BRB No. 13-0016 BLA

WILLIAM J. PATTERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 09/17/2013
and	)	
	)	
CONSOL ENERGY, INCORPORATED	)	
	)	
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 of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denial of Benefits (08-BLA-5323) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim for benefits on June 8, 2006. Director's Exhibit 2.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 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 disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

The administrative law judge noted the parties' stipulation to at least eighteen years of coal mine employment,[1] and found that claimant worked for more than fifteen years in underground coal mine employment. The administrative law judge further found that the evidence did not establish that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, he found that claimant did not invoke the Section 411(c)(4) presumption. Turning to whether claimant could affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), but failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the pulmonary function study evidence and the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv), and therefore erred in finding that claimant did not invoke the Section 411(c)(4) presumption.[2] Claimant also contends that the administrative law judge erred in finding that the x-ray evidence, CT scan evidence, and medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1),(4). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this appeal.

[1] Claimant's last coal mine employment was in Illinois. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Claimant does not challenge the administrative law judge's findings that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Those findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Claimant first challenges the administrative law judge's analysis of the pulmonary function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). The record contains the results of five pulmonary function studies. The January 15, 1979 pulmonary function study yielded non-qualifying[3] values on both the pre-bronchodilator and post-bronchodilator portions of the study. Employer's Exhibit 12. The administrative law judge noted Dr. Houser's comment that the study included no tracings, and found that the January 15, 1979 pulmonary function study was non-conforming. Decision and Order at 8.

The April 5, 2006 pulmonary function study yielded non-qualifying values on both the pre-bronchodilator and post- bronchodilator portions of the study. Claimant's Exhibit 5; Employer's Exhibit 13. The administrative law judge noted Dr. Houser's comment that the study included only one tracing, but in another copy of this study, the administrative law judge found additional tracings, and considered Dr. Tuteur's opinion that this study was valid. The administrative law judge therefore concluded that the April 5, 2006 study was conforming and valid. Decision and Order at 8.

The August 30, 2006 pulmonary function study yielded qualifying values on the pre-bronchodilator portion of the study, and its post-bronchodilator values were non-qualifying. Director's Exhibit 13. The administrative law judge reviewed Dr. Repsher's invalidation report, Employer's Exhibit 18, and the validation reports of Drs. Gerblich, Cohen, Tuteur, and Houser. Director's Exhibit 13, Claimant's Exhibits 6, 10; Employer's Exhibit 19. Based on the preponderance of the physicians' opinions validating this study, the administrative law judge found that the August 30, 2006 pulmonary function study was valid. Decision and Order at 9.

The July 26, 2007 pulmonary function study yielded qualifying values on the pre-bronchodilator portion of the study, and the post-bronchodilator values were non-qualifying. Employer's Exhibits 5, 6. The administrative law judge considered Dr. Repsher's report invalidating the results of this study, Employer's Exhibit 18, and the reports of Drs. Cohen, Houser, and Tuteur, validating the study. Claimant's Exhibits 6,

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i).

10; Employer's Exhibit 19. Based on the preponderance of the reports validating the study, the administrative law judge found that the July 26, 2007 pulmonary function study was valid. Decision and Order at 9.

Finally, the April 30, 2009 pulmonary function study yielded non-qualifying values on both the pre-bronchodilator and post-bronchodilator portions of the study. Claimant's Exhibits 4, 9. The administrative law judge noted that Dr. Repsher deemed this study invalid, Employer's Exhibit 18, but also considered that Drs. Istanbouly and Tuteur opined that the study was valid. Claimant's Exhibits 4, 9; Employer's Exhibit 19. The administrative law judge found that the weight of the probative evidence established that the April 30, 2009 pulmonary function study was valid. Decision and Order at 9.

Based on the foregoing analysis of the pulmonary function studies, the administrative law judge found that the preponderance of the valid pulmonary function study evidence did not establish total disability:

> [S]etting aside the non-conforming January 15, 1979 evaluation, of the remaining eight conforming and valid pulmonary function tests, two evaluations reached the total disability thresholds, while six studies did not. Accordingly, the preponderance of the conforming and valid pulmonary function studies did not reach the thresholds necessary to establish total disability. As a result, [claimant] can not establish total disability under 20 C.F.R. §718.204(b)(2)(i).

Decision and Order at 9.

Claimant contends that the administrative law judge erred because "there were only four tests to consider, not eight," with mixed qualifying and non-qualifying results. Claimant's Brief at 6. Claimant further asserts that the administrative law judge erred by failing to evaluate the pulmonary function studies "chronologically." *Id*.

After review of claimant's arguments and the administrative law judge's evaluation of the pulmonary function study evidence, we affirm the administrative law judge's finding that the preponderance of the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Although the administrative law judge phrased his finding in terms of eight studies, rather than four studies with pre-bronchodilator and post-bronchodilator results, he ultimately had to consider all the contrary probative evidence, and thus, had to consider both the pre-bronchodilator and post-bronchodilator values of all four studies. *See* 30 U.S.C. §923(b); 20 C.F.R. §718.204(b)(2). On appeal, claimant has not explained how the administrative law judge's evaluation of the pulmonary function study evidence resulted in prejudice, or

how considering the evidence as four studies, each with two results, would have changed the outcome of the administrative law judge's analysis. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009). Further, we find no merit in claimant's argument that the administrative law judge erred by not evaluating the chronology of the studies, as claimant has not explained how an analysis of the chronology of the pulmonary function studies would affect the outcome of this case.[4] Therefore, we reject claimant's allegation of error, and affirm the administrative law judge's finding that the preponderance of the pulmonary function study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Claimant also challenges the administrative law judge's analysis of the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Vacca, Istanbouly, and Houser, that claimant is totally disabled from a respiratory standpoint, and the contrary opinions of Drs. Tuteur and Repsher, that claimant is able to perform his usual coal mine employment from a respiratory or pulmonary standpoint.[5]

The administrative law judge initially determined that claimant's last coal mine job as a scoop operator required heavy manual labor. Decision and Order at 10. He accorded diminished weight to Dr. Vacca's opinion because he found that it was insufficiently reasoned. The administrative law judge further found that the opinions of

[4] As employer notes, the most recent pulmonary function study evidence was non-qualifying. Claimant's Exhibits 4, 9.

[5] Dr. Vacca diagnosed a moderate impairment, and stated that claimant lacks the respiratory capacity to perform his last coal mine employment. Director's Exhibit 13 at 6. He explained that claimant could not perform his coal mine employment due to his exercise limitations "from SOB, age & weakness." Director's Exhibit 13 at 4. Dr. Istanbouly, claimant's treating physician, stated that claimant's pulmonary function study showed a moderately severe obstruction, and opined that claimant "would not be able to return to his last coal mining [j]ob as it is physical." Claimant's Exhibit 9. He concluded that claimant is totally disabled because of his lung disease. *Id*. Dr. Tuteur opined that claimant has a moderate pulmonary impairment, but that it "would not be expected for this degree of impairment to render him totally disabled from returning to work in the coal mines." Employer's Exhibit 10 at 6. Dr. Repsher opined that claimant has "no evidence of any pulmonary impairment, clearly from a respiratory point of view, he is fully fit to perform his usual coal mine work. . . ." Employer's Exhibit 6. Dr. Houser opined that claimant "has a disabling respiratory impairment which would prevent him from performing his last job as a coal miner, which required lifting 50 pounds and carrying it 20 feet several times per day." Claimant's Exhibit 10 at 5.

Drs. Istanbouly, Houser, and Tuteur were documented and reasoned.[6] The administrative law judge, however, determined that Dr. Tuteur's opinion was better documented and reasoned than those of Drs. Istanbouly and Houser, and he accorded it greater weight. Decision and Order at 12. The administrative law judge therefore found that the medical opinion evidence did not establish total disability.

We reject claimant's argument that the administrative law judge erred in discounting Dr. Vacca's opinion. The administrative law judge found that Dr. Vacca did not adequately explain his opinion that claimant lacks the respiratory capacity to perform his last coal mine employment, noting that Dr. Vacca's opinion diagnosing disability due to "SOB, age & weakness" was "ambiguous on whether [claimant] has a pulmonary impairment that is totally disabling separate and apart from other non-respiratory conditions." *Id.* The administrative law judge also found that Dr. Vacca "relied on [claimant's] shortness of breath complaint to establish total disability without discussing whether the underlying objective medical evidence supported a finding that [claimant's] shortness of breath was severe enough to preclude heav[y] lifting." *Id.* The determination of whether a medical opinion is adequately reasoned is committed to the discretion of the administrative law judge. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-409, 2-426 (7th Cir. 2002). We affirm the administrative law judge's permissible determination that Dr. Vacca's opinion merited less weight, as it was inadequately explained. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

We also reject claimant's assertion that the administrative law judge erred in according greater weight to Dr. Tuteur's opinion, that claimant is not totally disabled, than to the opinions of Drs. Istanbouly and Houser stating that he is totally disabled. As an initial matter, we reject claimant's contention that the administrative law judge erred in finding that Dr. Tuteur adequately understood that claimant's job required heavy labor. Decision and Order at 12. Admittedly, Dr. Tuteur's own description of claimant's job duties was not as specific as those provided by Drs. Houser and Istanbouly,[7] or by the

[6] The administrative law judge discounted Dr. Repsher's opinion that claimant is not totally disabled, because Dr. Repsher opined that all of the pulmonary function studies of record were invalid, contrary to the administrative law judge's findings, and thus did not consider their results in reaching his opinion. Decision and Order at 12.

[7] Dr. Tuteur described claimant's jobs as running a shuttle car, working as a roof bolter and operating a "uni-car," and he stated that in claimant's last seven years he worked as a scoop operator which involved mild to moderate exertion. Employer's

administrative law judge, who found that claimant's job required heavy manual labor.[8] However, the record reflects that Dr. Tuteur reviewed the reports of Drs. Houser and Istanbouly and, at his deposition, he was asked to address whether claimant had the pulmonary capacity to "perform heavy manual labor" such as "carry[ing] 60-pound bundles of bolts, as many as 20 in a setting," several times a day, job duties similar to claimant's loading duties that were summarized by the administrative law judge. Employer's Exhibit 19 at 67; Decision and Order at 10. Review of the record therefore discloses substantial evidence to support the administrative law judge's finding that Dr. Tuteur understood that claimant had to perform heavy manual labor in his last coal mine job. *See Killman v. Director, OWCP*, 415 F.3d 716, 23 BLR 2-250 (7th Cir. 2005).

Further, the administrative law judge provided valid reasons for according greater weight to Dr. Tuteur's opinion than to those of Drs. Houser and Istanbouly. The administrative law judge's finding that Dr. Tuteur relied upon a "much greater documentary foundation than [did] Dr. Istanbouly," Decision and Order at 13, is supported by substantial evidence. *See Clark*, 12 BLR at 1-155; *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Similarly, the administrative law judge permissibly found that Dr. Tuteur "presented a better reasoned opinion" than did Dr. Houser, because Dr. Tuteur "well integrated all aspects of the medical evidence in the record, including [claimant's] usual clinical presentation, moderate pulmonary obstruction, and normal

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Exhibit 10 at 2; Employer's Exhibit 17 at 1; Employer's Exhibit 19 at 66-68. At his deposition, Dr. Tuteur was asked:

> If in fact working on a roof bolter machine he had to carry 60-pound bundles of bolts, as many as 20 in a setting, and he would have to do that 3 times per day or more, would that be heavy manual labor that he might not be able to do now?

Id. at 67. Dr. Tuteur explained that from a pulmonary standpoint, claimant could perform such duties. *Id* . Additionally, Dr. Tuteur reviewed Dr. Houser's March 16, 2010 report, wherein Dr. Houser described claimant's last coal mine employment as lifting and carrying fifty pounds twenty feet, several times a day, Claimant's Exhibit 10, and Dr. Istanbouly's report of January 29, 2010, which described claimant's last coal mine employment as standing for eight to twelve hours each day, walking various distances, and lifting "fifty plus pounds" several times each day. Claimant's Exhibit 9.

[8] The administrative law judge noted that claimant's job included "lifting, loading, and unloading 60 to 70 pound bundles of roof bolts and roof plates, and 50 pound rock dust bags. He also periodically lifted a tow bar weighing between 80 and 100 pounds. . . ." Decision and Order at 4.

arterial blood gas studies, including the exercise evaluations," *Id.*, in reaching his opinion that claimant is not totally disabled.[9] *See Stalcup*, 477 F.3d at 484, 24 BLR at 2-37; *Stein*, 294 F.3d at 895, 22 BLR at 2-426.

The administrative law judge is charged with weighing the conflicting medical opinions and determining whether they are well-reasoned and well-documented. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 13 BLR 2-348 (7th Cir. 1990); *Lafferty v. Cannelton Indus., Inc.*, 12 BLR 1-190 (1989). The administrative law judge provided reasonable grounds for his weighing of the evidence, and his findings are supported by substantial evidence. *See Stein*, 294 F.3d at 895, 22 BLR at 2-426; *Clark*, 12 BLR at 1-155. Therefore, we affirm the administrative law judge's determination that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

In view of the foregoing, we affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Consequently, we also affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption. In addition, we affirm the administrative law judge's finding that claimant did not affirmatively establish entitlement pursuant to 20 C.F.R. Part 718, as he did not establish total disability, a necessary element of entitlement.[10] *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

[9] The administrative law judge found that Dr. Houser provided comparatively less explanation and analysis for his opinion that claimant is totally disabled. Decision and Order at 13.

[10] In view of our holdings, we need not address claimant's assertion that the administrative law judge erred in finding that the evidence did not establish the existence of clinical pneumoconiosis.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge