

BRB No. 13-0327 BLA

JOHNNY C. HILL)
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 Claimant-Respondent)
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 v.)
)
 LONE MOUNTAIN PROCESSING) DATE ISSUED: 04/17/2014
)
 and)
)
 ARCH COAL C/O UNDERWRITERS)
 SAFETY & CLAIMS)
)
 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 – Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Mark L. Ford (Ford Law Offices PLLC), Harlan, Kentucky, for claimant.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (2011-BLA-05124) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on July 17, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012). Based on the filing date of the claim, the administrative law judge

considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Because the administrative law judge determined that claimant worked at least fifteen years in underground coal mine employment¹ and also suffers from a totally disabling respiratory or pulmonary impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).² The administrative law judge further found that employer failed to rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in determining the exertional requirements of claimant's last coal mine job and erred in relying on Dr. Rasmussen's opinion to find that claimant is totally disabled. Employer asserts that the administrative law judge misstated the evidence, cited to the wrong regulatory provision, and did not properly weigh all of the contrary probative evidence, relevant to whether claimant is totally disabled. Employer also asserts that the administrative law judge erred in finding that it did not establish rebuttal.

In response to employer's appeal, claimant filed a motion to remand for the limited purpose of having the administrative law judge provide the correct regulatory provision in support of his finding of total disability. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

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,

¹ The administrative law judge credited claimant with thirty-seven years of coal mine employment. Decision and Order at 4.

² Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory impairment. See 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-seven years of underground coal mine employment. Decision and Order at 4; see *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.⁴ 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).

I. INVOCATION OF THE PRESUMPTION – TOTAL DISABILITY

Employer argues that the administrative law judge erred in finding that claimant has a totally disabling respiratory or pulmonary impairment. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge found that the record contains two pulmonary function studies of record, dated October 12, 2009 and March 11, 2010. Each of these studies is non-qualifying for total disability.⁵ Director’s Exhibits 10, 13. The administrative law judge determined that claimant failed to establish total disability based on the pulmonary function evidence, but also noted that, “[t]hese tests are not dispositive of disability.” Decision and Order at 5.

Relevant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge found that Dr. Rasmussen conducted an arterial blood gas study on October 12, 2009, which had non-qualifying values, at rest, but yielded qualifying values for total disability during exercise. *See* Decision and Order at 5; Director’s Exhibit 10. However, the administrative law judge found that the qualifying exercise value “was not reproducible on the more recent study performed by Dr. Jarboe on March 11, 2010.” Decision and Order at 5. Dr. Jarboe’s blood gas studies were non-qualifying for total disability at rest and during exercise. Director’s Exhibit 13. The administrative law judge concluded that claimant was unable to establish total disability based on the blood gas study evidence. Decision and Order at 5.

Under 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Rasmussen and Jarboe, along with the medical treatment records of Dr. Alam. He noted that Dr. Rasmussen performed the Department of Labor evaluation on October 12, 2009. Director’s Exhibit 10. Dr. Rasmussen reported that claimant last worked as a low track continuous mine operator, which involved operating a rock dusting machine, occasional fire bossing, shoveling, and pulling heavy hose for rock dusting.

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant’s coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director’s Exhibits 3, 6.

⁵ A “qualifying” pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A “non-qualifying” study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Director's Exhibit 10. Dr. Rasmussen interpreted the x-ray taken during his examination as positive for simple and complicated pneumoconiosis, Category A. *Id.* He diagnosed chronic obstructive pulmonary disease/emphysema and opined that claimant suffers from moderate loss of lung function, as demonstrated by his reduced diffusing capacity and impaired oxygen transfer during moderate exercise. *Id.* Dr. Rasmussen opined that claimant is totally disabled from performing his usual coal mine work. *Id.*

Dr. Jarboe examined claimant on March 11, 2010. Director's Exhibit 13; *see also* Employer's Exhibit 2. He reported that claimant's last coal mine job involved cleaning the belt, rock dusting, acting as a fire boss, lifting rock dust bags that weighed fifty to eighty pounds, and shoveling. Director's Exhibit 13. Dr. Jarboe diagnosed simple coal workers' pneumoconiosis by x-ray. *Id.* He suggested that Dr. Rasmussen's blood gas study results were due to hypertension. *Id.* Dr. Jarboe opined that claimant is not totally disabled because the "ventilatory function [was] only mildly impaired" and there was "no impairment of gas exchange." *Id.* Dr. Jarboe attributed claimant's mild obstruction to a combination of smoking and bronchial asthma. *Id.*

The administrative law judge also summarized the treatment notes from Dr. Alam dated March 12, 2012. Decision and Order at 6-7; Claimant's Exhibit 4. Dr. Alam reported that claimant was seen for symptoms of coal workers' pneumoconiosis and chronic obstructive pulmonary disease. Claimant's Exhibit 4. Claimant described a dry cough, excessive sputum, morning cough, nocturnal dyspnea, wheezing and pain from pleurisy. *Id.* Claimant indicated that his respiratory symptoms were aggravated by anxiety, cold air exposure, and strenuous activity. *Id.* Dr. Alam prescribed medications, a nebulizer, and oxygen therapy. *Id.*

The administrative law judge acknowledged that, in assessing whether claimant was totally disabled, he was required to consider the medical opinions in conjunction with the exertional requirements of claimant's usual coal mine work. Decision and Order at 6. The administrative law judge determined that claimant's work as a continuous miner operator involved heavy labor. *Id.* The administrative law judge found that Dr. Rasmussen "demonstrated an awareness of the physical requirements of [c]laimant's usual coal mine employment" and credited Dr. Rasmussen's opinion that claimant's moderate breathing restriction would preclude him from returning to his usual coal mine work. *Id.* In contrast, the administrative law judge found that, while Dr. Jarboe diagnosed only a mild impairment, "[he] was not asked whether this would create a restriction on work related activities." Decision and Order at 6 n.4. The administrative law judge also noted that Dr. Jarboe was not asked whether claimant's use of oxygen would have affected his testing. *Id.* The administrative law judge observed that, "It is problematic whether a 'mild' restriction is competent to preclude heavy work. Neither party developed this issue." *Id.*

The administrative law judge credited Dr. Rasmussen's opinion, based on the following rationale:

I find that the opinion that the [c]laimant has a "moderate" breathing restriction is more reasonable than an opinion that he has no restriction at all. There is no evidence to show that the medications including oxygen were not necessary. I find that Dr. Alam's notes showing that claimant's symptoms were aggravated by activities of daily living, anxiety, cold air exposure and strenuous activity are consistent with Dr. Rasmussen's report.

Decision and Order at 6-7.

Employer alleges that "most" of claimant's usual coal mine work "involved pushing buttons on a control panel and operating a piece of equipment" and that "the mere fact that claimant testified that he had to lift [eighty] pounds" does not establish that his employment required heavy labor. Employer's Brief at 25. We disagree. Employer has proffered no evidence to contradict claimant's testimony. We see no error in the administrative law judge's rational interpretation of claimant's testimony or his reliance on that testimony to find that claimant was required to lift rock dust bags weighing up to eighty pounds in the performance of his usual coal mine work as a continuous miner. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The weight to be assigned to the evidence and the determinations concerning the credibility of the hearing witnesses are within the purview of the administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 n.9, 21 BLR 2-323, 2-335 n.9 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Additionally, contrary to employer's argument, the fact that claimant is unable to establish total disability by a preponderance of the pulmonary function or arterial blood gas study evidence does not preclude the administrative law judge from finding that claimant is totally disabled. The regulation at 20 C.F.R. 20 C.F.R. §718.204(b)(2)(iv) states:

Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv).

In this case, the administrative law judge permissibly determined that Dr. Rasmussen offered a reasoned and documented opinion that claimant is totally disabled, based on the results of the objective testing he obtained, his physical examination of claimant, and his understanding of the exertional requirements of claimant's usual coal mine work. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Although employer argues that Dr. Jarboe's opinion, that claimant is not totally disabled, is more credible, we consider employer's arguments to be a request that the Board reweigh the evidence, which we are not empowered to do.⁶ *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Additionally, we reject employer's assertion that the administrative law judge failed to weigh all of the conflicting evidence together prior to finding that claimant is totally disabled. The administrative law judge discussed all of the relevant evidence and acted within his discretion in crediting Dr. Rasmussen's opinion that claimant's reduced diffusing capacity and impaired oxygen transfer during moderate exercise demonstrated a moderate loss of lung function that prevented claimant from performing his last coal mine job, which required heavy labor. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 6-7; Director's Exhibit 10. Because it is supported by substantial evidence, we affirm the administrative law judge's credibility determinations and his finding that Dr. Rasmussen's opinion, along with the treatment records of Dr. Alam,⁷ are sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103;

⁶ Because Dr. Jarboe specifically opined that claimant is not totally disabled, we agree with employer that the administrative law judge stated erroneously, at the outset of his analysis, that "every physician rendering an opinion in this record agrees that the miner had totally disabling chronic obstructive pulmonary disease." *See Employer's Brief* at 18-19. However, we consider this error to be harmless, as the administrative law judge later characterized Dr. Jarboe's opinion correctly, noting that, "Dr. Jarboe did not 'feel' that [c]laimant had a totally and permanently disabling pulmonary condition." Decision and Order at 6. The administrative law judge also observed that, based on the March 11, 2010 exam, Dr. Jarboe opined that claimant's ventilatory function "is only mildly impaired as indicated by the post-dilator study showing mild airflow obstruction . . . and [claimant] retains the functional capacity to perform his last coal mining job or one of similar physical demand in a dust free environment." Decision and Order at 6, quoting Employer's Exhibit 2.

⁷ We reject employer's contention that Dr. Alam's treatment records, documenting claimant's respiratory symptoms and use of oxygen, are not relevant to the analysis of whether claimant is totally disabled. Determinations regarding relevancy and the weight to be accorded the evidence are within the purview of the administrative law judge. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

Shedlock v. Bethlehem Mines Corp., 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc). We therefore affirm the administrative law judge's findings that claimant established a totally disabling respiratory or pulmonary impairment and invoked the presumption at amended Section 411(c)(4).

II. REBUTTAL OF THE PRESUMPTION

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from either clinical or legal pneumoconiosis, or that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), *see* 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 80, 25 BLR 2-1, 2-9 (6th Cir. 2011).

The administrative law judge determined that claimant established the existence of clinical pneumoconiosis based, in part, on Dr. Jarboe's opinion. Decision and Order at 8. We affirm, as unchallenged by employer, the administrative law judge's determination that employer is unable to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8. Furthermore, contrary to employer's argument, the administrative law judge permissibly determined that Dr. Jarboe's opinion was insufficient to rebut the presumed fact of disability causation insofar as Dr. Jarboe did not diagnose a totally disabling respiratory or pulmonary impairment. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). The administrative law judge also rationally found that Dr. Jarboe failed to persuasively explain why claimant's thirty-seven years of coal mine employment played no role in his respiratory disability. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-495 (6th Cir. 2002). Thus, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Accordingly, the administrative law judge's Decision and Order – Award of Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge