BRB No. 13-0187 BLA

JAMES E. DICKERSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
	)	
and	)	DATE ISSUED: 01/31/2014
	)	
PEABODY INVESTMENTS, INCORPORATED	)	
	)	
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 Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (The Law Offices of Roger D. Forman, L.C.), Buckeye, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, DC, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits (2010-BLA-05337) of Administrative Law Judge Thomas M. Burke (the administrative law judge) rendered

on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge accepted the parties' stipulation to 27 years of coal mine employment, of which 25 years were underground, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725.[2] The administrative law judge found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013). The administrative law judge therefore found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b) (2013), and thus that he was entitled to invocation of the presumption at amended Section 411(c)(4). Employer also challenges the administrative law judge's finding that it failed to rebut the presumption at amended Section 411(c)(4) by showing the absence of pneumoconiosis or total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in this appeal.

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

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[1] Claimant filed his first claim on February 18, 2004. Director's Exhibit 1. In a Proposed Decision and Order dated August 20, 2004, a claims examiner deemed the claim denied by reason of abandonment. *Id*. Because claimant did not pursue this claim any further, the denial became final. Claimant filed this claim (a subsequent claim) on March 18, 2009. Director's Exhibit 3.

[2] The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id*. Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The record indicates that claimant was employed in the coal mining industry in West Virginia. Director's Exhibits 1, 4. Accordingly, the law of the United States Court of Appeals for the Fourth Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR

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

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Congress enacted 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 living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

Initially, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, 30 U.S.C. §921(c)(4), as it was filed after January 1, 2005, and was pending on March 23, 2010. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Next, we will address employer's contention that the administrative law judge erred in finding that the evidence established total respiratory disability at 20 C.F.R. §718.204(b) (2013). The administrative law judge found that the pulmonary function study evidence did not support a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(i) (2013). The administrative law judge also found that "[t]here was no evidence of cor pulmonale in this case, with or without right-sided congestive heart failure." Decision and Order at 22 n.4; *see* 20 C.F.R. §718.204(b)(2)(iii) (2013). Nevertheless, the administrative law judge found that the arterial blood gas study and medical opinion evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv) (2013). Moreover, the administrative law judge found that claimant's testimony supported a finding of total respiratory disability. The administrative law judge therefore found that the evidence established total respiratory disability at 20 C.F.R. §718.204(b) overall.

Employer asserts that the administrative law judge erred in relying on claimant's testimony to assess whether claimant was totally disabled. In finding total respiratory disability established at 20 C.F.R. §718.204(b), the administrative law judge stated that, "[w]hile the PFTs [pulmonary function tests] of record do not support a finding of total

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1-200 (1989)(en banc).

disability, such a finding is supported by the ABGs [arterial blood gases], [c]laimant's testimony, and the medical opinion evidence of record." Decision and Order at 25. In a living miner's claim, lay testimony is insufficient to establish total respiratory disability, unless it is corroborated by at least a quantum of medical evidence indicating a respiratory or pulmonary impairment. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987). Because the administrative law judge reasonably considered claimant's testimony, along with the medical evidence at 20 C.F.R. §718.204(b), *see Madden Gopher Mining Co.*, 21 BLR 1-123 (1999), we reject employer's assertion that the administrative law judge erred in relying on claimant's testimony to assess whether claimant was totally disabled.

Employer also asserts that the administrative law judge erred in finding that claimant's last coal mine employment as a truck driver involved heavy labor. Specifically, employer argues that the administrative law judge erred by focusing on the hardest part of claimant's job without regard to the frequency or extent of the demands. Employer maintains that "[n]either [claimant's] testimony, even if credible, nor the documentary evidence establishes that [claimant's] job required heavy manual labor on a sustained basis." Employer's Brief at 19. We disagree.

It is the administrative law judge's function to weigh the evidence, draw appropriate inferences, and determine credibility. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988). In this case, the administrative law judge considered claimant's testimony concerning the strenuousness of his last coal mine work at the hearing,[4] as well as his statements on Form CM-913.[5] The administrative law

[4] In considering claimant's testimony at the hearing, the administrative law judge stated: "Claimant testified that the jobs he performed while working in his last job as a truck driver and driller were physically demanding, involving climbing ladders, lifting and shoveling rock, overburden, and coal, shoveling frozen mud out of the truck's tracks, carrying oil up and down ladders, cleaning dust off of the machines with a hose, and helping to shovel for the packing. (Tr. 20-22). He testified that he had no help, as each driver was responsible for his own truck. (Tr. 23)." Decision and Order at 2.

[5] The administrative law judge stated that "[c]laimant's statements on his CM-913 form seem inconsistent with this testimony; in the space designated for describing the job duties of his coal mine employment, he said only 'Haul rock and coal from pit to dump si[te].' (CX 5)." Decision and Order at 23. The administrative law judge also noted that, while claimant indicated that the job required sitting for 7 hours per day, he did not fill out any of the blanks for describing the lifting, standing, crawling, or carrying requirements of the job.

judge reasonably determined that "[c]laimant's description of his actual job duties at the hearing was credible, as he repeated it and explained it when confronting the seemingly contradictory evidence of his CM-913 form."[6] Decision and Order at 23; *see Underwood*, 105 F.3d at 949, 21 BLR at 2-28. Further, the administrative law judge considered the descriptions of claimant's coal mine work in the reports of Drs. Rasmussen, Zaldivar and Cohen.[7] The administrative law judge reasonably found that claimant's last coal mine employment involved heavy labor, "[b]ased on Dr. Cohen's and Dr. Rasmussen's descriptions of the heavy labor involved in [c]laimant's last coal mine employment, and given Dr. Zaldivar's own concession that that job may have involved heavier labor than he listed in his report."[8] Decision and Order at 24; *see Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984). Because we see no error in the administrative law judge's rational interpretation of claimant's hearing testimony and the medical reports with regard to the descriptions of

[6] In considering claimant's testimony at the hearing regarding his statements on Form CM-913, the administrative law judge stated: "When confronted with this seemingly contradictory description at the hearing, [c]laimant said that even when he was classified as a truck driver, he was occasionally asked to drill, because the employers knew that he had experience drilling. He also said that the climbing and other labor he described was 'attendant to' the truck driving. (Tr. 33-35)." Decision and Order at 23.

[7] The administrative law judge noted that "[t]he physicians who discussed the job duties of [c]laimant's last coal mine employment likewise noted a degree of variation." Decision and Order at 24. Specifically, the administrative law judge noted that "Dr. Rasmussen said that the job encompassed 'heavy work,' including drilling, hole-loading, climbing up the rig, and changing flats, which, all told, would require 25-40 ml/kg/min of oxygen consumption, which [c]laimant did not achieve. (CX 7:13)." *Id.* The administrative law judge also stated that "Dr. Cohen noted that [c]laimant's last coal mine employment involved climbing 20-foot ladders up and down the truck 4-5 times per day, carrying oil for drills, and helping to lift 200-pound drill bits. (CX 6)." *Id.* By contrast, the administrative law judge noted that claimant told Dr. Zaldivar that truck driving was not hard work.

[8] In considering the coal mine employment histories noted in the medical opinion evidence, the administrative law judge stated that "[c]laimant told Dr. Zaldivar that truck driving was not hard work, but that is somewhat ambiguous, as [c]laimant may have meant only that the particular duty of actually driving the truck was not hard work, without commenting on the 'attendant' physical labor. (DX 25)." Decision and Order at 24. Further, the administrative law judge stated that "Dr. Zaldivar testified that he had no reason to disagree with Dr. Cohen's statement that [c]laimant's truck driver/drill operator employment involved heavy labor. (EX 9:66-67)." *Id.*

claimant's last coal mine work, *see Underwood*, 105 F.3d at 949, 21 BLR at 2-28, we affirm his finding that claimant's last coal mine employment involved heavy labor.

Employer further asserts that the administrative law judge erred in finding that the arterial blood gas study evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) (2013). Specifically, employer argues that the administrative law judge erred in failing to consider all of the arterial blood gas study evidence of record. We hold that employer's assertion has merit.

In summarizing the arterial blood gas study evidence, the administrative law judge indicated that the resting results of the September 9, 2009 and October 6, 2010 studies administered by Dr. Zaldivar produced non-qualifying values. Decision and Order at 5; Director's Exhibit 25; Employer's Exhibit 2. Further, in listing the results of the October 6, 2010 study, the administrative law judge noted "44" and "(average of 42 and 46)" for the pCO2, and "64" and "(average of 60 and 68)" for the pO2.[9] Decision and Order at 5. The administrative law judge also indicated that, while the resting results of the April 29, 2009 study administered by Dr. Rasmussen produced non-qualifying values, the exercise results of this study produced qualifying values. *Id*.; Director's Exhibit 15. In concluding that the arterial blood gas study evidence supported a finding of total respiratory disability, the administrative law judge gave greatest weight to the qualifying results during exercise of the April 29, 2009 study. The administrative law judge specifically stated:

> The only [arterial blood gas study] in the record that yielded qualifying results was the only exercise [arterial blood gas study] submitted. (DX 15; DX 25; EX 2). Given that [c]laimant's former coal mine employment was heavy work requiring much physical labor (see just *infra*), I find that [c]laimant's exercise-based [arterial blood gas studies] are more probative of his ability to perform that work than are his resting [arterial blood gas studies].

Decision and Order at 23.

[9] Employer asserts that "[the administrative law judge] erred when he averaged the results of Dr. Zaldivar's 2010 arterial blood gas tests[,] assuming that the two results were both resting when[,] in fact, one was performed at rest and one was performed with exercise." Employer's Brief at 20. Employer's assertion has merit. Dr. Zaldivar's October 6, 2010 study yielded values of 42 on pCO2 and 60 on pO2 at rest, and 46 on pCO2 and 68 on pO2 during exercise. Employer's Exhibit 2. Thus, the administrative law judge erred in averaging the values of Dr. Zaldivar's October 6, 2010 arterial blood gas study. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Contrary to the administrative law judge's finding, Dr. Rasmussen's April 29, 2009 study was not the only exercise arterial blood gas study in the record. Rather, Dr. Zaldivar's October 6, 2010 study produced non-qualifying values during exercise.[10] Employer's Exhibit 2. While an administrative law judge is not required to accept evidence that he determines is not credible, he must consider and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Because the administrative law judge erred in failing to consider the non-qualifying values produced during exercise on Dr. Zaldivar's October 6, 2010 arterial blood gas study, we vacate the administrative law judge's finding that the arterial blood gas study evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) (2013). *McCune*, 6 BLR at 1-988. On remand, the administrative law judge must consider all of the arterial blood gas study evidence in the record.

Employer additionally asserts that the administrative law judge erred in finding that the medical opinion evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) (2013). The record contains the medical opinions of Drs. Rasmussen, Cohen, Rosenberg and Zaldivar. The administrative law judge indicated that Drs. Rasmussen, Cohen, and Rosenberg opined that claimant does not retain the pulmonary capacity to perform heavy or very heavy manual labor. By contrast, the administrative law judge indicated that Dr. Zaldivar opined that claimant has the pulmonary capacity to perform physical labor. The administrative law judge discredited Dr. Zaldivar's opinion because he found that it was poorly reasoned and poorly documented. Conversely, the administrative law judge credited the opinions of Drs. Rasmussen, Cohen, and Rosenberg. The administrative law judge concluded that the medical opinion evidence supported a finding of total respiratory disability "[b]ecause the weight of the medical opinion evidence supports a finding that [c]laimant lacks the pulmonary capacity to perform heavy labor, and because [c]laimant's last coal mine employment involved heavy labor." Decision and Order at 25.

Employer asserts that the administrative law judge erred in discrediting Dr. Zaldivar's opinion. During a deposition dated January 24, 2012, Dr. Zaldivar stated, "So

[10] Employer argues that "the [administrative law judge] overlooked the most recent arterial blood gas performed by Dr. Cohen in July 2011." Employer's Brief at 20. The record contains the July 12, 2011 arterial blood gas study administered by Dr. Cohen. Claimant's Exhibit 6. This study produced non-qualifying values at rest. *Id*. In comments regarding the study, however, Dr. Cohen stated that "[claimant's] gas exchange could not be accurately measured *at peak exercise* due to the inability to place an arterial line." *Id*. (emphasis added). Thus, because Dr. Cohen's July 12, 2011 arterial blood gas study did not yield values during exercise, we hold that any error by the administrative law judge in failing to consider this study was harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

judging by Dr. Cohen's noninvasive test, he is able to do heavy labor." Employer's Exhibit 9 (Dr. Zaldivar's Depo. at 57). In weighing Dr. Zaldivar's opinion, the administrative law judge considered the doctor's reliance on Dr. Cohen's arterial blood gas testing. The administrative law judge specifically stated:

> Dr. Zaldivar said that while his own and Dr. Rasmussen's exercise blood gas testing indicated that [c]laimant would be disabled from performing heavy labor, Dr. Cohen's exercise test[11] demonstrated enough of an improvement that Dr. Zaldivar believed that [c]laimant's pulmonary functioning did not limit his capacity to perform physical labor at all. Dr. Zaldivar offered no reason other than Dr. Cohen's exercise test for why he considered [c]laimant not to be pulmonarily (sic) disabled.

Decision and Order at 24 (footnote added). The administrative law judge further stated:

> Though Dr. Zaldivar said exercise blood gas testing is unnecessary to determine whether the respiratory system is working properly, I find that the medical opinions discrediting Dr. Cohen's exercise test are well-reasoned, as [c]laimant's pulmonary dysfunction lies in a blood gas abnormality which worsens upon exercise; naturally, an examination which yields entirely normal results and has not tested for that abnormality will not be probative of whether [c]laimant is disabled.

Id. The administrative law judge therefore found that Dr. Zaldivar's opinion was poorly reasoned and poorly documented.

In light of our decision to vacate the administrative law judge's finding that the arterial blood gas study evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) (2013), which was based on the qualifying values produced during exercise of the April 29, 2009 study administered by Dr. Rasmussen, we vacate the administrative law judge's finding that Dr. Zaldivar's opinion was poorly reasoned and poorly documented.

Employer also asserts that the administrative law judge mischaracterized Dr. Rosenberg's opinion. In considering Dr. Rosenberg's August 23, 2010 report, the administrative law judge noted that Dr. Rosenberg opined that claimant does not have a

[11] Although the administrative law judge stated that Dr. Cohen performed an exercise arterial blood gas study, Decision and Order at 17, 18, 24, the record does not contain an arterial blood gas study administered by Dr. Cohen that produced values during exercise. Rather, as discussed, *supra*, Dr. Cohen indicated that he was unable to measure claimant's gas exchange during exercise. Claimant's Exhibit 6.

pulmonary disability that prevents him from performing his last coal mine employment or other arduous labor. With regard to Dr. Rosenberg's deposition testimony, the administrative law judge stated that, "[b]ased on all of the blood gas testing of record, including Dr. Zaldivar's October 2010 results, Dr. Rosenberg changed his earlier opinion regarding [c]laimant's disability, stating that [c]laimant has 'real' resting hypoxemia with an increased A-a gradient and a gas exchange abnormality which worsens on exercise. (EX 10:8-9)." Decision and Order at 20. Further, in weighing the medical opinion evidence, the administrative law judge stated that "Drs. Rasmussen, Cohen, and Rosenberg all opined, based on Dr. Rasmussen's and Dr. Zaldivar's October 2010 exercise blood gas testing, that [c]laimant did not retain the pulmonary capacity to perform heavy or very heavy manual labor (even though Dr. Rosenberg did not initially hold that opinion, before seeing the exercise tests)." *Id*. at 23-24.

Contrary to the administrative law judge's finding, Dr. Rosenberg did not opine that claimant lacked the pulmonary capacity to perform heavy or very heavy manual labor. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). As discussed, *supra*, in an August 23, 2010 report, Dr. Rosenberg opined that, from a pulmonary perspective, claimant is not disabled from performing his previous coal mining job or similarly arduous types of labor. Employer's Exhibit 3. During a deposition taken on August 14, 2012, Dr. Rosenberg stated that he had reviewed blood gases from tests performed by Dr. Zaldivar in October 2010 and that there was a diffusion problem. Employer's Exhibit 10 (Dr. Rosenberg's Depo. at 7-8). Additionally, in assessing all of the different arterial blood gas study results together, Dr. Rosenberg stated: "I think [claimant] has a resting degree of hypoxemia with an increased A-a gradient. I think it's real. I think the value that Dr. Zaldivar obtained on September 9th, 2009 is not verified on the subsequent testing, and I think that he has a gas exchange abnormality with exercise with worsening -- his gas exchange worsens with exercise." *Id*. (Dr. Rosenberg's Depo. at 8-9). Dr. Rosenberg also agreed that claimant has a diffusing impairment. Employer's Exhibit 10 (Dr. Rosenberg's Depo. at 16). Further, Dr. Rosenberg agreed that claimant has an impairment "with no obstruction, or minimal obstruction, or however you want to call it, basically no significant pulmonary function impairment." *Id*. (Dr. Rosenberg's Depo. at 30). Thus, the administrative law judge erred in mischaracterizing Dr. Rosenberg's opinion. *Tackett*, 7 BLR at 1-706.

In view of the forgoing, we vacate the administrative law judge's finding that the medical opinion evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv) (2013) and remand the case for further consideration of the medical opinion evidence.

Furthermore, in view of our decision to vacate the administrative law judge's finding that the evidence supported a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv) (2013), we also vacate the administrative law judge's finding

that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

If, on remand, the administrative law judge determines that claimant has established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and is thereby entitled to the presumption at amended Section 411(c)(4), the administrative law judge must determine whether the presumption is rebutted by employer establishing that claimant does not have pneumoconiosis or that claimant's impairment did not arise out of his coal mine employment. 20 C.F.R. §718.305(d).

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge