BRB No. 09-0602 BLA

EDD F. BEVILL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED: 07/29/2010
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (08-BLA-5033) of Administrative Law Judge Linda S. Chapman on a subsequent claim[1] filed pursuant to

[1] Claimant, Edd F. Bevill, filed his first application for benefits on March 20, 2000. Director's Exhibit 1. On July 21, 2000, the district director denied this claim based on claimant's failure to establish the existence of pneumoconiosis and total

the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*))(the Act). The administrative law judge credited claimant with twenty-four years of qualifying coal mine employment and, adjudicating the claim pursuant to 20 C.F.R. Parts 718 and 725, found that the newly submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found the weight of the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded, commencing as of December 2006, the month in which claimant filed his subsequent claim.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that claimant established the existence of pneumoconiosis and was totally disabled by the disease. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), initially declined to file a substantive response to employer's appeal, but subsequently filed a brief pursuant to the Board's Order, issued on March 30, 2010, permitting supplemental briefing in this case. The Director notes that, if the Board affirms the administrative law judge's factual findings and the award of benefits, the Board need not address the impact of the recent amendment to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] which became effective on March 23, 2010. However, the Director maintains that, if the Board does not affirm the award of benefits, the case must be remanded for the administrative law judge to determine whether claimant is entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and, if so, to allow the parties to proffer additional evidence consistent with the evidentiary limitations set forth in 20 C.F.R. §725.414, or upon a showing of good cause. Employer has filed a supplemental letter brief, arguing that it would be premature to apply the amended provisions of Section 411(c)(4) of the Act, 30

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disability. Director's Exhibit 1. Claimant took no further action until he filed the instant subsequent claim for benefits on December 18, 2006. Director's Exhibit 3.

[2] Section 411(c)(4) provides that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis or, relevant to a survivor's claim, death due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 199 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

U.S.C. §921(c)(4), in light of pending challenges to its constitutionality, and because the Secretary of the Department of Labor (DOL) has not yet promulgated regulations implementing the recent amendments to the Act. Employer additionally asserts that the evidence of record is insufficient to establish claimant's entitlement to benefits under both the pre-amendment and post-amendment provisions of the Act.[3]

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 the applicable law, they are binding upon this Board and may not be disturbed.[4] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence and contains no reversible error. Turning first to the issue of total respiratory disability, employer contends that the administrative law judge erred in finding that the weight of the newly submitted medical opinions of record, as supported by the qualifying arterial blood gas study results on exercise, was sufficient to establish total disability at Section 718.204(b)(2). Employer asserts that the administrative law judge should have credited Dr. Zaldivar's assessment of no pulmonary impairment, and erred in relying on the opinions of Drs. Forehand, Rasmussen, and Agarwal to support a finding of total disability, when the latter three physicians merely termed claimant's impairment as "significant" or "moderate," and premised their opinions on arterial blood gas studies that demonstrated only "mild" or "minimal" hypoxemia. Employer's Brief at 9, 10. Employer's arguments lack merit.

Dr. Forehand diagnosed a significant respiratory impairment with insufficient residual oxygen-transport capacity, which precluded claimant from returning to his usual coal mine employment and rendered him totally and permanently disabled. Director's Exhibit 10. Dr. Rasmussen opined that claimant's ventilatory studies revealed an irreversible obstructive ventilatory impairment; his incremental treadmill exercise test illustrated 68% of his predicted maximum oxygen uptake; and his moderate impairment

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-four years of qualifying coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 3.

[4] As claimant's last coal mine employment occurred in West Virginia, the Board 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 4.

in oxygen transfer demonstrated "at least [a] moderate loss of lung function" and, hence, an inability to perform very heavy exercise, as was required in his last regular coal mine work. Claimant's Exhibit 1. Despite a normal clinical examination, chest x-ray, and pulmonary function study, Dr. Agarwal characterized claimant's pulmonary impairment as severe, based on evidence of a gas exchange impairment and intrinsic lung disease, and opined that claimant does not retain the pulmonary capacity to work as a coal miner. Claimant's Exhibit 2.

In evaluating the newly submitted medical opinions of record at Section 718.204(b)(2)(iv), the administrative law judge permissibly found that Dr. Zaldivar's opinion was entitled to little weight, because he failed to explain how he reconciled his conclusion of no impairment with the fact that claimant's arterial blood gas study results on exercise produced results that qualify for a finding of total disability under the regulations. Decision and Order at 11; *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). The administrative law judge acted within her discretion in finding that the opinions of Drs. Forehand, Rasmussen, and Agarwal, that claimant does not retain the respiratory capacity to perform his usual coal mine employment, were well-reasoned, well-documented, and entitled to full probative weight. Decision and Order at 11; *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As substantial evidence supports the administrative law judge's findings, we affirm her determination that the newly submitted evidence was sufficient to establish total respiratory disability at Section 718.204(b), and a change in an applicable condition of entitlement at Section 725.309(d). As employer does not challenge the administrative law judge's finding that the newly submitted evidence was entitled to greater weight, as it was more probative of claimant's current condition than the earlier evidence, we further affirm her finding that the weight of the evidence of record established total disability pursuant to Section 718.204(b).

Next, employer challenges the administrative law judge's weighing of the conflicting medical opinions of record in finding the existence of pneumoconiosis established under Section 718.202(a)(4).[5] Citing *Scott v. Mason Coal Co.*, 289 F.3d 263,

[5] Relevant to 20 C.F.R. §718.202(a)(4), the record contains the following medical opinions. In a report dated January 24, 2007, Dr. Forehand diagnosed clinical and legal pneumoconiosis. Director's Exhibit 10. Dr. Forehand reiterated his opinion and explained his conclusions at a deposition on July 8, 2008. Employer's Exhibit 4. On December 12, 2007, Dr. Rasmussen diagnosed clinical pneumoconiosis and stated that it was "a material contributing factor to [claimant's] disabling lung disease," *i.e.*, an impairment in oxygen transfer caused by coal dust exposure. Claimant's Exhibit 1. On July 3, 2008, Dr. Agarwal diagnosed legal pneumoconiosis, based on claimant's oxygen

22 BLR 2-372 (4th Cir. 2002),[6] employer asserts that the diagnoses of legal pneumoconiosis rendered by Drs. Forehand and Rasmussen should have been discounted because they were based, in part, on positive x-ray interpretations, and the administrative law judge concluded that the preponderance of the x-ray evidence was negative for pneumoconiosis. Conversely, employer maintains that the opinions of Drs. Hippensteel and Zaldivar, that claimant does not suffer from clinical or legal pneumoconiosis, are entitled to greater weight because they are consistent with the negative x-ray evidence of record. Employer's arguments are without merit. The administrative law judge acknowledged that the diagnoses of clinical pneumoconiosis by Drs. Forehand and Rasmussen were entitled to diminished weight, as they were based on positive x-rays, but found that their diagnoses of legal pneumoconiosis were well-reasoned and well-documented. The fact that Drs. Forehand and Rasmussen based their conclusions, in part, on positive x-rays obtained during their pulmonary evaluations of claimant does not necessarily undermine the reliability of their diagnoses of legal pneumoconiosis. As the regulations and legal precedent have consistently provided that, pursuant to Section 718.202(a)(4), a physician's report may establish the existence of pneumoconiosis notwithstanding a negative x-ray, employer's arguments in this regard are rejected. 20 C.F.R. §718.202(a)(4); *Church v. Eastern Assoc. Coal Corp.*, 20 BLR 1-8, 1-13 (1996); *Taylor v. Director, OWCP*, 9 BLR 1-22, 1-24 (1986).

Employer also challenges the administrative law judge's crediting of the diagnoses of legal pneumoconiosis by Drs. Forehand, Rasmussen and Agarwal, *i.e.*, that claimant's disabling gas exchange impairment was attributable to coal dust exposure, over the opinion of Dr. Hippensteel, that claimant's impairment was related to his age, and the opinion of Dr. Zaldivar, that claimant's blood gas abnormality was of no clinical significance and was attributable to past episodes of pneumonia, not pneumoconiosis.

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transfer impairment, as demonstrated by his blood gas study results. Claimant's Exhibit 2. In a report dated August 14, 2007, Dr. Hippensteel diagnosed allergies and asthma, finding normal diffusion that was not indicative of any interstitial lung disease, and no x-ray evidence demonstrating abnormalities. Employer's Exhibit 1. Dr. Zaldivar completed three reports, all finding no evidence of coal workers' pneumoconiosis or any chronic lung disease caused by the inhalation of coal mine dust. Employer's Exhibit 2.

[6] In *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), the United States Court of Appeals for the Fourth Circuit held that the opinion of a physician who did not diagnose either clinical or legal pneumoconiosis, in direct contradiction to the administrative law judge's finding that the miner suffered from occupational pneumoconiosis, was entitled to little, if any, weight on the issue of disability causation under 20 C.F.R. §718.204(c). *Scott*, 289 F.3d at 269, 22 BLR at 2-383.

Employer asserts that Dr. Zaldivar, unlike the other physicians, reviewed all the evidence of record and provided a more comprehensive opinion that, contrary to the administrative law judge's finding, was not "at odds with [claimant's] qualifying arterial blood gas values on exercise," because the arterial blood gas study administered to claimant by Dr. Zaldivar did not yield qualifying results at rest or during exercise. Employer's Brief at 7. Employer surmises that the administrative law judge mistakenly relied on the exercise portion of the arterial blood gas study associated with Dr. Hippensteel's examination, rather than the test Dr. Zaldivar administered, when she assessed the probative value of Dr. Zaldivar's opinion.

A review of Dr. Zaldivar's report documenting his January 30, 2008 pulmonary examination of claimant reveals that the exercise portion of his arterial blood gas test produced a PCO_2 value of 34.0 and a PO_2 value of 72.0. Employer's Exhibit 2. While the administrative law judge incorrectly listed a PCO_2 value of 34.2 and a PO_2 value of 63.2 in summarizing Dr. Zaldivar's test results on exercise, *see* Decision and Order at 4, we deem this error harmless, since the administrative law judge accurately delineated Dr. Zaldivar's observations regarding both the arterial blood gas study that he administered to claimant and the additional blood gas studies that he reviewed. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Specifically, the administrative law judge correctly noted Dr. Zaldivar's observations regarding the blood gas test he administered to claimant, *i.e.*, "a mild drop in PO_2 during exercise, still within normal limits, with normal dead space, which means that the mild problem with oxygenation was a result of diffusion impairment." Decision and Order at 8; Employer's Exhibit 2. The administrative law judge accurately noted Dr. Zaldivar's opinion that claimant's "mildly abnormal blood gases were the result of injuries to [claimant's] lungs from episodes of pneumonia." Decision and Order at 9. Further, the administrative law judge acknowledged that Dr. Zaldivar's opinion, that the variability in claimant's blood gas studies during exercise was not attributable to coal workers' pneumoconiosis, remained unchanged even after he reviewed the studies conducted by Drs. Agarwal, Forehand, and Rasmussen, all of which demonstrated abnormalities and produced qualifying results on exercise. Decision and Order at 9, 10; Director's Exhibit 10; Claimant's Exhibits 1, 2. Finally, the administrative law judge reiterated Dr. Zaldivar's conclusion that "the only medical reason for [the] PO_2 to drop in any individual is the damage to lungs sustained through episodes of infections" which, in this case, Dr. Zaldivar attributed to claimant's past episodes of pneumonia, and not to the inhalation of coal dust. Decision and Order at 10.

In her assessment of the probative value of the medical opinions, the administrative law judge permissibly concluded that Dr. Zaldivar's opinion was entitled to diminished weight because Dr. Zaldivar failed to adequately explain how he reconciled his opinion, that claimant had no pulmonary impairment and that any abnormality exhibited on blood gases was clinically insignificant, with the fact that claimant's most recent blood gas studies produced exercise values that qualify as totally disabling under

the regulations. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 11. Because the administrative law judge reasonably determined that Dr. Zaldivar's opinion was not persuasive, we reject employer's argument that the opinion was entitled to greater weight. *See Clark*, 12 BLR at 1-155; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984).

We, likewise, reject employer's contention that the administrative law judge should have assigned greater weight to the opinions of Drs. Hippensteel and Zaldivar because these physicians are Board-certified in pulmonary diseases. While the respective qualifications of physicians is an "important indicator of the reliability of their opinions," *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-341 (4th Cir. 1998), the administrative law judge is not required to defer to the physicians with superior qualifications and must consider each physician's report to determine if the physician provided underlying documentation supportive of his/her conclusions, *see Trumbo*, 17 BLR at 1-88-89. As discussed *supra*, the administrative law judge permissibly found that Dr. Zaldivar's opinion was unpersuasive, and she likewise was not persuaded by Dr. Hippensteel's conclusion that impairments in gas exchange are "related to cardiac and pulmonary function" and "naturally worsen with age," because Dr. Hippensteel opined merely that claimant was "past 'retirement age'," but "did not point to any cardiac factors to account for his hypoxemia." Decision and Order at 14-15; Employer's Exhibit 1. Noting that Dr. Forehand's curriculum vitae documented "a great deal of experience in the diagnosis and treatment of coal workers' pneumoconiosis," the administrative law judge permissibly found that Dr. Forehand's opinion, that claimant's disabling gas exchange impairment was attributable to coal dust exposure and smoking, as supported by the opinions of Drs. Rasmussen and Agarwal, was entitled to greater weight. In so finding, the administrative law judge determined that Dr. Forehand persuasively discounted the effects of claimant's bouts of pneumonia and history of tuberculosis, explained that one of the few places he sees claimant's pattern of impairment is with disabling coal workers' pneumoconiosis, addressed claimant's normal diffusion study, and addressed the effects of both smoking and coal dust exposure on claimant's pulmonary impairment. Decision and Order at 14; *see Trumbo*, 17 BLR at 1-88; *Clark*, 12 BLR at 1-155; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). As substantial evidence supports the administrative law judge's credibility determinations in weighing the medical opinion evidence pursuant to Section 718.202(a)(4), and as the administrative law judge properly weighed together all of the relevant evidence in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), we

affirm her finding that claimant established the existence of legal pneumoconiosis pursuant to Section 718.202(a).[7] Decision and Order at 15.

Consistent with her weighing of the evidence on the issue of legal pneumoconiosis, the administrative law judge rationally credited the opinions of Drs. Forehand, Rasmussen and Agarwal to support her conclusion that claimant's disabling pulmonary impairment was due to coal dust exposure pursuant to Section 718.204(c), and discredited the contrary medical opinions. Decision and Order at 15; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002). As substantial evidence supports the administrative law judge's findings thereunder, we affirm her determination that claimant established disability causation, and affirm the award of benefits.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge

[7] A finding at 20 C.F.R. §718.203 is subsumed in a finding of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See* 20 C.F.R. §718.201(a)(2); *see Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006).