U.S. Department of Labor Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0255 BLA

GERALD B. KINCAID	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 04/09/2018
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 Denying Benefits of Carrie Bland, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2012-BLA-05844) of Administrative Law Judge Carrie Bland rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the

Act). This case involves a subsequent claim filed on April 15, 2011.[1] Director's Exhibit 5.

Applying Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with forty-five years of qualifying coal mine employment but found that the new evidence failed to establish a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant could not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), or establish a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). The administrative law judge further found that claimant could not establish entitlement without the benefit of the presumption under the alternate provisions at 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits.

On appeal, claimant argues that the administrative law judge erred in her analysis of the new arterial blood gas studies and medical opinions in finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv) and, therefore, erred in finding that claimant failed to invoke the Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[3]

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,

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[1] This is claimant's fourth application for benefits. Director's Exhibit 5. Claimant's most recent prior claim, filed on February 21, 2008, was finally denied by the district director on August 28, 2008 because claimant failed to establish total respiratory disability. Director's Exhibit 3. Claimant did not further pursue the denial of that claim. Subsequently, on April 15, 2011, claimant filed this claim, which is pending on appeal. Director's Exhibit 5.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where at least fifteen years in underground coal mine employment, or in surface mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that the evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 30.

and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

The regulations provide that a miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability is established by: 1) pulmonary function studies showing values equal to or less than those listed in Appendix B to 20 C.F.R Part 718; 2) arterial blood gas studies showing values equal to or less than those listed in Appendix C to 20 C.F.R. Part 718; 3) medical evidence showing that the miner has pneumoconiosis and cor pulmonale with right-sided congestive heart failure; or 4) the opinion of a physician who, exercising reasoned medical judgment, concludes that a miner's respiratory or pulmonary condition is totally disabling, based on medically acceptable clinical and laboratory diagnostic techniques. 20 C.F.R. §718.204(b)(2)(i)-(iv).

Claimant asserts that the administrative law judge erred in her evaluation of the new blood gas studies. The administrative law judge considered three blood gas studies dated November 29, 2011, March 21, 2012, and November 6, 2012. Decision and Order at 6-7, 30; Director's Exhibit 14; Employer's Exhibits 1, 6. The November 29, 2011 arterial blood gas study, administered by Dr. Rasmussen, produced non-qualifying[5] values at rest, but qualifying values during exercise. Director's Exhibit 14. In contrast, the March 21, 2012 arterial blood gas study, administered by Dr. Zaldivar, produced non-qualifying values both at rest and during exercise. Employer's Exhibit 1. Finally, the November 6, 2012 arterial blood gas study, administered by Dr. Castle, produced non-qualifying values at rest, no exercise study was performed. Employer's Exhibit 6. Noting that only the exercise portion of Dr. Rasmussen's November 29, 2011 arterial blood gas study produced qualifying values, the administrative law judge found that the preponderance of the arterial blood gas study evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii). *Id.*

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 16.

[5] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values specified in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yield exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

Claimant asserts that exercise blood gas studies are more indicative of claimant's respiratory ability to perform his usual coal mine work, and therefore, are entitled to greater weight than resting blood gas studies. Claimant further asserts that the administrative law judge should have assigned greater weight to Dr. Rasmussen's November 29, 2011 qualifying exercise study than to Dr. Zaldivar's March 21, 2012 non-qualifying exercise study. Claimant argues that "Dr. Rasmussen's study was performed at a higher level of exercise than was Dr. Zaldivar's" and is therefore a better indicator of whether claimant is capable of performing the heavy labor required of his usual coal mine work. Claimant's Brief at 13.

Contrary to claimant's assertion, while an administrative law judge may accord greater weight to exercise blood gas studies on the basis that exercise studies may be a more reliable indicator of a claimant's respiratory ability to perform his usual coal mine work, the administrative law judge is not required to do so. *See generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-976-77 (1980). Moreover, the administrative law judge fully considered the physicians' opinions regarding the degree to which claimant was exercised during the November 29, 2011 and the March 21, 2012 studies, including Dr. Rasmussen's comment that claimant "seemed to exercise a little higher [during his own study] based on the bicarbonate changes." Decision and Order at 9-12, 18-19, 34; Claimant's Exhibit 2 at 23. The administrative law judge noted, however, that Dr. Zaldivar refuted Dr. Rasmussen's criticisms and explained that claimant's oxygen consumption rate, one indicator of claimant's level of exertion, was actually higher in Dr. Zaldivar's study than in Dr. Rasmussen's study.[6] Decision and Order at 34, *referencing* Employer's Exhibit 11 at 15-16. In addition, the administrative law judge noted that Dr. Zaldivar explained that the duration of claimant's exercise at the March 21, 2012 study was limited by claimant's heart rate; Dr. Zaldivar did not point to any physiological or pulmonary abnormality.[7] Decision and Order at 34, *referencing* Employer's Exhibit 10 at 16. Further,

[6] Dr. Zaldivar testified that "oxygen consumption measures the degree of exertion" and "[t]he oxygen consumption here was higher than for [Dr.] Rasmussen." Employer's Exhibit 11at 15-16.

[7] Dr. Zaldivar testified:

> In this case, the heart rate was what limited [claimant's] stress test. I stopped the exercise because his heart rate actually was beyond what I intended it to be. I stopped at eighty-five percent of the predicted maximal. In this case, he had reached ninety-six percent of his predicted maximum heart rate.

the administrative law judge accurately observed that "there is no evidence in the record, from Dr. Rasmussen or anyone else, to suggest that the arterial blood gas study results obtained by Dr. Zaldivar were not valid," and that even Dr. Rasmussen stated that, if valid, he would find no impairment based on Dr. Zaldivar's study. Decision and Order at 34, *citing* Claimant's Exhibit 2 at 58.

Based on the foregoing, and in light of the fact that the regulations do not require that exercise be performed for a specific threshold duration or intensity, the administrative law judge did not err in declining to give determinative weight to Dr. Rasmussen's November 29, 2011 qualifying exercise study. *See generally Orek v. Director, OWCP*, 10 BLR 1-51, 1-54 (1987); Decision and Order at 30, 34. Rather, the administrative law judge permissibly found that Dr. Rasmussen's November 29, 2011 exercise study, the only qualifying study of record, was outweighed by the subsequent non-qualifying resting and exercise studies administered by Drs. Zaldivar, and the non-qualifying resting study administered by Dr. Castle.[8] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); Decision and Order at 30. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant did "not establish[ ] total disability by a preponderance of the arterial blood gas study evidence" at 20 C.F.R. §718.204(b)(2)(ii).[9] Decision and Order at 30; *see Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Employer's Exhibit 10 at 16.

[8] Claimant asserts that the administrative law judge erred in crediting Dr. Castle's testimony that claimant's November 29, 2011 arterial blood gas study was performed by Dr. Rasmussen at a low barometric pressure, and should therefore be considered normal, as claimant asserts that the statement is contrary to the regulations and case law. Claimant's Brief at 12-13, 17-18, *citing* Employer's Exhibit 9 at 29-32. However, contrary to claimant's assertion, the administrative law judge did not rely upon Dr. Castle's testimony to find the November 21, 2011 arterial blood gas study was non-qualifying. Rather, the administrative law judge found that the November 21, 2011 exercise study "produced qualifying results." Decision and Order at 30. As the administrative law judge did not credit Dr. Castle's statement in weighing the arterial blood gas study evidence, we need not address claimant's argument.

[9] Additionally, we reject claimant's assertion that the administrative law judge should have accorded the greatest weight to Dr. Rasmussen's November 29, 2011 qualifying blood gas study because it was validated by Dr. Gaziano on behalf of the Department of Labor. Claimant's Brief at 13; Director's Exhibit 14. The administrative law judge considered this aspect of Dr. Rasmussen's study and permissibly declined to

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence does not establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Rasmussen and Sood who opined that claimant suffers from a totally disabling respiratory impairment, along with the contrary opinions of Drs. Zaldivar and Castle. Decision and Order at 31-35. Acknowledging the physicians' respective qualifications, the administrative law judge credited the opinions of Drs. Zaldivar and Castle as well – reasoned and better supported by the objective evidence of record. *Id*. at 33-35. Thus, the administrative law judge concluded that claimant failed to establish the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 35.

Claimant asserts that the administrative law judge erred, as neither doctor adequately addressed whether claimant retains the respiratory capacity to perform the heavy labor required in his last coal mine employment. Claimant's contention lacks merit.

The administrative law judge correctly noted that Dr. Zaldivar testified that claimant has "no impairment" and that his "lungs will support any and all activity that his cardiac and musculoskeletal system can generate." Decision and Order at 17, *referencing* Employer's Exhibit 10 at 27-28. In addition, the administrative law judge accurately observed that Dr. Castle testified that claimant has no impairment from any cause, and that from a "pulmonary point of view [claimant] is not permanently and totally disabled."[10] Decision and Order at 28, *referencing* Employer's Exhibit 9 at 27, 33, 43. As neither Dr.

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accord it additional weight on this basis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998) (holding that a physician's check-box validation of an arterial blood gas study "lent little additional persuasive authority" to the study); *Lane v. Union Carbide Corp*., 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997) (noting lack of detail in validation of a qualifying blood gas study and affirming administrative law judge's conclusion that arterial blood gas studies did not establish total disability); Decision and Order at 34 n.18.

[10] At his December 23, 2014 deposition, Dr. Castle was asked "[s]o [claimant] has no impairment from any cause?" and he responded "[n]ot that I can discern, no." Employer's Exhibit 9 at 27. Dr. Castle was further asked "your ultimate conclusion . . . was that [claimant] does not have a totally disabling pulmonary impairment from any cause?" and Dr. Castle answered "[t]hat is correct." *Id*. at 43. In light of Dr. Castle's testimony that claimant has no impairment from any cause, we reject claimant's assertion that "Dr. Castle does not address whether a pulmonary impairment would be present, regardless of cause." Claimant's Brief at 17; *see* Employer's Exhibit 9 at 27, 43.

Zaldivar nor Dr. Castle diagnosed a respiratory impairment, no discussion of the exertional requirements of claimant's work was necessary. *See Lane v. Union Carbide Corp*., 105 F.3d 166, 172-73, 21 BLR 2-34, 2-45-46 (4th Cir. 1997) (holding that an administrative law judge "may rely on a physician's report that does not discuss the exertional requirements of the miner's work if the physician concludes that the miner suffers from no impairment at all."); *Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 (1985).

The administrative law judge is empowered to weigh the medical evidence and to draw her own inferences therefrom, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999); *Anderson,* 12 BLR at 1-113. In asserting that "the opinions of Drs. Rasmussen and Sood should have been found to outweigh the opinions of Drs. Zaldivar and Castle," claimant is seeking a reweighing of the evidence, which the Board is not empowered to do. Claimant's Brief at 18; *see Anderson*, 12 BLR at 1-113. We, therefore, affirm the administrative law judge's finding that the medical opinion evidence is insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[11]

Finally, considering all of the evidence relevant to total disability, the administrative law judge permissibly found that claimant failed to demonstrate that he has a respiratory

[11] Claimant again asserts that Dr. Castle's statements "discount[ing] Dr. Rasmussen's [November 29, 2011] exercise arterial blood gas study due to the barometric pressure during the testing . . . cannot be considered as substantial evidence concerning total disability." Claimant's Brief at 17-18. However, as previously noted, the administrative law judge found the November 29, 2011 study qualifying. *See* footnote 8, *supra*. Further, the administrative law judge noted that, in addition to opining that the November 29, 2011 results could be considered normal for the barometric pressure, Dr. Castle testified that he would not rely upon this study to conclude that claimant is totally disabled because claimant did not "have consistent findings of a qualifying blood gas with exercise." Decision and Order at 34, *referencing* Employer's Exhibit 9 at 31-32. Dr. Castle's opinion in this respect is in keeping with the administrative law judge's conclusion that "[c]laimant's lone qualifying exercise blood gas test, bracketed by non-qualifying tests" is not sufficient to establish a totally disabling respiratory impairment. Decision and Order at 35. Thus, the administrative law judge permissibly credited Dr. Castle's medical opinion as better supported by the objective evidence of record than the opinion of Dr. Rasmussen. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Justice v. Island Creek Coal Co.,* 11 BLR 1-91 (1988); Decision and Order at 35.

or pulmonary impairment that prevents him from performing his usual coal mine work pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 35. Thus, we affirm the administrative law judge's findings that claimant failed to establish a change in the applicable condition of entitlement, or invoke the Section 411(c)(4) presumption. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §§718.305, 725.309(c); *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362, 20 BLR 2-227, 2-235 (4th Cir. 1996) (en banc), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995). Because we have affirmed the administrative

law judge's finding that claimant did not established total disability, a necessary element of entitlement under 20 C.F.R. Part 718, claimant cannot establish entitlement to benefits under the regulatory criteria of Part 718. *Anderson*, 12 BLR at 1-112.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge