BRB Nos. 11-0681 BLA
and 11-0681 BLA-A

RONALD PREECE	)	
	)	
Claimant-Respondent Claimant-Cross-Petitioner	)	
	)	
v.	)	
	)	
TAURUS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCY EMPLOYERS' MUTUAL INSURANCE COMPANY	)	DATE ISSUED: 07/13/2012
	)	
Employer/Carrier-Petitioners Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals, and claimant cross-appeals, the Decision and Order on Remand – Award of Benefits (2008-BLA-5117) of Administrative Law Judge Larry S. Merck (the administrative law judge) rendered on a miner's claim filed on January 8, 2007, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).

When this case was first before the administrative law judge, the administrative law judge accepted the parties' stipulation to twenty-six years of coal mine employment and adjudicated the case pursuant to the regulations at 20 C.F.R. Part 718. The administrative law judge found that the evidence established the existence of clinical pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but that the evidence failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but not the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board also affirmed the administrative law judge's finding that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iii). The Board, however, agreed with claimant and the Director, Office of Workers' Compensation Programs (the Director), that the administrative law judge erred in finding that the blood gas study evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(iv). Additionally, the Board held that, because the administrative law judge's analysis of the blood gas study evidence tainted his finding that the medical opinion evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), that finding must also be vacated. Accordingly, the Board vacated the administrative law judge's decision denying benefits and remanded the case for the administrative law judge to reconsider whether the blood gas study and medical opinion evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii) and (iv), and total respiratory disability overall pursuant to 20 C.F.R. §718.204(b). In addition, the Board instructed the administrative law judge to specifically consider, if reached, whether Dr. Rasmussen's opinion established that claimant was totally disabled due to clinical pneumoconiosis pursuant to 20 C.F.R §718.204(c). Further, the Board instructed the administrative law judge to set forth his findings pursuant to the Administrative Procedure Act (the APA), which requires that the administrative law judge state the specific basis for his findings, and the rationale underlying his conclusions. 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). *Preece v. Taurus Coal Co.*, BRB No. 09-0288 BLA (Feb. 26, 2010)(unpub.).

On remand, the administrative law judge found total respiratory disability established pursuant to Section 718.204(b)(2)(ii) and (iv) based on the blood gas study and medical opinion evidence, and total respiratory disability established pursuant to Section 718.204(b) overall. The administrative law judge also found disability causation established pursuant to Section 718.204(c), based on Dr. Rasmussen's opinion. Accordingly, the administrative law judge awarded benefits.[1]

On appeal, employer challenges the administrative law judge's finding that the blood gas study and medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(ii) and (iv), and thereby established total respiratory disability pursuant to Section 718.204(b) overall. Employer also challenges the administrative law judge's finding that the opinion of Dr. Rasmussen established total disability due to pneumoconiosis pursuant to Section 718.204(c). On cross-appeal, claimant contends that, if the Board does not affirm the award of benefits, the case should be remanded for the administrative law judge to consider the applicability of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis.[2] The Director has not responded to these appeals.

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.[3] 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).

[1] The administrative law judge's finding that claimant's clinical pneumoconiosis arose out of coal mine employment is affirmed, as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that claimant is totally disabled due to pneumoconiosis, that his death was due to pneumoconiosis, or that at the time of his death he was totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Director's Exhibit 4.

Total Disability – 20 C.F.R. §718.204(b)(2)(ii)
Blood Gas Study Evidence

Employer first contends that the administrative law judge erred in finding that the blood gas study evidence established total respiratory disability pursuant to Section 718.204(b)(2)(ii). Specifically, employer contends that the administrative law judge erred in assigning controlling weight to the "most recent [March 20, 2007] qualifying [arterial blood gas study,]" administered by Dr. Rasmussen, that was conducted only one month after the non-qualifying study of February 15, 2007. Employer's Brief at 13. Employer contends that this evidence does "not give rise to any presumption that the most recent [study] is entitled to any additional weight, especially without any explanation as to why." *Id*. at 13-14. In addition, employer contends that the administrative law judge erred in rejecting Dr. Rosenberg's opinion, that the qualifying results of the March 20, 2007 study were caused by low barometric pressure at the test site, as insufficiently supported or explained. Rather, employer contends that Dr. Rosenberg's June 6, 2007 supplemental report fully "sets out his medical and scientific explanation," regarding the effect of low barometric pressure on the March 20, 2007 study. *Id*. at 14.

The relevant blood gas study evidence consists of the non-qualifying, pre-exercise February 15, 2007 study conducted by Dr. Rosenberg in Beckley, West Virginia, and the qualifying pre-and post-exercise March 20, 2007 study conducted by Dr. Rasmussen in Pikeville, Kentucky. Director's Exhibit 11. The March 20, 2007 blood gas study was validated as technically acceptable by Dr. Mettu. *Id*. In a supplemental report dated June 6, 2007, Dr. Rosenberg opined that the difference in the results between his February non-qualifying study and Dr. Rasmussen's March qualifying study was due to the difference in the barometric pressure at the sites where the studies were conducted. Specifically, Dr. Rosenberg opined that "Dr. Rasmussen's decrement in oxygenation to a disabling level would not be considered disabling if this same blood gas [study] had been performed at Pikeville, Kentucky," instead of Beckley, West Virginia. Director's Exhibit 17.

On remand, the administrative law judge considered the conflicting reports of Drs. Rosenberg and Rasmussen concerning the reliability of the March 20, 2007 pre-and post-exercise qualifying blood gas study values. Decision and Order at 4-5. Referencing Dr. Rosenberg's June 6, 2007 supplemental letter, the administrative law judge found it "unpersuasive," as "Dr. Rosenberg failed to provide medical support or an explanation for his opinion that the low barometric pressures on the date the [blood gas studies] were administered affected the PO_2 values of the tests." *Id*. at 6. Further, the administrative law judge found:

> Without a more thorough explanation as to how Dr. Rosenberg can opine, without speculation, that the qualifying arterial blood gas studies would not have been qualifying if they had been administered at a higher barometric pressure, I do not find his opinion persuasive in light of Dr. Rasmussen's reliance on the [arterial blood gas studies] and Dr. Mettu's opinion that the [arterial blood gas studies] are technically acceptable.

Id. at 6.

An administrative law judge may properly consider a medical opinion detailing factors, such as a medical condition suffered by the miner, or circumstances surrounding the testing, that render a particular blood gas study unreliable for assessing total disability. *See Big Horn Coal Co. v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1056 n.4, 13 BLR 2-372, 2-378-80 n.4 (10th Cir. 1990); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 2-124 (4th Cir. 1985); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984); *Cardwell v. Circle B Coal Co.*, 7 BLR 1-788 (1984). However, the administrative law judge must provide a rationale for preferring the opinion of the consulting physician over that of an administering physician, as to the validity of a test. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). Further, the resolution of conflicting medical evidence, and the determination of whether a physician's opinion is sufficiently credible and reasoned, is for the administrative law judge, as the trier-of-fact, to determine. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

In this case, the administrative law judge properly recognized that Dr. Rosenberg's February 15, 2007 blood gas study, which was administered at rest only, was non-qualifying, while the March 20, 2007 blood gas study, which was administered at both rest and after exercise, was qualifying. Decision and Order at 4; Director's Exhibits 11, 13. The administrative law judge also acknowledged Dr. Rosenberg's supplemental letter, where the doctor opined that the test results obtained by Dr. Rasmussen in Beckley, West Virginia, would not have evidenced disability if the barometric pressure at that test site had been the same as that in Pikeville, Kentucky, where Dr. Rosenberg's non-qualifying blood gas study results were obtained. Employer failed, however, to identify any evidence that supported Dr. Rosenberg's assertion, nor does Dr. Rosenberg cite to any authority supporting his conclusion. Moreover, employer provides no support for its contention that the barometric pressure of a location other than the actual testing location should be utilized to extrapolate lower test values. *See* 20 C.F.R. Part 718 Appendix C; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); *see also* 20 C.F.R. §718.105. Consequently, we conclude that the administrative law judge permissibly found that Dr. Rosenberg's opinion, discrediting the March 20, 2007 qualifying blood gas study, was unpersuasive as Dr. Rosenberg failed to sufficiently support or explain his opinion, the pre-and post-exercise March 20, 2007 test

results were qualifying, and both the pre- and post-exercise tests were validated as technically acceptable.[4] *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 358, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255 n.6, 5 BLR at 2-103 n.6; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Thus, we discern no error in the administrative law judge's weighing of the blood gas study evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 319, 17 BLR 2-77, 2-84 (6th Cir. 1993); *Schetroma v. Director, OWCP*, 18 BLR 1-19, 1-22 (1993); 20 C.F.R. §718.105(b)(2000). We, therefore, hold that the administrative law judge's analysis of the blood gas study evidence accords with the requirements of the APA, and we affirm the administrative law judge's finding that the blood gas study evidence established total respiratory disability pursuant to Section 718.204(b)(2)(ii).

Total Disability – 20 C.F.R. §718.204(b)(2)(iv)
Medical Opinion Evidence

In finding that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv), the administrative law judge credited Dr. Rasmussen's opinion that claimant was totally disabled as it was well-reasoned and well-documented.[5] The administrative law judge rejected the opinion of Dr. Rosenberg, that claimant did not have a totally disabling respiratory impairment as unreasoned, because he found that Dr. Rosenberg's opinion was based, in part, on his faulty analysis and rejection of claimant's March 20, 2007 pre- and post-exercise qualifying blood gas study. Decision and Order at 7. The administrative law judge, therefore, properly found that, because he could not determine how much of Dr. Rosenberg's faulty analysis of the blood gas study affected the doctor's opinion, he could not conclude that Dr. Rosenberg's opinion was reasoned on the issue of total respiratory disability. *See Clark*, 12 BLR at 1-155. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence established total respiratory disability pursuant to Section 718.204(b)(2)(iv), based on Dr. Rasmussen's opinion. Further, based on his weighing all the relevant evidence, the administrative law judge properly concluded that total respiratory disability was established pursuant to Section 718.204(b) overall, and that finding is, accordingly, affirmed.

[4] The administrative law judge reasonably found that the March 20, 2007 study, which reflected a drop in claimant's PO_2 level on exercise, was more reliably reflective of claimant's respiratory condition than the February 15, 2007 study, which was conducted at rest only. *See* 20 C.F.R. §718.105; *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-286 (6th Cir. 2005); Director's Exhibit 11 at 25.

[5] Employer does not contend that the administrative law judge erred in finding that Dr. Rasmussen's opinion was reasoned. That finding is, therefore, affirmed. *See Skrack*, 6 BLR at 1-711.

Disability Causation – 20 C.F.R. §718.204(c)

Employer challenges the administrative law judge's finding that claimant established disability causation pursuant to 20 C.F.R. §718.204(c). Specifically, employer contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion to find disability causation when it was based on a diagnosis of both clinical and legal pneumoconiosis, and only the existence of clinical pneumoconiosis was established.[6] Rather, employer contends that the administrative law judge should have relied on the opinion of Dr. Rosenberg, who did not diagnose the existence of either clinical pneumoconiosis or legal pneumoconiosis. Employer contends that Dr. Rosenberg's opinion that claimant did not have legal pneumoconiosis was well-reasoned and in keeping with the administrative law judge's finding that claimant did not have legal pneumoconiosis.[7]

Clinical pneumoconiosis and legal pneumoconiosis are distinct diseases, and the absence of a finding of legal pneumoconiosis does not preclude a finding of total disability due to clinical pneumoconiosis.[8] *See* 65 Fed. Reg. at 79941 (Dec. 20, 2000).

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[6] Dr. Rasmussen diagnosed coal workers' pneumoconiosis and chronic bronchitis, which was due to both smoking and coal dust exposure. Dr. Rasmussen further opined that coal dust exposure and smoking "combined to cause [claimant's] disabling lung disease." Director's Exhibit 11. Additionally, Dr. Rasmussen opined that coal dust exposure was a significant factor in claimant's total disability, noting that "[c]oal mine dust in contrast to cigarette smoke also causes diffuse interstitial fibrosis . . . which is felt by some authorities to be responsible for the frequent finding of impaired oxygen transfer absent significant ventilatory impairment in many impaired miners." *Id*. at 35-36. Dr. Rasmussen also concluded that claimant had "clinical pneumoconiosis which is a material contributing cause of his disabling lung disease." *Id*.

[7] Dr. Rosenberg, who examined claimant on February 17, 2007, considered claimant's twenty-seven years of coal mine employment, his smoking history of one pack of cigarettes a day since 1972, and his chest x-ray, pulmonary function study and resting blood gas study. Director's Exhibit 19. Dr. Rosenberg interpreted the chest x-ray as negative for pneumoconiosis and the pulmonary function study as showing no significant obstruction and no restriction. He noted that claimant's diffusion capacity measurement was mildly reduced, and "this undoubtedly has been adversely affected by his markedly elevated carboxyhemoglobin level." *Id*. Dr. Rosenberg opined that claimant does not have clinical or legal pneumoconiosis, or any restriction or significant obstruction, and "could perform his previous coal mine job or other similarly arduous types of labor." *Id*.

[8] "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent

Moreover, in the exercise of the administrative law judge's discretion, a medical opinion may be found credible on one issue, but not on another. *See Drummond Coal Co. v. Freeman*, 17 F.3d 361 (11th Cir. 1994). Because the only form of pneumoconiosis that has been established in this case is clinical pneumoconiosis, the issue before the administrative law judge was whether claimant's clinical pneumoconiosis was a substantially contributing cause of his total respiratory disability pursuant to Section 718.204(c).[9]

First, contrary to employer's argument, the administrative law judge properly credited Dr. Rasmussen's opinion on the issue of disability causation. Contrary to employer's contention, Dr. Rasmussen's causation opinion does not conflate his findings of clinical and legal pneumoconiosis. Rather, even though Dr. Rasmussen found that claimant's disabling respiratory impairment was due, in part, to coal mine employment

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deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. 20 C.F.R. §718.201(a)(1). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

[9] Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in [Section] 718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) [h]as a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) [m]aterially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1)(i), (ii); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 610-11, 22 BLR 2-288, 2-303 (6th Cir. 2001); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

i.e., legal pneumoconiosis, Dr. Rasmussen also stated that claimant's "clinical pneumoconiosis" was "a material contributing cause" of his disability. *See* Director's Exhibit 11 at 35-36. Consequently, as the administrative law judge found the existence of clinical pneumoconiosis established, he properly credited Dr. Rasmussen's opinion, which attributed claimant's disability to clinical pneumoconiosis pursuant to Section 718.204(c). *See Skukan v. Consolidated Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vacated sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *see also Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Accordingly, we affirm the administrative law judge's finding that the opinion of Dr. Rasmussen on causation was credible.

Next, contrary to employer's assertion, the administrative law judge did not err in rejecting Dr. Rosenberg's opinion because Dr. Rosenberg did not, contrary to the administrative law judge's finding, diagnose the existence of clinical pneumoconiosis. *See Scott*, 289 F.3d at 269, 22 BLR at 2-383; *Toler*, 43 F.3d at 115, 19 BLR at 2-83. Further, employer's contention that the administrative law judge should have credited Dr. Rosenberg's opinion because the doctor, like the administrative law judge, found that claimant does not have legal pneumoconiosis is rejected, as the issue before the administrative law judge was whether claimant's clinical pneumoconiosis was disabling. *See Scott*, 289 F.3d at 269, 22 BLR at 2-383; *Toler*, 43 F.3d at 115, 19 BLR at 2-83; 65 Fed. Reg. at 79,941. Consequently, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion on causation was not credible.

In conclusion, therefore, we affirm the administrative law judge's finding that clinical pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). As the administrative law judge properly found that claimant established the requisite elements of entitlement under 20 C.F.R. Part 718, he properly found that benefits were established in this case.[10]

[10] In view of our affirmance of the administrative law judge's award of benefits, we need not address the argument raised in claimant's cross-appeal regarding the applicability of the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), to this case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *see* Claimant's Cross-Petition for Review at 14-15.

Accordingly, the administrative law judge's Decision and Order on Remand - Award of 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