

BRB No. 13-0506 BLA

FRANK L. ZANDLO )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 ICG BECKLEY, LLC )  
 ) DATE ISSUED: 05/29/2014  
 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 of Thomas M. Burke,  
Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (David Huffman Law Services), Parkersburg, West  
Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for  
employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2010-BLA-5289) of  
Administrative Law Judge Thomas M. Burke denying benefits on a claim filed pursuant  
to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944  
(2012) (the Act). This claim, filed on April 24, 2009, is before the Board for the second  
time.

In his initial decision, the administrative law judge found that the evidence did not  
establish total disability pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the  
administrative law judge denied benefits.

Pursuant to claimant's appeal, the Board affirmed 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). *Zandlo v. ICG Beckley, LLC*, BRB No. 11-0750 BLA (Aug. 13, 2012) (unpub.). The Board, however, vacated the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). In addition, because the administrative law judge's finding regarding the blood gas study evidence influenced his weighing of the medical opinion evidence, the Board also vacated the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

On remand, the administrative law judge again found that the blood gas study evidence failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii) and, therefore, found that the evidence failed to establish that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a 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.<sup>1</sup> 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).

Claimant argues that the administrative law judge erred in finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). The record contains the results of two resting blood gas studies conducted on June 29, 2009 and February 22, 2010. While the June 29, 2009 blood gas study conducted by Dr. Rasmussen produced qualifying results, the February 22, 2010 blood gas study conducted by Dr. Crisalli was non-qualifying.<sup>2</sup> Director's Exhibit 11;

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<sup>1</sup> The record reflects that claimant's coal mine employment was in West Virginia. 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 (1989) (en banc).

<sup>2</sup> A qualifying blood gas study yields values that 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

Employer's Exhibit 3. The administrative law judge found that both of the studies were valid, and that "[c]ontrolling weight was not given to either study." Decision and Order on Remand at 2. The administrative law judge, therefore, found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *Id.* Claimant's statements regarding the administrative law judge's consideration of the blood gas study evidence amount to a request to reweigh the evidence of record. Such a request is beyond the Board's scope of review.<sup>3</sup> *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). We, therefore, affirm the administrative law judge's finding that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Consequently, we affirm the administrative law judge's finding that claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718.<sup>4</sup> *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W. G. Moore and Sons*, 9 BLR 1-4 (1986) (en banc); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

<sup>3</sup> Claimant argues that administrative law judge erred in not according greater weight to the qualifying June 29, 2009 blood gas study based upon the fact that it was validated by Dr. Gaziano. Although Dr. Gaziano checked a box indicating that the June 29, 2009 blood gas study is valid, claimant fails to explain how Dr. Gaziano's validation of the June 29, 2009 blood gas study calls into question the validity of the subsequent February 22, 2010 blood gas study. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998) (holding that a physician's check-box validation of an arterial blood gas study "lent little additional persuasive authority" to the study); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 172, 21 BLR 2-34, 2-44 (4th Cir. 1997) (noting lack of detail in validation of a qualifying blood gas study and affirming administrative law judge's conclusion that arterial blood gas studies did not establish total disability).

<sup>4</sup> Because claimant failed to establish that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), claimant cannot invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge