BRB No. 13-0569 BLA

GEORGE E. HAGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	
and	)	
	)	
PEABODY INVESTMENTS, INCORPORATED	)	DATE ISSUED: 06/26/2014
	)	
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 on Modification of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits on Modification (2011-BLA-5023) of Administrative Law Judge Lystra A. Harris rendered on a 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 credited claimant with thirty-seven years of underground coal mine employment, and adjudicated this claim pursuant to 20 C.F.R. Parts 718 and 725. After finding that the evidence was insufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c), the administrative law judge found that the weight of the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2). Thus, the administrative law judge concluded that a mistake in a determination of fact in the prior denial of the claim was demonstrated pursuant to 20 C.F.R. §725.310. Applying amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis thereunder, and that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge found that modification was appropriate pursuant to 20 C.F.R. §725.310, and awarded benefits.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that claimant established total respiratory disability at Section 718.204(b), and was entitled to invocation of the amended Section 411(c)(4)

[1] Claimant, George E. Hager, filed his claim for benefits on February 6, 2006. Director's Exhibit 2. By Decision and Order dated May 19, 2009, Administrative Law Judge Thomas M. Burke denied benefits, finding that claimant failed to establish either total respiratory disability at 20 C.F.R. §718.204(b) or the presence of complicated pneumoconiosis at 20 C.F.R. §718.304. Director's Exhibit 37. Claimant filed a timely request for modification of Judge Burke's denial on April 26, 2010. Director's Exhibit 40.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of qualifying coal mine employment, *i.e.*, underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 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 of proof shifts to employer to rebut the presumption by showing that the miner does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. 30 U.S.C. §921(c)(4).

presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that, despite finding that the blood gas studies and medical opinions of record do not establish total respiratory disability, the administrative law judge erred in finding total disability established at Section 718.204(b) by relying on the results of a single qualifying[5] pulmonary function study, which employer maintains does not conform to the quality standards set out at 20 C.F.R. §718.103. Employer asserts that the administrative law judge mechanically applied the "later evidence is better" rule in crediting the March 4, 2008 pulmonary function study over the earlier non-qualifying pulmonary function studies of record, and provided invalid reasons for discounting the opinion of Dr. Crisalli, that claimant does not have a totally disabling respiratory impairment. Employer's Brief at 6-15.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. Contrary to employer's argument, a single piece of qualifying evidence may establish invocation, although it does not compel invocation. *See Stapleton v. Westmoreland Coal Co.*, 785 F.2d 424, 8 BLR 2-109 (4th

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[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established thirty-seven years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Modification at 5, 31.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[5] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Cir. 1986); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 108 S. Ct. 427, 11 BLR 2-1 (1987). Moreover, claimant correctly notes that employer failed to raise the issue of the validity of the March 4, 2008 pulmonary function study before the administrative law judge and, thus, has waived its objection to the quality of this evidence. *See Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-312 (2003); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294 (2003).

After determining that the May 8, 2006, September 11, 2006, and January 8, 2007 pulmonary function testing did not produce qualifying results, the administrative law judge reviewed Dr. Crisalli's deposition testimony, wherein the doctor stated that he was unable to ascertain why the qualifying results from claimant's March 4, 2008 pulmonary function test were inconsistent with the results of previous testing. Decision and Order on Modification at 27; Employer's Exhibit 34 at 11. Dr. Crisalli indicated that he had "a limited number of curves upon which to test the validity of the study," and concluded that, assuming it was valid, the qualifying pulmonary function study was not "baseline since the other data is better." *Id.* Noting that the March 4, 2008 test was in substantial compliance with the regulatory criteria, and that Dr. Crisalli did not invalidate the test after reviewing the curves that were available, the administrative law judge acted within her discretion in discounting Dr. Crisalli's opinion as speculative. Decision and Order on Modification at 28; *see* 20 C.F.R. §718.103; *Winchester v. Director, OWCP*, 9 BLR 1-177, 1-178 (1986). The administrative law judge then found that the period of more than one year between claimant's earlier testing and the March 4, 2008 pulmonary function study was "significant," and permissibly accorded greatest weight to the most recent qualifying test, as it provided "the most current picture of the Claimant's respiratory health." Decision and Order on Modification at 28; *see Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). Thus, the administrative law judge rationally concluded that claimant established total respiratory disability at Section 718.204(b)(2)(i).

Next, after finding that claimant failed to establish total disability at Section 718.204(b)(2)(ii) and (iii) because the four blood gas studies of record produced non-qualifying values and the record contained no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge reviewed the conflicting medical opinions of record at Section 718.204(b)(2)(iv). Despite his status as claimant's treating physician, the administrative law judge permissibly accorded little weight to Dr. Flaim's opinion, that claimant was "unable to hold employment due to the severity of his lungs," based on Dr. Flaim's failure to explain the bases for his conclusion and the limited detail he provided regarding his treatment of claimant. Decision and Order on Modification at 29-30; Claimant's Exhibit 1; *see* 20 C.F.R. §718.104(d); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc). The administrative law judge rationally accorded little weight to Dr. Rasmussen's opinion, that claimant's testing demonstrated that he

does not retain the pulmonary capacity to perform very heavy manual labor, as the physician last examined claimant in January 2007; he indicated that the pulmonary function tests he conducted were poorly performed; and he did not review claimant's March 4, 2008 pulmonary function testing. Decision and Order on Modification at 30; *see Underwood*, 105 F.3d at 951, 21 BLR at 2-32. Lastly, the administrative law judge acted within her discretion in discounting Dr. Crisalli's opinion, that claimant's pulmonary function studies demonstrated a mild obstruction to airflow and that claimant did not have a totally disabling respiratory or pulmonary impairment, as the physician neither identified any findings that would lead him to question the validity of the March 4, 1008 pulmonary function study, nor did he explain why other test results were "better." Decision and Order on Modification at 30; Director's Exhibit 34 at 11; *see Clark*, 12 BLR at 1-155.

Weighing all relevant evidence together, the administrative law judge permissibly concluded that the non-qualifying blood gas studies, which measure a different type of impairment, and the insufficiently reasoned medical opinions of record did "not outweigh" the qualifying pulmonary function study evidence. Decision and Order on Modification at 31; *see Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988), *aff'd sub nom. Amax Coal Co. v. Fagg*, 865 F.2d 916 (7th Cir. 1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Whitaker v. Director, OWCP*, 6 BLR 1-983 (1984). As substantial evidence supports the administrative law judge's credibility determinations, we affirm her finding that the weight of the evidence was sufficient to establish total respiratory disability at Section 718.204(b), based on her conclusion that the March 4, 2008 pulmonary function study was the most probative. Consequently, we affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). As employer has not challenged the administrative law judge's finding that employer failed to establish rebuttal of the presumption, we affirm the administrative law judge's granting of claimant's request for modification at Section 725.310, and her award of benefits. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the Decision and Order Awarding Benefits on Modification of the administrative law judge is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge