BRB No. 12-0397 BLA

ROGER SEXTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GOLDEN OAK MINING COMPANY L.P.	)	
	)	DATE ISSUED: 04/25/2013
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05804) of Administrative Law Judge Adele Higgins Odegard rendered on a claim filed on September 10, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Considering the applicability of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), the administrative law judge found that claimant established more than fifteen years of underground coal mine employment and that he has a totally disabling respiratory impairment pursuant to 20

C.F.R. §718.204(b)(2).[1] The administrative law judge determined, therefore, that claimant invoked the presumption of total disability due to pneumoconiosis, set forth at amended Section 411(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and invoked the amended Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that it failed to rebut the amended Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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.[2] 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).

I. Invocation of the Presumption – Total Disability

A. Claimant's Usual Coal Mine Work

Pursuant to 20 C.F.R. §718.204(b)(1), a miner is considered to be totally disabled if his respiratory or pulmonary impairment, standing alone, prevents him from performing his usual coal mine work. The miner's "usual coal mine work" is the most recent job the miner performed regularly and over a substantial period of time. *See Pifer*

[1] Under amended Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 1. 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 (1989)(en banc).

v. Florence Mining Co., 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982).

In the present case, claimant testified that his usual coal mine work was as a continuous haulage operator,[3] and that when the continuous miner was not cutting coal, he performed "dead work" that included building brattices, roof bolting, rock dusting and shoveling coal. Hearing Transcript at 26, 34-36. When asked how often he built brattices, claimant stated, "[w]ell it just varies, maybe three or four times a month, maybe four or five, just according, you know. If the continuous miner was to break down and they couldn't mine coal, then they send us to do odd jobs." *Id*. at 34. Regarding the frequency of claimant's rock dusting, he indicated, "[i]t goes right back to what I said about like when they broke down, it's just – if they're rock dusting when they broke down, then we'd rock dust." *Id*. at 36.

The administrative law judge reviewed claimant's hearing testimony and determined that his usual coal mine employment "included the regular performance of dead work, several days per month; that this dead work included building brattices, shoveling coal, and rock dusting; and that rock dusting required him to carry 80-pound bags." Decision and Order at 17. The administrative law judge relied on this finding to determine that Dr. Rasmussen's opinion, that claimant's respiratory impairment renders him unable to perform heavy manual labor such as rock dusting, was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv).[4] *Id*. at 18; Director's Exhibit 12; Claimant's Exhibit 1.

Employer argues that the administrative law judge erroneously determined that claimant's usual coal mine employment required him to perform heavy manual labor on a consistent basis. Employer maintains that claimant's usual coal mine employment, as a continuous haulage operator, consisted of operating a machine in a seated position, and

[3] Claimant testified that as a continuous haulage operator, he ran a portion of the conveyer belt used to remove coal cut by the continuous miner. Hearing Transcript at 26.

[4] Dr. Rasmussen opined that the miner did not retain the pulmonary capacity to perform his last regular coal mine employment involving heavy manual labor. Director's Exhibit 12. Dr. Rasmussen indicated that he based his opinion on pulmonary function studies showing a minimal, irreversible restrictive ventilatory impairment and minimal reductions in total lung capacity, residual volume, and single breath carbon monoxide diffusing capacity. *Id*. Dr. Rasmussen also noted that claimant's blood gas studies revealed minimal resting hypoxia and minimal to moderate impairment in oxygen transfer with exercise. *Id*.

that he performed heavy manual labor only a few days a month. We reject employer's allegation of error.

The task of weighing the evidence and rendering findings of fact is committed to the discretion of the administrative law judge. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983); *Anderson Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). An administrative law judge's findings will be affirmed if they are rational and supported by substantial evidence. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. In the present case, the administrative law judge rationally determined, based on claimant's testimony regarding the entire range of activities he performed as a continuous haulage operator, including those involved in "dead work," that claimant's usual coal mine work regularly entailed heavy manual labor. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Hvidzak v. North Am. Coal Corp.*, 7 BLR 1-469 (1984); Decision and Order at 17-18. We affirm, therefore, the administrative law judge's finding.

B. 20 C.F.R. §718.204(b)(2)(iv)

When considering the medical opinions relevant to the issue of total disability, the administrative law judge noted Dr. Jarboe's statements that there was "no evidence of a gas exchange impairment caused by the inhalation of coal dust" and that claimant "experienced no significant fall in oxygen tension with exercise."[5] Decision and Order at 18, *quoting* Employer's Exhibit 1. The administrative law judge then stated that, pursuant to 20 C.F.R. §718.105(a), the purpose of arterial blood gas testing is to determine whether there is an impairment in alveolar gas exchange, which will manifest primarily as a fall in arterial oxygen tension either at rest or during exercise. Decision and Order at 18. The administrative law judge determined that Dr. Jarboe acknowledged, but did not comment on, claimant's hypoxia at rest in all three of the blood gas studies of record. *Id.* The administrative law judge further stated that, in the exercise study

[5] Dr. Jarboe performed resting and exercise blood gas studies on August 26, 2010, both of which were nonqualifying and which Dr. Jarboe described as "normal." Employer's Exhibit 1; *see* 20 C.F.R. §718.204(b)(2)(ii); Appendix C to 20 C.F.R. Part 718. Dr. Dahhan obtained resting and exercise blood gas studies on November 30, 2009, both of which produced nonqualifying values. Employer's Exhibit 15. Dr. Dahhan indicated that claimant's blood gas studies demonstrated "minimum hypoxemia" and that claimant's peak exercise values were normal. *Id*. Dr. Rasmussen performed resting and exercise blood gas studies on December 14, 2009. Director's Exhibit 13. The resting study produced qualifying values. *Id*. Dr. Rasmussen stated that the studies revealed minimal hypoxia at rest and minimal to moderate impairment in oxygen transfer after exercise. *Id*. The administrative law judge found that the blood gas studies were insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii), based upon the preponderance of more recent, nonqualifying studies. Decision and Order at 16.

performed by Dr. Jarboe, claimant's "arterial oxygen tension did not rise, but in fact fell (from 75.9 (millimeters of mercury) to 73.1), and his arterial carbon dioxide tension fell as well." *Id*.; *see* Employer's Exhibit 1. The administrative law judge concluded that Dr. Jarboe's opinion on the issue of total disability was entitled to little weight, "[b]ecause Dr. Jarboe's opinion does not address the significance of the data obtained in arterial blood gas testing in light of the regulation." Decision and Order at 18.

Employer contends that the administrative law judge erred in discrediting Dr. Jarboe's opinion at 20 C.F.R. §718.204(b)(2)(iv) because "he did not address the fall of [claimant's] arterial oxygen and carbon dioxide tension at rest." Employer's Brief at 11. Employer asserts that this is not recognized as a criterion for determining if a blood gas study supports a finding of total disability and, thus, the administrative law judge substituted her opinion for that of Dr. Jarboe. *Id*. Employer further maintains that Dr. Jarboe discussed the pO2 and pCO2 values identified by the administrative law judge, but explained that they were the product of hyperventilation and deconditioning. *Id*.

Employer is correct in maintaining that total disability is not established under 20 C.F.R. §718.204(b)(2)(ii) by blood gas studies showing a mere reduction in the pO2 and pCO2 values. 20 C.F.R. §718.204(b)(2)(ii); Appendix C to 20 C.F.R. Part 718. Employer is also correct in asserting that Dr. Jarboe noted that some of the blood gas study values were consistent with the diagnosis of some impairment in gas exchange and attributed this impairment to hyperventilation and deconditioning. *See* Employer's Exhibits 1, 3. The administrative law judge did not, however, substitute her opinion regarding the significance of the blood gas study results for that of Dr. Jarboe. Rather, the administrative law judge rationally found that Dr. Jarboe's opinion was not well-reasoned, as he did not acknowledge the possibility that blood gas study values above the regulatory criteria for establishing total disability may, nevertheless, show an impairment in gas exchange that renders claimant unable to perform his usual coal mine work. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (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). Therefore, we affirm the administrative law judge's finding. As employer has not identified any other error in the administrative law judge's weighing of the evidence relevant to total disability at 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant established total respiratory disability thereunder. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of underground coal mine employment, and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we further affirm the administrative law judge's finding that claimant established invocation of the

rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

II. Rebuttal of the Presumption

In considering whether employer established rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge stated that employer was required to prove either that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order at 18-19. The administrative law judge found that employer failed to establish rebuttal under either method. *Id*. at 19-26.

Employer initially contends that the administrative law judge's finding that the x-ray evidence was insufficient to disprove the existence of clinical pneumoconiosis must be vacated, as the administrative law judge erred in failing to accord any weight to Dr. Jarboe's negative reading of the x-ray dated August 26, 2010. Employer's Brief at 12. We reject employer's argument.

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge accurately indicated that the x-ray dated November 30, 2009 was read by two physicians who were dually-qualified as Board-certified radiologists and B readers, while the x-ray dated August 26, 2010 was read by two dually-qualified physicians and a B reader.[6] Decision and Order at 20-21. The administrative law judge stated that she would "give the most weight to the opinions of physicians who are dually-qualified" and, "in the event that a specific x-ray has at least one interpretation by a dually-qualified physician, I will give no weight to interpretations by physicians with lesser credentials." *Id*. at 21. Applying these standards, the administrative law judge determined that the x-ray dated November 30, 2009 was in equipoise, as it was read as positive for pneumoconiosis by Dr. Alexander, who is dually-qualified, and as negative for pneumoconiosis by Dr. Meyer, who is also dually-qualified. *Id*. at 22; Claimant's Exhibit 1; Employer's Exhibit 2. The administrative law judge determined that the x-ray dated August 26, 2010 was in equipoise as well, as it was read as positive for pneumoconiosis by Dr. Alexander, and as negative for pneumoconiosis by Dr. West, also a dually-qualified physician. Decision and Order at 22; Claimant's Exhibit 3; Employer's Exhibit 1. Although Dr. Jarboe read this x-ray as negative for pneumoconiosis, the administrative law judge accorded his

[6] The administrative law judge also acknowledged that the record contained a positive x-ray reading by Dr. Rasmussen of an x-ray dated December 14, 2009, but that the film was lost and thus unavailable to employer for review. Decision and Order at 22; Director's Exhibit 13. The administrative law judge thus gave no weight to Dr. Rasmussen's interpretation. *Id*.; *see* 20 C.F.R. §718.102(d).

interpretation no weight, as Dr. Jarboe is a B reader. Decision and Order at 22; Employer's Exhibit 1.

Contrary to employer's assertion, the administrative law judge did not ignore Dr. Jarboe's negative x-ray interpretation at 20 C.F.R. §718.202(a)(1), but instead acknowledged his interpretation and permissibly found that it was entitled to no weight when compared to the readings performed by dually-qualified physicians. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003); *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255 (2003); *Scheckler v. Clinchfield Coal Co*., 7 BLR 1-128, 131 (1984). Considering the x-ray evidence, individually and overall, as well as the qualifications of the readers, the administrative law judge acted within her discretion in finding that the x-ray evidence was in equipoise, based on the equal number of conflicting positive and negative interpretations for pneumoconiosis by dually-qualified readers. Decision and Order at 22; *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-7 (1999)(en banc); *Scheckler*, 7 BLR at 1-131. As substantial evidence supports the administrative law judge's finding that employer failed to meet its burden to establish rebuttal by disproving the existence of clinical pneumoconiosis, her finding is affirmed.[7]

Affirmance of the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis by the x-ray and medical opinion evidence at 20 C.F.R. §718.202(a)(1), (4), can obviate the need for the Board to review the administrative law judge's finding as to whether employer disproved the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[8] *See Dixon v. North Camp Coal Co*.,

[7] Based on the administrative law judge's permissible determination that the x-ray evidence was in equipoise, she acted reasonably in discrediting the opinions of Drs. Dahhan and Jarboe, who both relied on the negative x-ray evidence to rule out the presence of clinical pneumoconiosis, under 20 C.F.R. §718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-110 (1993); *Taylor v. Brown Badgett, Inc.*, 8 BLR 1-405 (1985); Decision and Order at 25.

[8] The definition of legal pneumoconiosis is set forth at 20 C.F.R. §718.201(a)(2), which states:

> "Legal pneumoconiosis" includes 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).

8 BLR 1-344, 1-345 (1985). However, because the administrative law judge's finding that employer failed to disprove that claimant's total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c) is inextricably linked to her finding that employer failed to disprove the existence of legal pneumoconiosis, we will address employer's challenges to the latter finding.

The administrative law judge weighed the opinions of Drs. Dahhan and Jarboe regarding the etiology of claimant's gas exchange impairment. Decision and Order at 25. The administrative law judge determined that neither the opinion of Dr. Dahhan, stating that claimant's respiratory condition is due to obesity and heart surgery, nor the opinion of Dr. Jarboe, stating that scarring on claimant's lungs could interfere with gas exchange, was sufficient to establish that claimant does not have legal pneumoconiosis. *Id*. The administrative law judge discredited Dr. Dahhan's opinion because he did not acknowledge that claimant has a gas exchange impairment. Decision and Order at 25. The administrative law judge further found that, while Dr. Jarboe commented on claimant's reduced blood gas study values and suggested they could be due to lung scarring, there was no basis upon which to credit Dr. Jarboe's opinion over Dr. Rasmussen's opinion, that claimant has a totally disabling gas exchange impairment caused by coal dust exposure, "as I find their professional qualifications are similar."[9] *Id*. The administrative law judge also determined that employer was unable to disprove a causal connection between claimant's disability and his legal pneumoconiosis, as neither Dr. Dahhan nor Dr. Jarboe believed that claimant suffers from legal pneumoconiosis, contrary to her finding. *Id*. at 26.

Employer asserts that the administrative law judge erred in crediting Dr. Rasmussen's opinion and in not giving greater weight to the opinion of Dr. Jarboe.

[9] The administrative law judge noted that Drs. Jarboe and Rasmussen are both Board-certified in internal medicine and that Dr. Jarboe is also Board-certified in pulmonology. Decision and Order at 15. The administrative law judge further stated:

> [A]ll other factors being equal, I would assign less weight to Dr. Rasmussen's opinion, based on his lesser professional qualifications. I also find, however, that the record establishes that Dr. Rasmussen has more than 50 years of experience specializing in pulmonary disease, and also has much experience treating and evaluating miners, as Dr. Rasmussen testified in his deposition. Consequently, I conclude that Dr. Rasmussen's lack of a professional credential is offset by his personal experience in the relevant field of pulmonary evaluation and I will not give lesser weight to Dr. Rasmussen's opinion based on this factor.

Id.

Employer's Brief at 14. Employer also alleges that the administrative law judge impermissibly relied on Dr. Rasmussen's opinion which, according to employer, "consisted of nothing more than a bare conclusion." *Id*.

Contrary to employer's contention, the administrative law judge acted within her discretion in finding that Dr. Rasmussen's diagnosis of legal pneumoconiosis was well-reasoned, as Dr. Rasmussen identified clinical findings that were consistent with a coal dust-induced gas exchange impairment in support of his statement that the only known cause of claimant's impaired lung function was his coal mine dust exposure. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553. In addition, employer is incorrect in alleging that Dr. Rasmussen agreed with Dr. Jarboe's attribution of claimant's diminished pO2 and pCO2 values to deconditioning. Although Dr. Rasmussen identified deconditioning as the cause of claimant's increased oxygen consumption with exercise, he stated that claimant's abnormal oxygen tension with exercise was due to a gas exchange impairment. Claimant's Exhibit 1 at 11-17. Similarly, the administrative law judge noted Dr. Rasmussen's observation that claimant's impairment was not due to cardiac factors, as he did not exceed his anaerobic threshold during exercise and the difference between claimant's arterial and end tidal CO2 tensions did not increase. Decision and Order at 11, 24; Claimant's Exhibit 1 at 15-18. We also reject employer's argument that the administrative law judge erred in failing to credit Dr. Jarboe's comment that lung scarring could impair gas exchange during exercise, as the administrative law judge rationally determined that there was no basis to credit his opinion over Dr. Rasmussen's contrary opinion in light of their similar qualifications. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

As the administrative law judge provided valid reasons for discounting the opinions of Drs. Dahhan and Jarboe, the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Based upon our affirmance of the administrative law judge's findings on the issue of the existence of legal pneumoconiosis, we also affirm the administrative law judge's determination that the opinions of Drs. Dahhan and Jarboe are insufficient to establish that claimant's total disability did not arise out of, or in connection with, his coal mine employment. *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated 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); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17-19 (2004). We further affirm, therefore, the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Morrison v.*

Tenn. Consol. Coal Co., 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Martin*, 400 F.3d at 306, 23 BLR at 2-285.

Accordingly, the administrative law judge's Decision and Order Awarding 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