BRB No. 06-0896 BLA

J. R. M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CORBIN COAL COMPANY	)	
	)	DATE ISSUED: 08/16/2007
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 Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

J. Lawson Johnston (Dickie, McCamey & Chilcote, P.C.), Pittsburgh, Pennsylvania, for employer.

Rita Roppolo (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

Claimant appeals the Decision and Order Denying Benefits (06-BLA-5197) of Administrative Law Judge Linda S. Chapman on a subsequent claim[1] filed pursuant to

[1] Claimant filed his first application for benefits on October 23, 2001 and the district director finally denied this claim on August 8, 2003 based on claimant's failure 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 initially credited claimant with twenty-three years of qualifying coal mine employment. Adjudicating this subsequent claim pursuant to 20 C.F.R. Part 718, the administrative law judge found that the newly developed medical evidence was sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and therefore, claimant affirmatively established that one of the applicable conditions of entitlement had changed since the denial of his prior claim pursuant to 20 C.F.R. §725.309. Addressing the merits of entitlement, the administrative law judge found that while claimant established that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b), claimant failed to establish total disability at 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's determination that claimant failed to demonstrate total respiratory disability pursuant to Section 718.204(b)(2)(iv), arguing that the administrative law judge mischaracterized the medical report of Dr. Rasmussen. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a Motion to Remand, agreeing with claimant that the administrative law judge failed to discuss sufficiently Dr. Rasmussen's opinion with respect to the issue of total respiratory disability. In addition, the Director contends that the administrative law judge incorrectly found that none of the arterial blood gas studies of record produced qualifying values.[2] Consequently, the Director asserts that the case should be remanded to the administrative law judge for reconsideration under subsections (b)(2)(ii) and (iv).[3]

---

establish the existence of pneumoconiosis and total respiratory disability due to pneumoconiosis. Director's Exhibit 1. Claimant filed a subsequent application for benefits on November 3, 2004; this claim is the subject of this appeal. Director's Exhibit 3.

[2] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[3] We affirm the administrative law judge's determinations regarding length of coal mine employment and pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and 725.309 because these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3-4, 7-8.

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.[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).

The Director initially contends that the administrative law judge erred in finding that none of the blood gas studies of record produced qualifying values at Section 718.204(b)(2)(ii). We agree. The Director correctly notes that, in fact, both the February 10, 2005 and the June 29, 2005 blood gas studies produced qualifying values at rest. Director's Motion to Remand at 2; Director's Exhibit 11; Employer's Exhibit 1; *see* 20 C.F.R. §718.204(b)(2)(ii), Appendix C. Consequently, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(ii), and remand this case for the administrative law judge to weigh the conflicting arterial blood gas study evidence of record to determine whether it is sufficient to establish total respiratory disability.

Claimant and the Director also challenge the administrative law judge's finding that the medical opinion of Dr. Rasmussen is insufficient to establish total respiratory disability at Section 718.204(b)(2)(iv). Claimant argues that the administrative law judge mischaracterized Dr. Rasmussen's opinion as "vague and equivocal," *see* Decision and Order at 9, and asserts that the physician clearly and unequivocally opined that claimant suffered from disabling pneumoconiosis. Claimant's Memorandum of Law in Support of Petition for Review at 5-6; Director's Exhibit 11. The Director concurs, and maintains that the administrative law judge failed to adequately discuss Dr. Rasmussen's findings. Director's Motion to Remand at 2-3. The arguments of claimant and the Director have merit.

After reviewing Dr. Rasmussen's opinion, that claimant suffers from a disabling lung disease with moderate loss of lung function demonstrated by his reduced diffusing capacity and moderate impairment in oxygen transfer during light to moderate exercise, the administrative law judge concluded that the physician had "stopped short" of rendering an affirmative diagnosis that claimant suffers from a totally disabling respiratory impairment or that claimant does not have the respiratory capacity to perform his usual coal mine employment.[5] Decision and Order at 9; Director's Exhibit 11. The

[4] Because the miner last worked in West Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

[5] After conducting a complete pulmonary evaluation of claimant, including a physical examination, chest x-ray, pulmonary function study, arterial blood gas study, and electrocardiogram, Dr. Rasmussen specifically opined:

administrative law judge, however, did not discuss Dr. Rasmussen's observation that, during his incremental treadmill exercise test, claimant achieved a maximum oxygen intake of only 15.2 ml/kg/min but needed to achieve 20 to 25 ml/kg/min in order to perform his last regular coal mine work.[6] Director's Exhibit 11. As the administrative law judge did not explain why Dr. Rasmussen's observation did not demonstrate total respiratory disability, we vacate the administrative law judge's findings pursuant to Section 718.204(b)(2)(iv). *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990), *citing Black Diamond Coal Co. v. Benefits Review Board* [*Raines*], 758 F.2d 1532, 1534 (11th Cir. 1985) ("Physicians need not phrase their medical conclusions in terms of 'total disability' in order to establish a presumption sufficient to set out the physical impairments that rule out work."); *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986) (*en banc*). On remand, the administrative law judge must reassess Dr. Rasmussen's opinion and weigh it against the remaining medical opinions at Section 718.204(b)(2)(iv). The administrative law judge should then

---

> Overall, these studies indicate at least a moderate loss of lung function as reflected by his reduced diffusing capacity and his moderate impairment in oxygen transfer during light to moderate exercise. [Claimant] achieved a maximum oxygen uptake of 15.2 ml/kg/min., which is equivalent to no more than moderate exertion. This is much less exercise than would be required of his last regular coal mine job, which required at least 20-25 ml/kg/min. While his exercise blood gases do not quite meet the listings on CM-1159, they are within 2 mmHg, which is within the range of error of the analyzer. In addition, were he to exercise to a level consistent with his previous coal mine work, he would have shown considerably more impairment in oxygen transfer. . . . He has both clinical coal workers' pneumoconiosis and legal pneumoconiosis, which contributes [sic] significantly to his disabling lung disease.

Director's Exhibit 11.

[6] Employer asserts that the administrative law judge quoted Dr. Rasmussen accurately, and that the pulmonary function studies and blood gas studies performed at the request of Dr. Rasmussen did not meet the requirements for entitlement. Contrary to employer's arguments, however, the resting blood gas study values obtained by Dr. Rasmussen are qualifying, and the physician indicated that the exercise values were close to qualifying and would have demonstrated considerably more impairment in oxygen transfer had claimant exercised to a level consistent with his previous coal mine work. Director's Exhibit 11.

determine whether the weight of the relevant evidence, like and unlike, is sufficient to establish total respiratory disability under Section 718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (*en banc*). If, on remand, the administrative law judge finds that claimant has established total respiratory disability, she must then determine whether claimant has established disability causation pursuant to Section 718.204(c). *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the Decision and Order Denying Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge