**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0251 BLA

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| TAYLOR HIGNITE, JR. | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
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| ICG HAZARD, LLC, a/k/a PINE BRANCH RESOURCES, LLC | ) | DATE ISSUED: 05/08/2020 |
| | ) | |
| and | ) | |
| | ) | |
| KENTUCKY EMPLOYERS MUTUAL INSURANCE | ) | |
| | ) | |
| 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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Taylor Hignite, Jr., Busy, Kentucky.

James W. Herald, III (Riley, Herald & Banks, PLLC), Prestonsburg, Kentucky, for employer/carrier.[1]

Before: BOGGS, Chief Administrative Appeals Judge, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[2] the Decision and Order Denying Benefits (2017-BLA-05456) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed under the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's claim filed on December 28, 2015.

The administrative law judge accepted employer's concession to thirty-three years of coal mine employment as supported by the record, but found claimant did not establish a totally disabling respiratory or pulmonary impairment. The administrative law judge therefore found claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] He also found that because the record lacks evidence of complicated pneumoconiosis, the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of

[1] On February 10, 2020, subsequent to the filing of employer's response brief, William S. Lyons of Lewis and Lewis Law Offices, Hazard, Kentucky, filed a Motion to Enter Appearance and Be Substituted as Counsel with the Board to represent employer and carrier (employer) in this case. No party has filed an objection to the motion. We grant the motion and therefore substitute William S. Lyons of Lewis and Lewis Law Offices for James W. Herald, III, of Riley, Herald & Banks, PLLC, as employer's counsel.

[2] On claimant's behalf, Ms. Diane Jenkins, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested the Board review the administrative law judge's decision, but Ms. Jenkins is not representing claimant in this appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305. In light of claimant's failure to establish total disability, the administrative law judge did not address whether claimant's surface coal mine work constituted qualifying employment for purposes of invoking the fifteen-year presumption. Decision and Order at 2, 12.

the Act is inapplicable. 30 U.S.C. §921(c)(3); *see* 20 C.F.R. §718.304. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the denial. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[4]

In an appeal a claimant files without the assistance of counsel, the Board considers whether the Decision and Order Denying Benefits below is supported by substantial evidence. *See McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989). We must affirm the administrative law judge's Decision and Order Denying Benefits if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.[5] 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).

Without the benefit of the Section 411(c)(3) and (c)(4) presumptions, claimant must establish disease (pneumoconiosis); disease causation (it arose out of coal mine employment); disability (a totally disabling respiratory or pulmonary impairment); and disability causation (pneumoconiosis substantially contributed to the disability). 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 an award of benefits. *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); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

**Total Disability**

Claimant is totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). He may establish total disability based on pulmonary function testing, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). Qualifying evidence in any of the four categories establishes total disability when there is no "contrary probative evidence." 20 C.F.R. §718.204(b)(2). The administrative law judge must

[4] We affirm, as unchallenged, the administrative law judge's crediting claimant with thirty-three years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 2.

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant's coal mine employment occurred in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Hearing Transcript at 11.

consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-20-21 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

Relevant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered six pulmonary function studies. Decision and Order at 4-5. The pre-bronchodilator studies performed on December 8, 2015,[6] and February 22, 2016, produced qualifying[7] values. Director's Exhibits 12, 17. The post-bronchodilator study performed on December 8, 2015, and the pre-bronchodilator study performed on May 11, 2017, are nonqualifying as are the pre- and post-bronchodilator studies performed on February 22, 2016, July 14, 2016,[8] February 22, 2017, and February 12, 2018. Director's Exhibit 19; Claimant's Exhibits 4, 5; Employer's Exhibit 3. Dr. Gaziano reviewed the February 22, 2016 study and opined it was valid. Director's Exhibit 16.

With respect to the pulmonary function study dated December 8, 2015, the administrative law judge correctly observed that it appears in claimant's treatment records. Decision and Order at 14. The quality standards used to determine the validity of a pulmonary function study are inapplicable to studies performed in the course of a miner's treatment. 20 C.F.R. §718.101(b); *see J.V.S.* [*Stowers*] *v. Arch of W. Va./Apogee Coal Co.*, 24 BLR 1-78, 1-89 (2008). Nevertheless, the administrative law judge must still be persuaded a pulmonary function study appearing in a miner's treatment record is "reliable" for "it to form a basis for a finding of fact on an entitlement issue." 65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000).

[6] The administrative law judge incorrectly stated the date of this pulmonary function study as December 18, 2015, when it is dated December 8, 2015. Decision and Order at 4; Director's Exhibit 17. We deem this clerical error harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the applicable table values listed in Appendices B and C of 20 C.F.R. Part 718. A "non-qualifying" study exceeds those values. 20 C.F.R. §718.204(b)(2)(i), (ii).

[8] The administrative law judge incorrectly stated the date of this pulmonary function study as July 26, 2016, when it is dated July 14, 2016. Decision and Order at 5; Director's Exhibit 19. We again deem this clerical error harmless. *See Larioni*, 6 BLR at 1-1278.

The administrative law judge permissibly found the December 8, 2015 treatment pulmonary function study was not reliable because it was not accompanied by any statement as to claimant's effort and cooperation.[9] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Decision and Order at 14. He noted that the pre-bronchodilator results of the February 22, 2016 pulmonary function study produced qualifying values, but rationally questioned whether these results were an accurate indicator of claimant's current pulmonary capacity in light of the non-qualifying pre- and post-bronchodilator results obtained on the July 14, 2016 and February 12, 2018 studies. *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004); *Workman v. E. Assoc. Coal Corp.*, 23 BLR 1-22, 1-27 (2004); Decision and Order at 15; Director's Exhibit 19; Employer's Exhibit 3. The administrative law judge then permissibly accorded the greatest weight to the February 12, 2018 non-qualifying study as it is the most recent test of record and, therefore, most accurately represents claimant's current pulmonary condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624 (6th Cir. 1988) (administrative law judge may credit evidence that better reflects the miner's respiratory or pulmonary status at the time of the hearing); Decision and Order at 15. Thus, the administrative law judge rationally found the weight of the pulmonary function study evidence does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988); *Burich v. Jones and Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984); Decision and Order at 15.

Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three arterial blood gas studies dated February 22, 2016, July 14, 2016, and February 12, 2018. The February 22, 2016 arterial blood gas study produced non-qualifying values both at rest and with exercise, and the February 12, 2018 study, administered only at rest, also produced non-qualifying values. Director's Exhibits 12; Employer's Exhibit 1. The July 14, 2016 arterial blood gas study, Dr. Jarboe administered, produced non-qualifying values at rest, but qualifying values with exercise. Director's Exhibit 19.

The administrative law judge observed that the February 22, 2016 and July 14, 2016 tests were conducted "only five months" apart and, within his discretion, considered them "essentially contemporaneous." Decision and Order at 15; *see Rowe*, 710 F. 2d at 255. He therefore permissibly found the July 14, 2016 qualifying exercise values in equipoise with the February 22, 2015 non-qualifying exercise values. *See Sunny Ridge Mining Co. v. Keathley*, 773 F.3d 734, 740-41 (6th Cir. 2014); Decision and Order at 15. Weighing the February 12, 2018 non-qualifying study along with the February 22, 2016 and July 14,

[9] The administrative law judge correctly noted the December 18, 2015 pulmonary function study report states it is an "unconfirmed report." Decision and Order at 14; Director's Exhibit 17.

2016 tests, the administrative law judge rationally found the preponderance of the blood gas studies failed to establish total respiratory disability. *See Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987); Decision and Order at 15.

The administrative law judge then accurately found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. Decision and Order at 12. We therefore affirm the administrative law judge's finding that claimant did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii).

Pursuant to 20 C.F.R §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Ajjarapu[10] and Alam[11] that claimant is totally disabled, and the opinions of Drs. Jarboe[12] and Broudy[13] that claimant has a mild obstructive impairment but is not totally disabled. Decision and Order at 15-20; Director's Exhibits 12, 23; Claimant's Exhibit 7; Employer's Exhibits 1, 3. The administrative law judge reviewed Dr. Ajjarapu's opinion in detail and rationally accorded it little weight because she relied, in part, on her February 22, 2016 qualifying pulmonary function study, contrary to the administrative law judge's finding that the weight of the more recent pulmonary function

[10] In a February 22, 2016 report regarding her physical examination of claimant, Dr. Ajjarapu opined claimant "doesn't have the pulmonary capacity to do his previous coal mine employment" based on the qualifying pulmonary function study she described as "technically . . . suboptimal." Director's Exhibit 12. In a supplemental report, she reviewed Dr. Jarboe's objective tests and conclusions, and opined that although the objective tests did not demonstrate total disability, "the fact that [claimant] had moderate airflow obstruction, and exercise induced hypoxemia, would indicate evidence of pulmonary impairment." Director's Exhibit 23. She concluded that the objective studies establish claimant does not "have the pulmonary capacity to do his previous coal mine employment." *Id.*

[11] In a March 29, 2017 report regarding his examination of claimant, Dr. Alam diagnosed a totally disabling pulmonary impairment based on a pulmonary function study reflecting an FEV1 result that was 54% of predicted. Claimant's Exhibit 7.

[12] On July 24, 2016, Dr. Jarboe examined claimant and acknowledged his exercise-induced hypoxemia a blood gas study demonstrated, but opined claimant could perform his previous coal mine work "in a supervisory capacity or operate heavy equipment." Employer's Exhibit 1 at 18.

[13] In a report dated February 12, 2018, Dr. Broudy concluded claimant is not disabled from performing his previous coal mine job or other similarly arduous types of labor. Employer's Exhibit 3.

study evidence does not support a finding of total disability. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305-06 (6th Cir. 2005); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14 (6th Cir. 2002); Decision and Order at 16-17. Further, the administrative law judge permissibly found Dr. Ajjarapu did not demonstrate an accurate understanding of the actual demands of claimant's last coal mining job because she reported claimant's duties as a night superintendent involved running dozers and loaders, whereas the evidence of record indicates his usual duties did not involve running heavy equipment.[14] *See Cornett v. Benham Coal, Inc*., 227 F.3d 569, 578 (6th Cir. 2000); Decision and Order at 16-17; Director's Exhibit 23. For these reasons, the administrative law judge permissibly concluded Dr. Ajjarapu's opinion is neither sufficiently reasoned nor explained and is entitled to little weight on the issue of disability. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 16-17.

With respect to Dr. Alam, the administrative law judge assessed the probative value of his opinion in light of his status as a treating physician. Decision and Order at 17. Under 20 C.F.R. §718.104(d), an administrative law judge is not required to give greater weight to the opinion of a treating or examining physician based on that status alone. *See* 20 C.F.R. §718.104(d)(5); *Collins v. J&L Steel (LTV Steel)*, 21 BLR 1-181, 1-189 (1999). Rather, the administrative law judge may accord controlling weight to a treating physician's opinion only if the opinion is credible "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 492 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade). In his March 29, 2017 report, Dr. Alam opined claimant "is disabled from [a] pulmonary point of view with [an] FEV1 54%." Claimant's Exhibit 7. The administrative law judge noted correctly that while the objective evidence available to Dr. Alam at the time he reached his conclusions supported his disability opinion, he did not review the subsequent "considerably higher" FEV1 values obtained on the February 12, 2018 pulmonary function study. Decision and Order at 17-18. The administrative law judge therefore permissibly found Dr. Alam's opinion not "particularly persuasive or reliable"

[14] Claimant testified at the hearing and at a deposition that he last worked as a mine superintendent, which required him to walk through the pits, to check on various jobs and occasionally to assist with lifting and carrying objects weighing up to 100 pounds. Hearing Transcript at 14-15, 31; Employer's Exhibit 29 at 6. When asked whether he operated machinery, he replied that he did so in his prior job as a foreman. Hearing Transcript at 15.

despite his status as a treating physician. *See Crisp*, 866 F.2d at 185; *Rowe*, 710 F.2d at 255; *Stark*, 9 BLR at 1-37; Decision and Order at 17-18.

The determination of whether a medical opinion is documented and reasoned is for the administrative law judge to make, and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Napier*, 301 F.3d at 713-714; *Moseley v. Peabody Coal Co*., 769 F.2d 357, 360 (6th Cir. 1985). As the administrative law judge's credibility determinations are rational and supported by substantial evidence, we affirm his finding that the medical opinion evidence does not establish total disability at 20 C.F.R. §718.204(b)(2)(iv).[15] *See Cornett*, 227 F.3d at 578; Decision and Order at 20.

Finally, weighing the evidence supporting total disability against the contrary probative evidence, the administrative law judge permissibly found that claimant failed to establish he is incapable of performing his usual coal mine work from a respiratory standpoint. *See Fields*, 10 BLR at 1-21; *Shedlock*, 9 BLR at 1-198; Decision and Order at 20. Thus, the administrative law judge's finding that claimant did not establish total respiratory disability at 20 C.F.R. §718.204(b)(2), an essential element of entitlement under Section 411(c)(4) and 20 C.F.R. Part 718, is affirmed. 30 U.S.C. §921(c)(4); *see Anderson*, 12 BLR at 1-112; *Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

[15] We need not address the administrative law judge's findings with respect to the opinions of Drs. Jarboe and Broudy because they opined claimant does not have a totally disabling respiratory impairment and, therefore, do not assist claimant in satisfying his burden to establish he is totally disabled. Decision and Order at 18-20; Director's Exhibit 9; Employer's Exhibits 1, 3.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge