BRB No. 08-0810 BLA

M.J.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHERN APPALACHIAN COAL COMPANY	)	
	)	
	)	DATE ISSUED: 08/18/2009
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

David L. Yaussy (Robinson & McElwee PLLC), Charleston, West Virginia, for employer.

Sarah Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-5627) of Administrative Law Judge Thomas M. Burke rendered on a subsequent claim filed on June 8, 2006, pursuant to the provisions of Title IV of the Federal Coal Mine Health and

Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] Director's Exhibit 4. In a Decision and Order dated July 29, 2008, the administrative law judge credited claimant with at least thirty years of coal mine employment, as stipulated by the parties. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge determined that the record supported employer's concession that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203 and, thus, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding the evidence to be sufficient to establish that claimant is totally disabled and that his disability is due to pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), filed a brief urging the Board to affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b), (c). Employer also filed a reply brief, reiterating its arguments.[2]

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.[3] 33 U.S.C. §921(b)(3), as incorporated into the

[1] Claimant has filed four previous claims for benefits, each of which was denied by the district director because claimant did not establish any of the requisite elements of entitlement. Director's Exhibits 1-4. Claimant took no action with regard to the denial of his last claim on October 6, 1992, until he filed the current subsequent claim. Director's Exhibit 5.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings that claimant has at least thirty years of coal mine employment and that the evidence established the existence of pneumoconiosis arising out of coal mine employment, which demonstrated a change in an applicable condition of entitlement. *See* 20 C.F.R. §§718.202(a), 718.203(b), 725.309; *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 6.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer first asserts that the administrative law judge erred in finding that claimant's pulmonary impairment is totally disabling. Pursuant to 20 C.F.R. §718.204(b), a miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1).[4] In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing qualifying values equal to or less than those in Appendix B, blood gas studies showing the qualifying values listed in Appendix C, evidence of cor pulmonale with right-sided congestive heart failure, or through the reasoned and documented opinion of a physician. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

Relevant to the issue of total disability, the administrative law judge considered two pulmonary function studies dated July 13, 2006 and June 4, 2007, and an arterial blood gas study dated July 13, 2006. Director's Exhibit 16; Employer's Exhibit 2. The July 13, 2006 pulmonary function study produced qualifying values for total disability both before and after the administration of a bronchodilator. Director's Exhibit 16. The June 4, 2007 pulmonary function study produced qualifying values before the administration of the bronchodilator, but non-qualifying values after the administration of a bronchodilator. Employer's Exhibit 2. The arterial blood gas study was non-qualifying for total disability. Director's Exhibit 16.

The administrative law judge also considered two medical opinions by Drs. Gaziano and Crisalli. Dr. Gaziano examined claimant on July 13, 2006, at the request of the Department of Labor. Director's Exhibit 16. In his report dated July 20, 2006, Dr. Gaziano noted that claimant "worked in mines [for] 40 years" and that his last job was as a mine foreman from August 1975 to July 1977. *Id*. Dr. Gaziano listed cardiopulmonary diagnoses of coal workers' pneumoconiosis and atherosclerotic heart disease. *Id*. He

[4] The record contains no evidence of complicated pneumoconiosis. *See* 20 C.F.R. §§718.204(b), 718.304.

identified the etiology of claimant's coal workers' pneumoconiosis as forty years in underground coal mine employment and listed the etiology of claimant's heart disease as "non-occupational." *Id*. Dr. Gaziano opined that the July 13, 2006 pulmonary function study revealed "moderately severe obstructive ventilatory impairment" and that the arterial blood gas study was normal. *Id*. Dr. Gaziano wrote that claimant was "unable to work in the mines." *Id*. When asked on Form CM-988 to identify the extent to which each of the diagnosed conditions contributed to claimant's disability, Dr. Gaziano stated that claimant was moderately to severely impaired by pneumoconiosis and moderately to severely impaired by heart disease. *Id*.

Dr. Crisalli examined claimant on June 4, 2007. Employer's Exhibit 1. In his report dated August 29, 2007, Dr. Crisalli diagnosed simple coal workers' pneumoconiosis based on multiple x-rays and a CT scan. *Id*. He reviewed claimant's earlier medical records including the July 13, 2006 pulmonary function study. *Id*. He opined that the June 4, 2007 pulmonary function study revealed "a moderate degree of obstruction to air flow, mild air trapping, severe diffusion impairment, significant improvement after bronchodilators, and no restrictive defect." *Id* at 3. Dr. Crisalli opined that claimant suffered from "moderate pulmonary impairment," but also noted that "multiple studies have shown improvement after bronchodilators." *Id*. at 10. Dr. Crisalli further stated:

> In the study performed in my examination, [claimant] had moderate obstruction to air flow before bronchodilators, but improved to an area of mild obstruction to air flow after bronchodilators. At the time of my examination, [claimant] was not using bronchodilators at home, nor was he using home oxygen. It is difficult to state whether [claimant's] obstruction to air flow is permanent or whether it represents an asthmatic condition. Certainly, the pulmonary function studies suggest that [claimant] should be placed on an intensive trial of bronchodilators in an effort to improve his lung function. It is possible that [claimant's] lung function could improve to the point where he could perform his previous job in the coal mines, as well as any other [seventy-eight] year old male ([claimant's] age at the time of my examination).
>
> The improvement seen after bronchodilators at the time of my examination would place [claimant] in a pulmonary impairment category which would allow him to perform his last job in the coal mines, which by description, involved moving through the mines throughout the entire day and carrying 20 pounds of material throughout the day.

Employer's Exhibit 2.

The administrative law judge determined that "all of the pulmonary function studies, with the exception of one post-bronchodilator result, have produced qualifying values." Decision and Order at 6. The administrative law judge also credited Dr. Gaziano's opinion, that claimant is unable to work in mines, finding it to be "supported by the objective medical evidence of record." Decision and Order at 6. The administrative law judge further found that Dr. Crisalli "failed to explain how he concluded that [c]laimant would be able to return to his previous coal mine employment, even if it only required light labor, in light of pulmonary function study results that meet the regulatory criteria." *Id*. The administrative law judge noted that in order to credit Dr. Crisalli's opinion that claimant's pulmonary function test results show that claimant has the pulmonary capacity to perform his last coal mine work, "one would have to assume that [c]laimant would work under the affect [sic] of bronchodilation medication." *Id*. Decision and Order at 6. Thus, the administrative law judge concluded that "based on the results of the pulmonary function studies and the well reasoned and well documented report of Dr. Gaziano, [c]laimant is found to be totally disabled." *Id*.

Although employer concedes that claimant "has a pulmonary impairment, as manifested by his ventilatory studies," employer asserts that the administrative law judge erred in failing to give proper weight to the contrary probative evidence that claimant is not totally disabled, consisting of the non-qualifying arterial blood gas study and Dr. Crisalli's opinion. Employer's Memorandum in Support of Petition For Review at 3-6. We disagree.

Contrary to employer's assertion, non-qualifying blood gas studies do not negate qualifying pulmonary function studies as these tests measure different types of impairment. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Sheranko v. Jones & Laughlin Steel Corp.*, 6 BLR 1-797 (1984); *see also Estep v. Director*, OWCP, 7 BLR 1-904 (1985); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller v. Gibraltar Coal Corp*., 6 BLR 1-1291 (1984). Thus, we reject employer's argument that the administrative law judge erred in failing to conclude that claimant was not disabled based on the non-qualifying blood gas study results presented in this record.

Furthermore, in considering the pulmonary function studies, the administrative law judge rationally gave Dr. Crisalli's opinion less weight than the opinion of Dr. Gaziano. Dr. Crisalli opined that claimant's non-qualifying post-bronchodilator result demonstrated that he was not totally disabled. Employer's Exhibit 2. However, the administrative law judge reasonably found that Dr. Crisalli failed to explain the basis for his conclusion that claimant would be able to return to his previous coal mine employment in light of the qualifying pulmonary function studies results, specifically the July 13, 2006 pulmonary function study that had qualifying values for disability both before and after the use of a bronchodilator. *See Beavan v. Bethlehem Mines Corp*., 741 F.2d 689, 691 6 BLR 2-101, 2-107 (4th Cir. 1984); *see also Milburn Colliery Co. v.*

Hicks, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); Employer's Exhibit 2. In addition, the Director notes that it is well recognized that "post-bronchodilator results are not an adequate assessment of a miner's disability," citing 45 Fed. Reg. 13682 (1980), which states "[a]lthough the use of a bronchodilator does not provide an adequate assessment of the miner's disability, it may aid in determining the presence or absence of pneumoconiosis." Director's Brief at 4-5; 45 Fed. Reg. 13682 (1980).

Thus, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i), that the weight of the qualifying pulmonary function study evidence is sufficient to establish a totally disabling respiratory impairment. We further affirm, as supported by substantial evidence, the administrative law judge's overall finding that claimant established total disability.[5]

Employer next argues that the administrative law judge erred in relying on the opinion of Dr. Gaziano to find that claimant established total disability due to pneumoconiosis. Employer's Memorandum In Support of Petition for Review Brief at 6. Employer asserts that Dr. Gaziano's opinion is insufficient to satisfy claimant's burden of proving "by reasoned medical opinion that pulmonary impairment is totally disabling in and of itself." *Id*. Employer maintains that "Dr. Gaziano's report can only be read for the proposition that [claimant] was unable to work because of the combined effect of coal workers[']s pneumoconiosis (a pulmonary condition) and atherosclerosis (a non-pulmonary impairment)." *Id*. We disagree.

Pursuant to 20 C.F.R. §718.204(c), a miner is considered totally disabled due to pneumoconiosis if pneumoconiosis is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment.[6] In weighing the evidence on

[5] Employer asserts that the administrative law judge erred in concluding that Dr. Gaziano provided a reasoned opinion that claimant was totally disabled. Employer's Memorandum In Support of Petition for Review at 4. Because we have affirmed the administrative law judge's finding that the pulmonary function evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(i), and Dr. Gaziano's opinion does not constitute contrary probative evidence, we need not address the administrative law judge's weighing of Dr. Gaziano's opinion at 20 C.F.R. §718.204(b)(2)(iv). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

[6] Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it: (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. §718.204(c)(1)(i), (ii).

disability causation, the administrative law judge found that Dr. Gaziano's diagnosis that coal workers' pneumoconiosis caused a "moderately severe impairment" was sufficient to establish that pneumoconiosis contributed, in part, to claimant's totally disabling respiratory or pulmonary impairment.[7]

Contrary to the employer's argument, Dr. Gaziano was not required to provide an opinion that claimant's pneumoconiosis was totally disabling, in and of itself. A medical opinion need only establish that pneumoconiosis is at least a contributing cause of the miner's totally disabling respiratory impairment. *See Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76 (4th Cir. 1990). The administrative law judge properly determined that claimant has a totally disabling respiratory impairment based on the qualifying pulmonary function study results obtained by Dr. Gaziano. Because Dr. Gaziano specifically diagnosed that claimant has a moderate to severe respiratory impairment caused by coal workers' pneumoconiosis based on the results of claimant's pulmonary function testing, we affirm the administrative law judge's finding that Dr. Gaziano's opinion is sufficient to satisfy claimant's burden of proving total respiratory disability due, in part, to coal dust exposure. Decision and Order at 6. Thus, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c*). Jewell v. Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995).

[7] The administrative law judge gave Dr. Crisalli's opinion little weight at 20 C.F.R. §718.204(c), as Dr. Crisalli did not provide an opinion as to the etiology of claimant's respiratory impairment. Decision and Order at 7.

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

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge