BRB No. 11-0186 BLA

MICHAEL MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ROCKSPRING DEVELOPMENT, INCORPORATED	)	DATE ISSUED: 11/18/2011
	)	
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 Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (09-BLA-5422) of Administrative Law Judge Larry S. Merck denying benefits on a subsequent claim filed 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).[1] The administrative law judge accepted the parties'

[1] Claimant filed his first claim on April 26, 2004. Director's Exhibit 1. It was finally denied by a claims examiner on January 7, 2005, because claimant did not establish any of the elements of entitlement. *Id*. Claimant filed this claim on April 17,

stipulation to twenty-two years of coal mine employment, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, although the administrative law judge found that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), he found that the evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2)-(4) or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence did not establish total disability pursuant to 20 C.F.R. § 718.204(b)(2)(i)-(iv).[2] Further, the administrative law judge found that the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was not applicable in this case because the evidence did not establish total respiratory disability. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii) and (iv) and, thus, that he erred in finding that the presumption at Section 411(c)(4) of the Act was not applicable in this case. Claimant also contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate 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,

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2008. Director's Exhibit 3.

[2] The administrative law judge found that the issue of disability causation was moot because claimant failed to establish total respiratory disability.

[3] Because the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), that the x-ray evidence established the existence of clinical pneumoconiosis on the merits pursuant to 20 C.F.R. §718.202(a)(1), and that the evidence did not establish total disability on the merits pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iii) are not challenged on appeal, we affirm these findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

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. In pertinent part, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is 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. *See* 30 U.S.C. §921(c)(4), as amended by Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556(a) (2010).

Claimant initially contends that the administrative law judge erred in finding that the arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge considered the previously submitted arterial blood gas study dated June 3, 2004, as well as the newly submitted arterial blood gas studies dated May 21, 2008, October 1, 2008, and June 9, 2009. The June 3, 2004 study that was conducted by Dr. Mettu yielded non-qualifying[5] values both at rest and during exercise. Director's Exhibit 1. The May 21, 2008 study that was conducted by Dr. Rasmussen yielded non-qualifying values at rest, but qualifying values during exercise. Director's Exhibit 12. The October 1, 2008 study that was conducted by Dr. Zaldivar yielded non-qualifying values both at rest and during exercise. Employer's Exhibit 1. Lastly, the June 9, 2009 study that was conducted by Dr. Crisalli yielded non-qualifying values at rest. Employer's Exhibit 5. The administrative law judge gave the greatest weight to the latest arterial blood gas studies that yielded non-qualifying values.

[4] The record indicates that claimant's last coal mine employment was in West Virginia. Director's Exhibits 1, 4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[5] A "qualifying" blood gas study yields values that are equal to or less than the applicable table values in Appendix C of Part 718. A "non-qualifying" study yields values exceeding those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

Hence, the administrative law judge found that the arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Claimant asserts that, because Dr. Zaldivar did not exercise claimant to the exertional level that Dr. Rasmussen had exercised him, "Dr. Zaldivar's exercising arterial blood gas study did not adequately address whether [claimant] has the pulmonary capacity to perform work at the heavy level of exertion." Claimant's Brief at 16. Claimant therefore argues that "the administrative law judge erred in considering whether Dr. Zaldivar's exercise arterial blood [gas] study properly addressed whether the claimant could work at the heavy level of exertion." *Id*. Claimant maintains that the exercise portion of the October 1, 2008 study conducted by Dr. Zaldivar is incomplete. We disagree. During a deposition dated November 3, 2009, Dr. Zaldivar stated that the exercise portion of the October 1, 2008 test was voluntary and "[claimant] told us that he wanted to stop, so we stopped where he wanted to." Employer's Exhibit 7 (Dr. Zaldivar's Depo. at 31). Further, Dr. Zaldivar observed that Dr. Rasmussen's results were obtained at "an extremely high level of exercise that goes into the very heavy – twenty-six ml. per kilogram per minute is very heavy labor." Employer's Exhibit 7 (Dr. Zaldivar's Depo. at 32). Dr. Zaldivar explained that the drop in PO2 in Dr. Rasmussen's study showed that, although "[claimant] would not be able to sustain that kind of activity for a long time," he could perform "moderate work" and "stints of heavy labor, very heavy labor" and "moderate to heavy labor on a regular basis." *Id*. As discussed *supra*, the administrative law judge considered the non-qualifying values of the October 1, 2008 arterial blood gas study conducted by Dr. Zaldivar at Section 718.204(b)(2)(ii). Further, in considering Dr. Zaldivar's disability opinion at Section 718.204(b)(2)(iv), the administrative law judge stated that "Dr. Zaldivar further explains in his deposition that 'according to the blood gases and breathing tests,' including the test by Dr. Rasmussen which showed an abnormal drop in PO2, that [c]laimant could do 'moderate to heavy labor on a regular basis' and 'stints of heavy labor, very heavy labor.'" Decision and Order at 14. 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). As substantial evidence supports the administrative law judge's credibility determinations regarding the May 21, 2008 study conducted by Dr. Rasmussen and the October 1, 2008 study conducted by Dr. Zaldivar, we reject claimant's assertion that the administrative law judge should have excluded the non-qualifying values yielded during the exercise portion of the October 1, 2008 study conducted by Dr. Zaldivar.

Claimant also asserts that the administrative law judge should have given dispositive weight to the May 1, 2008 study conducted by Dr. Rasmussen because it yielded the only qualifying values during exercise. Contrary to claimant's assertion, an administrative law judge is not required to accord greater weight to arterial blood gas

study values yielded during exercise than to arterial blood gas study values yielded at rest. *Sturnick v. Consolidation Coal Co.*, 2 BLR 1-972, 1-976-77 (1980). Rather, an administrative law judge must weigh arterial blood gas study values yielded at rest and during exercise together, and explain his reason for crediting one study over another. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). In this case, the administrative law judge considered all the arterial blood gas study values of record, both at rest and during exercise. The administrative law judge also noted that the June 9, 2009 arterial blood gas study did not include values that were produced during exercise, as "[c]laimant had recently completed exercise studies and he had a cast on his right upper arm." Decision and Order at 9. Nevertheless, the administrative law judge properly gave greater weight to the non-qualifying at rest values of the June 9, 2009 arterial blood gas study because he found that it was more indicative of claimant's current condition, as it was the most recent study of record. *Schetroma v. Director, OWCO*, 18 BLR 1-19, 1-22 (1993); *see also Roberts v. West Virginia C.W.P. Fund*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Coffey v. Director, OWCP*, 5 BLR 1-404 (1982). Thus, we reject claimant's assertion that the administrative law judge should have given dispositive weight to the May 1, 2008 study conducted by Dr. Rasmussen because it yielded the only qualifying values during exercise.

Claimant further asserts that the administrative law judge erred in giving greater weight to the October 1, 2008 arterial blood gas study conducted by Dr. Zaldivar due to its recency. Specifically, claimant argues that "[t]he administrative law judge did not address why Dr. Zaldivar's study, performed only four months and ten days after Dr. Rasmussen's study[,] would be entitled to greater weight due to the study being more recent." Claimant's Brief at 15. While an administrative law judge may credit the most recent arterial blood gas study of record, *Schetroma*, 18 BLR at 1-22, he, nevertheless, must provide more of an explanation for his finding that the later study is more credible, where the studies are only separated by a short period of time. *Wojtowicz*, 12 BLR at 1-165. In this case, the administrative law judge stated, "in weighing all the submitted evidence together, I give the most weight to the latest [arterial bloody gas studies] which I find to be more indicative of [c]laimant's current arterial blood gas condition." Decision and Order at 9. However, the administrative law judge did not explain why the October 1, 2008 study conducted by Dr. Zaldivar was more credible than the May 21, 2008 study conducted by Dr. Rasmussen. *Wojtowicz*, 12 BLR at 1-165. Nevertheless, because the administrative law judge properly gave greater weight to the non-qualifying at rest values of the June 9, 2009 arterial blood gas study, because he found that it was more indicative of claimant's current condition, *Schetroma*, 18 BLR at 1-22, we hold that any error by the administrative law judge in according greater weight to the October 1, 2008 study conducted by Dr. Zaldivar than to the May 21, 2008 study conducted by Dr. Rasmussen is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii).

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the opinions of Drs. Mettu, Rasmussen, Zaldivar and Crisalli.[6] Dr. Mettu opined that claimant has a moderate pulmonary impairment. Claimant's Exhibit 1. Dr. Rasmussen opined that claimant has a disabling chronic lung disease.[7] Director's Exhibit 12. By contrast, Dr. Zaldivar opined that, from a pulmonary standpoint, claimant is fully capable of performing his usual coal mine employment or work requiring similar effort.[8] Employer's Exhibit 1. Similarly, Dr. Crisalli opined that, from the standpoint of a pulmonary functional impairment, claimant is not totally disabled from performing his usual coal mine job.[9] Employer's Exhibit 5. The administrative law judge gave little probative weight to Dr. Mettu's opinion because he found that "Dr. Mettu did not give an opinion, however, if this 'moderate' impairment would prevent [c]laimant from performing his last coal mine job of one year's duration."[10] Decision and Order at 10. Conversely, the administrative law judge gave full weight to the opinions of Drs. Rasmussen, Zaldivar, and Crisalli because he found that they are well-reasoned and well-documented. Nonetheless, the administrative law judge gave the most weight to the opinions of Drs. Zaldivar and

[6] The administrative law judge also considered treatment records dated from July 29, 2003 to April 2, 2008. Employer's Exhibits 2, 3. The administrative law judge gave little probative weight to the treatment records because they did not contain a reasoned and documented disability opinion. Decision and Order at 17. No party contests the administrative law judge's weighing of the treatment records.

[7] Dr. Rasmussen opined that claimant's pulmonary impairment prevents him from performing his current or last coal mine job of one year's duration. Director's Exhibit 12.

[8] Dr. Zaldivar opined that claimant does not have a totally disabling pulmonary impairment that would prevent him from performing his most recent coal mine employment regardless of cause. Employer's Exhibit 7 (Dr. Zaldivar's Depo. at 38).

[9] Dr. Crisalli opined that claimant has a mild pulmonary functional impairment that would not prevent him from performing his usual coal mine job. Employer's Exhibit 5.

[10] No party contests the administrative law judge's weighing of Dr. Mettu's opinion.

Crisalli because he found that, in addition to being well-reasoned and well-documented, they are better supported by the objective medical evidence of record. Hence, the administrative law judge found that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Claimant asserts that the administrative law judge erred in finding that Dr. Rasmussen's opinion was outweighed by the contrary opinions of Drs. Zaldivar and Crisalli. Contrary to claimant's assertion, the administrative law judge properly gave greater weight to the opinions of Drs. Zaldivar and Crisalli than to Dr. Rasmussen's contrary opinion because he found that "[they] are better supported by the objective medical evidence in the record as all the [pulmonary function studies] in the record are non-qualifying and all but one of the [arterial blood gas studies] are non-qualifying." Decision and Order at 17; *see Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Lane v. Union Carbide Corp*., 105 F.3d 166, 171, 21 BLR 2-34, 2-44 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Thus, we reject claimant's assertion that the administrative law judge erred in finding that Dr. Rasmussen's opinion was outweighed by the contrary opinions of Drs. Zaldivar and Crisalli.

Claimant also asserts that the administrative law judge erred in failing to compare the qualifications of Drs. Rasmussen, Zaldivar, and Crisalli. Specifically, claimant argues that the administrative law judge should have given greater weight to Dr. Rasmussen's opinion because of the doctor's extensive experience. Contrary to claimant's assertion, while an administrative law judge may accord more weight to a physician's opinion based on that physician's superior qualifications, *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), he is not required to so find, *Clark*, 12 BLR at 1-154. In this case, the administrative law judge acknowledged that Dr. Rasmussen is Board-certified in internal medicine and "a Senior Disability Analyst." Decision and Order at 11. The administrative law judge also acknowledged that Drs. Zaldivar and Crisalli are Board-certified in internal and pulmonary medicine. *Id*. at 12, 14. Nevertheless, the administrative law judge properly gave greater weight to the opinions of Drs. Zaldivar and Crisalli than to Dr. Rasmussen's contrary opinion because he found that they are better supported by the objective medical evidence of record. *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *Lane*, 105 F.3d at 171, 21 BLR at 2-44; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47. Thus, we reject claimant's assertion that the administrative law judge should have given greater weight to Dr. Rasmussen's opinion because of the doctor's superior qualifications. The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *Anderson*, 12 BLR at 1-113; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).

Furthermore, because the administrative law judge properly found that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b), we also affirm the administrative law judge's finding that the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was not applicable in this case.

In light of our affirmance of the administrative law judge's findings that the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), was not applicable in this case and that the evidence did not establish total respiratory disability at 20 C.F.R. §718.204(b),[11] an essential element of entitlement under 20 C.F.R. Part 718, we affirm the administrative law judge's denial of benefits. *Anderson*, 12 BLR at 1-112.

[11] In view of our disposition of the case at 20 C.F.R. §718.204(b), we need not address claimant's contentions regarding the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

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