

BRB No. 12-0240 BLA

RANDALL RAY FULLER)
)
 Claimant-Petitioner)
)
 v.)
)
 HAR LEE COAL COMPANY,) DATE ISSUED: 01/22/2013
 INCORPORATED)
)
 and)
)
 EMPLOYERS INSURANCE OF WAUSAU)
)
 Employer/Carrier-)
 Respondents)
)
 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 Pamela J. Lakes,
Administrative Law Judge, United States Department of Labor.

Randall Ray Fuller, Clincho, Virginia, *pro se*.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for
employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2010-BLA-05799) of Administrative Law Judge Pamela J. Lakes, rendered on a miner's claim filed on October 20, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).

The administrative law judge credited claimant with fifteen and three-quarter years of underground coal mine employment. Because the administrative law judge determined that the evidence was insufficient to establish that claimant has a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2), he concluded that claimant was unable to invoke the presumption at amended 411(c)(4) of the Act,¹ and that claimant failed to establish a requisite element of entitlement under 20 C.F.R. Part 718.² Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

¹ Relevant to this claim, Section 1556 of Public Law No. 111-148, reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

² In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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).

³ Because the record indicates that claimant's last coal mine employment was in Virginia, we will apply the law 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); Director's Exhibit 3.

A miner shall be considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work and comparable gainful work. *See* 20 C.F.R. §718.204(b)(1). In the absence of contrary probative evidence, a miner's disability shall be established by pulmonary function studies showing values equal to, or less than, those in Appendix B, blood gas studies showing values equal to or less than those set forth in Appendix C, by evidence establishing cor pulmonale with right-sided congestive heart failure, or if a physician exercising reasoned medical judgment concludes that a miner's respiratory or pulmonary condition is totally disabling. *See* 20 C.F.R. §718.204(b)(2)(i)-(iv).

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered two pulmonary function studies, dated November 9, 2009 and October 19, 2010. Decision and Order at 8; Director's Exhibit 8; Employer's Exhibit 1. Because the administrative law judge properly found that neither study was qualifying under the regulatory criteria,⁴ we affirm his finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 8.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of two arterial blood gas studies, dated November 9, 2009 and October 19, 2010. Decision and Order at 8-9; Director's Exhibit 8; Employer's Exhibit 1. The administrative law judge found that the November 9, 2009 blood gas study was non-qualifying at rest, but that the study showed qualifying values for total disability during exercise.⁵ Decision and Order at 9. In contrast, she found that the October 19, 2010 blood gas study was qualifying at rest, but that the study showed non-qualifying values during exercise. *Id.* The administrative law judge found "the results of the arterial blood gas studies to be in equipoise." *Id.*

Initially, we note that the administrative law judge mistakenly found that the November 9, 2009 blood gas study had qualifying values for total disability during exercise. Although the administrative law judge observed that the study showed a pCO₂ of 37.1 and a pO₂ of 63.2 during exercise, she stated: "For a pCO₂ value of 37, a pO₂ value of 63 would be qualifying under Appendix C. If the readings are rounded down to

⁴ A "qualifying" pulmonary function test yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" test yields values that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

⁵ A "qualifying" arterial blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix C. A "non-qualifying" study yields values that exceed those values. 20 C.F.R. §718.204(b)(2)(ii).

the next full number, the exercise values for Dr. Forehand's examination are qualifying." Decision and Order at 9, n. 15; *see* Director's Exhibit 8. However, contrary to the administrative law judge's finding, the interpretation of the test results using the tables in Appendix C "encompasses neither the 'rounding up' nor 'rounding down' of pCO₂ or pO₂ values, but, rather, follows the express regulatory requirement that the reported test value be 'equal to or less than' the specified table value." *See Tucker v. Director, OWCP*, 10 BLR 1-35 (1987). In this case, the November 9, 2009 exercise blood gas study is actually non-qualifying for total disability, as Appendix C provides that, for a pCO₂ value of 38 *or below*, the pO₂ value must be *equal to or less* than 62.

Because the resting and exercise values of the November 9, 2009 blood gas study are non-qualifying, we agree with the administrative law judge, on alternate grounds, that claimant is unable to establish total disability based on that study. With regard to the October 19, 2010 arterial blood gas study, we conclude that the administrative law judge acted within her discretion in finding the study to be in equipoise. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Thus, we affirm the administrative law judge's finding that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(ii). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994).

Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge correctly found that there was no evidence in the record to support a finding that claimant had cor pulmonale with right-sided congestive heart failure. Decision and Order at 9. Thus, we affirm the administrative law judge's finding that claimant is unable to establish total disability under that subsection. *Id.*

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Forehand and Dahhan. As noted by the administrative law judge, Dr. Forehand examined claimant on November 9, 2009, and opined that claimant has a significant impairment, based on the fact that claimant's pO₂ levels decreased with exercise. Director's Exhibit 8. In contrast, Dr. Dahhan examined claimant on October 19, 2010, and opined that claimant suffers a "mild ventilatory defect," which would not render him totally disabled. Employer's Exhibit 1.

In weighing the conflicting medical opinion evidence, the administrative law judge found that, while Dr. Forehand opined that claimant is totally disabled, based on the exercise pO₂ levels he obtained, his opinion "does not account for [c]laimant's subsequent medical records, which show a significant improvement in [claimant's] pO₂ levels with exercise." Decision and Order at 10. The administrative law judge also found that Dr. Dahhan "did not explain his basis for disagreeing with Dr. Forehand that

[c]laimant is totally disabled[,] nor did he explain his position based on the totality of the blood gas studies.” *Id.* The administrative law judge concluded:

Although the opinions of Drs. Forehand and Dahhan are rationally related to the arterial blood gas results they obtained, both doctors failed to explain their opinions in light of the contradictory evidence obtained by the other. Accordingly, I decline to give additional weight to one doctor’s opinion over the other. Because Drs. Forehand and Dahhan reached inconsistent opinions with respect to disability, the medical opinion evidence is in equipoise.

Id. at 11.

We conclude that the administrative law judge acted within her discretion in finding the medical opinions to be in equipoise pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Furthermore, because the administrative law judge rationally found that “the clear weight of the evidence” does not prove a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge’s determination that claimant is unable to invoke the presumption at amended Section 411(c)(4), 30 U.S.C. §921(c)(4). Decision and Order at 11; *see Ondecko*, 512 U.S. at 272-76, 18 BLR at 2A-6-9. We also affirm her finding that claimant is not entitled to benefits, as he failed to establish a requisite element of entitlement under 20 C.F.R. Part 718. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge