BRB No. 01-0285 BLA

DONALD P. YEDLOSKY Claimant-Respondent v. BARNES AND TUCKER COMPANY 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 Awarding Benefits and Order Denying Motion for Reconsideration of James W. Kerr, Jr. Administrative Law Judge, United States Department of Labor.

Leslie Mansfield (University of Tulsa Legal Clinic), Tulsa, Oklahoma, for claimant.

John J. Bagnato (Spence, Custer, Saylor, Wolfe & Rose), Johnstown, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration (2000-BLA-0418) of Administrative Law Judge James W. Kerr, 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] Claimant filed his application for benefits on July 19, 1999. Director's Exhibit 1. The District Director of the Office of Workers' Compensation Programs denied benefits and claimant requested a hearing, Director's Exhibits 11, 12, which was held on May 19, 2000 in Waco, Texas.[2]

In the ensuing Decision and Order Awarding Benefits, the administrative law judge credited claimant with 3.25 years of coal mine employment and found that the medical evidence established the existence of pneumoconiosis arising out of coal mine employment, that claimant is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits. Subsequently, the administrative law judge denied employer's motion for reconsideration.

On appeal, employer contends that substantial evidence does not support the finding that claimant is totally disabled because the administrative law judge erred in his analysis of the blood gas study evidence. Claimant has not filed a response brief, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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

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[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.

[2] The record indicates that claimant's coal mine employment occurred in Pennsylvania. Director's Exhibit 2; Tr. at 10. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] We affirm as unchallenged on appeal the administrative law judge's findings that claimant has 3.25 years of coal mine employment, that the existence of pneumoconiosis arising out coal mine employment was established pursuant to 20 C.F.R. §§718.202(a) and 718.203(c), and that claimant's total disability is due to pneumoconiosis. *See* 20 C.F.R. §718.204(c); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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).

In finding that claimant established total disability pursuant to 20 C.F.R. §718.204(c)(2)(2000),[4] the administrative law judge relied on a September 9, 1999 resting blood gas study yielding qualifying[5] values, and rejected as unreliable an October 5, 1999 blood gas study that was non-qualifying both at rest and during exercise. Director's Exhibits 7, 9. Employer argues that the administrative law judge erred in finding the October 5, 1999 blood gas study unreliable when the study conforms to the quality standards set forth in the regulations. Employer's argument has merit.

The arterial blood gas study is one category of evidence which may establish, in the absence of contrary probative evidence, that claimant is totally disabled by a respiratory or pulmonary impairment, *see* 20 C.F.R. §718.204(b)(2)(ii), or which may provide support for a reasoned medical opinion. *See* 20 C.F.R. §718.204(b)(2)(iv). The regulations applicable to the medical tests performed in connection with this claim set forth quality standards for the administration and reporting of blood gas studies. 20 C.F.R. §718.105(2000).[6] A medical test must be in substantial compliance with the applicable quality standards. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 638, 13 BLR 2-259, 2-265 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 1327, 10 BLR 2-220, 2-233 (3d Cir. 1987).

The record indicates that on September 9, 1999, Dr. David Luterman recorded at-rest test results of pCO2: 38 and pO2: 62. Director's Exhibit 7. On October 5, 1999, Dr. William Coleman performed an at-rest test resulting in pCO2: 39.4 and pO2: 71.6. Director's Exhibit 9. He then performed an exercise test and recorded results of pCO2: 38.3 and pO2: 83.7. *Id.* Dr. Coleman's report of the October 5, 1999 study specified the test site altitude as less than 3000 feet above sea level. Director's Exhibit 9. Dr. Luterman did not report the altitude at which his September 9, 1999 study was conducted. Director's Exhibit 7. However, the parties jointly stipulated the altitude of Dr. Luterman's study, conducted in Dallas, Texas, as less than 3000 feet above sea level.[7] Joint Exhibit 1. Under the table values for blood

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[4] 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).

[5] 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).

[6] Section 718.105 has been revised by the Department of Labor, but revised Section 718.105 applies only to tests conducted after January 19, 2001. 20 C.F.R. §718.101(b).

[7] The administrative law judge accepted the parties' joint stipulation in his Decision and Order. Decision and Order at 2 n.3.

gas studies conducted below 3000 feet, the September 1999 study is qualifying and the October 1999 study is non-qualifying. 20 C.F.R. Part 718, App. C. The record contains no evidence challenging the reliability of either study.

The administrative law judge found that the September 9, 1999 study was qualifying, but found that the "qualification factor of the [October 5, 1999] test results are unknown, and the probative value of the test is minimal," because the altitude was not reported. Decision and Order at 20; *see also* Order Denying Motion for Reconsideration at 3. However, as employer contends, substantial evidence does not support this finding. Consistent with the requirements of Section 718.105, the report of the October 5, 1999 blood gas study specifies the altitude at which the study was conducted.[8] Director's Exhibit 9; *see* 20 C.F.R. §718.105(c)(2)(2000).

The administrative law judge further found that on the exercise portion of the October 5 study, "no objective notations [were] made regarding the [c]laimant's ability to participate and reliability [sic]." Decision and Order at 20. The administrative law judge found that, by contrast, the report of the September 9 resting blood gas study indicated that claimant's "participation and cooperation were very good." Order Denying Motion for Reconsideration at 3.

However, as employer notes, the quality standards for *pulmonary function studies* require notations of understanding and cooperation, *see* 20 C.F.R. §718.103(2000), but the standards for blood gas studies do not require a blood gas study report to set forth claimant's understanding or degree of cooperation in the test. Instead, the report must specify the "[d]uration and type of exercise," 20 C.F.R. §718.105(c)(7)(2000), which Dr. Coleman duly reported was a six-minute treadmill walk. Director's Exhibit 9. A testing sheet attached to the blood gas study report sets forth claimant's walking speed and the elevation of the treadmill for each minute of exercise. *Id.* The record reveals that no physician identified any deficiency in the administration of this study; indeed, two physicians who are Board-certified in Internal Medicine and Pulmonary Disease relied on the study as evidence that claimant is not totally disabled. Employer's Exhibits 5, 7-9.

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[8] We note that review of the record and of the joint stipulation of the evidence indicates that only one blood gas study was conducted on October 5, 1999, and it is reported at Director's Exhibit 9. Thus, the administrative law judge erred in concluding that two different blood gas studies were administered to claimant on October 5, 1999. Decision and Order at 20.

Under these circumstances, substantial evidence does not support the administrative law judge's findings.[9] Because the administrative law judge provided no other reasons for his weighing of the blood gas study evidence, we must vacate his finding that total disability was established pursuant to 20 C.F.R. §718.204(c)(2)(2000), and remand this case for him to reweigh the blood gas studies. The administrative law judge should then complete the disability analysis by weighing together all of the contrary probative evidence to determine whether the weight of the evidence supports a finding of total disability. *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).

[9] Regarding the administrative law judge's finding that the report of the September 9, 1999 at-rest blood gas study was more reliable because it set forth claimant's cooperation and effort, employer notes, correctly, that Director's Exhibit 7 is a computer printout reporting the results of both a pulmonary function study and a resting blood gas study conducted on the same day. Director's Exhibit 7. The printout necessarily includes claimant's effort and cooperation on the pulmonary function exhalation maneuvers as required by Section 718.103, but such notation is not applicable to the administration of a resting blood gas study. *See* 20 C.F.R. §718.105(b)(2000)("A blood-gas study shall initially be administered at rest and in a sitting position.").

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Motion for Reconsideration are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge