

BRB No. 05-0247 BLA

ROBERT E. CLINE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CLINE BROTHERS MINING COMPANY)	
)	
and)	
)	
WEST VIRGINIA COAL-WORKERS’ PNEUMOCONIOSIS FUND)	DATE ISSUED: 10/31/2005
)	
Employer/Carrier- Petitioners)	
)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and W. Andrew Delph (Wolfe, Williams & Rutherford), Norton, Virginia, for claimant.

Robert Weinberger (Workers’ Compensation Defense Division), Charleston, West Virginia, for carrier.

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

PER CURIAM:

Carrier appeals the Decision and Order Granting Benefits (03-BLA-6164) of Administrative Law Judge Pamela Lakes Wood 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). Claimant filed this subsequent claim on June 6, 2001. Director's Exhibit 3. The administrative law judge found the newly submitted evidence sufficient to establish a change in an applicable condition of entitlement because it established total disability, one of the elements previously adjudicated against claimant. 20 C.F.R. §§718.204(b)(2); 725.309. Considering all of the relevant evidence of record, the administrative law judge found it sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv). Accordingly benefits were awarded. Carrier appeals, arguing that the administrative law judge erred in finding that the blood gas study evidence and medical opinion evidence established total disability.¹ Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Carrier first argues that the administrative law judge erred in finding that the blood gas study evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii). Specifically, carrier asserts that four of six blood gas studies produced non-qualifying values, and carrier argues that four non-qualifying results should outweigh two qualifying exercise study results, based on numerical superiority. The record contains three newly submitted blood gas studies, dated December 6, 2001, August 14, 2002, and December 1, 2003, each consisting of a resting and exercise study. Director's Exhibits 15, 22; Claimant's Exhibit 1. The exercise portions of the 2001 and 2003 tests, conducted by Dr. Rasmussen, produced qualifying values. The resting portions of each of these studies did

¹ Carrier conceded the issues of the existence of pneumoconiosis arising out of coal mine employment at the hearing. Tr. at 6; 20 C.F.R. §§718.202(a); 718.203. The administrative law judge's finding at 20 C.F.R. §718.204(c), as well as the finding of fourteen years of coal mine employment, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-170 (1983).

not produce qualifying values. Director's Exhibit 15; Claimant's Exhibit 1. The resting portion of the 2002 test, conducted by Dr. Zaldivar, did not produce a qualifying value, and the exercise portion of the test was terminated early. Director's Exhibit 22. The administrative law judge rationally found that the exercise values were more probative of claimant's ability to perform his last coal mine employment, because they assess oxygen levels during physical exertion, which was required by claimant's last coal mine employment. Decision and Order at 8. The administrative law judge found that the two qualifying studies "satisfy the preponderance of the evidence standard" under *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986) *aff'd on recon.* 9 BLR 1-236 (1987). *Id.* Additionally, the administrative law judge noted that the 2001 blood gas study results were validated by Dr. Ranavaya. Moreover, the administrative law judge noted that the 2002 non-qualifying exercise blood gas study test was terminated prior to completion, due in part to claimant's shortness of breath, and that Dr. Zaldivar included that test result in his report without commenting on the fact that this test was incomplete. *Id.*; Director's Exhibit 22. The administrative law judge properly explained her rationale for according more weight to the exercise studies, rather than mechanically considering only the number of qualifying results. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984). Based on the foregoing, we affirm the administrative law judge's finding that total disability was established by the newly submitted evidence at Section 718.204(b)(2)(ii), as it is supported by substantial evidence.

At 20 C.F.R. §718.204(b)(2)(iv), carrier next asserts that the administrative law judge erred in crediting the opinion of Dr. Rasmussen because it conflicts with the objective studies he conducted during his two examinations. Carrier argues that Dr. Rasmussen's report cannot be considered well-reasoned because the pulmonary function study results and the resting portions of the blood gas study results did not produce qualifying values. Dr. Rasmussen examined claimant in 2001 and 2003, and each examination included a pulmonary function study and blood gas study. Director's Exhibit 15; Claimant's Exhibit 1. In each case, the pulmonary function study and the resting portion of the blood gas study did not produce qualifying results, but the exercise portion of the blood gas study produced qualifying values. Relying on the exercise results, and the "marked loss of lung function," Dr. Rasmussen concluded that claimant was incapable of performing his last coal mine employment, with its requirement for heavy, and some very heavy, labor. *Id.* The administrative law judge found Dr. Rasmussen's reasoning to be comprehensive and supported by objective medical evidence. Decision and Order at 11. We, therefore, affirm the administrative law judge's reliance on Dr. Rasmussen's opinion as well reasoned and supported by the objective medical evidence, as it is supported by substantial evidence. *See Carson v. Westmoreland Coal Company*, 19 BLR 1-18 (1994); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

Carrier next asserts that the administrative law judge erred in discrediting Dr. Zaldivar's opinion because he did not "elaborate on how Claimant's ability to perform his job duties were impacted" by the mild pulmonary impairment he assessed. Carrier's Brief at 3. Dr. Zaldivar, in his report, diagnosed mild reversible airways disease and diffusion impairment, and in a separate letter, stated that the impairment would not preclude claimant from performing his usual coal mine employment, without explaining which medical findings supported his conclusion. Director's Exhibit 22. The administrative law judge reasonably found that Dr. Zaldivar's report lacked the same level of analysis as that provided by Dr. Rasmussen, who discussed specific testing results in assessing the effect such results would have on claimant's ability to perform his usual coal mine employment. Decision and Order at 11; Director's Exhibit 15; Claimant's Exhibit 1. The administrative law judge also noted that Dr. Zaldivar failed to address the fact that claimant was unable to finish the exercise portion of the blood gas study the physician conducted, due to shortness of breath, and did not address how shortness of breath would affect claimant's ability to perform his usual coal mine employment. Decision and Order at 11. An administrative law judge may reject an opinion where he finds that the doctor failed to adequately explain his diagnosis. See *Clark v. Karst Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Thus, we affirm the administrative law judge's rejection of Dr. Zaldivar's opinion.

Finally, carrier argues that the administrative law judge erred in determining that claimant's testimony was consistent with a finding of total disability. Carrier argues that claimant testified that, but for a knee injury, he could perform his coal mine employment. Claimant testified that, *in 1989*, he could have continued working but for his knee injury. Tr. at 20. However, the administrative law judge found claimant's testimony regarding his *current* breathing difficulties, and inability to walk a short distance or to perform household chores, was consistent with total disability. Tr. at 13. Thus, the administrative law judge found that carrier "misconstrued" claimant's testimony, and that, in fact, claimant testified to his ability to work fifteen years earlier, not at the time of the hearing. Decision and Order at 12. A review of the transcript supports the administrative law judge's finding that claimant did not testify that he was able to perform his usual coal mine employment at the time of the hearing. Tr. at 13. Moreover, the administrative law judge reasonably found "...the medical evidence[,] coupled with the Claimant's specific testimony as to his capabilities[,] to be more probative on the issue of total disability than the Claimant's subjective opinion." Decision and Order at 12. The administrative law judge's determination that claimant's testimony is consistent with a finding of total disability is therefore affirmed.

Based on the foregoing, we reject carrier's challenges to the administrative law judge's findings at Section 718.204(b)(2)(iv), based on the newly submitted evidence, and affirm his finding that total disability is established at Section 718.204(b)(2)(iv).

We further affirm the administrative law judge's finding that the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement because it establishes total disability, one of the elements of entitlement previously adjudicated against claimant. 20 C.F.R. §§718.204(b)(2); 725.309. As carrier makes no additional argument regarding the administrative law judge's consideration of the evidence on the merits at 20 C.F.R. §718.204(b)(2) as a whole, we further affirm the administrative law judge's finding of total disability therein. *Skrack, supra*.

In light of the foregoing, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge