BRB No. 97-0766 BLA

ROY R. HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION	)	
	)	Date Issued:
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-BLA-1195) of Administrative Law Judge Frederick D. Neusner denying 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). The administrative law judge found not less than nineteen years of coal mine employment established and adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] The administrative law judge found that the existence of pneumoconiosis was established by the x-ray evidence of record pursuant to 20

[1]Claimant filed a claim on August 28, 1995, Director's Exhibit 1.

C.F.R. §718,202(a)(1), but further found that total disability was not established pursuant to 20 C.F.R. §718.204(c)(1)-(4). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in failing to find total disability established pursuant to Section 718.204(c)(2), (4). Employer responds, urging the Board to affirm the administrative law judge's Decision and Order denying benefits. The Director, Office of Workers' Compensation Programs, as a party-in-interest, has not responded to this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the 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 under Part 718 in this living miner's claim, it must be established that claimant suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3; 718.202; 718.203; 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986). Failure to prove any one of these elements precludes entitlement, *id*. Pursuant to Section 718.204(c), the administrative law judge must weigh all relevant evidence, like and unlike, with the burden on claimant to establish total respiratory disability by a preponderance of the evidence, *see Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(*en banc)*; *Fields v. Island Creek Coal Co.*, 10 BLR 19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986).[2]

[2]Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305, is inapplicable to the instant claim filed after January 1, 1982, *see* 20 C.F.R. §718.305(a), (e); Director's Exhibit 1.

Claimant contends that the administrative law judge erred in finding that total disability was not demonstrated by the blood gas study evidence pursuant to Section 718.204(c)(2) or the medical opinion evidence pursuant to Section 718.204(c)(4).[3] The relevant evidence under Section 718.204(c)(2) and (4) includes an October, 1995, blood gas study administered by Dr. Forehand which yielded non-qualifying resting results, but qualifying exercise results, Director's Exhibits 11, 13. Dr. Michos validated Dr. Forehand's blood gas study by checking a box on a form indicating that it was technically acceptable, Director's Exhibit 14. Dr. Sargent subsequently administered a non-qualifying resting blood gas study in April, 1996, Director's Exhibit 27, and a non-qualifying resting and exercise blood gas study in May, 1996, Employer's Exhibit 1. After also examining claimant, Dr. Forehand diagnosed coal workers' pneumoconiosis in an October, 1995, opinion and found that claimant was totally disabled based on the results of the blood gas study he administered indicating hypoxemia with exercise, *i.e.*, claimant's non-qualifying exercise blood gas study results, Director's Exhibit 12; Claimant's Exhibit 1.

Dr. Sargent also examined claimant and reviewed the medical evidence of record, including Dr. Forehand's blood gas study results and opinion, Director's Exhibit 27; Employer's Exhibit 3. Dr. Sargent diagnosed simple coal workers' pneumoconiosis, but found that claimant did not have any ventilatory or respiratory impairment. In regard to Dr. Forehand's qualifying exercise blood gas study results, Dr. Sargent found them inconsistent with the rest of the evidence of record and attributed them to either error or an acute illness claimant was suffering from at that time unrelated to coal workers' pneumoconiosis that subsequently resolved itself, in light of the fact that Dr. Sargent's subsequent exercise blood gas study did not reveal any impairment.[4]

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[3]Inasmuch as the administrative law judge's finding that the existence of pneumoconiosis was established by the x-ray evidence of record pursuant to Section 718.202(a)(1) is not challenged by any party on appeal, it is affirmed, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Moreover, the administrative law judge properly found that all of the pulmonary function study evidence of record was non-qualifying pursuant to Section 718.204(c)(1) and that there was no evidence of cor pulmonale with right-sided congestive heart failure in the record pursuant to Section 718.204(c)(3). A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (2). Inasmuch as the administrative law judge findings pursuant to Section 718.204(c)(1) and (3) have not been challenged by any party on appeal, they are also affirmed, *see Skrack, supra*.

[4]Dr. Sargent further noted that claimant did not achieve his maximum heart rate on Dr. Forehand's exercise blood gas study and its results were unusual in light of the fact that claimant's diffusion capacity results were normal, Director's Exhibit 27; Employer's Exhibit 3.

In addition, Dr. Castle reviewed the evidence of record and found no evidence of pulmonary impairment, Employer's Exhibit 4. In regard to Dr. Forehand's qualifying exercise blood gas study, Dr. Castle noted that claimant only exercised for three minutes before stopping due to fatigue, which was not an adequate or maximal amount of time, whereas claimant exercised for an adequate or appropriate maximal period of eight minutes on Dr. Sargent's subsequent non-qualifying exercise blood gas study. Moreover, in light of Dr. Sargent's subsequent non-qualifying exercise blood gas study, Dr. Castle opined that the impairment revealed on Dr. Forehand's prior blood gas study could not be due to coal workers' pneumoconiosis, because coal workers' pneumoconiosis is irreversible.

Initially, although the administrative law judge incorrectly found that there was no qualifying blood gas study evidence of record under Section 718.204(c)(2), Decision and Order at 4, inasmuch as the exercise results of Dr. Forehand's October, 1995, blood gas study were qualifying, Director's Exhibits 1, 13; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985), the administrative law judge found under Section 718.204(c)(4) that it was "significant" that Dr. Forehand's blood gas study occurred in 1995, whereas Dr. Sargent's comparable exercise blood gas study occurred "at least six months later," Decision and Order at 6. The administrative law judge found that the "combination of the passage of time and the material change in the final test result [*i.e.,* with Dr. Sargent's exercise blood gas study results] is sufficient to support an inference that it was the more reliable..., lending credence to Dr. Sargent's suggestion that an acute pulmonary or respiratory impairment produced the anomalous" exercise blood gas study results from Dr. Forehand, *id*. The administrative law judge reasoned that "[b]ecause Dr. Sargent's 1996 test was later in time and indicates that Claimant's pulmonary and respiratory capacity subsequently became normal, it is more persuasive, since pneumoconiosis is generally accepted to be a progressive pulmonary disease," *id*. The administrative law judge concluded that "[i]t follows that the improvement in Claimant's condition that the combination of the two tests implied is persuasive evidence... that the Claimant is not impaired by pneumoconiosis," *id.*[5] The administrative law judge ultimately found, therefore, that Dr. Forehand's opinion was insufficient to support a finding of total disability under Section 718.204(c)(4).

Claimant contends that the administrative law judge mechanically applied the most recent evidence rule and selectively analyzed the blood gas study evidence, without determining whether Dr. Forehand's opinion and blood gas study were sufficient to establish that claimant was at least temporarily disabled at that time. Contrary to claimant's contention that the administrative law judge should have at least determined whether Dr. Forehand's opinion and blood gas study were sufficient to establish that claimant was at least temporarily disabled at that time, the date of the hearing is the date upon which the extent of disability is assessed by the administrative law judge in a living miner's case, *see Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); *see also Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). In the instant case, Dr. Forehand's examination and blood gas study date from October, 1995, Director's Exhibits 11-13, whereas the hearing was not held until almost a year later in October, 1996, and Dr. Sargent's exercise blood gas study was administered in May, 1996, Employer's Exhibit 1.

[5]The administrative law judge also found that Dr. Castle's opinion corroborated Dr. Sargent's opinion, Decision and Order at 6, n. 9.

In regard to the administrative law judge's finding that Dr. Sargent's non-qualifying exercise blood gas study result was "more reliable" than Dr. Forehand's prior qualifying exercise blood gas study result because it occurred "later" and shows a "change" or "improvement" in its results, however, the United States Court of Appeals for the Sixth Circuit has held that it is rational to credit more recent evidence, solely on the basis of recency, only if it shows that the miner's condition has progressed or worsened, *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993), *citing Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992)*; see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).[6] The court reasoned that, because it is impossible to reconcile conflicting evidence based on its chronological order if the evidence shows that a miner's condition has improved, inasmuch as pneumoconiosis is a progressive disease and claimants cannot get better, "[e]ither the earlier or the later result must be wrong, and it is just as likely that the later evidence is faulty as the earlier," *see Woodward, supra, citing Adkins, supra*. Thus, the administrative law judge must resolve the conflict in such evidence and/or determine its reliability based on a weighing and independent evaluation of the conflicting evidence without regard to its chronological relationship, but based on reasons other than their chronological relationship, such as the qualifications of the physicians or the completeness of a physician's explanation and/or the evidence the physician relied on, etc., *id*. Consequently, we vacate the administrative law judge's findings under Section 718.204(c)(2), (4), and remand the case for the administrative law judge to reweigh and resolve the conflicting blood gas study and medical opinion evidence based on reasons other than recency or the chronological relationship of the evidence, *see generally Lane*

[6]Although claimant worked at least nineteen years for employer in Virginia, inasmuch as claimant's most recent coal mine employment, for only approximately six months, was with Twin Pines, Incorporated, in Kentucky, *see* Director's Exhibits 2, 5-6, the instant 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 (1989). The Board further held, however, that where the miner has worked in more than one circuit and the laws of those circuits are compatible, it is unnecessary to determine which law applies, *id*. Thus, inasmuch as the holdings of the Fourth Circuit court in *Adkins* and the Sixth Circuit court in *Woodward* are compatible, it is unnecessary to the outcome in this case which circuit court's law applies.

v. Union Carbide Corp., 105 F.3d 166, 21 BLR 2-35 (4th Cir. 1997)(where the court affirmed an administrative law judge's crediting of a more recent blood gas study's non-qualifying results over a prior blood gas study's qualifying results based on reasons other than recency or the chronological relationship of the evidence).

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge