



BRB No. 14-0315 BLA

JAMES ERVIN PATTERSON)	
)	
Claimant-Respondent)	
)	
v.)	
)	
CONSOLIDATION COAL COMPANY)	DATE ISSUED: 03/18/2015
)	
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 Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05065) of Administrative Law Judge Daniel F. Solomon with respect to a miner's claim filed on November 24, 2010, 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

found that claimant established that he had thirty-three years of underground coal mine employment² and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis.³ 30 U.S.C. §921(c)(4) (2012). The administrative law judge concluded that the presumption was not rebutted. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2)(i), (iv) by relying on the most recent qualifying pulmonary function study and Dr. Burrell's opinion of total respiratory disability.⁴ Therefore, employer contends that the administrative law judge erred in finding claimant entitled to invocation of the amended Section 411(c)(4)

¹ Claimant filed claims on May 8, 2008 and July 6, 2009, but withdrew both claims. Decision and Order at 2.

² We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-three years of underground coal mine employment. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

³ Congress enacted amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012), which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis. In order to invoke the presumption, a miner must establish that he worked fifteen or more years in one or more underground coal mines or in coal mines other than underground mines in conditions substantially similar to those in underground mines, and that he has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). Under the implementing regulations, once the presumption is invoked, the burden shifts to employer to rebut the presumption by showing that the miner did not have pneumoconiosis, or that no part of his disability was caused by pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii).

⁴ The administrative law judge found that, although the two blood gas studies from 2011 produced qualifying results, the more recent 2012 blood gas study conducted by Dr. McSharry and the 2013 blood gas study conducted by Dr. Fernandes did not. The administrative law judge concluded, therefore, that the blood gas study evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Likewise, the administrative law judge found that total respiratory disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(iii), as there was "no evidence of cor pulmonale [with right-sided congestive heart failure] in the record." Decision and Order at 10. These findings are affirmed as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

presumption of total disability due to pneumoconiosis. Employer also asserts that the administrative law judge erred in finding that it failed to rebut the amended Section 411(c)(4) presumption. Additionally, employer asserts that the administrative law judge did not comply with the requirements of the Administrative Procedure Act (APA)⁵ in evaluating the evidence. Claimant has not filed a brief in response to employer's appeal. The Director, Office of Workers' Compensation Programs, responds to employer's appeal, urging affirmance of the administrative law judge's decision awarding benefits.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.⁶ 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).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of four pulmonary function studies. Decision and Order at 2-3, 8-9. He indicated that while the three pulmonary function studies, dating from January 2011 through May 2012, did not produce qualifying results,⁷ Dr. Fernandes' study from December 2013 produced qualifying results.⁸ Director's Exhibit 10; Employer's Exhibits 3, 5; Claimant's Exhibit 2. The administrative law judge found that because the December 2013 pulmonary function study was "almost a year and a half more recent than the previous pulmonary function study[.]" it warranted "greater weight as it is a more reliable indicator of [c]laimant's present condition." Decision and Order at 9; Claimant's

⁵ The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

⁶ The record reflects that claimant's last coal mine employment was in Virginia. Director's Exhibit 4; Decision and Order at 4. Accordingly, we will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

⁷ These non-qualifying studies consist of a January 18, 2011 study; a May 24, 2011 study; and a May 10, 2012 study. Director's Exhibit 10; Employer's Exhibits 3, 5.

⁸ A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

Exhibit 2. He therefore determined that the pulmonary function study evidence supports a finding of total respiratory disability at 20 C.F.R. §718.204(b)(2)(i).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Burrell and Fernandes, diagnosing a totally disabling respiratory impairment, along with the opinions of Dr. McSharry, who stated that claimant's impairment "would not be likely to prevent him from performing his regular job in coal mining," and Dr. Dahhan, who assessed a mild non-disabling obstructive defect. Decision and Order at 12-13, 22; Employer's Exhibits 3, 7, 11. The administrative law judge also considered claimant's description of his coal mine employment on his coal mine employment history form.

The administrative law judge found that Dr. Burrell's opinion was based on, and supported by, the doctor's findings on physical examination and review of claimant's symptoms and history, as well as a pulmonary function study.⁹ Decision and Order at 10-11, 14; Director's Exhibit 10. The administrative law judge also noted that Dr. Burrell reviewed claimant's employment history form, in which he described his coal mine employment as a shuttle car operator and a utility worker, in addition to shoveling coal. Thus, the administrative law judge found that Dr. Burrell's opinion that claimant was totally disabled was "well-reasoned" and "well-documented." Decision and Order at 14. The administrative law judge concluded, therefore, that claimant established total respiratory disability by medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).¹⁰ *Id.* at 15. The administrative law judge then weighed all of the

⁹ Dr. Burrell diagnosed clinical and legal pneumoconiosis, and opined that claimant suffers from a totally disabling respiratory impairment that would prevent him from performing his previous coal mine duties. Decision and Order at 11, 14, 17; Director's Exhibit 10.

¹⁰ The administrative law judge accorded little weight to Dr. McSharry's opinion, that "[e]ven before the bronchodilator studies [claimant] has moderate airflow limitation and many people function pretty well with that," because it failed to indicate whether claimant can perform his coal mine employment duties. Decision and Order at 12-13; Employer's Exhibits 3, 5 at 3, 8 at 20; *see* Director's Response at 4. Further, the administrative law judge accorded little weight to the opinions of Drs. McSharry and Dahhan because "both emphasized claimant's response to bronchodilators" in assessing total disability, and because both failed "to adequately take into account Dr. Fernandes' pulmonary function study" in addressing the severity of claimant's respiratory impairment. Decision and Order at 13. Additionally, the administrative law judge assigned little weight to Dr. Fernandes' opinion that the miner is totally disabled, because she did not demonstrate any knowledge of claimant's usual coal mine employment. The administrative law judge's determination to assign less weight to the opinions of Drs.

relevant evidence together, and determined that the qualifying pulmonary function study of Dr. Fernandes and the opinion of Dr. Burrell warranted greater weight than the contrary evidence. Accordingly, the administrative law judge found total respiratory disability established pursuant to 20 C.F.R. §718.204(b) overall.

Employer first argues that the administrative law judge erred in finding total respiratory disability established pursuant to 20 C.F.R. §718.204(b)(2)(i), based on the pulmonary function study evidence. Specifically, employer contends that the administrative law judge “grasps only the fact that Dr. Fernande[s]’ 2013 pulmonary function study is the most recent of record,” and “mechanically” assigns it greater weight, contrary to the requirements of the APA and caselaw. Employer’s Brief at 11. Instead, employer contends that the administrative law judge should have discounted Dr. Fernandes’ interpretation of the 2013 pulmonary function study because she did not know that earlier pulmonary function studies demonstrated greater values and showed improvement with the administration of bronchodilators.

The administrative law judge considered that the qualifying pulmonary function study values were obtained eighteen months after the previous non-qualifying study. He, therefore, rationally determined that Dr. Fernandes’ study is a “more reliable indicator of claimant’s present condition.” *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); Decision and Order at 9. Hence, we reject employer’s allegation of error and affirm the administrative law judge’s finding that the pulmonary function study evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Next, employer contends that the administrative law judge improperly credited the opinion of Dr. Burrell on the issue of total respiratory disability, as Dr. Burrell’s 2011 opinion was based on early diagnostic testing that was subsequently contradicted by more recent testing. The administrative law judge, however, found that Dr. Burrell’s opinion had several bases: in addition to blood gas testing; a pulmonary function test; a physical examination; symptoms, including dyspnea, occasional chest pain, and shortness of breath resting and on exertion; medical history, including wheezing and bronchial asthma; and work history, including knowledge of the specific duties of claimant’s usual coal mine employment. Decision and Order at 11, 14-15. Consequently, we affirm the administrative law judge’s finding that the relevant evidence weighed together establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b) overall, *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987), and that claimant was, therefore, entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4) (2012).

McSharry, Dahhan, and Fernandes is affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711; Decision and Order at 7, 11-14.

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

In finding that the presumption was not rebutted, the administrative law judge found that employer failed to disprove the existence of clinical or legal pneumoconiosis and failed to show that no part of claimant's total disability was caused by pneumoconiosis. Specifically, the administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis, as the x-ray evidence was in equipoise and the opinions of Drs. McSharry and Dahhan were based solely on negative x-ray evidence. The administrative law judge found that employer failed to disprove the existence of legal pneumoconiosis because Drs. McSharry and Dahhan relied on the "reversibility" seen on bronchodilation to attribute claimant's chronic obstructive pulmonary disease (COPD) to asthma or smoking, instead of coal mine dust exposure. The administrative law judge accorded little weight to the opinions of Drs. McSharry and Dahhan, not only because they relied on the "reversibility" seen on bronchodilation, but also because the doctors failed to explain how claimant's COPD played no role in the irreversible component of claimant's respiratory impairment. 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. Dahhan found that claimant has pneumoconiosis or a totally disabling respiratory impairment.

The party opposing entitlement may rebut the presumption 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," his coal mine employment. 30 U.S.C. §921(c)(4) (2012); *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). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical¹¹ or legal

¹¹ The regulation at 20 C.F.R. §718.201(a)(1) provides:

"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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

pneumoconiosis,¹² 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 §718.201.” 20 C.F.R. §718.305(d)(1)(ii).

We first address employer’s argument that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. Employer contends that the administrative law judge should have found the absence of legal pneumoconiosis established based on the opinions of Drs. McSharry and Dahhan. Employer’s Brief at 15-18.

At the outset, we reject employer’s argument that the administrative law judge erred in utilizing the preamble to the 2001 revised regulations in evaluating Dr. McSharry’s opinion. An administrative law judge may evaluate expert opinions in conjunction with the discussion by the Department of Labor (DOL) of medical science in the preamble, and may consult the preamble as a statement of scientific research accepted by the DOL.¹³ See 65 Fed. Reg. 79,940 (Dec. 20, 2000); *Harman Mining Co. v. Director, OWCP* [Looney], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *J.O. [Obush] v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff’d sub nom. Helen Mining Co. v. Director, OWCP* [Obush], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

The administrative law judge, therefore, permissibly found, in light of the preamble’s recognition of studies showing that coal dust exposure is additive in causing clinically significant airways obstruction, that Drs. McSharry and Dahhan failed to adequately explain how they determined that claimant’s COPD was not related to his coal dust exposure or how it did not aggravate any respiratory impairment claimant had from other causes. See 65 Fed. Reg. 79,940 (Dec. 20, 2000); 20 C.F.R. §718.201(b); *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007). The administrative law judge also permissibly accorded little weight to the opinions of Drs. McSharry and Dahhan because the doctors did not explain how improvement on bronchodilation eliminated legal pneumoconiosis as a cause of the remaining fixed respiratory impairment. See *Barrett*, 478 F.3d at 356, 23 BLR at 2-483. Hence, the administrative law judge acted within his discretion in according little weight to the opinions of Drs. McSharry and Dahhan and in finding them insufficient to disprove the existence of legal pneumoconiosis.

¹² Pursuant to 20 C.F.R. §718.201(a)(2), “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).

¹³ Employer does not offer more recent research to the contrary.

Because the administrative law judge permissibly accorded little weight to the opinions of Drs. McSharry and Dahhan and found them insufficient to disprove the existence of legal pneumoconiosis, we affirm the administrative law judge's finding that employer did not rebut the presumption by disproving the existence of pneumoconiosis.¹⁴ *See* 20 C.F.R. §718.305(d)(1)(i); *Rose*, 614 F.2d at 938-39, 2 BLR at 2-43-44.

Lastly, the administrative law judge addressed the remaining method of rebuttal, namely, that no part of claimant's total disability was caused by pneumoconiosis. He properly accorded little weight to the opinions of Drs. McSharry and Dahhan because, contrary to his own findings, they found that claimant did not have pneumoconiosis or total respiratory disability. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order at 21-22. Consequently, we affirm the administrative law judge's finding that employer failed to establish that "no part" of claimant's total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii). In sum, we affirm the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption by either method provided. 20 C.F.R. §718.305(d)(1)(i), (ii).¹⁵

¹⁴ In light of our affirmance of the administrative law judge's finding that employer failed to establish the absence of legal pneumoconiosis, we need not address employer's arguments regarding the administrative law judge's finding that employer failed to establish the absence of clinical pneumoconiosis. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

¹⁵ The administrative law judge properly assigned little weight to the opinions of Drs. McSharry and Dahhan, the only opinions supportive of rebuttal, and found them insufficient to rebut the presumption. We need not, therefore, address employer's arguments concerning the administrative law judge's evaluation of the opinions of Drs. Burrell and Fernandes, as they relate to rebuttal.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge