

U.S. Department of Labor

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



BRB No. 15-0536 BLA

GARY C. BYRD)
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 Claimant-Respondent)
)
 v.)
)
 AEP KENTUCKY COAL, LLC)
) DATE ISSUED: 08/22/2016
 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 of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe, Brad A. Austin, and M. Rachel Wolfe (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

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

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Maia Fisher, Acting 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, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-5955) 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 May 4, 2010.

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),¹ the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment,² 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). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Employer also 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 argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, requesting that the Board reject employer's contention that it is not the responsible operator.³

¹ Section 411(c)(4) of the Act 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) (2012); *see* 20 C.F.R. §718.305.

² The record reflects that claimant's last coal mine employment was in Kentucky. Hearing Transcript at 19. Accordingly, the Board will apply the law 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).

³ The administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment is affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Responsible Operator

Employer, AEP Kentucky Coal, LLC (AEP), challenges its designation as the responsible operator, contending that the administrative law judge erred in finding that AEP was the successor operator to Branham & Baker Underground Corporation (Branham & Baker).

If a miner worked for more than one coal mine operator during his career, the responsible operator is the most recent coal mine operator to employ the miner, provided that the operator qualifies as a "potentially liable operator." 20 C.F.R. §725.495. The regulation at 20 C.F.R. §725.494 sets forth five criteria for identifying a potentially liable operator: (i) the miner's disability or death arose out of employment with that operator; (ii) the operator, or any person with respect to which the operator may be considered a successor operator, was an operator for any period after June 30, 1973; (iii) the miner was employed by the operator, or any person with respect to which the operator may be considered a successor operator, for a cumulative period of not less than one year; (iv) the miner's employment included at least one working day after December 31, 1969; and (v) the operator is financially capable of assuming liability for the claim. 20 C.F.R. §725.494(a)-(e).

A "successor operator" is defined as "[a]ny person who, on or after January 1, 1970, acquired a mine or mines, or substantially all of the assets thereof, from a prior operator, or acquired the coal mining business of such operator, or substantially all of the assets thereof[.]" 20 C.F.R. §725.492(a). Additionally, Section 725.492(b) states that a successor operator is created when an operator ceases to exist by reorganization, liquidation, sale of assets, merger, consolidation, or division. 20 C.F.R. §725.492(b)(1)-(3).

In an Order issued on May 12, 2015, which the administrative law judge later incorporated into her Decision and Order, the administrative law judge found that claimant worked for AEP for less than one year from 2001 to 2002. Order at 1-5; Decision and Order at 3. The administrative law judge, however, found that AEP acquired the ownership and assets of Branham & Baker, an operator that previously employed claimant from 1997 to 2001. Order at 1-3. The administrative law judge,

therefore, determined that AEP was the successor operator to Branham & Baker, and responsible for the payment of benefits. *Id.*

AEP argues that the administrative law judge erred in designating it as the responsible operator because the district director did not provide any documentation that AEP was the successor to Branham & Baker. In a Proposed Decision and Order dated March 30, 2011, the district director noted that his research confirmed that AEP “acquired the ownership and all assets of Branham & Baker” on October 31, 2001. Director’s Exhibit 29. Although AEP accurately notes that the district director did not provide any documentation supporting such an acquisition, AEP ignores the fact that the administrative law judge’s designation of AEP as a successor operator did not rely exclusively upon the district director’s statement. The administrative law judge also relied upon claimant’s testimony that he worked for the same coal mine operator between 1997 and 2002, which he stated was known as Branham & Baker before becoming AEP. Order at 2; Director’s Exhibit 23-9. As the Director notes, claimant’s testimony is consistent with his Social Security records. Director’s Brief at 4; Director’s Exhibit 7. Moreover, as the administrative law judge accurately noted, “AEP [has] neither denied that it previously acquired ownership of all assets of Branham & Baker . . . , nor provided any proof that it had not done so.” Order at 3; *see Ridings v. C & C Coal Co.*, 6 BLR 1-227, 1-231 (1983) (A potentially liable operator must carry the burden of producing evidence to support its theory that it was not a successor to a miner’s earlier employer where information is within its exclusive control.). Because it is supported by substantial evidence, we affirm the administrative law judge’s determination that AEP was the successor to Branham & Baker.

AEP also argues that it cannot be designated the responsible operator because it employed claimant for less than one year. Employer’s Brief at 8. The regulations, however, provide that where an operator is considered a successor operator, any employment with a prior operator “is deemed to be employment with the successor.” 20 C.F.R. §725.493(b)(1); *see also Kentland Elkhorn Coal Corp. v. Hall*, 287 F.3d 555, 564-65, 22 BLR 2-349, 2-364-66 (6th Cir. 2002). In this case, it is undisputed that Branham & Baker employed claimant for more than one year. We, therefore, affirm the administrative law judge’s designation of AEP as the responsible operator in this case.

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 arterial blood gas study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).⁴

The administrative law judge considered five arterial blood gas studies conducted on July 20, 2010, January 17, 2011, May 26, 2013, June 3, 2013, and November 10, 2014. Although the resting blood gas studies conducted on July 20, 2010 and June 3, 2013 produced qualifying values,⁵ Director's Exhibit 10; Claimant's Exhibit 7, the resting blood gas studies, conducted on January 17, 2011, May 26, 2013, and November 10, 2014 produced non-qualifying values. Claimant's Exhibit 4; Employer's Exhibits 1, 4. The only exercise blood gas study was conducted on May 26, 2013, and produced qualifying values. Claimant's Exhibit 4.

In considering the blood gas study evidence, the administrative law judge permissibly accorded greater weight to the exercise blood gas study conducted on May 26, 2013, finding that “[e]xercise testing is a better predictor of the [c]laimant’s ability to work in the mines.” *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 307, 23 BLR 2-261, 2-285-87 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 18. Because it is supported by substantial evidence,⁶ we affirm the administrative law judge’s finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

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

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).

⁶ Employer raises an objection to the validity of the exercise blood gas study, noting that Dr. Agarwal testified that the abnormality revealed by the exercise blood gas study was due to body habitus, obesity, and obesity hypoventilation syndrome. Employer’s Brief at 10; Employer’s Exhibit 5 at 11. However, because employer raises its objection to the validity of the qualifying exercise blood gas study for the first time on appeal, we decline to consider it. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-

Employer also contends 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 considered the medical opinions of Drs. Al-Khasawneh, Agarwal, Klayton, and Rosenberg. Drs. Al-Khasawneh, Agarwal, and Klayton opined that claimant suffers from a totally disabling pulmonary impairment. Director's Exhibit 10; Claimant's Exhibits 4, 7. Although Dr. Rosenberg initially opined that claimant suffers from a totally disabling pulmonary impairment, Employer's Exhibits 1, 3, he subsequently opined that claimant is not totally disabled from a respiratory perspective.⁷ Employer's Exhibits 4, 9.

In weighing the medical opinion evidence, the administrative law judge accorded less weight to Dr. Rosenberg's opinion because the doctor, in opining that claimant does not suffer from a totally disabling pulmonary impairment, did not address the significance of the results of the qualifying May 26, 2013 exercise blood gas study. Decision and Order at 19. The administrative law judge found that the opinions of Drs. Al-Khasawneh, Agarwal, and Klayton that claimant suffers from a totally disabling pulmonary impairment were better supported by the objective medical evidence. *Id.* 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 argues that the administrative law judge erred in finding that Dr. Agarwal's opinion supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) because the doctor attributed claimant's disabling pulmonary impairment to obesity. We disagree. Under the Department's regulations, the fact that a pulmonary impairment has a nonpulmonary origin does not preclude it from being

298-99 (2003); *Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73, 1-75 (1986). Regardless, Dr. Agarwal, the physician who administered the study, did not testify that it was invalid or that the results were unreliable. Moreover, although Dr. Agarwal testified that claimant's obesity hypoventilation syndrome could have accounted for the high pCO₂ value (42), Employer's Exhibit 5 at 10, a lesser pCO₂ value would not have altered the qualifying nature of the study. *See* Appendix C of 20 C.F.R. Part 718.

⁷ Initially, Dr. Rosenberg opined that claimant was totally disabled based on the pulmonary function study that he conducted during his first evaluation of claimant, but later opined that claimant was not totally disabled, based upon the results of a second pulmonary function study that he conducted. Employer's Exhibits 1, 3, 4, 9.

considered in determining whether the miner is or was totally disabled.⁸ See 20 C.F.R. 718.204(a).

Employer also contends that the administrative law judge erred in his consideration of Dr. Rosenberg's opinion. We disagree. In a 2013 medical report, Dr. Rosenberg reviewed the results of Dr. Agarwal's May 26, 2013 exercise blood gas study and characterized it as "disabling based on [claimant's] hypoventilation." Employer's Exhibit 3 at 4. Although Dr. Rosenberg subsequently submitted reports in 2014 and 2015, wherein he opined that claimant was not disabled from a respiratory perspective, the administrative law judge permissibly discredited the doctor's later opinions because he failed to address the significance of the results from the exercise blood gas study, results that he previously found supportive of a disabling impairment. See *Martin*, 400 F.3d at 307, 23 BLR at 2-285-87; *Hopton v. U.S. Steel Corp.*, 7 BLR 1-12, 1-14 (1984). Because employer raises no other error in connection with the administrative law judge's consideration of the medical opinion evidence,⁹ we affirm her finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Because we have affirmed the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), we also affirm her finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

⁸ We note that in his May 26, 2013 evaluation, Dr. Agarwal listed legal pneumoconiosis, sleep apnea, "obesity-hypoventilation syndrome . . . due to his body habitus," and bronchial asthma under the heading "Etiology of *Pulmonary* Diagnosis." Claimant's Exhibit 4 (emphasis added). Moreover, the deposition testimony cited by employer was part of a line of questioning premised on the total disability in question being pulmonary ("Q: . . . you felt that the . . . disability from a *pulmonary* standpoint was due to the body habitus, the morbid obesity and the hypoinflation (sic) syndrome; is that correct? A. Hypoventilation syndrome. Q. Is that correct? A. Yeah." Employer's Exhibit 5 at 10 (emphasis added).

⁹ Employer argues that the administrative law judge erred in not addressing Dr. Vuskovich's opinion pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. Employer did not designate Dr. Vuskovich's report as a medical report or as rebuttal to the arterial blood gas evidence. Employer submitted Dr. Vuskovich's report only as rebuttal evidence to claimant's pulmonary function study evidence. See Employer's Evidence Summary Form dated November 19, 2014 at 4, 7-9. The administrative law judge did not rest her finding of total disability on the pulmonary function study evidence.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that the miner had neither legal nor clinical pneumoconiosis,¹⁰ 20 C.F.R. §718.305(d)(1)(i), or by establishing that “no part of the miner’s respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201.” 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In evaluating whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered Dr. Rosenberg’s medical opinion. Dr. Rosenberg diagnosed chronic obstructive pulmonary disease (COPD) due to cigarette smoking, obesity, allergies, and asthma. Employer’s Exhibits 1, 3. Dr. Rosenberg opined that claimant does not suffer from legal pneumoconiosis. Employer’s Exhibit 9 at 2.

The administrative law judge discredited Dr. Rosenberg’s opinion because the physician did not adequately explain how he determined that claimant’s twenty-seven years of coal mine dust exposure did not contribute to claimant’s obstructive lung disease. Decision and Order at 23. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id.* at 25.

Employer argues that the administrative law judge erred in her consideration of Dr. Rosenberg’s opinion. We disagree. The administrative law judge permissibly questioned Dr. Rosenberg’s opinion because she found that the physician failed to adequately explain why claimant’s twenty-seven years of coal mine dust exposure did not contribute, along with his cigarette smoking, obesity, allergies, and asthma to his obstructive lung disease.¹¹ *See* 65 Fed. Reg. 79,920, 79,940 (Dec. 20, 2000); *Brandywine*

¹⁰ “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).

¹¹ The administrative law judge found that Dr. Rosenberg failed to offer any credible explanation for why he excluded coal dust as a contributing factor to claimant’s

Explosives & Supply v. Director, OWCP [Kennard], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 23-25. The administrative law judge, therefore, permissibly discounted Dr. Rosenberg’s opinion. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc).

Because the administrative law judge permissibly discredited Dr. Rosenberg’s opinions, we affirm her finding that employer failed to establish that claimant does not have legal pneumoconiosis.¹² Accordingly, we affirm the administrative law judge’s determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner does not have pneumoconiosis.¹³ *See* 20 C.F.R. §718.305(d)(1)(i).

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 the miner’s respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge rationally discounted Dr. Rosenberg’s opinion that claimant’s pulmonary impairment was not caused by pneumoconiosis because Dr. Rosenberg did not diagnose legal pneumoconiosis, contrary to the administrative law judge’s finding that employer failed to disprove legal pneumoconiosis. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 25.

The administrative law judge also properly found that Dr. Agarwal’s opinion that claimant’s legal pneumoconiosis made a “small and not substantial” contribution to claimant’s total disability was insufficient to support a finding that “no part” of

obstructive lung disease. Decision and Order at 23. A review of the record reveals that the administrative law judge’s characterization of Dr. Rosenberg’s opinion is accurate.

¹² Because the administrative law judge provided a valid basis for according less weight to Dr. Rosenberg’s opinion, the administrative law judge’s error, if any, in according less weight to his opinion for other reasons, constitutes harmless error. *See Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). Therefore, we need not address employer’s remaining arguments regarding the weight accorded to Dr. Rosenberg’s opinion.

¹³ Employer’s failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

claimant's pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *W.Va. CWP Fund v. Bender*, 782 F.3d 129, 143-45, BLR (4th Cir. 2015); in *Minich v. Keystone Coal Mining Corp.*, BLR , BRB No. 13-0544 BLA (Apr. 21, 2015) (Boggs, J., concurring & dissenting); Decision and Order at 25. We, therefore, 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).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge