BRB No. 98-1224 BLA

ALFRED E. DELP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARMCO, INCORPORATED	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: 8.31/99
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lisa A. Warner (Shaffer & Shaffer), Madison, West Virginia, for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-1650) of Administrative Law Judge Michael P. Lesniak awarding benefits on a claim filed 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). Claimant filed his initial application for benefits on July 12, 1973. Director's Exhibit 40. The district director denied benefits on January 16, 1981. Director's Exhibit 40. Claimant filed a second application for benefits on July 6, 1984. Director's Exhibit 40. In a Decision and Order dated June 2, 1992, Administrative Law Judge Edward J. Murty, Jr., credited claimant with thirty-two years of coal mine employment, and found that the newly submitted x-ray evidence of record was sufficient to establish the presence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Judge Murty further found, however, that claimant had failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

Claimant filed the present duplicate claim on July 9, 1993. Director's Exhibit 1. Administrative Law Judge Julius A. Johnson noted that claimant had previously established thirty-two years of coal mine employment and the presence of pneumoconiosis. After considering the newly submitted evidence, Judge Johnson found that claimant failed to establish a material change in conditions under 20 C.F.R. §725.309(d) since the new evidence did not establish the presence of a totally disabling respiratory impairment due to pneumoconiosis pursuant to Section 718.204(b) and (c). Accordingly, benefits were denied. On appeal, the Board vacated Judge Johnson's Section 725.309 finding based on the holding in *Shupink v. LTV Steel Corp.,* 17 BLR 1-24 (1992), and remanded the case for further consideration. The Board instructed the fact-finder to consider whether Dr. Daniel's medical report was sufficient to establish total disability, when considered in conjunction with the exertional requirements of claimant's former coal mine employment, and to fully discuss and weigh the evidence in accordance with the provisions of the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Finally, the Board affirmed the findings of thirty-two years of coal mine employment and that the named employer is the operator liable for benefits herein. *Delp v. Armco, Inc.,* BRB No. 95-1109 BLA (May 30, 1996)(unpub.).

On remand, the case was transferred to Administrative Law Judge Michael P. Lesniak (the administrative law judge) who issued a Decision and Order on Remand Denying Benefits on January 29, 1997. The administrative law judge found that the newly submitted objective tests and Dr. Daniel's medical report were insufficient to establish total disability or causation at Section 718.204(b) and (c). Thus, the administrative law judge found that claimant failed to establish a material change in conditions pursuant to the holding in *Lisa Lee Mines v. Director, OWCP [Rutter],* 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1995), *cert denied,* 519 U.S. 1090 (1997).[1] On appeal, the Board affirmed the

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

administrative law judge's finding that total disability had not been established at Section 718.204(c)(1)-(3). Due to the administrative law judge's mischaracterization of Dr. Daniel's medical report, the Board vacated the administrative law judge's finding of no total disability at Section 718.204(c)(4). The Board instructed the administrative law judge on remand to reconsider this opinion, in conjunction with the exertional requirements of claimant's usual coal mine employment, and to determine whether it established a material change in conditions pursuant to Section 725.309. *Delp v. Armco, Inc.,* BRB No. 97-0746 BLA (Jan. 22, 1998)(unpub.).

On May 20, 1998, the administrative law judge issued his Decision and Order on Remand Awarding Benefits. The administrative law judge found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), which presumption was unrebutted. The administrative law judge also found that Dr. Daniel's report established total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c)(4), thereby establishing a material change in conditions pursuant to Section 725.309. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in crediting Dr. Daniel's report at Section 718.204(b) and (c)(4). Claimant has not participated in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the award of benefits.

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, and is 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).

2.

Employer argues that the administrative law judge erred by crediting Dr. Daniel's report under Section 718.204(b) and (c)(4). Employer specifically contends that the administrative law judge erred in failing to acknowledge that Dr. Daniel's opinion was based solely on the A-aO_2 gradient which the physician extrapolated from non-qualifying blood gas studies. Employer further argues that a physician's report based on such a calculation should not provide a basis for finding that pneumoconiosis is totally disabling.[2] Employer further contends that the Act and the regulations do not contemplate medical reports which are based solely on this calculation. In response, the Director contends that an administrative law judge has the discretion to accept a medical opinion of total disability based on an A-aO_2 gradient.[3]

[2]The A-aO_2 gradient (the arterial oxygen tension gradient) is a means of expressing the information derived from an analysis of the PO_2 measured during blood gas studies. *See Addison v. Jewell Ridge Coal Co.*, 7 BLR 1-438 (1984).

[3]The Director, Office of Workers' Compensation Programs, also notes, *inter alia,* that employer never requested that the administrative law judge permit the submission of additional medical evidence on this point and did not address the A-aO_2 gradient issue in its briefs on remand.

Contrary to employer's contention, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Daniel's medical report was sufficiently documented and reasoned.[4] *See Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.,* 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.,* 8 BLR 1-46 (1985). A physician may find that a non-qualifying arterial blood gas study is indicative of a totally disabling respiratory impairment and the administrative law judge may not substitute his opinion for that of a physician by independently interpreting medical tests. *Marcum v. Director, OWCP,* 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.,* 9 BLR 1-131 (1986); *Smith v. Director, OWCP,* 8 BLR 1-258 (1985); *Fuller v. Gibralter Coal Corp.,* 6 BLR 1-1291 (1984). Moreover, we disagree with employer's assertion that the Act and the regulations do not contemplate opinions based on the A-aO_2 gradient. As noted by the Director, the comments accompanying the Part 718 regulations, in connection with 20 C.F.R. §718.105, specifically indicate that the use of the A-aO_2 gradient may be appropriate as supplemental information assessing impairment. 45 Fed. Reg. 13683 (Feb. 29, 1980); *see also* 43 Fed. Reg. 36826 (Aug. 18, 1978). Moreover, the comments indicate that use of the A-aO_2 gradient may be included in the category of "other medical evidence" discussed at 20 C.F.R. §718.107, which permits the submission of "any medically acceptable test or procedure reported by a physician not addressed in this subpart which test or procedure tends to demonstrate . . . the presence or absence of a respiratory or pulmonary impairment." *See* 20 C.F.R. §718.107.

[4]Dr. Daniel examined claimant in 1993, obtained claimant's medical and employment histories, and performed an electrocardiogram, a pulmonary function study, and an arterial blood gas study. Dr. Daniel interpreted the non-qualifying blood gas study as revealing an A-aO_2 gradient of 21 Torr on level three exercise that would inhibit claimant from performing heavy manual labor. Director's Exhibit 15. The administrative law judge compared Dr. Daniel's findings with the exertional requirements of claimant's former position as a beltman in the mines, which the administrative law judge determined involved strenuous exertion, and found that it established total disability. Decision and Order at 3.

Moreover, employer's reliance on the Board's holding in *Francis v. Slab Fork Coal Co.,* 7 BLR 1-666 (1985) is misplaced as *Francis* does not state that the A-aO_2 gradient is inherently unreliable, or that opinions relying upon such a calculation should be rejected as a matter of law.[5] We also reject employer's assertion that Dr. Daniel's opinion does not support claimant's burden under Section 718.204(b) as Dr. Daniel indicated that claimant's totally disabling respiratory impairment was due to his coal workers' pneumoconiosis. *See Robinson v. Pickands Mather & Co.,* 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990)*;* Director's Exhibit 15. As employer raises no other assertions of error, we affirm the administrative law judge's findings that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(b) and (c)(4) and also affirm the award of benefits.

[5]In *Francis v. Slab Fork Coal Co.*, 7 BLR 1-666 (1985), the Board stated that:

> ...the comments following Section 727.203 do not state that the A-aO_2 gradient standard is absolutely unreliable. They state only that the A-aO_2 gradient test is often not a reliable measure of disability or impairment, because it is difficult to administer. 43 Fed. Reg. 36826 (August 18, 1978). While the A-aO_2 gradient test may not yet be reliably administered on a uniform basis, the thoroughly documented and reasoned reports of individual physicians like Dr. Rasmussen should not be discounted as a matter of law. [Citation omitted.] The administrative law judge should, and does, have discretion to accept them.

Francis, 7 BLR at 1-670.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge