

BRB No. 12-0096 BLA

JAMES THOMAS)
)
 Claimant-Respondent)
)
 v.)
)
 BILL BRANCH COAL COMPANY) DATE ISSUED: 11/20/2012
)
 and)
)
 A.T. MASSEY)
)
 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 of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5320) of Administrative Law Judge Pamela J. Lakes awarding benefits on a claim filed pursuant to

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a claim filed on February 11, 2008.¹

The administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least twenty-nine years of underground coal mine employment,² and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer further argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not

¹ Although claimant filed an earlier claim in April 1981, that claim was subsequently withdrawn, and is, therefore, considered not to have been filed. 20 C.F.R. §725.306(d).

² Claimant's last coal mine employment was in Virginia. Director's Exhibit 5. Accordingly, 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).

filed a response brief. In a reply brief, employer reiterates its previous contentions.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. 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).

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

Employer contends that the administrative law judge erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the evidence established the existence of a totally disabling respiratory impairment.⁴

After finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge considered whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Agarwal, Baker, Fino, and Hippensteel. After opining that claimant suffers from a severe pulmonary impairment, Dr. Agarwal stated that “[Claimant] does not retain the pulmonary capacity to work as a coal miner. This assessment is based on [a] mild restrictive ventilatory defect associated with mild hypoxemia at rest. This further worsened with exercise.” Director's Exhibit 10.

In his initial report, Dr. Baker opined that claimant suffers from a mild impairment that would not preclude him from performing the work of a miner. Claimant's Exhibit 2. However, after reviewing the qualifying results⁵ of the exercise arterial blood gas study

³ Employer's argument, that this claim could be affected by constitutional challenges to the Patient Protection and Affordable Care Act, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 2012 WL 2427810 (June 28, 2012).

⁴ Because employer does not challenge the administrative law judge's finding that claimant established at least twenty-nine years of underground coal mine employment, that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

⁵ A “qualifying” arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendix C of 20 C.F.R. Part 718. A “non-qualifying” study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(ii).

conducted by Dr. Agarwal on April 22, 2008, Dr. Baker prepared a supplemental report, wherein he noted that the study revealed “a severe degree of hypoxemia with exercise.” Claimant’s Exhibit 3. Dr. Baker, therefore, opined that claimant does not have the respiratory capacity to perform the work of a coal miner. *Id.* Dr. Baker further indicated that claimant is “totally and permanently disabled for any type of occupation that would require exertional activity.” *Id.*

Dr. Fino opined that claimant is “limited in what he can do because of his breathing.” Employer’s Exhibit 2. Dr. Fino noted that claimant’s ventilatory capacity was reduced, and that “a significant drop in the PO₂ with exercise . . . has pretty much been seen in every [arterial blood gas] test.” *Id.* Dr. Fino, however, noted that there was some improvement on the exercise arterial blood gas study conducted on July 23, 2009. *Id.*

Dr. Hippensteel opined that claimant “has variable ventilatory impairment from one exam to another and at most has no more than mild permanent obstructive impairment without restriction that is not severe enough to keep him from going back to his job in the mines.” Employer’s Exhibit 3. Dr. Hippensteel opined that claimant does not have a totally disabling pulmonary impairment. Employer’s Exhibit 5 at 27.

The administrative law judge found that the opinions of Drs. Agarwal and Baker, that claimant is totally disabled, were well-reasoned, and supported by the results of the exercise arterial blood gas studies. Decision and Order at 8-9. After noting that Dr. Fino did not dispute the significance of the exercise arterial blood gas studies, the administrative law judge found that Dr. Hippensteel’s opinion, that claimant is not totally disabled from a pulmonary standpoint, was not well-reasoned. *Id.* at 9. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer initially argues that the administrative law judge erred in finding Dr. Agarwal’s opinion supportive of a finding of total disability, since the doctor noted only a “mild restrictive ventilatory defect associated with mild hypoxemia.” We disagree. Dr. Agarwal opined that claimant suffers from “mild hypoxemia at rest that *further worsen[s] with exercise.*” Director’s Exhibit 10 (emphasis added). Thus, Dr. Agarwal based his assessment of claimant’s pulmonary impairment on the qualifying results of the April 22, 2008 exercise blood gas study. Consequently, the administrative law judge permissibly found that Dr. Agarwal’s opinion was well-reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985).

Employer similarly argues that the administrative law judge erred in finding that Dr. Baker's opinion was well-reasoned. We disagree. Like Dr. Agarwal, Dr. Baker based his opinion, that claimant is totally disabled, on the qualifying results of the April 22, 2008 exercise blood gas study. Dr. Baker explained that the results of the exercise study revealed a "severe degree of arterial hypoxemia" under conditions similar to those encountered by claimant during his work. Claimant's Exhibit 3. Consequently, the administrative law judge permissibly found that Dr. Baker's opinion was well-reasoned.⁶ *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-6.

Employer next contends that the administrative law judge mischaracterized Dr. Fino's opinion. Although the administrative law judge acknowledged that Dr. Fino "did not address the issue of total disability directly," she found that the doctor's opinion was not contrary to the opinions of Drs. Agarwal and Baker, insofar as Dr. Fino interpreted the decrease in pO₂ values during exercise as revealing an abnormality that prevented claimant's lungs from working properly. Decision and Order at 9; Employer's Exhibit 13-14. The administrative law judge found that, to this extent, Dr. Fino's opinion was "consistent with a finding of total disability." Decision and Order at 9. Because the administrative law judge merely found aspects of Dr. Fino's opinion supportive of the opinions of Drs. Agarwal and Baker, the administrative law judge did not err in her consideration of his opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

Employer next argues that the administrative law judge erred in her consideration of Dr. Hippensteel's opinion. The administrative law judge found that Dr. Hippensteel's opinion, that claimant does not suffer from a totally disabling pulmonary impairment, was not well-reasoned because it was inadequately explained:

[Dr. Hippensteel] fails to explain his opinion in light of the fact that Claimant could not complete the exercise trial for the blood gas study due

⁶ Employer also argues that the administrative law judge erred in relying upon the opinions of Drs. Agarwal and Baker, that claimant is totally disabled from a pulmonary standpoint, when she found that the blood gas study evidence, standing alone, does not support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). We disagree. A claimant may establish total disability with reasoned medical opinion evidence even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section" 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-722, 23 BLR 2-250, 2-259 (7th Cir. 2005).

to dyspnea. When asked at his deposition about the decrease in arterial oxygen tension with exercise (shown on all but Dr. Forehand's exam), he noted the absence of a reduced diffusing capacity and suggested that the finding was due to cardiac factors. That explanation refers to the etiology of the impairment. However, he did not explain why he did not find the Claimant's drop in his pO₂ levels following exercise to be disabling, as Drs. Agarwal and Baker found, and Dr. Fino did not dispute.

Decision and Order at 9.

Contrary to employer's contention, the administrative law judge properly noted that Dr. Hippensteel's emphasis on the etiology of claimant's gas exchange abnormality ("cardiac factors" and obstructive sleep apnea), was not relevant to the issue of whether claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv). The existence of a totally disabling pulmonary impairment, and the cause of the totally disabling pulmonary impairment, are separate issues. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.204(a), (b)(1), (c). The administrative law judge, therefore, permissibly found that Dr. Hippensteel's opinion was not well-reasoned. *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76.

The administrative law judge permissibly credited the opinions of Drs. Agarwal and Baker that claimant's exercise-induced gas exchange abnormality precludes him from performing his most recent coal mine employment as a shot foreman, "a job that required heavy manual labor." Decision and Order at 9; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 587, 22 BLR 2-107, 2-124 (6th Cir. 2000); *see also Killman v. Director, OWCP*, 415 F.3d 716, 721-722, 23 BLR 2-250, 2-259 (7th Cir. 2005). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Moreover, the administrative law judge properly weighed the medical opinion evidence with the pulmonary function and arterial blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 9-10. This finding is, therefore, affirmed.

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 10. The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 10-17.

Employer contends that the administrative law judge erred in finding that employer failed to disprove the existence of legal pneumoconiosis.⁷ The administrative law judge considered the medical opinions of Drs. Agarwal, Baker, Fino, and Hippensteel. Dr. Agarwal diagnosed "legal pneumoconiosis" due to claimant's coal mine dust exposure. Director's Exhibit 10. Dr. Baker also diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due to coal mine dust exposure.⁸ Claimant's Exhibit 2. Although Dr. Fino opined that claimant's "lung problem" was not related to his coal mine dust exposure, he conceded that a lack of necessary information precluded him from identifying its cause. Employer's Exhibit 4 at 25-26, 30. Dr. Hippensteel diagnosed chronic bronchitis unrelated to claimant's coal mine dust exposure. Employer's Exhibit 5 at 21-22. Dr. Hippensteel also diagnosed an "exercise-induced gas exchange impairment." *Id.* Dr. Hippensteel opined that claimant's "cardiac status is the cause for this gas exchange impairment rather than any intrinsic lung impairment." *Id.*

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge accorded less weight to Dr. Fino's opinion because the doctor expressed concerns as to the adequacy of the available clinical data. Decision and Order at 14. The administrative law judge found that Dr. Fino did not adequately explain why claimant's coal dust exposure did not contribute, along with his other conditions, to his gas exchange impairment. *Id.* The administrative law judge accorded less weight to Dr. Hippensteel's opinion because he failed to adequately explain how he was able to eliminate claimant's coal mine dust exposure as a cause of claimant's gas exchange impairment. *Id.* at 15. The administrative law judge, therefore, found that

⁷ "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

⁸ Drs. Agarwal and Baker noted that claimant never smoked. Director's Exhibit 10; Claimant's Exhibit 2.

employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in her consideration of the opinions of Drs. Fino and Hippensteel. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Fino and Hippensteel regarding the cause of claimant's gas exchange impairment because neither doctor adequately explained how he eliminated claimant's coal dust exposure as a source of the impairment. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; Decision and Order at 14-15. The administrative law judge permissibly found that Drs. Fino and Hippensteel did not adequately explain why claimant's twenty-nine years of coal dust exposure did not contribute, along with claimant's other conditions, to his gas exchange impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. As the administrative law judge's basis for discrediting the opinions of Drs. Fino and Hippensteel is rational and supported by substantial evidence, this finding is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-08, 22 BLR 2-162, 2-168 (4th Cir. 2000).

Because the opinions of Drs. Fino and Hippensteel are the only opinions supportive of a finding that claimant does not suffer from legal pneumoconiosis, we affirm the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

Employer next argues that the administrative law judge erred in finding that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with, employment in a coal mine." 30 U.S.C. §921(c)(4). Employer's argument lacks merit. The same reasons for which the administrative law judge discredited the opinions of Drs. Fino and Hippensteel, that claimant does not suffer from legal pneumoconiosis, also undercut their opinions that claimant's impairment is unrelated to his coal mine employment. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 17. Because the opinions of Drs. Fino and Hippensteel are the only opinions supportive of a finding that claimant's pulmonary impairment did not arise out of his coal mine employment, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. *See Rose*, 614 F.2d at 939, 2 BLR at 2-43; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge