BRB No. 13-0086 BLA

RONDAL G. MIDDLETON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLEDSOE COAL CORPORATION	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 08/27/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
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.

Gerald Vanover (Morgan, Brashear, Collins & Yeast), London, Kentucky, for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-05951) of Administrative Law Judge Adele Higgins Odegard, rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a miner's claim filed on February 26, 2010. Director's Exhibit 2.

In her Decision and Order issued November 5, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she 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(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

The administrative law judge found that claimant had thirty-two years of coal mine employment, at least fifteen of which were underground coal mine employment.[1] The administrative law judge also found that the evidence established claimant's total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption. Finally, the administrative law judge determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2).[2] 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,

[1] Claimant's coal mine employment was in Kentucky. Director's Exhibit 3. 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, 1-202 (1989) (en banc).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had thirty-two years of coal mine employment, and at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law. 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).

Employer contends that the administrative law judge erred in finding that claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Specifically, employer argues that the administrative law judge erred in weighing the arterial blood gas study evidence and the medical opinion evidence.

The administrative law judge considered pulmonary function studies, arterial blood gas studies, and medical opinions in determining whether claimant is totally disabled.[3] *See* 20 C.F.R. §718.204(b)(2). Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three blood gas studies: one performed by Dr. McKay on May 4, 2010, one performed by Dr. Rosenberg on June 30, 2010, and one performed by Dr. Rasmussen on August 31, 2010. Decision and Order at 7-8; Director's Exhibits 15, 17, 19. Dr. McKay's study produced non-qualifying resting and exercise values, although the administrative law judge noted that claimant's pO2 decreased after exercise. Director's Exhibit 17 at 18-19; Decision and Order at 8. Dr. Rosenberg's study produced a non-qualifying resting value; Dr. Rosenberg indicated that he did not perform an exercise study because of "EKG changes." Director's Exhibit 19 at 4, 6, 23. Dr. Rasmussen's study, which was later validated by Dr. Mettu, produced a non-qualifying resting value and a qualifying exercise value. Director's Exhibit 15 at 27, 32. The administrative law judge gave the greatest weight to Dr. Rasmussen's study because:

> (1) it is most recent; (2) he tested the Claimant post-exercise, as opposed to Dr. Rosenberg; (3) his test was independently validated; (4) both he and Dr. McKay noted diminished arterial oxygen tension, despite Dr. McKay's results being non-qualifying; and (5) it appears that Dr. Rasmussen subjected the claimant to a somewhat greater amount of exercise (seven minutes) than Dr. McKay (six minutes).

Decision and Order at 8. Therefore, the administrative law judge found that the weight of the blood gas study evidence supported a finding that claimant is totally disabled. *Id*.

[3] A qualifying pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii). Because the three pulmonary function studies produced non-qualifying values, the administrative law judge found that they did not establish total disability. Decision and Order at 6-7; Director's Exhibits 15, 17, 19.

Next, the administrative law judge considered medical opinions from Drs. Rasmussen and Rosenberg. *See* 20 C.F.R. §718.204(b)(2)(iv). Dr. Rasmussen diagnosed claimant with "at least moderately severe loss of lung function as reflected by his ventilatory impairment and particularly his impairment in oxygen transfer during exercise," and concluded that claimant lacks the pulmonary capacity to perform his regular coal mine employment. Director's Exhibit 15 at 43. Dr. Rosenberg, in contrast, diagnosed claimant as having "a mild degree of restriction," and concluded that "from a pulmonary perspective, he is not disabled from performing his previous coal mine job or other similarly arduous types of labor." Director's Exhibit 19 at 5. The administrative law judge found Dr. Rasmussen's opinion to be "better reasoned and more thorough in that he conducted a post-exercise arterial blood gas test, which produced qualifying results." Decision and Order at 12. Thus, the administrative law judge found that the medical opinion evidence supported a finding that claimant is totally disabled. *Id*.

Consequently, based on the weight of the blood gas study and medical opinion evidence, the administrative law judge found that claimant established that he has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 12. Therefore, the administrative law judge also found that claimant invoked the Section 411(c)(4) presumption. *Id*.

Employer first contends that the administrative law judge erred in weighing the blood gas study evidence. Specifically, employer challenges the administrative law judge's decision to give more weight to Dr. Rasmussen's qualifying exercise study because it is the most recent study, arguing that there was not enough time between Dr. McKay's exercise blood gas study on May 4, 2010, and Dr. Rasmussen's exercise blood gas study on August 31, 2010, to warrant a determination that Dr. Rasmussen's study was more reliable. Employer's Brief at 6. This argument lacks merit.

Contrary to employer's contention, the administrative law judge acted within her discretion when, in determining claimant's condition at the time of the hearing, she assigned more weight to the more recent qualifying exercise blood gas study performed by Dr. Rasmussen.[4] *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Therefore, we affirm the administrative law judge's finding that the weight of the blood

[4] Moreover, the administrative law judge gave more weight to Dr. Rasmussen's study because it was validated by Dr. Mettu, a credibility determination that employer does not challenge. *See Siegel v. Director, OWCP*, 8 BLR 1-156, 1-157 (1985); *Skrack v. Island Creek Coal Co.*, 6 BLR at 1-710, 1-711 (1983). The record contains no evidence that Dr. McKay's blood gas study was validated.

gas study evidence supports a finding of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(ii).[5]

Employer also contends that the administrative law judge erred in weighing the medical opinions of Drs. Rasmussen and Rosenberg. We disagree. Employer first argues that, because the administrative law judge erred in weighing the blood gas studies performed by Drs. Rasmussen and Rosenberg, she also erred in weighing their opinions regarding total disability. Employer's Brief at 7-8. Because we have affirmed the administrative law judge's weighing of the blood gas study evidence, we also reject this argument. Next, employer notes that Dr. Rosenberg, unlike Dr. Rasmussen, is Board-certified in Pulmonary Disease and Occupational Medicine, and contends that the administrative law judge should have taken those certifications into account when weighing the physicians' opinions. Employer's Brief at 8; Director's Exhibit 19 at 25; Director's Exhibit 15 at 48. To the extent employer is arguing that the administrative law judge should have given more weight to Dr. Rosenberg's opinion because he is better qualified, employer's argument lacks merit. The administrative law judge considered the credentials of Drs. Rasmussen and Rosenberg, but was not required to assign more weight to Dr. Rosenberg's opinion because of his credentials. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-154 (1989) (en banc); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); Decision and Order at 9-10. Finally, employer challenges the administrative law judge's decision to credit Dr. Rasmussen's opinion because he conducted an exercise blood gas study that produced qualifying results, pointing out that physicians are not required to obtain exercise values. *See* 20 C.F.R. §718.105(b); Employer's Brief at 8. This argument lacks merit. Employer is correct that Dr. Rosenberg was not required to conduct an exercise blood gas study, but the administrative law judge acted within her discretion when she credited Dr. Rasmussen's opinion because it was "more thorough" and consistent with the objective medical evidence. *See Rowe v. Director, OWCP*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-155; Decision and Order at 12. We therefore affirm the administrative law judge's finding that the weight of the medical opinion evidence supports a finding of total disability, pursuant to 20 C.F.R. §718.204(b)(2)(iv).

We affirm, as supported by substantial evidence, the administrative law judge's finding that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R.

[5] As the administrative law judge provided valid reasons for according more weight to Dr. Rasmussen's exercise blood gas study, we need not address employer's argument that the administrative law judge erred in relying on the extra minute of exercise to credit Dr. Rasmussen's study. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 7.

§718.204(b)(2). We therefore also affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4); Decision and Order at 12. Finally, because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer failed to rebut the presumption. *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge