

BRB No. 12-0502 BLA

HAROLD L. FLEMING)
)
 Claimant-Petitioner)
)
 v.)
)
 MOUNTAIN EDGE MINING,)
 INCORPORATED)
) DATE ISSUED: 06/17/2013
 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 on Remand – Denying Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Kevin T. Gillen and Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand – Denying Benefits (08-BLA-5974) of Administrative Law Judge Michael P. Lesniak rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case involves a miner’s claim filed on October 22, 2007, and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with 23.55 years of coal mine employment,¹ and found that the medical evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge also found that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board vacated the administrative law judge's denial of benefits. *Fleming v. Mountain Edge Mining, Inc.*, BRB No. 10-0574 BLA (June 3, 2011)(unpub.). Specifically, the Board vacated the administrative law judge's findings that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv),² and that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and remanded the case to the administrative law judge for further consideration. The Board also instructed the administrative law judge, on remand, to consider whether claimant could establish invocation of the amended Section 411(c)(4) presumption,³ and to allow the parties the opportunity to submit additional evidence responsive to the new law.⁴ 30 U.S.C. §921(c)(4).

¹ The record indicates that claimant's coal mine employment was in West Virginia. Hearing Transcript at 23; Director's Exhibit 3. Accordingly, 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, 1-202 (1989)(en banc).

² The Board affirmed, as unchallenged, the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). *Fleming v. Mountain Edge Mining, Inc.*, BRB No. 10-0574 BLA (June 3, 2011)(unpub.), slip op. at 2 n.3.

³ Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, 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).

⁴ On remand, employer submitted a supplemental report from Dr. Repsher, dated November 29, 2011, and a supplemental report from Dr. Castle, dated December 14, 2011. The administrative law judge admitted these reports as Employer's Exhibits 10 and 11.

On remand, the administrative law judge again concluded that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant could not establish entitlement pursuant to 20 C.F.R. Part 718, and could not invoke the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response brief.

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must establish 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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

In addressing, on remand, whether claimant established the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Rasmussen and Repsher,⁵ in light of the exertional requirements of claimant's usual coal mine work as a roof bolter.⁶ Dr. Rasmussen opined that claimant suffers from a totally disabling

⁵ The administrative law judge also considered, and discounted, the opinion of Dr. Castle, that claimant is not disabled from a respiratory standpoint. Decision and Order on Remand at 9; Employer's Exhibits 9, 11. Employer does not challenge this aspect of the administrative law judge's decision.

⁶ The administrative law judge found that claimant's usual coal mine work was that of a roof bolter, a position that required "heavy and sometimes very heavy manual labor." Decision and Order on Remand at 7. The administrative law judge found that, as part of his duties as a roof bolter, claimant was required to bend roof bolts, which requires an exertional level equivalent to lifting 100 pounds. Decision and Order on Remand at 7; Claimant's Exhibit 6 at 27-28.

respiratory impairment.⁷ Claimant's Exhibit 6 at 23-29. In contrast, Dr. Repsher opined that claimant retains the respiratory capacity to perform his usual coal mine work as a roof bolter. Employer's Exhibits 8 at 31; 9 at 39-40. The administrative law judge discounted the opinion of Dr. Rasmussen, and accorded some weight to the opinion of Dr. Repsher, to conclude that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order on Remand at 9.

Claimant argues that the administrative law judge erred in his consideration of Dr. Rasmussen's opinion. We disagree. The administrative law judge noted that, in his initial report, Dr. Rasmussen stated that claimant did not retain the pulmonary capacity to perform the heavy manual labor required of a roof bolter, based on the results of a December 13, 2007 exercise arterial blood gas study that revealed gas exchange abnormalities reflecting a minimal impairment. Director's Exhibit 12 (Dr. Rasmussen's January 3, 2008 report at 4). Dr. Rasmussen subsequently testified, however, that claimant's December 13, 2007 exercise blood gas study showed a minimal to moderate impairment in oxygen transfer. Director's Exhibit 15 at 19. At his second deposition, Dr. Rasmussen testified that claimant's December 13, 2007 exercise blood gas study revealed a significant degree of impairment in oxygen transfer. Claimant's Exhibit 6 at 24-25, 49.

The administrative law judge permissibly found that Dr. Rasmussen's opinion was undermined by his admitted reliance on limited medical data, namely the single exercise blood gas study of record.⁸ *See Milburn Colliery Co. v. Hicks*, 138 F.3d 532-33, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441,

⁷ Dr. Rasmussen prepared two medical reports, dated January 3, 2008 and January 28, 2008, and testified at two depositions held on April 9, 2008 and October 29, 2009. Director's Exhibits 12, 15; Claimant's Exhibit 6. Dr. Rasmussen based his disability assessment on the results of a December 13, 2007 exercise arterial blood gas study that revealed gas exchange abnormalities. Dr. Rasmussen noted that, during light exercise, claimant achieved an oxygen consumption of 19.8 millimeters of oxygen per kilogram per minute. Dr. Rasmussen explained that this measurement revealed that claimant would be unable to perform heavy manual labor, which required twenty-five to thirty millimeters of oxygen per kilogram per minute. Claimant's Exhibit 6 at 23-24.

⁸ The administrative law judge found that during his second deposition, Dr. Rasmussen conceded that he principally relied on the results of the exercise blood gas study, and that there were no other medical test results upon which he based his opinion. Decision and Order on Remand at 8; Claimant's Exhibit 6 at 49. As noted earlier, we have affirmed the administrative law judge's prior determination that the record contains no other evidence that supports a finding of total disability. *See supra* n.2.

21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34, 2-47 (4th Cir. 1997); *Sabett v. Director, OWCP*, 7 BLR 1-299, 1-301 n.1 (1984)(noting that an administrative law judge may discount a medical opinion that is based on limited medical data); Decision and Order on Remand at 8. The administrative law judge further found, as was within his discretion, that while Dr. Rasmussen consistently opined that claimant is disabled, his opinion was called into question by his failure to adequately explain why he alternately characterized claimant's pulmonary impairment as minimal, minimal to moderate, and significant, despite reviewing the same objective evidence. See *Hicks*, 138 F.3d at 532, 21 BLR at 2-334; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67, 1-68 (1986); Decision and Order on Remand at 8; Director's Exhibits 12, 15; Claimant's Exhibit 6. Thus, the administrative law judge concluded that Dr. Rasmussen's opinion lacks credibility and is not sufficient to meet claimant's burden to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). As the administrative law judge's basis for discrediting the opinion of Dr. Rasmussen is rational and supported by substantial evidence, it is affirmed.⁹

Because the administrative law judge provided valid reasons for discounting the opinion of Dr. Rasmussen, the only physician to diagnose a totally disabling respiratory impairment, we affirm the administrative law judge's finding that claimant failed to meet his burden to establish a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2)(iv).¹⁰ See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

In addition, as the administrative law judge reasonably considered the pulmonary function and arterial blood gas study evidence along with the medical opinion evidence, and found that, when weighed together, the evidence failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), we also affirm that finding. See *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc); Decision and Order on Remand at 9.

⁹ Because the administrative law judge provided a valid basis for discounting the opinion of Dr. Rasmussen, we need not address claimant's remaining arguments regarding the weight accorded to Dr. Rasmussen's opinion. See *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

¹⁰ Therefore, we need not address claimant's additional contention that the administrative law judge erred in according some weight to the opinion of Dr. Repsher, that claimant is not totally disabled, submitted by employer. See *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), entitlement under 20 C.F.R. Part 718 is precluded. Moreover, as claimant did not establish total disability, we further affirm the administrative law judge's determination that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4). Consequently, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge