

U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601



BRB No. 15-0264 BLA

BILLY F. HAZELWOOD)	
)	
Claimant-Respondent)	
)	
v.)	
)	
U.S. STEEL MINING COMPANY, LLC)	DATE ISSUED: 03/30/2016
)	
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 Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2014-BLA-05058) of Administrative Law Judge Paul C. Johnson, Jr., on a subsequent claim filed on December 14, 2012, pursuant to the provisions of the Black Lung Benefits Act, as

amended, 30 U.S.C. §§901-944 (2012) (the Act).¹ The administrative law judge credited claimant with at least thirty-two years of coal mine employment, of which at least fifteen were underground. Additionally, the administrative law judge found that the newly submitted medical evidence was sufficient to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge determined, therefore, that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), and invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).² The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer contends that the administrative law judge erred in finding that claimant was totally disabled and, therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge did not properly weigh the x-ray and medical opinion evidence relevant to the existence of pneumoconiosis and disability causation. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, did not submit a response brief in this appeal.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, and in accordance with applicable law.⁴ 33 U.S.C. §921(b)(3), as incorporated by 30

¹ Claimant filed his initial claim for benefits on September 15, 2001. Director's Exhibit 1. The district director denied this claim because claimant did not establish any of the elements of entitlement. *Id.* Claimant took no further action until filing his current subsequent claim.

² Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305.

³ We affirm, as unchallenged by employer on appeal, the administrative law judge's finding of at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

⁴ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See*

U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Invocation of the Section 411(c)(4) Presumption – Total Disability

In determining whether claimant established that he suffers from a totally disabling respiratory or pulmonary impairment, the administrative law judge considered pulmonary function studies, blood gas studies, and medical opinion evidence. Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge determined that “the [c]laimant has not established that he is totally disabled based on pulmonary function studies alone,” because the preponderance of the studies, including the most recent of record, produced non-qualifying values.⁵ Decision and Order at 20. Similarly, the administrative law judge determined, at 20 C.F.R. §718.204(b)(2)(ii), that the blood gas study evidence was insufficient to establish total disability, as all of the studies were non-qualifying.⁶ *Id.* With respect to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge found that there was no evidence suggesting that claimant suffers from cor pulmonale with right-sided congestive heart failure. *Id.*

Relevant to his consideration of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge determined that claimant’s usual coal mine work involved transporting welding equipment, acetylene tanks, hoses, and related tools into the mine and that these items ranged in weight from twenty-five to 100 pounds. Decision and Order at 5. The administrative law judge characterized this work as requiring heavy-to-very-heavy manual labor. *Id.* at 23. The administrative law judge then weighed the medical opinions of Drs. Farrow, McSharry, Killeen, and Rasmussen. Decision and Order at 21; Claimant’s Exhibit 1; Employer’s Exhibits 1, 3.

Dr. Farrow examined claimant on February 20, 2013, and diagnosed a moderate obstructive impairment, but did not offer a specific opinion as to whether claimant

Shupe v. Director, OWCP, 12 BLR 1-200 (1989) (en banc); Director’s Exhibits 1, 5, 8; Hearing Transcript at 16.

⁵ A “qualifying” pulmonary function study yields values that are equal to or less than the values listed in Appendix B to 20 C.F.R. Part 718. A “non-qualifying” study exceeds those values. 20 C.F.R. §718.204(b)(2)(i).

⁶ A “qualifying” blood gas study yields values that are equal to or less than the values listed in Appendix C to 20 C.F.R. Part 718. A “non-qualifying” study exceeds those values. 20 C.F.R. §718.204(b)(2)(ii).

retained the capacity to perform his usual coal mine job. Director's Exhibit 13. Dr. McSharry examined claimant on September 10, 2013, and reviewed Dr. Farrow's report and a CT scan dated January 9, 2009. Employer's Exhibit 1. He determined that claimant has a moderate obstructive lung disease that would prohibit him from performing his usual coal mine employment, which required "heavy exertion for extended periods of time." *Id.* Dr. Killeen examined claimant on October 10, 2013, and reviewed the January 9, 2009 CT scan, the objective studies performed in 2013, the readings of chest x-rays taken in 2013, and the medical reports of Drs. Farrow, Rasmussen, and McSharry. Employer's Exhibit 3. Dr. Killeen stated that claimant has a mild to moderate airway obstruction that "*may* affect the ability to perform heavy exertion such as described by the claimant in his previous job duties while working in the mines." *Id.* (emphasis added). He also indicated that the results of claimant's cardiac stress test showed that he had an exercise limitation that would prevent him from performing his previous coal mine work. *Id.* Dr. Rasmussen examined claimant on May 5, 2014, and diagnosed a moderate obstructive impairment that would prevent claimant from performing his usual coal mine employment, which required heavy-to-very-heavy manual labor.⁷ Claimant's Exhibit 1.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge stated:

Considering all the medical opinions together, I find the preponderance of this evidence supports a finding of total disability. I credit the opinions of Drs. Rasmussen . . . and McSharry that the [c]laimant is unable to perform his last coal mine employment due to obstructive lung disease. I give some credit to the opinions of Drs. Farrow and Killeen, in that they indicate the [c]laimant suffers from some degree of obstructive impairment, but as they are both equivocal and vague I give them less weight . . . Drs. Rasmussen and McSharry best explained how all of the evidence they developed supported their conclusions, and they addressed this in conjunction with the exertional level of [claimant's] past coal mine employment. I find that the

⁷ The record from claimant's initial claim contains Dr. Rasmussen's report of an examination of claimant on November 14, 2000, in which the physician opined that claimant did not have a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. The administrative law judge summarized this opinion, and noted its existence when weighing the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 11, 21. The administrative law judge stated, "[b]ecause of the latent and progressive nature of pneumoconiosis, as codified in the regulations, I find this report is marginally probative and give this opinion no weight as to the issue of total disability." *Id.* at 21.

preponderance of the medical opinion evidence supports a finding of total disability.

Decision and Order at 23. The administrative law judge further determined that the well-reasoned and well-documented medical opinions outweighed the non-qualifying objective studies and, therefore, were sufficient to establish total disability under 20 C.F.R. §718.204(b)(2). *Id.* Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement, and invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis.

Employer contends that the administrative law judge erred in finding that the medical opinion evidence was sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv), and in finding that it outweighed the contrary probative evidence of record.⁸ In support of its argument, employer maintains that the opinions of Drs. McSharry and Killeen prove that any respiratory or pulmonary impairment suffered by claimant is not permanent, as they performed post-bronchodilator pulmonary function studies that showed higher values and an improvement in claimant's lung volumes. Employer also asserts that Dr. Farrow's opinion is entitled to little weight because he did not perform a post-bronchodilator study and, therefore, was unaware of the reduction in claimant's impairment in response to the application of bronchodilators. Similarly, employer alleges that the administrative law judge should have addressed the fact that Dr. Rasmussen ignored his own post-bronchodilator pulmonary function study results and the non-qualifying nature of both his pulmonary function study and blood gas study to conclude that claimant is totally disabled.

Employer's contentions are without merit. Contrary to employer's allegations, the fact that the preponderance of claimant's pulmonary function studies, and all of his blood gas studies, were non-qualifying did not preclude the administrative law judge from crediting the diagnoses of a totally disabling impairment rendered by Drs. Rasmussen and McSharry. *See Marsiglio v. Director, OWCP*, 8 BLR 1-190, 1-192 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-298 (1984). The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides, "[w]here total disability cannot be shown under paragraphs (b)(2)(i), (ii) or (iii) . . . total disability may nevertheless be found if a physician

⁸ In challenging the administrative law judge's finding of total disability, employer includes several arguments relating to the separate issue of disability causation. *See* Employer's Brief at 13, 15-19. We will address these arguments when we consider employer's assertion that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by establishing that claimant's total respiratory or pulmonary disability is not due to pneumoconiosis under 20 C.F.R. §718.305(d)(2)(ii).

exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques,” concludes that the miner has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge acted within his discretion as fact-finder in according greater weight to the opinions of Drs. Rasmussen and McSharry because they considered the exertional requirements of claimant’s employment and thoroughly explained why claimant’s moderate obstructive impairment is totally disabling, despite the fact that his objective studies were non-qualifying. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). Employer’s arguments regarding Dr. Farrow’s opinion are misplaced because the administrative law judge did not rely on this physician’s conclusions to find total disability established. Rather, he permissibly accorded Dr. Farrow less weight because his statements on the issue were “equivocal and vague.” Decision and Order at 23; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). The administrative law judge also acted rationally in discrediting Dr. Killeen’s opinion as equivocal, in light of his comment that claimant has a mild to moderate airway obstruction that “*may* affect the ability to perform heavy exertion such as described by the claimant in his previous job duties while working in the mines.” Employer’s Exhibit 3 (emphasis added); *see Underwood*, 105 F.3d at 949, 21 BLR at 2-28.

Finally, we reject employer’s argument that the fact that Dr. McSharry obtained post-bronchodilator pulmonary function study results showing improvement in claimant’s obstructive impairment precluded the administrative law judge from crediting any diagnoses of a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2)(iv). The regulatory standards do not require post-bronchodilator pulmonary function testing, and the responsiveness of an impairment to bronchodilators does not preclude a finding that an impairment is present. 20 C.F.R. §§718.103(b)(8), 718.204(b)(2)(i); *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Consolidation Coal Co. v. Swiger*, 98 F. App’x. 227, 238 (4th Cir. 2004). In addition, as we held, *supra*, the administrative law judge acted within his discretion in crediting, as reasoned and documented, the diagnoses of total respiratory or pulmonary disability rendered by Drs. Rasmussen and McSharry, based on objective studies that were non-qualifying and that included post-bronchodilator pulmonary function studies. *See slip op.* at 5-6.

Because we have affirmed the administrative law judge’s weighing of the medical opinion evidence, we further affirm his determination that the opinions of Drs. Rasmussen and McSharry are sufficient to establish total disability under 20 C.F.R. §718.204(b)(2)(iv). *See Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336. We also affirm the administrative law judge’s finding that,

because the well-reasoned and well-documented medical opinion evidence outweighs the contrary probative evidence in the form of the non-qualifying objective studies, claimant has proven that he is totally disabled at 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). Finally, we affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d), and invocation of the Section 411(c)(4) presumption. *See West Virginia CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

Rebuttal of the Section 411(c)(4) Presumption

To rebut the presumption of total disability due to pneumoconiosis under Section 411(c)(4), employer must affirmatively establish that claimant does not have either legal⁴ or clinical⁵ pneumoconiosis, or that “no part of [claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201.” 20 C.F.R. §718.305(d)(1)(i), (ii); *see Bender*, 782 F.3d at 137; *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-159 (2015) (Boggs, J., concurring and dissenting).

Upon consideration of rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge determined that employer failed to disprove the existence of legal pneumoconiosis because Drs. McSharry and Killeen relied on the “reversibility” seen on bronchodilation to attribute claimant's chronic obstructive pulmonary disease (COPD) to smoking or asthma, instead of coal mine dust exposure. Decision and Order at 27; Employer's Exhibits 1, 3, 8, 9. The administrative law judge further accorded little weight to the opinions of Drs. McSharry and Killeen, because they failed to “consider the possibility that coal dust exposure may be additive” and “[b]oth opinions also emphasize the lack of restrictive impairment.” Decision and Order at 27. The administrative law judge also accorded less weight to Dr. Killeen's opinion on the ground that he failed to consider that pneumoconiosis is a latent, progressive disease, which may first become detectable after coal dust exposure has ceased. *Id.* Finally, the administrative law judge found that employer failed to establish that no part of claimant's total disability was due to pneumoconiosis as, contrary to his own findings, neither Dr. McSharry nor Dr. Killeen found that claimant has pneumoconiosis. *Id.* at 30.

Employer argues that the administrative law judge should have found the absence of legal pneumoconiosis established based on the opinions of Drs. McSharry and Killeen. Employer's Brief at 11-12. This contention is without merit. The administrative law judge observed that, in diagnosing an obstructive impairment caused by smoking, Drs. McSharry and Killeen did “not consider the possibility that coal dust exposure may be

additive.” Decision and Order at 27. Noting that the preamble to the revised regulations acknowledges the prevailing view of the medical community that the risks associated with smoking and coal mine dust exposure are additive, the administrative law judge permissibly discredited the opinions of Drs. McSharry and Killeen because he found that neither physician adequately explained why claimant’s coal mine dust exposure did not contribute, along with his cigarette smoking, to his obstructive impairment. *See* 20 C.F.R. §718.201(a)(2); *Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 27.

The administrative law judge further observed that Drs. McSharry and Killeen emphasized claimant’s lack of a restrictive impairment, which he reasonably determined was contrary to the premises underlying the regulations, which define pneumoconiosis as “any chronic *restrictive or obstructive* pulmonary disease arising out of coal mine employment,” 20 C.F.R. §718.201(a)(2) (emphasis added), and thus permissibly found them less persuasive. *See Looney*, 678 F.3d at 313, 25 BLR at 2-127; Decision and Order at 27. The administrative law judge further acted within his discretion in finding that the probative value of both physicians’ opinions was diminished by their attribution of claimant’s impairment, in part, to asthma, when there is no evidence in the medical records they reviewed, or in claimant’s medical history, that he has asthma. *See Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. In light of the valid rationales that the administrative law judge provided, we affirm his determination that the opinions of Drs. McSharry and Killeen⁹ are not well-reasoned and, therefore, are insufficient to satisfy employer’s burden to rebut the presumed existence of legal pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i).¹⁰ *See Bender*, 782 F.3d at 137.

⁹ Because the administrative law judge provided valid reasons for discrediting the opinions of Drs. McSharry and Killeen, we need not address any additional allegations of error regarding the administrative law judge’s decision to accord little weight to their opinions on the existence of legal pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983). In addition, as the administrative law judge permissibly assigned little weight to the opinions of Drs. McSharry and Killeen, the only opinions supportive of rebuttal, we need not address employer’s arguments concerning the administrative law judge’s evaluation of the opinions of Drs. Farrow and Rasmussen. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53, 1-55 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

¹⁰ Although employer raises allegations of error that are arguably relevant to rebuttal of the presumed existence of clinical pneumoconiosis, we decline to address them. Error, if any, in the administrative law judge’s consideration of clinical pneumoconiosis is harmless in light of our affirmance of his determination that employer

Lastly, the administrative law judge addressed the second method of rebuttal, namely, whether employer established that no part of claimant's total respiratory or pulmonary disability was caused by pneumoconiosis. He properly accorded little weight to the opinions of Drs. McSharry and Killeen because, contrary to his own findings, they determined that claimant does not have pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 30. Consequently, we affirm the administrative law judge's finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(ii). In sum, we affirm the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by either method. 20 C.F.R. §718.305(d)(1)(i), (ii).

failed to rebut the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Johnson*, 12 BLR at 1-55; *Larioni*, 6 BLR at 1-1278.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge