rasmussen's opinion that Dr. Dahhan's exercise arterial blood gas study was invalid. In his report, Dr. Dahhan observed that the March 23, 2006 arterial blood gas study yielded normal results at rest and during exercise. Director's Exhibit 13. Further, during his deposition, Dr. Dahhan opined that the values yielded by the March 23, 2006 exercise arterial blood gas study were valid. Employer's Exhibit 2 (Dr. Dahhan's Deposition at 11). However, in a questionnaire dated June 11, 2006, which was in response to a request by the Department of Labor (DOL) for an opinion regarding the administration of the March 23, 2006 exercise arterial blood gas study, Dr. Rasmussen opined that the actual exercise time had an effect on the final result of the study because two minutes was grossly inadequate for assessing gas exchange. Director's Exhibit 21. Dr. Rasmussen

also opined that the time that the sample was drawn had an effect on the final result of the study because it must be drawn during the actual time of exercise for accuracy. *Id.* Additionally, in a report dated June 13, 2006, Dr. Rasmussen opined that the samples from the March 23, 2006 exercise arterial blood gas study were not properly drawn. *Id.* The administrative law judge found that Dr. Dahhan's credibility was affected by Dr. Rasmussen's statements regarding the March 23, 2006 exercise arterial blood gas study. In considering Dr. Dahhan's opinion that claimant's respiratory impairment was caused entirely by cigarette smoking, the administrative law judge stated:

This conclusion is thrown into sharp doubt by the statements of Dr. Rasmussen concerning the validity of Dr. Dahhan's exercise blood gas studies. There is nothing in the record to show that Dr. Dahhan was ever asked to directly respond to these damaging comments. Although Dr. Dahhan did testify that the [c]laimant's poor exercise tolerance was due to a sedentary lifestyle and poor conditioning, and that the exercise of only two minutes was due to his age, and that the values were valid, these general comments do not address directly Dr. Rasmussen's technical concerns regarding the timing and reliability of the draw.

Decision and Order on Remand at 21. Thus, the administrative law judge permissibly discredited Dr. Dahhan's opinion because it was based, in part, on the March 23, 2006 exercise arterial blood gas study that he found to be of diminished probative value. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003). Consequently, we reject James River Coal's assertion that the administrative law judge erred in discrediting Dr. Dahhan's opinion that claimant does not have legal pneumoconiosis because Dr. Dahhan did not adequately evaluate the complete nature of claimant's lung impairment.

James River Coal further asserts that the administrative law judge erred in discrediting Dr. Broudy's opinion that claimant does not have a chronic lung disease or respiratory impairment caused by coal dust exposure. Contrary to James River Coal's assertion, the administrative law judge properly discredited Dr. Broudy's opinion because it was unreasoned. *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). The administrative law judge found that Dr. Broudy did not provide a rationale for concluding that claimant's obstructive airways disease was related to cigarette smoking and that no disease or impairment was related to claimant's exposure to coal dust for over twenty years. In so finding, the administrative law judge stated:

As the regulations now specifically provide that coal dust may cause obstructive lung disease, *see* §718.201(a)(2), in order to be found credible on this issue, Dr. Broudy was obliged to articulate some medical rationale

for differentiating between obstructive lung disease caused by cigarette smoking and obstructive lung disease caused by coal mine dust, and, more specifically, how, in the case of the [c]laimant, he could rule out any significant causal contributing effect of the [c]laimant's coal dust exposure of a miner.

Decision and Order on Remand at 22. Thus, because the administrative law judge properly found that Dr. Broudy's opinion was unreasoned, *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark*, 12 BLR at 1-155, we reject James River Coal's assertion that the administrative law judge erred in discrediting Dr. Broudy's opinion that claimant does not have a chronic lung disease or respiratory impairment caused by coal dust exposure. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that James River Coal failed to establish the absence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).

James River Coal also contends that the administrative law judge erred in finding that the medical opinion evidence established total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). Specifically, James River Coal asserts that the administrative law judge should have given greater weight to the opinions of Drs. Dahhan and Broudy because of their superior qualifications. The administrative law judge considered the disability opinions of Drs. Koura, Rasmussen, Dahhan, and Broudy. Dr. Koura opined that claimant should avoid moderate exposure to fumes, odors, dusts, and gases, that he would have good and bad days, and that he was likely to be absent more than three times a month in a work environment.⁹ Claimant's Exhibit 1. Dr. Rasmussen opined that claimant does not have the respiratory capacity to perform moderate or heavy manual labor. Director's Exhibit 10. By contrast, Dr. Dahhan opined that claimant does not have a total or permanent pulmonary disability and retains the physiological capacity to return to his previous coal mining work or a job of comparable physical demand. Director's Exhibit 13. Similarly, Dr. Broudy opined that claimant retains the respiratory capacity to do his previous work as a reclamation director and inspector. Employer's Exhibit 5. The administrative law judge found that Dr. Koura did not provide a rationale or explanation for his findings and the invalidation of Dr. Koura's pulmonary function studies by Dr. Broudy cast doubt on the reliability of the objective testing. The administrative law judge therefore gave some weight, rather than great weight, to Dr. Koura's opinion. The administrative law judge next found that Dr. Rasmussen's opinion was sufficiently

⁹ Dr. Koura noted that claimant can walk less than one city block without rest or severe pain and he can continuously sit for 30 minutes and stand for 15 minutes. Dr. Koura also noted that, during an eight-hour working day with normal breaks, claimant can sit, stand, and walk for less than two hours, and he needs to sit and rest every one to two hours for 15 minutes during unscheduled breaks. Claimant's Exhibit 1.

documented and reasoned. Further, after finding that Dr. Rasmussen's defense of the validity of his exercise arterial blood gas study was compelling and persuasive, the administrative law judge gave substantial weight to Dr. Rasmussen's opinion. The administrative law judge then found that Dr. Rasmussen's concerns regarding the timing and reliability of the draw of the exercise arterial blood gas study by Dr. Dahhan cast substantial doubt on Dr. Dahhan's assessment of the degree of claimant's impairment. Lastly, after noting that "Dr. Broudy was unable to obtain exercise arterial blood gas studies," the administrative law judge stated that "Dr. Rasmussen appears to be the only physician who obtained blood gas studies drawn *during* exercise of significant duration – six minutes – and he found that the [c]laimant's exercised (sic) blood gas study indicated a 'progressive impairment in oxygen transfer during only very light exercise.'" Decision and Order on Remand at 26. Hence, the administrative law judge found that the medical opinion evidence was, at best, in equipoise. The administrative law judge therefore found that James River Coal failed to establish that claimant does not have a totally disabling respiratory impairment.

Contrary to James River Coal's assertion, while an administrative law judge may accord more weight to a physician's opinion based on that physician's superior qualifications, *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc*), he is not required to so find, *Clark*, 12 BLR at 1-154. In this case, the administrative law judge acknowledged that Drs. Broudy and Dahhan are Board-certified in internal and pulmonary medicine. Nevertheless, the administrative law judge reasonably found that the opinions of Drs. Dahhan and Broudy were not sufficient to establish that claimant does not have a disabling respiratory impairment, as Dr. Dahhan did not respond to Dr. Rasmussen's comments regarding the timing and reliability of the draw during the exercise arterial blood gas study and Dr. Broudy was unable to obtain exercise arterial blood gas studies. *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP, v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Thus, we reject James River Coal's assertion that the administrative law judge should have given greater weight to the opinions of Drs. Dahhan and Broudy because of their superior qualifications. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that James River Coal failed to establish the absence of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv).

Further, James River Coal contends that the administrative law judge erred in finding that the evidence established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Specifically, James River Coal asserts that the administrative law judge erred in discrediting the disability causation opinions of Drs. Dahhan and Broudy because he required them to satisfy too high a standard, *i.e.*, to rule out the *possibility* that coal dust contributed to claimant's pulmonary condition. In addressing the issue of disability

causation, the administrative law judge stated that “[t]he analysis here is almost identical to that discussing the cause of [claimant’s] impairment in determining the presence of legal pneumoconiosis.” Decision and Order on Remand at 26. The administrative law judge considered all of the relevant medical opinions: Dr. Rasmussen’s opinion that cigarette smoking was a major cause of claimant’s impairment and coal dust exposure was a significant cause of his impairment; Dr. Dahhan’s opinion that ruled out any causal connection between claimant’s impairment and coal dust exposure; and Dr. Broudy’s opinion that claimant’s mild to moderately severe impairment was due entirely to his cigarette smoking. The administrative law judge permissibly discredited Dr. Dahhan’s opinion because he found that it is contradictory, *i.e.*, Dr. Dahhan proffered inconsistent findings regarding the cause of a reversible impairment in his written report and deposition testimony. *See Fagg*, 12 BLR at 1-79; *Hopton*, 7 BLR at 1-14; *see also Mabe*, 9 BLR at 1-68. In addition, the administrative law judge properly discredited Dr. Dahhan’s opinion because he found that Dr. Rasmussen’s criticism of the manner in which the exercise arterial blood gas study was conducted by Dr. Dahhan raised doubt regarding Dr. Dahhan’s knowledge of the nature and extent of claimant’s impairment. *Williams*, 338 F.3d at 514, 22 BLR at 2-649. Further, the administrative law judge properly discredited Dr. Broudy’s opinion that claimant’s mild to moderately severe impairment was due entirely to his cigarette smoking because he provided no explanation. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Clark*, 12 BLR at 1-155. Thus, the administrative law judge reasonably found that the opinions of Drs. Dahhan and Broudy were insufficient to satisfy employer’s burden of ruling out a substantial causal connection between claimant’s pneumoconiosis and total disability. *Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-325; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Consequently, we reject James River Coal’s assertion that the administrative law judge erred in discrediting the disability causation opinions of Drs. Dahhan and Broudy because he required them to satisfy a higher standard of ruling out the *possibility* that coal dust contributed to claimant’s pulmonary condition.

Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that James River Coal failed to establish the absence of total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Moreover, in view of the foregoing, we affirm the administrative law judge’s finding that James River Coal failed to establish a mistake in a determination of fact at 20 C.F.R. §725.310.

Finally, claimant’s counsel has filed a complete, itemized statement requesting a fee for services performed in this appeal pursuant to 20 C.F.R. §802.203. Claimant’s counsel requests a fee of \$4,575.00 for 30.5 hours of legal services at an hourly rate of \$150.00. No objections to the fee petition have been received. Claimant’s counsel’s fee petition includes charges related to litigation before the Office of Administrative Law

Judges, as it listed 0.25 hours on May 5, 2006 for reviewing Judge Phalen's Order Allowing Briefs on Remand. Because the Board may not award a fee for services performed before other tribunals, *see Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Matthews v. Director, OWCP*, 9 BLR 1-184, 1-186 (1986), we disallow 0.25 hours of time for services performed on May 5, 2006. In all other aspects, we find the fee to be reasonable in light of the necessary services performed. Therefore, claimant's counsel is hereby awarded a fee of \$4,537.50 for 30.25 hours of legal services at a rate of \$150.00 per hour, to be paid directly to claimant's counsel by James River Coal. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203; *see Clark v. Director, OWCP*, 9 BLR 1-211 (1986).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and claimant's counsel is awarded a fee of \$4,537.50.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge