BRB No. 12-0436 BLA

REGINALD DEAN WALLS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MARFORK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 04/05/2013
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand Denying Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Second Remand Denying Benefits (2008-BLA-05121) of Administrative Law Judge Robert B. Rae with respect to a claim filed on January 29, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for a third time. In its most recent decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant did not establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) or total disability at 20 C.F.R.

§718.204(b)(2)(i), (iii). *Walls v. Marfork Coal Co.*, BRB No. 11-0216 BLA, slip op. at 3 n.1 (Nov. 22, 2011)(unpub.). However, the Board vacated the administrative law judge's determination that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv). *Id*. at 4-5. Accordingly, the Board vacated the denial of benefits and remanded the case to the administrative law judge for reconsideration of whether claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2). *Id*. at 5. The Board instructed the administrative law judge to consider the applicability of amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] *Id*.

On remand, the administrative law judge credited claimant with twenty-nine years of underground coal mine employment and assumed, *arguendo*, that the blood gas study evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). However, the administrative law judge found that this evidence was outweighed by the medical opinions of record and the contrary probative evidence as a whole at 20 C.F.R. §718.204(b)(2). The administrative law judge concluded that claimant did not establish total disability and, therefore, was not entitled to the presumption set forth in amended Section 411(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge did not properly weigh the medical opinion evidence in finding that he did not establish total disability at 20 C.F.R. §718.204(b)(2). Claimant maintains that the administrative law judge should have found that he invoked the presumption at amended Section 411(c)(4) and that employer did not rebut it. Employer responds, urging affirmance of the denial of benefits.[2] The Director, Office of Workers' Compensation Programs, has not filed a response 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,

[1] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4).

[2] Employer also acknowledges the Board's previous holdings concerning the constitutionality and applicability of the amended Section 411(c)(4) presumption but continues to argue that application of amended Section 411(c)(4) would violate several principles of constitutional law.

and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In reconsidering whether claimant established that he is totally disabled, the administrative law judge initially reviewed the blood gas studies of record, conducted on April 18 and July 23, 2007. Decision and Order on Second Remand at 2-4. The study that Dr. Rasmussen performed on April 18, 2007 produced non-qualifying values at rest and qualifying values after exercise.[4] Director's Exhibit 10. Dr. Crisalli's July 23, 2007 study was only performed at rest and produced non-qualifying values.[5] Employer's Exhibit 1.

The administrative law judge found that Dr. Rasmussen's blood gas study consisted of "five separate [blood gas] studies conducted within minutes of each other," with the two exercise studies resulting in "marginal qualifying values" and the resting studies producing non-qualifying values. Decision and Order on Second Remand at 3. The administrative law judge also noted that the non-qualifying resting blood gas study performed by Dr. Crisalli had "values [that] almost duplicated those of Dr. Rasmussen's resting and baseline studies." *Id*. The administrative law judge stated:

> Of the three studies that "count" – two of the three studies were not qualifying. This "majority" would seem to me to be indicative of an overall finding of "not qualifying" or, at best, a "tie" wherein the tests are in a sort of equipoise condition. Since the burden of proof is on the claimant, I find that he has not met his burden in this regard and that the [blood gas] studies overall do not support a finding of total disability.

[3] Claimant's coal mine employment was in West Virginia. Hearing Transcript at 17. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[4] A "qualifying" blood gas study yields results that are equal to or less than the values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(ii).

[5] Dr. Crisalli indicated in his report that claimant had "inadequate collateral circulation and therefore an arterial line will not be inserted for a pulmonary stress test." Employer's Exhibit 1.

> However, for the sake of this decision, I will assume *arguendo* that the [blood gas] studies ***do support*** a finding of total disability. I will weigh this determination against the other medical evidence in making my final decision.

Id. at 3-4.

The administrative law judge then reconsidered the opinions of Drs. Rasmussen, Crisalli, and Hippensteel at 20 C.F.R. §718.204(b)(2)(iv). Dr. Rasmussen examined claimant on April 18, 2007 and diagnosed a totally disabling impairment based on the results of claimant's exercise blood gas study. Director's Exhibit 10. Dr. Rasmussen reiterated his diagnosis after reviewing Dr. Crisalli's report of his examination of claimant on July 23, 2007. Claimant's Exhibit 4. Dr. Crisalli opined that claimant is totally disabled "as a whole man" but is not totally disabled from a respiratory or pulmonary standpoint and does not suffer from intrinsic lung disease. Employer's Exhibits 1, 7 at 29, 31-32. Dr. Hippensteel reviewed claimant's medical records, and the reports submitted by Drs. Rasmussen and Crisalli, and concurred with Dr. Crisalli's opinion. Employer's Exhibit 4.

The administrative law judge determined that each of these opinions was well-reasoned and well-documented but gave greater weight to Dr. Crisalli's opinion, as supported by Dr. Hippensteel's opinion, because it was based on objective evidence and was supported by his deposition testimony explaining why the gas exchange impairment revealed on the exercise blood gas study obtained by Dr. Rasmussen was not respiratory or pulmonary in nature.[6] Decision and Order on Second Remand at 9-10. Consequently, the administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 10. Weighing the evidence as a whole at 20 C.F.R. §718.204(b)(2), the administrative law judge found that because "the marginal [blood gas] study finding of total disability" did not outweigh the contrary probative evidence, claimant did not establish total disability. *Id*. at 10-11.

Claimant argues that, contrary to the decision of the United States Court of Appeals for the Fourth Circuit in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), "the [administrative law judge] simply counted the number of reports and opinions to resolve the issue in favor of the employer." Employer's Brief at 7. Claimant further contends that Dr. Rasmussen's report is the only medical opinion that is based on

[6] Dr. Crisalli indicated that claimant's oxygen pulse during exercise, ratio of dead space to tidal volume, and breathing reserve supported his determination that claimant does not have intrinsic lung disease and is not disabled from a respiratory or pulmonary standpoint. Employer's Exhibit 7 at 27-32.

resting and exercise blood gas study values, which permitted him to evaluate claimant's ability to perform work. Claimant argues that Drs. Crisalli and Hippensteel erroneously assumed that claimant does not have pneumoconiosis and, therefore, erroneously concluded that any impairment he has must be due to something other than coal dust exposure. Claimant maintains, therefore, that their opinions would be insufficient to rebut the Section 411(c)(4) presumption. As a result, claimant requests that the administrative law judge's Decision and Order be reversed and that he be awarded benefits.

Claimant's arguments lack merit. In concluding that the medical opinion evidence did not support a finding of total disability, the administrative law judge acted within his discretion as fact-finder in giving greater weight to Dr. Crisalli's opinion, as supported by Dr. Hippensteel's opinion, that claimant is not totally disabled by a respiratory or pulmonary impairment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). The administrative law judge rationally found that Dr. Crisalli's opinion was better supported by the objective evidence and was more persuasive on the issue of whether claimant's impairment was respiratory or pulmonary in nature. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). Further, in weighing the evidence as a whole, the administrative law judge acted within his discretion in determining that the medical opinion evidence outweighed the qualifying exercise blood gas study. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Therefore, we affirm the administrative law judge's finding that claimant did not establish the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and did not invoke the amended Section 411(c)(4) presumption.[7]

[7] Based on this holding, we need not address claimant's arguments concerning employer's ability to rebut the presumption at amended Section 411(c)(4) or employer's arguments concerning the validity and applicability of the rebuttal provisions.

Accordingly, the administrative law judge's Decision and Order on Second Remand Denying Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge