BRB No. 08-0814 BLA

J.G.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INDEPENDENCE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 08/31/2009
	)	
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.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-5589) of Administrative Law Judge Thomas M. Burke on a miner's claim filed on June 5, 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). In a Decision and Order dated July 29, 2008, the administrative law judge credited claimant with 19.82 years of coal mine employment. Adjudicating this claim pursuant to 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). In addition, the

administrative law judge found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). 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 asserts that the administrative law judge erred in finding that claimant is totally disabled based solely on one exercise blood gas study pursuant to 20 C.F.R. §718.204(b)(2)(ii). Employer alleges that the administrative law judge failed to properly weigh the contrary probative evidence establishing that claimant's qualifying exercise blood gas study results are due to a heart condition and not a respiratory or pulmonary impairment. Employer also contends that the administrative law judge improperly shifted the burden of proof to employer to disprove that claimant has a totally disabling respiratory impairment caused by coal dust exposure pursuant to 20 C.F.R. §718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[1]

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 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*).

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[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's findings of 19.82 years of coal mine employment and that claimant established the existence of simple pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[2] 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 9.

Employer first contends that the administrative law judge erred in concluding that claimant is totally disabled from a respiratory or pulmonary impairment. In this case, the evidence for total disability consists of two pulmonary function studies dated September 6, 2006 and May 14, 2007, which were non-qualifying for total disability. Director's Exhibit 16; Employer's Exhibit 1. There is also one blood gas study dated September 6, 2006, which had non-qualifying values at rest, but the exercise portion of the test produced qualifying values for total disability. Director's Exhibit 16.

There are also three medical opinions of record. Dr. Rasmussen examined claimant on September 6, 2006, at the request of the Department of Labor. Director's Exhibit 16. In his report dated September 27, 2006, Dr. Rasmussen diagnosed coal workers' pneumoconiosis based on a positive x-ray and claimant's history of coal dust exposure. He noted that while claimant's pulmonary function study and resting blood gas study were normal, the "single breath carbon monoxide diffusing capacity was minimally reduced" and the exercise blood gas study revealed a "moderate impairment in oxygen transfer." *Id.* Dr. Rasmussen described the exertional requirements of claimant's coal mine employment as follows:

> His last job was that of roof bolter. He was occasionally required to bend the bolts. He hung heavy electrical cable. He set timbers when pillaring. He occasionally did work such as cleaning and rock dusting the section and cleaning, moving and rock dusting the belt.

Id. Dr. Rasmussen concluded that, "[o]verall, these studies indicate moderate loss of lung function." He further opined that "this degree of impairment would render [claimant] totally disabled for resuming his last work, which required very heavy manual labor." *Id*.

Dr. Crisalli examined claimant on May 14, 2007 and obtained a chest x-ray and performed pulmonary function testing. Employer's Exhibit 1. A blood gas study was not performed. *Id*. Dr. Crisalli, however, reviewed additional medical records including the results of Dr. Rasmussen's September 6, 2006 pulmonary function study and blood gas study. *Id*. In his report dated July 11, 2007, Dr. Crisalli diagnosed coal workers' pneumoconiosis based on the positive x-ray evidence. He stated that the "pulmonary function and blood gas studies, taken together, revealed a mild obstruction to air flow with a normal diffusion capacity" while the exercise blood gas study showed hypoxemia upon exertion. *Id*. He opined that "[t]his pattern [of impairment] is not consistent with occupational pneumoconiosis which should cause an abnormal diffusion capacity" and "may reflect residual lung damage as a result of [claimant's] two pulmonary emboli that he had in the past." *Id*.

Dr. Crisalli noted that claimant last worked as a roof bolter, which required him to install roof bolts, stand for nine to fourteen hours per day, lift and carry forty pounds of material for ten feet at least ten times per day, and also lift one hundred pounds of material up to ten times per day. Employer's Exhibit 1. Dr. Crisalli stated that claimant's position as a roof bolter "involved heavy manual labor by description." *Id*. He concluded that "[i]t is likely that [claimant] does not retain the pulmonary functional capacity to perform his previous job in the coal mines, but this inability to perform his previous job in the coal mines is not related to coal workers' pneumoconiosis. . . ." *Id*.

Dr. Castle reviewed the medical record and prepared a consultative report dated August 27, 2007. Employer's Exhibit 2. He opined that claimant "probably does have radiographic findings indicating the presence of simple coal workers' pneumoconiosis." *Id*. He stated that "valid physiological studies that were done by Dr. Rasmussen showed evidence of very minimal airway obstruction without restriction or significant diffusion abnormality." *Id.* In addition, he noted that the blood gas study "demonstrate[d] a mild degree of hypoxemia following exercise." *Id*. Dr. Castle opined that claimant "did not demonstrate any consistent physical findings indicating the presence of an interstitial pulmonary process." *Id*. He further noted that claimant had numerous risk factors for the development of "pulmonary symptoms," including tobacco use, a "history of significant cardiac disease," pulmonary emboli, and obesity. *Id*. He explained that cardiac disease "can result in significant shortness of breath as well as physiological changes[,] including hypoxemia." *Id*. Dr. Castle opined that claimant's "exercise-induced hypoxemia is most likely related to his reduced cardiac function rather than any pulmonary disease . . . [as] manifested by his lack of significant ventilatory dysfunction including normal diffusing capacity after correction for alveolar volume." *Id*. Dr. Castle concluded that it was "most likely" that claimant is totally disabled due to cardiac disease. *Id*.

In a deposition conducted on September 11, 2007, Dr. Castle testified with respect to Dr. Rasmussen's blood gas study as follows:

> Q. And how did [claimant] perform with the exercise portion of Dr. Rasmussen's study?
> A. He had a fall in the p02 to 64 with a pCO2 of 36, which would be a mild degree of hypoxemia but would meet disability criteria by the federal government.
> Q. So based on that parameter, would you consider [claimant] to be totally disabled from performing his most recent coal mine employment?
> A. I would.
> Q. And I'm not sure if we discussed this previously, but did [claimant's] coal mine coal mine employment involve heavy labor?

A. It did.
Q. So the drop in the pO2 with exercise would be sufficient to prevent him from performing that heavy labor?
A. Yes, ma'am, it would.
Q. Doctor, [to] what do you attribute that fall in arterial blood gases with exercise?
A. I believe that that fall resulted from [claimant]'s significant cardiac disease with reduced cardiac output. I'm basing that on the fact that he does have significant cardiac disease and, yet, he has normal ventilatory function, including a normal diffusing capacity; and I think in the absence of any reason to have – or any other evidence of any pulmonary impairment, that it's most likely due to cardiac disease.
Q. So . . . does [claimant] have a pulmonary impairment from either history of coal dust exposure or his history of cigarette smoking?
A. No, ma'am.

Employer's Exhibit 7 at 16-18. Thus, Dr. Castle concluded that claimant's "problem appeared to have occurred as a result of his cardiac disease." *Id*. at 34.

In considering whether claimant satisfied his burden to establish total disability, the administrative law judge weighed all of the evidence together at 20 C.F.R. §718.204(b)(2). The administrative law judge found that while the pulmonary function study results were non-qualifying for total disability, the "exercise arterial blood gas test results evidence a total pulmonary disability . . . as those results are indicative of a condition that would preclude [c]laimant from performing his last job as a roof bolter since the roof bolter position required significant exertion, and performing that job would involve a gas exchange with substantial exercise." Decision and Order at 7. The administrative law judge also found that the weight of the medical opinion evidence established that claimant was totally disabled:

> Drs. Rasmussen and Crisalli agree that [c]laimant does not retain the pulmonary functional capacity to perform his last coal mine job as a roof bolter, although their reports differ on the basis for that conclusion. Dr. Rasmussen diagnosed a moderate loss of lung function reflected by a reduced diffusion capacity and impairment in oxygen transfer during moderate exercise. Dr. Crisalli's finding of a lack of pulmonary capacity to perform his last coal mine job was based on a mild obstruction to air flow with a normal diffusion capacity, and blood gas test results evidencing hypoxemia during exertion. Dr. Castle finds no pulmonary disability. He interpreted the post exercise arterial blood gas test results as showing only a

> mild degree of hypoxemia, and he considered the blood gas test results as showing only a mild degree of hypoxemia, and he considered the results to reflect a reduced cardiac function rather than pulmonary function.

Id. The administrative law judge specifically credited the opinions of Drs. Rasmussen and Crisalli, diagnosing a disabling *respiratory* impairment, over the contrary opinion of Dr. Castle, that claimant suffered from a disabling cardiac condition, finding Dr. Castle's opinion to be "less well-reasoned." *Id*. Thus, the administrative law judge found claimant satisfied his burden of proving that he was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii),(iv).[3]

Employer contends that while the blood gas study evidence is qualifying for total disability, the administrative law judge erred in failing to weigh all of the contrary probative evidence, including the opinion of Dr. Castle, as to whether claimant satisfied his burden of proof. Employer specifically asserts that there is no evidentiary support for the administrative law judge's conclusion that the exercise blood gas study results are "indicative of a condition that would preclude [c]laimant from performing his last job as a roof bolter since [that position] requires significant exertion, and performing that job would involve a gas exchange with substantial exercise.'" Employer's Brief at 8, *citing* Decision and Order at 7. Employer's assertions of error are rejected as they are without merit.

The administrative law judge correctly found that the one arterial blood gas study had qualifying values during exercise, and therefore, was supportive of a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 5. The administrative law judge also properly found that claimant established total disability based on the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). As noted by the administrative law judge, both Dr. Rasmussen and Dr. Crisalli diagnosed hypoxemia and opined that claimant would be unable to work as a roof bolter based on the results of the exercise blood gas study. Decision and Order at 7. Dr. Rasmussen also specifically stated that the exercise blood gas study indicates a degree of impairment which "would render [claimant] totally disabled for resuming his last work, which required heavy manual labor." Director's Exhibit 16. In contrast, Dr. Castle interpreted the results of the exercise blood gas study as showing reduced cardiac function as opposed to a respiratory or pulmonary impairment. *Id*. In support of his opinion that claimant did not have any respiratory or pulmonary impairment, Dr. Castle pointed out

[3] The administrative law judge concluded that the evidence was insufficient to establish the existence of complicated pneumoconiosis or total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(iii). We affirm these findings as they are not challenged. *Skrack*, 6 BLR at 1-711.

that claimant had a history of heart disease and that he demonstrated no significant impairment during pulmonary function testing. *Id*.

Contrary to employer's contention, the administrative law judge permissibly found Dr. Castle's opinion to be unpersuasive in light of the fact that that "the regulations presuppose that a miner could have normal pulmonary function test results and still be totally disabled from a pulmonary condition." Decision and Order at 7; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (*en banc*). Since blood gas and pulmonary function studies measure different types of impairment, medical opinions of no impairment based on a pulmonary function study do not necessarily rule out the existence of a pulmonary impairment based on a blood gas study. *See Sheranko v. Jones and Laughlin Steel Corp.* 6 BLR 1-797 (1984). We, therefore, reject employer's contention that the administrative law judge erred in his consideration of Dr. Castle's contrary opinion. Thus, because the administrative law judge permissibly found the opinions of Drs. Rasmussen and Crissali, diagnosing that claimant has a totally disabling respiratory or pulmonary impairment, to be reasoned and documented, we affirm his finding that claimant established total disability based on the medical opinions at 20 C.F.R. §718.204(b)(2) (iv). *See Clark*, 12 BLR at 1-151. Furthermore, contrary to employer's assertion, as the administrative law judge properly considered all of the contrary probative evidence, we affirm his overall finding that claimant satisfied his burden of proving total disability. *See Clark*, 12 BLR at 1-151; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

Employer's final argument is that the administrative law judge erred in weighing the medical opinions as to whether claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). Contrary to employer's assertion, since Dr. Castle was not of the opinion that claimant had a totally disabling respiratory impairment, the administrative law judge properly gave Dr. Castle's opinion "little credit" on the issue of disability causation at 20 C.F.R. §718.204(c). Decision and Order at 9; *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

With respect to the conflicting opinions of Drs. Rasmussen and Crisalli, we reject employer's assertion that the administrative law judge erred in finding Dr. Rasmussen's opinion, that claimant's respiratory impairment was due, at least in part, to coal dust exposure, to be more persuasive. As noted by the administrative law judge, Dr. Rasmussen cited several potential causes for claimant's disabling lung disease, including coal dust exposure, smoking, heart disease and claimant's history of pulmonary emboli. Director's Exhibit 16. Dr. Rasmussen explained that claimant did "not manifest some of the classic findings of [chronic obstructive lung disease], namely productive cough and airway obstruction," that are typically associated with impairment due to smoking, although he acknowledged that "emphysema could be present." *Id*. Dr. Rasmussen

explained that claimant did not have any "physiological evidence" to confirm that his exercise blood gas study results were due to pulmonary emboli. *Id*. Dr. Rasmussen also explained why the results of the exercise blood gas study were not indicative of heart disease:

> Cardiac disease can cause significant symptoms of shortness of breath[;] however, [claimant] again does not show characteristic findings associated with congestive heart failure. Heart failure in the first place does not result in exercise induced hypoxemia. It does cause an increase in dead space ventilation and VD/VT ratio and a distinct increase in arterial to end tidal carbon monoxide tension and an increase in VE/VC02, none of which [claimant] exhibits.

Id. Dr. Rasmussen also cited several medical articles indicating that "it is not uncommon in impaired coal miners to find patients with impairment in oxygen transfer during exercise absent ventilatory impairment." *Id*. Thus, based on claimant's history of dust exposure and the results of the objective testing, Dr. Rasmussen concluded that claimant "has clinical pneumoconiosis, which is a material contributing cause of his impaired lung function." *Id*.

In contrast to Dr. Ramussen's opinion, Dr. Crisalli stated that claimant's pulmonary impairment was "not consistent with occupational pneumoconiosis which should cause an abnormal diffusion capacity." Employer's Exhibit 1. He opined that "though there is evidence of simple coal workers' pneumoconiosis, there is no evidence of pulmonary functional impairment or related disability secondary to or in any way related to coal dust exposure." *Id*. Dr. Crisalli suggested that claimant's history of pulmonary emboli may be responsible for the reduction in oxygen during exercise blood gas testing. *Id*.

Contrary to employer's assertions, the administrative law judge rationally credited Dr. Rasmussen's opinion over Dr. Crisalli's opinion because he found that it was better reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Lucostic v. U.S. Steel Corp*., 8 BLR 1-46 (1985); Decision and Order at 9. The administrative law judge reasonably concluded that Dr. Rasmussen "explained why the pulmonary pattern is consistent with a pulmonary impairment caused by coal dust and provided a reasoned explanation of why the pulmonary emboli and cardiac disease were not the cause of [c]laimant's condition to the exclusion of coal dust exposure," while Dr. Crisalli did not explain with any specificity "why the impairment in oxygen function during moderate exercise could not be caused by coal dust exposure" other than to cite to a normal diffusion capacity. *Id*. The administrative law judge also noted that Dr. Crisalli's opinion does not "refute Dr. Rasmussen's explanation for excluding pulmonary emboli as a causative factor" for claimant's respiratory disability. *Id*.

Because the administrative law judge has discretion to determine the credibility of the medical experts and decide the weight to accord their opinions, we affirm his finding that claimant established total disability due to pneumoconiosis based on Dr. Rasmussen's opinion pursuant to 20 C.F.R. §718.204(c). *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 603 n.10 (4th Cir. 1999); *Jewell v. Smokeless Coal Corp. v. Street*, 42 F.3d 241, 19 BLR 2-1 (4th Cir. 1994); *see also Clark*, 12 BLR at 151; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Thus, we affirm the administrative law judge's award of benefits as it is supported by substantial evidence.

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