BRB No. 07-0720 BLA

D.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WILLIAMS MOUNTAIN COAL COMPANY	)	
	)	
	)	DATE ISSUED: 05/20/2008
Employer-Petitioner	)	
	)	
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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (04-BLA-6335) of Administrative Law Judge Michael P. Lesniak (the administrative law judge), rendered

on a subsequent claim[1] filed on May 6, 2003, 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 credited claimant with thirty-two years of qualifying coal mine employment,[2] and found that because the weight of the newly submitted evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Reviewing the entire record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1), (4); 718.203(b), and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer raises several challenges to the administrative law judge's finding that the medical opinion evidence established that claimant is totally disabled at 20 C.F.R. §718.204(b)(2)(iv). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response urging the Board to reject employer's argument that the newly submitted opinion of Dr. Rasmussen cannot establish total disability as a matter of law.[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. 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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising

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[1] Claimant filed his initial claim for benefits on September 24, 1998, which was finally denied on November 8, 2001, for failure to establish total disability. Director's Exhibit 1.

[2] The law of the United States Court of Appeals for the Fourth Circuit is applicable as the miner was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc).*

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established thirty-two years of qualifying coal mine employment, and pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal* Co., 6 BLR 1-710 (1983).

out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish total disability. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3); *see Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996).

Pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that the new pulmonary function study and blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (ii),[4] but that the reasoned medical opinion evidence established total disability under 20 C.F.R. §718.204(b)(2)(iv). Because the medical opinion evidence considered a totality of factors, the administrative law judge found it to be "particularly probative" and therefore found, in weighing together all the contrary, probative evidence, that claimant established total disability under 20 C.F.R. §718.204(b)(2).

The administrative law judge considered four medical opinions. Drs. Rasmussen and Cohen opined that claimant is totally disabled from performing his usual coal mine employment as an electrician and mechanic, while Drs. Castle and Crisalli opined that claimant retains the respiratory capacity to perform his usual coal mine employment. Director's Exhibits 12, 13; Claimant's Exhibit 3; Employer's Exhibits 1, 3. In weighing these four opinions, the administrative law judge credited the opinion of Dr. Rasmussen and the supporting opinion of Dr. Cohen over the contrary opinions of Drs. Castle and Crisalli.

Employer initially contends that the administrative law judge erred in considering Dr. Rasmussen's opinion that claimant is totally disabled. Employer's Brief at 12-15. Specifically, employer alleges that Dr. Rasmussen's opinion is a "misdiagnosis for legal purposes [and] must be deemed unreliable as a matter of law" because the diagnosis is

[4] The administrative law judge noted that there was no new evidence of cor pulmonale with right-sided congestive heart failure to be considered pursuant to 20 C.F.R. §718.204(b)(2)(iii).

identical to the diagnosis that Dr. Rasmussen made in 1999, and which the prior administrative law judge found to be unpersuasive. Employer's Brief at 18-19. We disagree.

The Director and claimant correctly point out that claimant is not bound by an administrative law judge's credibility findings in a previous claim; rather, claimant need only establish, with new evidence, an element of entitlement that he failed to establish in his previous claim. *Rutter*, 86 F.3d at 1365, 20 BLR at 2-235. Moreover, the administrative law judge is required to consider all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 139, 11 BLR 2-1, 2-4 (1987) *reh'g denied*, 484 U.S. 1047 (1988); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). As the record reflects that Dr. Rasmussen's newly submitted opinion was based upon new medical examination and testing conducted in 2003, Dr. Rasmussen's report constituted new, relevant evidence that the administrative law judge was obligated to consider. *See* 20 C.F.R. §725.309(d)(3); *Rutter*, 86 F.3d at 1365, 20 BLR at 2-235.

Employer next contends that the administrative law judge impermissibly reconsidered the exertional requirements of claimant's usual coal mine employment. *Id*. at 12-15. Specifically, employer alleges that, in finding that "the record supports Dr. Rasmussen's assessment that [c]laimant's usual coal mine job as an electrician and mechanic involved heavy and some very heavy lifting," Decision and Order at 4, the administrative law judge "usurps the prior finding concerning the exertional rigors of [claimant's] last coal mine work and increases the exertional rigors which he deems were necessary to accomplish the last coal mining job[,]" in violation of *res judicata*. Employer's Brief at 12-13, 18. Employer additionally argues that substantial evidence does not support the administrative law judge's exertional requirement finding because "there is no factual basis to support the finding from the miner's testimony." *Id*. at 15.

Employer's contentions lack merit. The record reflects that there was no prior exertional requirement finding;[5] thus, *res judicata* did not bar the administrative law

[5] On October 16, 2000, in his Decision and Order – Denying Benefits, Administrative Law Judge Robert J. Lesnick summarized claimant's description of his job duties as follows:

> Generally, [c]laimant would only lift items weighing about 40 to 50 pounds, but occasionally, he would lift items weighing 100 pounds or more. If the items were too heavy to carry they were lifted by a scoop.

judge from considering the exertional requirements of claimant's usual coal mine job in this subsequent claim. *See Rutter*, 86 F.3d at 1364, 20 BLR at 2-233 (explaining that a finding that should have been made is not a finding that was made). Further, in determining the exertional requirements of a miner's usual coal mine job, an administrative law judge is not limited solely to a miner's testimony. *See Lane*, 105 F.2d at 174, 21 BLR at 2-38. The record reflects that claimant told Dr. Crisalli he was required to carry tools weighing 40 pounds distances of 400 feet, ten times per day, and to lift 100-pound cables, three times per day, and that Dr. Castle reported that claimant's last coal mine job involved some heavy labor, handling motors and underground equipment. Decision and Order at 4; Employer's Exhibits 1, 3, 8. The administrative law judge permissibly based his finding on this relevant evidence. *See Lane*, 105 F.2d at 174, 21 BLR at 2-38. We, therefore, affirm the administrative law judge's finding that claimant's usual coal mine job required "heavy and some very heavy lifting," as it is supported by substantial evidence.

Employer next challenges the administrative law judge's weighing of the medical opinion evidence discussing claimant's diffusing capacity tests. Specifically, employer asserts that the administrative law judge failed to explain how the diffusing capacity test is a relevant and acceptable diagnostic test, or to resolve the conflicting interpretations of its results in a rational manner. Employer's Brief at 15-16.

The record reflects that employer did not challenge the relevance and acceptability of the diffusing capacity test before the administrative law judge. Moreover, contrary to employer's assertions, the administrative law judge properly noted that both Drs. Cohen and Rasmussen reported that diffusing capacity studies can be a predictor of, or be associated with, gas exchange abnormalities, and that each physician, including employer's experts, based his total disability opinion in part upon the results of diffusing capacity tests. Decision and Order at 8-9; Director's Exhibit 12, Claimant's Exhibit 3; Employer's Exhibits 1, 3, 7 at 48-52. Further, the Fourth Circuit Court of Appeals has recognized the general validity and relevance of diffusing capacity test results as a means of establishing total disability. *Walker v. Director, OWCP*, 927 F.2d 181, 184-5, 15 BLR 2-16, 2-24 (4th Cir. 1991) (holding that the results of a properly reported and validated diffusing capacity test must be weighed with all other relevant evidence). Thus, the

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2000 Decision and Order at 3, 13 n.7; 2000 Hearing Transcript at 12-13. Judge Lesnick did not, however, make a specific finding as to what degree of exertion was required of claimant to perform these tasks.

administrative law judge could properly consider the diffusing capacity evidence. *See Lane*, 105 F.2d at 174, 21 BLR at 2-38.

In weighing the physicians' interpretations of the diffusing capacity tests, the administrative law judge found that the preponderance of the evidence indicated that claimant suffers a diffusion capacity abnormality. Decision and Order at 9. Substantial evidence supports this finding. The administrative law judge accurately noted that Dr. Castle opined that claimant's diffusing capacity was essentially normal, while Drs. Rasmussen, Crisalli, and Cohen opined that claimant's diffusing capacity was abnormal. In weighing the conflicting opinions, the administrative law judge reasonably considered Dr. Crisalli's and Dr. Rasmussen's testimony that Dr. Castle had interpreted claimant's diffusing capacity based on a particular value that had limited utility, and which they had therefore declined to use.[6] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532, 21 BLR 2-323, 2-334 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). We affirm the administrative law judge's permissible finding. *See Grizzle v. Picklands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 2000).

Employer lastly challenges the administrative law judge's crediting of Dr. Rasmussen's opinion over the contrary opinions of Drs. Castle and Crisalli, asserting that Dr. Rasmussen's opinion is not reasoned. Employer's Brief at 16-20. Specifically, employer asserts that Dr. Rasmussen's opinion cannot be reasoned because it is based in part on a blood gas study value taken while claimant was standing,[7] and the regulations

[6] This particular value was the "DL/VA ratio."

[7] Dr. Rasmussen performed the Department of Labor complete pulmonary evaluation on August 4, 2003. Director's Exhibits 12, 13. Dr. Rasmussen obtained results for two resting blood gas studies and one exercise study. The first resting value, 67, was obtained while claimant was seated, in accordance with 20 C.F.R. §718.105(b), which provides that a blood gas study shall initially be administered at rest and in a sitting position. *See* 20 C.F.R. §718.105(b). The second resting value, 73, was obtained while claimant was standing at the treadmill; and the final value, 67, was obtained upon light exercising on the treadmill. Director's Exhibit 12. Dr. Rasmussen diagnosed minimal resting hypoxia and, based on the drop seen between the standing and exercise PO2 values, diagnosed a moderate impairment in oxygen transfer during light exercise. Dr. Rasmussen additionally diagnosed a diffusing capacity abnormality based on claimant's DLCO test results. Based on claimant's hypoxia, diffusing capacity abnormality, and the heavy to very heavy lifting he was required to do in his last coal mining job, Dr. Rasmussen concluded that claimant was totally disabled.

fail to allow consideration of a resting blood gas study obtained in a standing position. Employer's Brief at 17.

We disagree. Although 20 C.F.R. §718.105(b) provides that a blood gas study shall initially be administered at rest and in a sitting position, the Fourth Circuit established in *Walker* that the results of objective tests not accounted for in the regulations may form the basis for a reasoned medical opinion, if properly reported and validated by a qualified physician. 927 F.2d at 184-5, 15 BLR at 2-24. The record reflects that the administrative law judge properly noted that Dr. Rasmussen's use of the standing blood gas study was not challenged as being medically unacceptable, and that Dr. Rasmussen's curriculum vitae and testimony demonstrate years of experience and research assessing total disability in coal miners through arterial blood gas testing. Decision and Order at 9-10. Thus, contrary to employer's assertions, the administrative law judge acted within his discretion in finding Dr. Rasmussen's opinion to be reasoned. *See Walker*, 927 F.2d at 184-5, 15 BLR at 2-24; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

With respect to the administrative law judge's weighing of the opinions of Drs. Castle and Crisalli, employer asserts that the administrative law judge "ignored" Dr. Castle's opinion that "blood gases are [a]ffected by age and altitude[,]" and impermissibly rejected Dr. Crisalli's opinion because Dr. Crisalli did not diagnose pneumoconiosis. Employer's Brief at 16-20.

Employer has mischaracterized the administrative law judge's findings. The record reflects that the administrative law judge did not ignore Dr. Castle's opinion, nor did he discredit Dr. Crisalli's disability opinion because the doctor failed to diagnose pneumoconiosis. Rather, the administrative law judge discounted the opinions of Drs. Castle and Crisalli as inadequately explained, and credited Dr. Rasmussen's contrary opinion as better explained, because Dr. Rasmussen had considered the exertional requirements of claimant's last coal mine job in conjunction with the near-qualifying results of claimant's blood gas study:

> [T]he results of [c]laimant's arterial blood gas testing are close to qualifying for disability, and in the case of Drs. Castle and Rasmussen, being within 1.2 and one point, respectively, of qualifying for total disability.
>
> Dr. Castle testified that he applies the regulatory criteria to determine total disability. Specifically, if the numerical criteria are not met, [c]laimant is not totally disabled. Dr. Castle does not appear to factor in the proximity of [c]laimant's arterial blood gas study results to meeting the criteria. Dr. Rasmussen concluded that [c]laimant's arterial blood gas study

> results should be equated with total disability. I find Dr. Rasmussen's conclusion reasonable in light of the heavy and very heavy exertional requirements of [c]laimant's usual coal mine job. . . .
>
> Dr. Crisalli's report indicated that he was aware of the exertional requirements of [c]laimant's usual coal mine job. However, Dr. Crisalli simply concluded that [c]laimant could do that job with no specific discussion as to why the abnormalities he detected would not have affected [c]laimant's ability to perform heavy and very heavy labor. Dr. Crisalli did not conduct an exercise test.

Decision and Order at 9.

The administrative law judge may give less weight to a physician's opinion where the physician does not adequately account for the exertional requirements of a miner's usual coal mine job. *See Walker*, 927 F.2d at 183, 15 BLR at 2-22. Further, the administrative law judge may give more weight to a physician's opinion that he finds is based on a more thorough review of the evidence of record. *See Hall v. Director, OWCP*, 8 BLR 1-193, 1-195 (1985). Consequently, the administrative law judge acted within his discretion in crediting Dr. Rasmussen's opinion over the opinions of Drs. Castle and Crisalli. We therefore affirm his finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), as supported by substantial evidence.[8] *See Compton*, 211 F.3d at

[8] Employer additionally asserts that the administrative law judge failed to address the disagreement in medical opinions regarding whether exercise blood gas studies were contraindicated in light of claimant's prior strokes and current treatment with blood thinners. Employer's Brief at 4. However, employer has failed to brief, in terms of relevant law and evidence, how this clinical judgment call affects the validity of the medical opinions of record, or how the administrative law judge's failure to make such a finding constitutes error. Therefore, the Board declines to review the administrative law judge's findings on this basis. *See Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

211, 22 BLR at 2-175. We additionally affirm the administrative law judge's findings, in weighing all the contrary, probative evidence together, that claimant established total disability pursuant to 20 C.F.R. §718.204(b), and a change in applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Further, as employer has not challenged the administrative law judge's finding that claimant established that his total disability is due to pneumoconiosis at 20 C.F.R. §718.204(c), we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge