BRB No. 13-0534 BLA

GARY T. JACKSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 07/22/2014
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 on Remand of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

William S. Mattingly and Kevin T. Gillen (Jackson Kelly PLCC), Morgantown, West Virginia, for employer.

Rita Roppolo (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, SMITH and BOGGS, Administrative Appeals Judges.

Hall, Acting Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (09-BLA-5777) of Administrative Law Judge Pamela J. Lakes 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 subsequent claim filed on September 9, 2008,[1] and is before the Board for the second time.

In her initial decision, the administrative law judge applied amended Section 411(c)(4).[2] 30 U.S.C. §921(c)(4). The administrative law judge credited claimant with twenty-three years of underground coal mine employment,[3] and found that the evidence established that claimant suffered from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that claimant established twenty-three years of underground coal mine employment. *Jackson v. Island Creek Coal Co.*, BRB No. 11-0851 BLA (Sept. 25, 2012) (unpub.). However, the Board vacated the administrative law judge's finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *Id.* The Board, therefore, vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *Id.* The Board also vacated the administrative law judge's finding that employer did not rebut the Section 411(c)(4)

[1] Claimant's previous claim, filed on September 12, 2000, was finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[2] 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).

[3] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 1. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] The administrative law judge noted that her finding, that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), would also establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). Decision and Order at 5.

presumption. *Id.* Consequently, the Board vacated the administrative law judge's award of benefits, and remanded the case for further consideration. *Id.*

On remand, the administrative law judge again found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer did not rebut the Section 411(c)(4) 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 argues that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions.

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 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).[5]

The record contains an October 25, 2000 pulmonary function study submitted in connection with claimant's prior claim, and three new pulmonary function studies conducted on December 9, 2008, January 28, 2009, and April 15, 2009. The October 25,

[5] The Board previously affirmed the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii). *Jackson v. Island Creek Coal Co.*, BRB No. 11-0851 BLA (Sept. 25, 2012) (unpub.).

2000 pulmonary function study produced qualifying values,[6] both before and after the administration of a bronchodilator. Director's Exhibit 1. The December 9, 2008 pulmonary function study also produced qualifying values, both before and after the administration of a bronchodilator. Director's Exhibit 12. The January 28, 2009 pulmonary function study, submitted as part of claimant's treatment records, produced non-qualifying values before the administration of a bronchodilator. Employer's Exhibit 6. Finally, the April 15, 2009 pulmonary function study produced qualifying values, both before and after the administration of a bronchodilator. Employer's Exhibit 1.

In weighing the conflicting pulmonary function study evidence, the administrative law judge questioned the reliability of the January 28, 2009 non-qualifying pulmonary function study:

> [W]ithout knowing the specifics relating to the purpose for which the examination was conducted, whether [claimant] was under any medication at the time of the test, and other particulars, it is not clear that such a test is entitled to the same weight as testing conducted for the specific purpose of determining the subject's pulmonary function as related to his ability to perform work [on] a pulmonary or respiratory basis. The [other three pulmonary function studies] were conducted for that purpose.

Decision and Order on Remand at 3.

The administrative law judge next judge found that the April 15, 2009 study was "somewhat equivocal," based on her incorrect characterization of the pre-bronchodilator values as non-qualifying and the post-bronchodilator values as qualifying. Decision and Order on Remand at 3. The administrative law judge found that the two remaining pulmonary function studies, conducted on October 25, 2000 and December 9, 2008 studies, were qualifying. *Id.* The administrative law judge, therefore, found that the weight of 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 finding that the pulmonary function study evidence established total disability. We disagree. The administrative law judge found that, even if she accorded equal weight to all of the

[6] 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.

studies,[7] the pulmonary function study evidence supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), reasoning that two of the studies are qualifying (October 25, 2000 and December 9, 2008), one of the studies is non-qualifying (January 28, 2009), and one of the studies is equivocal (April 15, 2009). Decision and Order on Remand at 3. The administrative law judge's determination, that the April 15, 2009 pulmonary function study was "equivocal," was based upon her mistaken belief that the pre-bronchodilator portion of the study was non-qualifying. As the Director accurately notes, the administrative law judge mischaracterized the pre-bronchodilator results. The FEV1 value (2.05) and the MVV value (67) from this particular study are less than the values provided in Part 718, Appendix B, for a miner whose height is 70.1 inches and who is 60 years of age (2.06 and 82, respectively).[8] Consequently, the April 15, 2009 pulmonary function study produced qualifying values both before and after the administration of a bronchodilator, thereby providing further support for the administrative law judge's finding that the pulmonary function evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

The administrative law judge also found that the non-qualifying pulmonary function study conducted on January 28, 2009 was entitled to less weight because it was not sufficiently reliable. Decision and Order on Remand at 3. Because the January 28, 2009 pulmonary function study was not generated in connection with claimant's claim for benefits, it is not subject to the quality standards set forth at 20 C.F.R. §718.105. 20 C.F.R. §718.101(b); *J.V.S.* [*Stowers*] *v. Arch of W. Va.*, 24 BLR 1-78, 1-89, 1-92 (2008).

[7] Employer concedes that the December 9, 2008, January 28, 2009, and April 15, 2009 pulmonary function studies are "valid tests." Employer's Brief at 13. There is no evidence calling into question the validity of the October 25, 2000 pulmonary function study. Director's Exhibit 1.

[8] Claimant's listed height of 70 inches on the April 15, 2009 pulmonary function study falls between the heights listed in Part 718, Appendix B (69.7 and 70.1 inches). Employer contends that the table values for a miner with a height of 69.7 inches should be used, which would render the pre-bronchodilator portion of the April 15, 2009 pulmonary function study non-qualifying. The Director, Office of Workers' Compensation Programs (the Director), disagrees, advocating, in his response brief, that the greater height of 70.1 inches should be used. Director's Brief at 5. The Director's position is consistent with the position he has taken in prior cases, that if a miner's height falls between the heights listed on the tables, the height should be considered as the next higher height. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 1142, 19 BLR 2-257, 2-261 n.2 (4th Cir. 1995). Because the Director's position is reasonable, we adopt it for purposes of determining the qualifying nature of claimant's pre-bronchodilator April 15, 2009 pulmonary function study.

However, the comments to the revised regulations explain that evidence not subject to the quality standards must still be assessed for reliability by the fact finder:

> The Department note[s] that [20 C.F.R.] §718.101 limits the applicability of the quality standards to evidence "developed * * * in connection with a claim for benefits" governed by 20 CFR [P]arts 718, 725, or 727. Despite the inapplicability of the quality standards to certain categories of evidence, the adjudicator still must be persuaded that the evidence is reliable in order for it to form the basis for a finding of fact on an entitlement issue.

65 Fed. Reg. 79,920, 79,928 (Dec. 20, 2000). In this case, the administrative law judge permissibly discounted the January 28, 2009 pulmonary function study of record because it did not indicate whether claimant was on medications at the time of the test. *Stowers*, 24 BLR at 1-89. Moreover, as previously noted, the administrative law judge found that, even if she accorded equal weight to the non-qualifying January 28, 2009 pulmonary function study, the pulmonary function study evidence, as a whole, supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Because it is supported by substantial evidence, we 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).

In addressing whether the medical opinion evidence established total disability, the administrative law judge considered the opinions of Drs. Agarwal, Hippensteel, and Spagnolo. While Dr. Agarwal opined that claimant does not retain the pulmonary capacity to work as a miner, Director's Exhibit 12, Drs. Hippensteel and Spagnolo opined that claimant is not totally disabled from a pulmonary standpoint. Employer's Exhibits 1, 3, 9, 10. The administrative law judge permissibly discounted the opinions of Drs. Hippensteel and Spagnolo, because the physicians ruled out any obstructive or restrictive pulmonary impairment, based on claimant's non-qualifying FEV1/FVC values and normal lung volume testing, without explaining why claimant's qualifying FEV1 and FVC values would not support a finding of total disability. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Decision and Order on Remand at 6. The administrative law judge also permissibly credited Dr. Agarwal's opinion, that claimant suffers from a totally disabling pulmonary impairment because she properly found that it was more consistent with the pulmonary function study evidence. *Id*. at 5-7. An administrative 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 medical opinion evidence with the pulmonary function and 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 on Remand at 8. 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 burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[9] 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); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator. Employer's contention is substantially similar to the one that the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring), and we reject it here for the reasons set forth in that decision.[10]

[9] "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). "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).

[10] The regulations also make clear that the rebuttal provisions apply to responsible operators. 20 C.F.R. §718.305(d)(1).

Employer also asserts that the administrative law judge applied an improper rebuttal standard under Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's totally disabling respiratory impairment. Contrary to employer's argument, the administrative law judge correctly explained that, 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 pneumoconiosis, or by proving that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); Decision and Order on Remand at 9, 12. Moreover, the United States Court of Appeals for the Fourth Circuit has explicitly stated that in order to meet its rebuttal burden, employer must "effectively . . . rule out" any contribution to claimant's pulmonary impairment by dust exposure in coal mine employment.[11] *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

With respect to whether employer disproved the existence of pneumoconiosis, the administrative law judge found that the evidence did not disprove the existence of clinical pneumoconiosis, a finding that employer does not challenge on appeal. Decision and Order on Remand at 9; *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption by disproving the existence of 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.

With respect to the second method of rebuttal, employer argues that the administrative law judge erred in finding that the opinions of Drs. Hippensteel and Spagnolo were insufficient to establish that claimant's pulmonary impairment did not arise out of his coal mine employment. Employer's Brief at 23-26. We disagree. The administrative law judge reasonably discredited the opinions of Drs. Hippensteel and Spagnolo because, contrary to the administrative law judge's finding, neither physician diagnosed claimant as suffering from a totally disabling pulmonary condition. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order on Remand at 13. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant's impairment did not arise out of his coal mine employment.

[11] Similarly, the regulations require the party opposing entitlement in a miner's claim to establish "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).

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefit is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur:

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge permissibly found that, even if all the pulmonary function studies were given equal weight, this evidence supported a finding of total disability; that the administrative law judge permissibly credited Dr. Agarwal's opinion, as consistent with the pulmonary function study evidence; and that the administrative law judge permissibly discredited the opinions of Drs. Hippensteel and Spagnolo, because these physicians ruled out impairment without explaining why the qualifying test results would not support a finding of total disability. I also agree that the administrative law judge permissibly found that the evidence, as a whole, established total disability.

With respect to rebuttal of the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), since the administrative law judge permissibly discounted the medical opinions of Drs. Hippensteel and Spagnolo, and found that the pulmonary function studies were positive with respect to the existence of total disability, and employer does not challenge her findings with respect to the x-ray evidence, rebuttal was not established

under any standard,[12] and it is not necessary to address employer's arguments with respect to the application of limitations on rebuttal in this case.

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JUDITH S. BOGGS
Administrative Appeals Judge

[12] Employer suggests that rebuttal could be established by showing that an impairment was so mild that it had no effect on disability; however, it did not cite evidence in the record supporting this argument.