BRB Nos. 12-0022 BLA
and 12-0022 BLA-A

HERMAN DOTSON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
BLACKFIELD COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
KENTUCKY COAL PRODUCERS SELF-INSURANCE FUND	)	DATE ISSUED: 10/12/2012
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 in a Subsequent Claim of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center), Whitesburg, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order – Denial of Benefits in a Subsequent Claim (2009-BLA-5902) of Administrative Law Judge Joseph E. Kane. The claim was filed on November 25, 2008, 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). The administrative law judge credited claimant with 16.74 years of underground coal mine employment and found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309,[1] by establishing the existence of clinical pneumoconiosis based on the new x-ray evidence.[2] Turning to the merits, however, the administrative law judge found that claimant failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2),[3] and was not, therefore, entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.[4] 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

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[1] Claimant filed his first claim for benefits on August 20, 1990, after leaving coal mine employment in 1989 due to a back injury. That claim was denied by the district director on February 1, 1991, because claimant failed to establish any element of entitlement. *See* Claimant's Exhibit 1. No further action was taken on the claim and it was administratively closed. Decision and Order at 2.

[2] The administrative law judge found that the existence of legal pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(4). Decision and Order at 19.

[3] The administrative law judge also found that the existence of clinical pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a)(1), based on all of the evidence of record, and that employer failed to rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Decision and Order at 19-20.

[4] 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, Pub. L. No. 111-148, §1556(a)(2010).

On appeal, claimant contends that the administrative law judge erred in finding that the existence of legal pneumoconiosis was not established. Claimant also contends that the administrative law judge erred in finding that the blood gas study and medical opinion evidence did not establish a totally disabling respiratory impairment pursuant to Section 718.204(b) and, therefore, erred in failing to consider the claim pursuant to Section 411(c)(4). In response, employer contends that the administrative law judge's denial of benefits should be affirmed, as the administrative law judge properly found that total respiratory disability was not established and that claimant was not, therefore, entitled to invocation of the Section 411(c)(4) presumption. Employer additionally asserts that the administrative law judge properly found that the existence of legal pneumoconiosis was not established. The Director, Office of Workers' Compensation Programs (the Director), has not responded to claimant's appeal.

On cross-appeal, employer asserts that the administrative law judge erred in finding that 16.74 years of underground coal mine employment were established, instead of the 14 years found by the district director.[5] Employer also asserts that the administrative law judge erred in finding the existence of clinical pneumoconiosis established by x-ray evidence and erred, therefore, in finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). In response, claimant contends that the administrative law judge's findings, regarding claimant's length of coal mine employment and that clinical pneumoconiosis was established, were proper. The Director has not responded to employer's cross-appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed.[6] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[5] Employer concedes, however, that any error made by the administrative law judge in finding fifteen or more years of underground coal mine employment would be harmless if the Board affirms the administrative law judge's finding that total respiratory disability was not established pursuant to Section 718.204(b)(2). The Section 411(c)(4) presumption of total disability due to pneumoconiosis can only be invoked if a totally disabling respiratory impairment is established. 30 U.S.C. §921(c)(4).

[6] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry 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)

In finding that total respiratory disability was not established pursuant to Section 718.204(b),[7] the administrative law judge found that, as none of the new pulmonary function studies were qualifying, they did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i). Turning to the new blood gas study evidence pursuant to Section 718.204(b)(2)(ii), the administrative law judge found that it failed to establish total respiratory disability, as only one of the studies, the study conducted on January 28, 2009, was qualifying, while the more recent February 11, 2009 and September 3, 2009 studies were non-qualifying. The administrative law judge further found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as claimant failed to submit evidence of cor pulmonale with right-sided congestive heart failure. Considering the new medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge found that, although Drs. Jarboe, Rasmussen and Westerfield provided "well-reasoned and well-documented" opinions,[8] the opinion of Dr. Jarboe was entitled to greater weight because it was "supported by more extensive documentation than either Dr. Rasmussen's or Dr. Westerfield's opinion." Decision and Order at 25. In particular, the administrative law judge found that "Dr. Jarboe relied upon not only his own medical report, but integrated the objective medical evidence contained in Dr. Westerfield's and Dr. Rasmussen's medical report when rendering his opinion on total disability." Decision and Order at 25. The administrative law judge, therefore, found that the medical opinion evidence failed to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Considering all of the evidence together pursuant to Section 718.204(b), the administrative law judge found that total respiratory disability was not established based on the more extensively documented opinion of Dr. Jarboe and the more recent non-qualifying pulmonary function and blood gas study evidence. *Id*.

[7] The administrative law judge considered the pulmonary function study, blood gas study, and medical opinion evidence submitted with claimant's 1990 claim, but properly accorded it little probative weight due to its "age." *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(en banc recon.)(McGranery, J., concurring and dissenting); Decision and Order at 21, 23, and 24.

[8] Drs. Jarboe and Westerfield both opined that claimant is not totally disabled from a pulmonary or respiratory standpoint. Employer's Exhibit 1; Director's Exhibit 15. In contrast, Dr. Rasmussen opined that claimant does not retain the pulmonary capacity to perform his regular coal mine employment. Director's Exhibit 13.

Claimant contends that the administrative law judge erred in finding that he failed to establish a totally disabling respiratory impairment pursuant to Section 718.204(b)(2)(ii), based on the blood gas study evidence. Specifically, claimant contends that the administrative law judge did not properly consider all of the evidence relevant to the validity and reliability of the blood gas studies. Claimant also contends that the administrative law judge erred in according greater weight to the two non-qualifying blood gas studies, because they were more recent, than to the single qualifying blood gas study.

Contrary to claimant's contention, the administrative law judge properly considered all of the evidence discussing the validity and reliability of the blood gas study evidence, including whether the studies were performed before or after exercise, in weighing them. *See Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985); Decision and Order at 21-23. The administrative law judge accepted that Dr. Rasmussen's January 28, 2009 study was qualifying, but nonetheless permissibly assigned greater weight to the more recent studies by Drs. Jarboe and Westerfield, which were non-qualifying. *See Schretoma v. Director, OWCP*, 18 BLR 1-19 (1993). Consequently, we affirm the administrative law judge's finding that the blood gas study evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(ii).

Next, claimant contends that the administrative law judge erred in crediting the opinion of Dr. Jarboe over the opinion of Dr. Rasmussen to find that the medical opinion evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). Contrary to claimant's argument, that Dr. Jarboe opined that he would find that claimant had a disabling respiratory impairment if Dr. Rasmussen's qualifying blood gas study was valid, the administrative law judge noted that Dr. Jarboe explained why he found that the qualifying results of Dr. Rasmussen's blood gas study were not valid or reliable[9] and "adhered to his finding that [c]laimant is not totally disabled during his deposition." Decision and Order at 24; Director's Exhibits 15-16. Further, the administrative law judge properly found that Dr. Jarboe's opinion, in addition to being based on his own physical examination and non-qualifying pulmonary function and blood gas studies, was also based on a review of the physical findings and objective test results of both Drs. Westerfield and Rasmussen. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 155 (1989)(en banc). The administrative law judge, therefore, permissibly found

[9] The administrative law judge noted that Dr. Jarboe explained that the blood gas study evidence "did not support the presence of a disabling impairment of respiration because 'Dr. Rasmussen's resting arterial oxygen tension is unexplainably and significantly lower than that recorded in my laboratory and that of Dr. Westerfield.'" Decision and Order at 24.

that Dr. Jarboe's opinion was better supported by the record than Dr. Rasmussen's contrary opinion. *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-400, 402 (1982). Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability pursuant to Section 718.204(b)(2)(iv).

As employer has not otherwise challenged the administrative law judge's finding that the evidence did not establish total respiratory disability pursuant to Section 718.204(b), that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, the administrative law judge properly found that total respiratory disability was not established pursuant to Section §718.204(b), based on his consideration of all of the relevant evidence of record. He, therefore, properly found that claimant was not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, 30 U.S.C. §921(c)(4), and that claimant did not establish entitlement pursuant to 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987). The administrative law judge's denial of benefits is, therefore, affirmed. In light of the foregoing, we need not consider claimant's other arguments on appeal or employer's arguments on cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, the administrative law judge's Decision and Order – Denial of Benefits in a Subsequent Claim 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