BRB No. 08-0146 BLA

J.L.S.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	DATE ISSUED: 10/24/2008
	)	
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 - Denial of Benefits, the Decision and Order - Denial of Reconsideration Request, and the Decision and Order - Denial of Second Reconsideration Request of Richard Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

John Cline, Piney View, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits, the Decision and Order - Denial of Reconsideration Request, and the Decision and Order - Denial of Second Reconsideration Request (2005-BLA-6270) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act, as amended, 30 U.S.C. §901 *et seq*. (the Act). The administrative law judge credited claimant with at least thirty-one years of qualifying coal mine employment, as stipulated by the parties, and adjudicated this claim,

filed on September 28, 2004, pursuant to the regulatory provisions at 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), but insufficient to establish total respiratory disability under 20 C.F.R. §718.204(b)(2). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's evaluation of the blood gas study evidence and the medical opinion evidence at Section 718.204(b)(2)(ii), (iv), and his determination that claimant failed to establish total disability. Employer responds, urging affirmance of the denial of benefits. Should the Board choose not to affirm the denial of benefits, employer challenges the administrative law judge's finding of pneumoconiosis at Section 718.202(a)(1), and employer additionally asserts that the Board lacks appellate jurisdiction herein because claimant's appeal was untimely filed. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a response.

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.[1] 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).

We first address employer's jurisdictional challenge. The record reflects that claimant filed two requests for reconsideration of the administrative law judge's Decision and Order issued on June 1, 2007. The administrative law judge denied the first motion for reconsideration on August 15, 2007, after reviewing claimant's assertions at length, further explaining his findings, and correcting an inaccuracy. Subsequently, claimant filed a second request for reconsideration on September 9, 2007. The administrative law judge denied the request on September 17, 2007, briefly addressing claimant's assertion that the medical opinions should have been weighed differently, and reiterating his conclusions from the first denial of reconsideration. Thereafter, claimant filed a Notice of Appeal with the Board on October 13, 2007.

Employer asserts that "[claimant's] second request for reconsideration did not toll the time limit to file an appeal, and the Board does not have jurisdiction to hear this untimely appeal." Employer's Response Brief at 11. Specifically, employer argues that under 20 C.F.R. §802.205, claimant was required to file an appeal with the Board within thirty days of the denial of his first motion for reconsideration, and that his second motion

[1] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant was employed in the coal mining industry in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 4; Hearing Transcript at 53.

for reconsideration did not toll the time for appeal under 20 C.F.R. §802.206(a), which authorizes only "a" timely motion for reconsideration. Citing *Midland Coal Co. v. Director, OWCP* [*Luman*], 149 F.3d 558, 21 BLR 2-451 (7th Cir. 1998); *Peabody Coal Co. v. Abner*, 118 F.3d 1106, 21 BLR 2-154 (6th Cir. 1997); and *Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999), employer argues that a second motion for reconsideration does not toll the time period for filing an appeal of an agency action to the circuit court. Employer submits that the reasoning in *Abner* and *Luman* applies to appeals from administrative law judges' decisions. Employer's Response Brief at 13.

Employer's jurisdictional challenge is without merit. The Board has previously determined that the holdings in *Luman* and *Stanley* do not apply to appeals of administrative law judges' decisions to the Board, as these cases address the requirements for invoking the jurisdiction of the United States Courts of Appeals rather than internal administrative appeals within an agency. *See Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007). Instead, in the context of appeals of administrative law judge decisions, the Board analogized the situation to the court's holding in *Jones v. Illinois Central Gulf Railroad*, 846 F.2d 1099, 11 BLR 2-150 (7th Cir. 1988), that the time allowed for a motion for reconsideration, pursuant to Section 802.206, does not conflict with the thirty-day appeal period specified at Section 21 of the Act, 33 U.S.C. §921.[2] Observing that *Jones* did not address a second motion for reconsideration, the Board noted:

> As only final decisions of the administrative law judge may be appealed to the Board, the court stated that it is "reasonable to refrain from characterizing the original order of the ALJ as his/her final action, and therefore a proper subject for BRB review, until the motion for reconsideration has been disposed of by the ALJ." (citation omitted). Thus, provided the parties' motions are timely, there could be no limit on the number of times they may request reconsideration from the administrative law judge. If the administrative law judge grants the motions and reconsiders the issues, then his decisions may be amended and are not final.

Tucker, 41 BRBS at 67, citing *Jones*, 846 F.2d at 1102, 11 BLR at 2-155. Moreover, the instant case is factually on point with *Tucker*, since the administrative law judge "granted the first motion for reconsideration in part and reconsidered an issue raised....[t]hereafter, he denied the second motion in its entirety." *Tucker*, 41 BRBS at 68. In such a circumstance, the Board held, "the time for filing an appeal to the Board was tolled until after the administrative law judge filed his decision denying employer's second motion

[2] Notably, *Tucker v. Thames Valley Steel*, 41 BRBS 62 (2007), was filed under the Longshore and Harbor Worker's Compensation Act; therefore a ten-day period for filing a motion for reconsideration applies, while a thirty-day period is specified for black lung cases. 20 C.F.R. §802.206(b)(1), (2).

for reconsideration." *Id*. Finally, because claimant filed his appeal twenty-six days after the issuance of the administrative law judge's final decision denying the second motion for reconsideration, this appeal is timely.

Turning to the merits, in order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of 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; *Scott v. Mason Coal Co.*, 289 F.3d 263, 268, 22 BLR 2-372, 2-382 (4th Cir. 2002). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Claimant first argues that the administrative law judge improperly discounted Dr. Ramussen's opinion of total disability, including his evaluation of the March 2006 blood gas study, because it did not produce qualifying values.[3] Claimant contends that the test results "exhibited a significant decline in gas exchange with exercise on all three arterial blood gas studies," and that these results established that his impairment prevents him from performing his usual coal mine work.[4] Petition for Review at 8. Accordingly, claimant submits: "Dr. Rasmussen specifically addressed the claimant's inability to perform his usual coal mine work, and his opinion is not 'unreasoned' simply because the miner's decline in gas exchange with exercise did not reach a level set forth in Appendix C that would create a *presumption* of disability." *Id*.

It is uncontested that the blood gas studies failed to produce qualifying results under Section 718.204(b)(2)(ii). Decision and Order at 10; Claimant's Brief at 6. However, in further evaluating the evidence of total disability, the administrative law judge recited Dr. Rasmussen's determination that claimant lacks "the pulmonary capacity to perform heavy or very heavy manual labor based on his January 12, 2005 blood gas study." Decision and Order at 22. In his initial Decision and Order, the administrative

[3] A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set forth in the tables appearing at Appendix C to 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[4] The administrative law judge found that claimant's usual coal mine work was his position as an underground foreman from 1973 to 1999, rather than his aboveground foreman job when he ceased coal mine employment in 2004. Decision and Order at 20. The administrative law judge specified: "this job involved supervisory work of the coal extraction process, as well as helping with actual mining tasks as needed. [Claimant] supplied roof-bolters with materials, operated machinery, lifted 50 pound bags of rock dust, hung the dust control curtain, and loaded and unloaded roof-bolts, plates, cinderblocks and cement;" the work required "very heavy labor." Decision and Order at 20-21.

law judge found that Dr. Rasmussen's opinion was inadequately reasoned because the physician failed to account for improved results from the March 2006 blood gas studies. On reconsideration, however, the administrative law judge corrected his statement, thus:

> It is clear that Dr. Rasmussen *did* discuss the March 2006 arterial blood gas study results in his medical opinion. The statement in the Decision and Order that Dr. Rasmussen did not provide an assessment of the 2006 results was incorrect. Nevertheless, I still conclude that Dr. Rasmussen failed to adequately integrate the findings from the March 2006 blood gas study into his opinion.

Decision and Order – Denial of Reconsideration Request at 3. The administrative law judge explained further that he nonetheless found Dr. Rasmussen's opinion to be unreasoned based on two "reasoning defects." *Id*. First, he found that Dr. Rasmussen "failed to address the fact that, even though [claimant's] oxygenation levels dropped with exercise, the reduced O2 level remained well above the total disability qualifying level of 61." *Id*. Next, Dr. Rasmussen failed to discuss how improved results from March 2006 were consistent with the irreversible disease of pneumoconiosis. Accordingly, the administrative law judge again found Dr. Rasmussen's total disability assessment entitled to little probative weight. *Id*.

In this connection, claimant argues that the administrative law judge improperly rejected Dr. Rasmussen's opinion that claimant's oxygen consumption "is significantly less that that required of his last regular coal mine job, which required oxygen consumptions of at least 25-30 ml/kg/min." Claimant's Petition for Review at 8; Claimant's Exhibit 15 at 1. However, the administrative law judge accepted Dr. Zaldivar's contrary opinion that the 2006 blood gas study was "normal in terms of showing [claimant] had the respiratory capacity to engage in heavy manual labor," and his conclusion that claimant has the pulmonary capacity to perform his last coal mine work. Decision and Order at 15; Decision and Order – Denial of Reconsideration Request at 3; Employer's Exhibit 10 at 34-35. Specifically, Dr. Zaldivar's adjustment of the blood gas study results based on claimant's weight resulted in a value of 25cc/kg/min, which Dr. Zaldivar stated "is equivalent to being able to perform very heavy labor." Employer's Exhibit 5 at 8. Additionally, Dr. Zaldivar explained that the drop in oxygen upon exercise showed that claimant has an "impairment to oxygen transfer, but it is not sufficient to disable him from his usual coal mine work." *See* Employer's Exhibit 10 at 15-17, 26-27, 29, 33-34. Dr. Zaldivar interpreted the March 8, 2006 blood gas study as demonstrating "minimal abnormality" and "overall normal exercise capacity even at the excessive weight that he carries."[5] Employer's Exhibit 6.

[5] Dr. Zaldivar noted claimant's weight of 271 pounds, stating that his ideal weight would be 166 pounds. Employer's Exhibit 11 at 40-41.

Further, contrary to claimant's assertion, the administrative law judge did not reject Dr. Rasmussen's opinion on total disability solely because the March 2006 blood gas study results were non-qualifying. A review of the original Decision and Order and the two subsequent decisions on reconsideration reflect that the administrative law judge provided lengthy summaries of the evaluations by Drs. Rasmussen and Zaldivar of the blood gas study results. Decision and Order at 12-16, 22. In this connection, the administrative law judge noted that:

> Dr. Zaldivar initially identified a moderate exercise limitation in 2005, but upon subsequent testing in 2006 noted that the limitation resolved or was resolving. Dr. Zaldivar concluded that the improved test results showed that [claimant's] once significant exercise hypoxemia was no longer present. Dr. Zaldivar also explained that although oxygen still dropped with exercise in 2006, [claimant's] oxygen consumption is equivalent to being able to perform very heavy manual labor.

Decision and Order at 22. The record therefore fails to support claimant's assertion that the administrative law judge believed himself bound by the regulatory table values in evaluating the medical opinions on total disability.[6] Rather, the administrative law judge accurately found the objective testing of record failed to establish total disability by means of pulmonary function studies or blood gas studies. *See* Decision and Order at 20; 20 C.F.R. §718.204(b)(2)(i), (ii). Based on his evaluation of the relevant medical opinion evidence, he permissibly concluded that Dr. Rasmussen's opinion lacked probative value for failure to explain how the test results, specifically the values obtained from exercise, supported his diagnosis of total disability. *Milburn Colliery Co. v. Director, OWCP* [*Hicks*], 138 F.3d 524, 534, 21 BLR 2-323, 2-336 (4th Cir. 1998).

Further, claimant asserts that because Appendix C of Part 718 does not adjust for weight, Dr. Zaldivar's consideration of that factor when evaluating the blood gas studies was improper. *See* Employer's Exhibit 11 at 26-33. However, as physicians may properly account for weight as a factor in evaluating blood gas study results, claimant's assertion is without merit. *See Hicks*, 138 F.3d at 534, 21 BLR at 2-336; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Ramey v. Kentland Elkhorn Coal Corp.*, 755 F.2d 485, 7 BLR 1-124 (4th Cir. 1985); *Vivian v. Director, OWCP*, 7 BLR 1-360 (1984).[7]

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[6] Dr. Tuteur also provided a medical assessment opining that claimant is not totally disabled; the administrative law judge found it documented but not fully reasoned, and gave it reduced probative weight. Decision and Order at 18.

[7] Claimant's objection that the administrative law judge did not consider the effect of the length of the exercise periods on the results of the various blood gas studies is equally without merit. Claimant fails to identify any medical evidence in support of his

Finally, claimant asserts that Dr. Zaldivar's medical opinion included only a generic description of claimant's work duties, and failed to assess the exertional requirements of claimant's usual coal mine work. We disagree. Dr. Zaldivar, who based his medical opinion of March 21, 2006, on his two examinations of claimant and a review of the medical evidence, including the pulmonary evaluation performed by Dr. Rasmussen, *see* Director's Exhibit 12, described claimant's job as: "general inside laborer…classified as heavy work requiring lifting 50 to 100 pounds occasionally." Employer's Exhibits 5-6. Dr. Zaldivar added:

> On 9-24-04 he detailed his work history as supervising and involving hands-on labor such as belt-cleaning, roller changes, belt splicing and rock dusting. He also has done bulldozer work and inspect [*sic*] for methane. He crawled 50 feet, he had to lift 50 pounds and carry 50 pounds often.

Employer's Exhibit 5. Accordingly, in concluding that claimant's impairment does not prevent him from performing the "heavy labor" required in his usual underground coal mine work, Dr. Zaldivar accurately described claimant's job duties, and his opinion was permissibly credited. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991). Further, where a physician diagnoses a minimal respiratory impairment with a retained capacity for the described coal mine work, an administrative law judge is not required to specifically compare the miner's exertional capabilities with his usual coal mine work requirements. *Budash v. BethEnergy Mining Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

In sum, Dr. Rasmussen's opinion as to the significance of the blood gas study results differed from that of Dr. Zaldivar, whose opinion was found to be both reasoned and documented. The administrative law judge rationally resolved this evidentiary conflict in favor of Dr. Zaldivar's opinion, which he characterized as the most inclusive and persuasive. Further, while assigning diminished probative weight to the other medical opinions of record, the administrative law judge concluded that Dr. Zaldivar's opinion "integrates all aspects of the medical and work requirement evidence" and demonstrates that claimant is not disabled from performing his underground coal mine work.[8] *See* Decision and Order at 22; Decision and Order - Denial of Reconsideration Request at 3.

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argument that values from the 2006 blood gas test "may have been different" because the exercise period was shorter. Claimant's Brief at 11. Further, the administrative law judge is not empowered to interpret medical test results, and his findings must be based solely on the evidence of record. *White v. New White Coal Co.*, 23 BLR 1-1, 1-7 n.8 (2004).

[8] Dr. Zaldivar opined that the blood gas studies demonstrated that claimant can perform heavy labor from a cardiopulmonary standpoint, adding that if claimant "was

As fact-finder, the administrative law judge is charged with evaluating the probative value of the medical evidence, and must consider the medical opinions for and against a finding of total disability, in light of each physician's explanation of how the objective testing of record supports his conclusion on the issue of total disability. *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195, 1-197-98 (1986), *aff'd on recon*., 9 BLR 1-236 (1987)(*en banc*). Moreover, as the administrative law judge may validly credit more recent testing, his determination that Dr. Rasmussen's opinion failed to account for the later improved blood gas test results is rational. *See Hicks*, 138 F.3d 524, 21 BLR 2-323; *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987).[9] Finally, we note the administrative law judge's conclusion that even if Dr. Rasmussen's opinion were credited, the medical evidence on the issue of total disability would nevertheless have been in equipoise, and the claim denied. *See generally G.L.S. v. Mountaineer Coal Development Co*., BRB No. 07-0659 BLA (Apr. 29, 2008)(unpub), *aff'd* Sept. 15, 2008 (4th Cir.)(unpub.); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4, 1-6 (1986)(*en banc*). Accordingly, claimant's urging of Dr. Rasmussen's opinion as supportive of his claim is insufficient to establish that the administrative law judge's evaluation of the medical opinion evidence was erroneous. *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 1-46 (6th Cir. 1986).

Our review, therefore, indicates that the administrative law judge's finding that total disability was not established, based on the opinion of Dr. Zaldivar, in conjunction with the non-qualifying pulmonary function and blood gas study evidence, constitutes a valid exercise of his discretion in resolving evidentiary conflicts. *Shedlock*, 9 BLR at 1-195; *King v. Consolidation Coal Co*., 8 BLR 1-262, 1-265 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); *Fuller v. Gibraltar Coal Corp*., 6 BLR 1-1291, 1-1294 (1984). Because the administrative law judge need not accept any particular medical opinion or construction of the medical evidence, *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997), but must weigh conflicting medical opinions with the medical evidence of record and draw his own conclusions, claimant's objections are without merit. *See Lane*, 105 F.3d 166, 21 BLR 2-

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100 pounds lighter, he would consume more oxygen and be able to exercise more." Decision and Order at 16.

[9] The administrative law judge also found that Dr. Rasmussen failed to explain how claimant's "improved" 2006 blood gas study results were consistent with the irreversible disease of pneumoconiosis. An administrative law judge may permissibly accord diminished weight to an opinion which fails to adequately account for the lessening of the degree of impairment previously demonstrated by testing values. *See generally Fields v. Island Creek Coal Co*., 10 BLR 1-19 (1981); *Hall v. Director, OWCP*, 8 BLR 1-19 (1985).

34. Consequently, we affirm the administrative law judge's findings pursuant to Section 718.204(b)(2), as supported by substantial evidence, and affirm his denial of benefits.[10]

Accordingly, the administrative law judge's Decision and Order - Denial of Benefits, his Decision and Order - Denial of Reconsideration Request, and his Decision and Order - Denial of Second Reconsideration Request are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[10] In view of our disposition herein, we need not address employer's arguments on the issue of the existence of pneumoconiosis.