

BRB No. 01-0582 BLA

ANDREW S. RIDNER)

Claimant-Respondent)

v.)

LEMARCO, INCORPORATED)

Employer-Petitioner)

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)

Party-in-Interest)

DATE ISSUED:

DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and Order Denying Motion for Reconsideration of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Sidney B. Douglass (Douglass Law Office), Harlan, Kentucky, for claimant..

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

Dorothy L. Page (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits and

the Order Denying Motion for Reconsideration (1998-BLA-0636) of Administrative Law Judge Thomas F. Phalen, Jr. rendered on a claim filed pursuant 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).¹ This case is before the Board for the second time.

Claimant filed his application for benefits on October 13, 1984. Director's Exhibit 1. After a hearing, the administrative law judge credited claimant with thirty-two years of coal mine employment, found that the weight of the medical opinion evidence established the existence of pneumoconiosis arising out of coal mine employment, and found that claimant's resting blood gas study results coupled with the medical opinions of his treating physicians established the presence of a totally disabling respiratory or pulmonary impairment due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, 145 F.Supp.2d 1 (D.D.C. 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

Upon consideration of employer's appeal, the Board affirmed the administrative law judge's finding that the existence of pneumoconiosis arising out of coal mine employment was established, but vacated his finding that total disability was established because he did not consider the non-qualifying² blood gas study values obtained during exercise testing conducted on October 24, 1996, and because he did not properly weigh together all contrary probative evidence relating to disability. *Ridner v. Lemarco, Inc.*, BRB No. 99-0646 BLA (Mar. 23, 2000)(unpub.). Because the Board vacated the administrative law judge's finding that total disability was established, the Board also vacated his finding that claimant's total disability was due to pneumoconiosis. Nevertheless, the Board held that the administrative law judge had provided valid reasons for his weighing of the evidence relevant to disability causation, and indicated that if total disability were found established on remand, the administrative law judge could rely on his former analysis to conclude that claimant's total disability is due to pneumoconiosis. *Ridner*, slip op. at 6-7. The Board denied employer's motion for reconsideration.

On remand, the administrative law judge found that a preponderance of the blood gas study evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(c)(2)(2000).³ The administrative law judge also found that the most well-reasoned and supported medical opinions tended to establish total disability pursuant to 20 C.F.R. §718.204(c)(4)(2000). Additionally, the administrative law judge found that the qualifying blood gas study evidence and the medical opinions diagnosing claimant as totally disabled outweighed the non-qualifying pulmonary function studies and the contrary medical opinions, considering that claimant's job as a roof bolt helper required hard manual labor. Finally, the administrative law judge relied on his previous analysis of disability causation to find that claimant's totally disabling respiratory impairment is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Accordingly, the administrative law judge awarded benefits. The administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge violated employer's right to due process by depriving employer of the opportunity to file a brief on remand. Employer further asserts that the administrative law judge erred in his analysis of the exercise blood gas study results. Additionally, employer argues

² A "qualifying" blood gas study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study exceeds those values. See 20 C.F.R. §718.204(b)(2)(ii).

³ The regulation applied by the administrative law judge, Section 718.204, has been restructured. The methods of establishing disability cited by the administrative law judge at 20 C.F.R. §718.204(c)(1)-(4)(2000) are now set forth at 20 C.F.R. §718.204(b)(2)(i)-(iv), and the standard for disability causation cited by the administrative law judge at 20 C.F.R. §718.204(b)(2000) is now set forth at 20 C.F.R. §718.204(c).

that the administrative law judge made several errors in his weighing of the medical opinion evidence, and did not properly weigh together the contrary probative evidence regarding total disability. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), responds urging the Board to reject employer's argument that the regulations favor exercise blood gas study values over resting values as a measure of disability. Employer has filed a reply reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer first contends that the administrative law judge violated employer's due process rights when he issued his Decision and Order on Remand without first notifying the parties that he had resumed jurisdiction over the case. Employer asserts that the administrative law judge's failure to announce that he had the case on remand precluded employer from requesting permission to file a brief. Employer's contention lacks merit.

The Board's March 23, 2000 decision remanding the case to the administrative law judge and its June 23, 2000 order denying reconsideration provided employer with notice that the case would be remanded to the administrative law judge. See 20 C.F.R. §802.403(b). At that point, the regulations provided a process which employer could have utilized. Section 725.459A provides that "[b]riefs or other written statements . . . as to facts or law may be filed by any party with the permission of the administrative law judge." 20 C.F.R. §725.459A. Employer had seven months after the issuance of the Board's denial of reconsideration within which to request permission from the administrative law judge

to file a brief on remand, but did not do so.⁴ See 29 C.F.R. §18.6 (providing for motions and requests to the administrative law judge). Employer was not deprived of due process of law; employer chose not to avail itself of the opportunity to file a brief with the administrative law judge in the seven months before he issued his decision. See *Betty B. Coal Co. v. Stanley*, 194 F.3d 491, 503, 22 BLR 2-1, 2-21 (4th Cir. 1999) (“The due process right to be heard compels the government to listen, but not the defendant to speak.”)

In any event, once employer received the administrative law judge’s decision, employer moved for reconsideration and set forth its arguments as to how it believed the evidence should be weighed. See 20 C.F.R. §725.479(b). Under these circumstances, we find no error in the administrative law judge’s issuance of his Decision and Order on Remand without the benefit of briefs on remand.

⁴ Prior to the filing of employer’s motion for reconsideration with the Board, the administrative law judge *sua sponte* issued an order setting a briefing schedule on remand. Employer asserts that its April 20, 2000 letter to the administrative law judge, requesting that he reissue the briefing order after the Board ruled on employer’s motion, demonstrates that employer requested permission to file a brief on remand. In the administrative law judge’s Order on Reconsideration, he stated that his file contained no such letter, and he noted that in any event employer “had six months during which time it could have followed up with this office regarding its request,” but “took no action to determine if its request would be granted and the schedule reissued.” Order Denying Motion for Reconsideration at 2. Employer’s claim that it took serious steps to file a brief with the administrative law judge on remand is belied by the fact that employer took no action when the expected briefing schedule was not forthcoming.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), employer contends that remand is required because the administrative law judge erroneously concluded that the non-qualifying, exercise blood gas study of October 24, 1996 was not administered in compliance with 20 C.F.R. §718.105(b)(2000). Section 718.105(b) provides in pertinent part that if a miner's resting blood gas study yields non-qualifying results, "an exercise blood-gas test shall be offered to the miner unless medically contraindicated." 20 C.F.R. §718.105(b)(2000). The at-rest portion of claimant's October 24, 1996 blood gas study was non-qualifying and the record contains no evidence that an exercise study was medically contraindicated. Director's Exhibit 43. Therefore, the October 24, 1996 exercise blood gas study was properly administered, and the administrative law judge misapplied Section 718.105(b) when he suggested that the exercise study should not have occurred.⁵ Decision and Order on Remand at 3.

Nevertheless, the administrative law judge's error is harmless because he provided an additional, valid reason for his weighing of the blood gas study evidence. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). The record contains five blood gas studies. The administrative law judge noted correctly that the blood gas studies conducted on October 24, 1994, August 27, 1996, March 11, 1997, and March 14, 1997 all yielded qualifying values. Additionally, the administrative law judge reasonably considered that the October 24, 1996 resting blood gas study values, although non-qualifying, were at a near-qualifying level. Director's Exhibit 43; 20 C.F.R. Part 718, App. C. Based on the fact that the October 24, 1996 resting values were nearly qualifying and all of the other studies were qualifying, the administrative law judge found within his discretion that a preponderance of the blood gas study evidence supported a finding of total disability.

Substantial evidence supports the administrative law judge's finding, and employer cites no authority for its contention that the regulations favor exercise blood gas study values over resting values as a measure of disability. Consequently, we affirm the administrative law judge's finding that a preponderance of the blood gas study evidence supports a finding of total respiratory disability. See 20 C.F.R. §718.204(b)(2)(ii).

⁵ The Director confirms that the exercise study was correctly administered. Director's Brief at 2.

Pursuant to 20 C.F.R. §718.204(c)(4)(2000), employer contends that the administrative law judge erred in weighing the medical opinion evidence. The administrative law judge based his analysis primarily on the medical opinions of four physicians.⁶ Review of the record indicates that Dr. John Myers examined and tested claimant on August 27, 1996 and concluded, based on “[a]bnormal blood gases with diminished oxygen saturation,” that claimant met “the criteria for disability under Federal Black Lung Regulation 718, Appendix C.” Director's Exhibit 43.

Dr. Kenneth Smith, who was then claimant’s treating physician, wrote three letters addressing claimant’s respiratory capacity. On September 9, 1996, Dr. Smith referred to a blood gas study that yielded a pO₂ value of 60,⁷ and concluded that “a person with a PO₂ of 60 could not perform much physical labor and should be regarded as disabled for any job requiring physical labor.” Director's Exhibit 43. On April 1, 1997, Dr. Smith discussed claimant’s recent hospitalization and treatment for breathing problems and explained that claimant’s resting blood gas study taken on March 14, 1997, the day of his discharge, reflected that “his oxygen level is only barely above that for which continuous oxygen treatment is recommended indicating he has quite severe pulmonary disease.” Director's Exhibit 43. On August 29, 1997, Dr. Smith, upon review of Dr. Gregory Fino’s February 27, 1997 opinion that claimant is not totally disabled, observed that claimant’s “O₂ values were low with the exception of one following exercise.” Director's Exhibit 43. Dr. Smith indicated that “with Mr. Ridner’s clinical picture and low O₂’s, I certainly cannot agree with Dr. Fino’s statements. . . .” *Id.*

Dr. Elias Dalloul, who began treating claimant upon Dr. Smith’s retirement, testified that claimant’s primary medical problems are shortness of breath and hypoxemia, which in Dr. Dalloul’s opinion prevent claimant from performing manual labor. Claimant's Exhibit 3 at 9-11.

By contrast, Dr. A. Dahhan, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed his medical records and concluded that he retains the respiratory capacity to perform his usual coal mine employment. Dr. Dahhan reasoned that claimant is not totally disabled because he has resting hypoxia due to obesity that subsides with exercise, in the presence of normal pulmonary function studies and a normal chest examination. Director's Exhibits 15, 43. Dr. Gregory Fino, who is Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record and concluded that claimant has intermittent resting hypoxia due to obesity but retains

⁶ No party has challenged the administrative law judge’s decision to discount the report of a fifth physician, Dr. Glen Baker.

⁷ Review of the record indicates that Dr. Smith was apparently referring to the results of the qualifying blood gas study conducted on August 27, 1996, the only study of record that lists “60” as the pO₂ value. Director's Exhibit 43.

the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 43.

Employer contends that the administrative law judge erred in crediting the opinions of Drs. Myers, Smith, and Dalloul because these physicians did not discuss the specific exertional requirements of claimant's usual coal mine work. Employer's contention lacks merit, as the administrative law judge assessed the medical opinions in light of his own finding that claimant's job as a roof bolter helper required hard manual labor. Decision and Order on Remand at 5. Contrary to employer's contention, that finding is supported by substantial evidence in the record of claimant's lifting and carrying requirements, Director's Exhibit 12; Hearing Tr. at 18-20, and it provided the administrative law judge with a basis for evaluating the medical opinions addressing claimant's respiratory ability to perform his usual coal mine employment. See *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*).

Employer argues that the administrative law judge erred in according less weight to the opinions of Drs. Dahhan and Fino. The administrative law judge "recognize[d] the expertise of Drs. Dahhan and Fino," Decision and Order on Remand at 5, but acted within his discretion in finding that the opinions of Drs. Myers, Smith, and Dalloul were better-supported by the weight of the qualifying blood gas studies of record. See *Fife v. Director, OWCP*, 888 F.2d 365, 369, 13 BLR 2-109, 2-114 (6th Cir.1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir.1983); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). The administrative law judge also permissibly found that Drs. Smith and Dalloul, as claimant's treating physicians, had demonstrated superior familiarity with claimant's condition. See *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Berta v. Peabody Coal Co.*, 16 BLR 1-69, 1-70 (1992). Substantial evidence supports the administrative law judge's finding that the medical opinion evidence "tends to establish total disability" pursuant to 20 C.F.R. §718.204(c)(4)(2000), Decision and Order on Remand at 5, and the Board is not empowered to reweigh the evidence. *Mays v. Piney Mountain Coal Co.*, 21 BLR 1-59, 1-64 (1997)(Dolder, J., concurring and dissenting). Therefore, the administrative law judge's finding is affirmed.⁸

Employer contends further that the administrative law judge did not comply with the Board's instruction to explain his weighing of the contrary probative evidence. On remand, the administrative law judge explained that the qualifying blood gas study evidence and medical opinions supporting a finding of total respiratory disability outweighed the non-qualifying pulmonary function studies and

⁸ Because we affirm the administrative law judge's finding on these grounds, we need not address employer's remaining allegations of error in the administrative law judge's weighing of the medical opinions.

contrary medical opinions in view of claimant's need to perform heavy manual labor as a roof bolter helper, and in view of his medical treatment for breathing problems. Because the administrative law judge adequately explained his finding, which is supported by substantial evidence, we reject employer's contention and we affirm the administrative law judge's finding that the weight of the evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(c)(2000). See *Beatty v. Danri Corporation and Triangle Enterprises*, 16 BLR 1-11, 1-14 (1991); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986).

In view of the Board's previous determination that the administrative law judge proffered valid reasons for his weighing of the evidence regarding disability causation, the administrative law judge rationally relied on his previous finding that claimant's total disability is due to pneumoconiosis. See *Ridner*, slip op. at 6-7; Decision and Order on Remand at 5. Employer raises no new challenge to the administrative law judge's disability causation finding. Consequently, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2000).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge