



BRB No. 14-0355 BLA

ROY E. GRIFFITH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EXCEL MINING, LLC/PINTIKI COAL	)	
	)	DATE ISSUED: 04/15/2015
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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Paul E. Jones (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Jonathan Rolfe (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: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (10-BLA-5614) of Administrative Law Judge Alice M. Craft awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on October 14, 2009.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),<sup>1</sup> the administrative law judge credited claimant with thirty-five years of qualifying coal mine employment,<sup>2</sup> and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Employer further challenges the administrative law judge's determination regarding the commencement date for benefits. Claimant has not filed a response brief. Although the Director, Office of Workers' Compensation Programs, has not filed a substantive response brief, he notes that, should the Board remand this case for further consideration, the administrative law judge may take official notice of several documents pertaining to the credibility of Dr. Wheeler's x-ray interpretations.<sup>3</sup>

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<sup>1</sup> Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4). The Department of Labor revised the regulations to implement the amendments to the Act. The revised regulations became effective on October 25, 2013, and are codified at 20 C.F.R. Parts 718, 725 (2014).

<sup>2</sup> The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

<sup>3</sup> We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant has thirty-five years of qualifying coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore 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 pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).<sup>4</sup>

The record contains three pulmonary function studies conducted on November 3, 2009, August 3, 2011, and January 4, 2012.<sup>5</sup> The November 3, 2009 pulmonary function study produced qualifying values<sup>6</sup> before the administration of a bronchodilator, but non-qualifying values thereafter. The August 3, 2011 and January 4, 2012 pulmonary function studies produced qualifying values, both before and after the administration of a bronchodilator. Director's Exhibit 12; Claimant's Exhibit 2; Employer's Exhibit 2.

In weighing the pulmonary function study evidence, the administrative law judge accorded the greatest weight to the two most recent qualifying pulmonary function studies conducted on August 3, 2011 and January 4, 2012. Decision and Order at 15. The administrative law judge further noted that the earlier November 3, 2009 pulmonary function study also produced qualifying pre-bronchodilator values, and post-bronchodilator values that are "very close to qualifying." *Id.* The administrative law

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<sup>4</sup> The administrative law judge found that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). Decision and Order at 18, 20.

<sup>5</sup> The administrative law judge resolved the height discrepancy recorded on the pulmonary function studies, finding that claimant's height for purposes of the studies was 67.75 inches. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

<sup>6</sup> A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

judge, therefore, found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. 718.204(b)(2)(i). *Id.*

Employer argues that the administrative law judge erred in relying on the August 3, 2011 pulmonary function study to support a finding of total disability because it “is not valid as it does not contain three tracings . . . .”<sup>7</sup> Employer’s Brief at 8. Employer, however, did not raise such an objection at the hearing before the administrative law judge. In its post-hearing brief, employer not only failed to object to the validity of the August 3, 2011 pulmonary function study, but also indicated that the study was accompanied by tracings. Employer’s Post-Hearing Brief at 5. As a result, the administrative law judge had no reason to question whether the requisite number of tracings was present. Because employer raises its objection to the August 3, 2011 pulmonary function study for the first time on appeal, we decline to consider it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986); *Lyon v. Pittsburgh & Midway Coal Co.*, 7 BLR 1-199, 1-201 (1984). We, therefore, affirm the administrative law judge’s finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. 718.204(b)(2)(i).

Employer next argues that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. 718.204(b)(2)(iv). The administrative law judge found that claimant worked primarily as a shuttle car operator, a job which “required him to sit for most of the day and drive a buggy with his hands and feet.” Decision and Order at 4. The administrative law judge noted that claimant described the shuttle car as being similar to an “underground coal truck.” *Id.* The administrative law judge noted that claimant indicated that he loaded the shuttle car with a continuous miner at the face of the mine and transported the coal to the feeder. *Id.* The administrative law judge further noted that while claimant primarily operated a shuttle car, he would occasionally operate a scoop, build brattices, hang curtains, and shovel the belt line. *Id.*

In addressing whether the medical opinion evidence established total disability, the administrative law judge considered the opinions of Drs. Mettu, Broudy, and Dahhan. Dr. Mettu examined claimant on November 3, 2009. In a report dated November 16, 2009, Dr. Mettu diagnosed a moderate pulmonary impairment that would prevent claimant from performing his last coal mine job as a shuttle car operator. Director’s

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<sup>7</sup> The standards for the administration and interpretation of pulmonary function tests provide that a “minimum of three flow-volume loops and derived spirometric tracings shall be carried out.” 20 C.F.R. Part 718, Appendix B; *see also* 20 C.F.R. §718.103(b).

Exhibit 12. During a March 2, 2010 deposition, Dr. Mettu conceded that, based on American Medical Association guidelines, claimant's November 3, 2009 post-bronchodilator pulmonary function study revealed a mild, or a Class 2, pulmonary impairment. Director's Exhibit 12A at 9-10. Dr. Mettu opined that claimant could perform moderate, but not heavy, work. *Id.* at 11. Dr. Mettu specifically opined that claimant could perform the work of a shuttle car operator "if he's not doing manual work." *Id.*

Dr. Broudy reviewed Dr. Mettu's 2009 medical report. In a report dated February 10, 2010, Dr. Broudy opined that claimant was not totally disabled. Director's Exhibit 14.

Dr. Dahhan examined claimant on January 4, 2012. In a report dated January 4, 2012, Dr. Dahhan opined that claimant has a moderate ventilatory defect. Employer's Exhibit 2. Dr. Dahhan opined that, from a respiratory standpoint, claimant does not retain the capacity to return to his previous coal mining work. *Id.*

The administrative law judge permissibly credited the opinions of Drs. Mettu and Dahhan, that claimant suffers from a totally disabling pulmonary impairment,<sup>8</sup> over Dr. Broudy's contrary opinion, because she properly found that they are more consistent with the pulmonary function study evidence. Decision and Order at 15-16. An administrative

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<sup>8</sup> We reject employer's contention that the administrative law judge "ignored [Dr. Mettu's] deposition testimony where he unequivocally found [claimant] not disabled." Employer's Brief at 9. Although the administrative law judge acknowledged that Dr. Mettu characterized claimant's impairment as mild in response to questions regarding the American Medical Association guidelines for classifying pulmonary impairment, she noted that such guidelines do not apply to black lung cases. Decision and Order at 15. Moreover, the administrative law judge noted that while Dr. Mettu opined that claimant could perform the work of a shuttle car operator, he qualified his opinion by stating that this would only be the case "if he's not doing manual work." *Id.* The administrative law judge noted that the attendant tasks associated with claimant's job as a shuttle operator (operating a scoop, building brattices, hanging curtains, and shoveling the belt line) involved manual work. The administrative law judge, therefore, permissibly found that Dr. Mettu's opinion supported a finding that claimant is totally disabled from a pulmonary standpoint. See *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577-78, 22 BLR 2-107, 2-123-24 (6th Cir. 2000) (recognizing that even a mild impairment can be disabling if it precludes the miner from performing his usual coal mine employment). We also reject employer's contention that its own physician, Dr. Dahhan, was not aware of claimant's usual coal mine employment. Employer's Brief at 11. Dr. Dahhan accurately noted that claimant worked as a shuttle car operator. Employer's Exhibit 2.

law judge may properly credit the medical opinions that he determines are better supported by the objective evidence of record. *See Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Voytovich v. Consolidation Coal Co.*, 5 BLR 1-141 (1982). 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 pulmonary function study and medical opinion evidence with the 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 16. This finding is, therefore, affirmed.

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of qualifying 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); 20 C.F.R. §718.305.

#### **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 burden of proof shifted to employer to establish rebuttal by disproving the existence of both legal and clinical pneumoconiosis,<sup>9</sup> 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); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer next contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer established that claimant does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Broudy and Dahhan. Drs. Broudy and

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<sup>9</sup> "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). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

Dahhan opined that claimant's coal mine dust exposure did not contribute to his obstructive pulmonary impairment. Director's Exhibit 14; Claimant's Exhibit 2.

The administrative law judge found that Drs. Broudy and Dahhan failed to adequately explain how they eliminated coal dust exposure as a cause of claimant's obstructive pulmonary impairment. Decision and Order at 20-21. The administrative law judge also found that the opinions of Drs. Broudy and Dahhan, that claimant did not have legal pneumoconiosis, were inconsistent with the premises underlying the regulations. *Id.* The administrative law judge, therefore, found that employer failed to disprove the existence of legal pneumoconiosis.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Broudy and Dahhan. We disagree. The administrative law judge permissibly questioned the opinions of Drs. Broudy and Dahhan, that claimant's obstructive pulmonary impairment was due solely to smoking, because neither physician adequately explained how he eliminated claimant's thirty-five years of coal mine dust exposure as a source of his obstructive impairment. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order at 20-21. The administrative law judge, therefore, properly accorded less weight to the opinions of Drs. Broudy and Dahhan.<sup>10</sup> *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited the opinions of Drs. Broudy and Dahhan, we affirm her finding that employer failed to disprove the existence of legal pneumoconiosis. Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant does not suffer from pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Accordingly, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish rebuttal by showing that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The

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<sup>10</sup> Because the administrative law judge provided a valid basis for according less weight to the opinions of Drs. Broudy and Dahhan, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

administrative law judge rationally discounted the opinions of Drs. Broudy and Dahhan, that claimant's pulmonary impairment was not caused by pneumoconiosis, because Drs. Broudy and Dahhan did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove legal pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *see also Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062 (6th Cir. 2013); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order at 21-22. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by proving that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(ii).

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

### **Benefits Commencement Date**

Employer challenges the administrative law judge's determination regarding the commencement date for benefits. Once entitlement to benefits is established, the date for the commencement of those benefits is determined by the month in which the miner became totally disabled due to pneumoconiosis. 20 C.F.R. §725.503; *see Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). If the date of onset of total disability due to pneumoconiosis is not ascertainable from all the relevant evidence of record, benefits will commence with the month during which the claim was filed, unless evidence credited by the administrative law judge establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990).

In addressing the commencement date for benefits, the administrative law judge initially considered Dr. Mettu's opinion, which she had credited in finding that claimant suffers from a totally disabling pulmonary impairment.<sup>11</sup> The administrative law judge found that Dr. Mettu's opinion established only that claimant was totally disabled due to pneumoconiosis at some point prior to the doctor's examination on November 3, 2009.

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<sup>11</sup> Employer argues that Dr. Mettu's opinion does not support a finding that claimant was totally disabled in November 2009. As discussed, *supra*, we have affirmed the administrative law judge's reliance upon Dr. Mettu's opinion to support a finding that claimant suffers from a totally disabling pulmonary impairment.

Decision and Order at 22-23. The administrative law judge did not credit any evidence that claimant was not totally disabled due to pneumoconiosis at any time subsequent to the filing date of his claim. Since the administrative law judge's finding, that the medical evidence does not reflect the date upon which claimant became totally disabled due to pneumoconiosis, is supported by substantial evidence, we affirm the administrative law judge's determination that benefits are payable from October 2009, the month in which claimant filed this claim. 20 C.F.R. §725.503(b).

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge