BRB No. 12-0469 BLA

RAYMOND A. HAYS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCK CREEK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 05/16/2013
	)	
and	)	
	)	
SECURITY INSURANCE OF HARTFORD	)	
	)	
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 – Award of Benefits in a Subsequent Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits in a Subsequent Claim (2008-BLA-5882) of Administrative Law Judge Larry S. Merck, rendered pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-

944 (Supp. 2011) (the Act).[1] The administrative law judge found that the newly submitted evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Based on the filing date of the claim and his determinations that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory impairment, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to satisfy its burden to rebut that presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability for invocation of the amended Section 411(c)(4) presumption, and erred in weighing the evidence relevant to whether employer rebutted the presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief.[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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

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[1] Claimant filed his initial claim for benefits on August 10, 1998, which was denied by reason of abandonment. Director's Exhibit 1. Claimant filed a subsequent claim on January 13, 2003, which was denied by the district director on October 29, 2003, because claimant did not prove any element of entitlement. Director's Exhibit 2. Claimant filed a third claim on December 6, 2004, but it was withdrawn on September 15, 2005. Director's Exhibit 3. Claimant took no further action in pursuit of benefits until filing his current subsequent claim on October 18, 2007. Director's Exhibit 5.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment. *See* 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant worked in underground coal mine employment for at least twenty-four years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 5.

[4] The administrative law judge determined that a preponderance of the evidence established that claimant's last coal mine employment was in Indiana. Decision and

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

I. INVOCATION OF THE PRESUMPTION

Employer contends that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment for invocation of the amended Section 411(c)(4) presumption. We disagree.

The administrative law judge found that claimant was unable to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), as none of the newly submitted pulmonary function study evidence is qualifying for total disability.[5] Decision and Order at 9. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered three newly submitted arterial blood gas studies. *Id*. The administrative law judge found that the arterial blood gas studies conducted on November 30, 2007 are qualifying for total disability at rest and during exercise. He further found that arterial blood gas studies conducted "four and six months later" on March 19, 2008 and May 15, 2008, respectively, are non-qualifying for total disability.[6] *Id*.; *see* Director's Exhibits 14, 18; Employer's Exhibit 1. The administrative law judge found that the arterial blood gas study evidence "overall is inconclusive" for total disability. Decision and Order at 9. Pursuant to 20 C.F.R. §718.204(b)(2)(iv),[7] the administrative law judge noted that there are three medical opinions by Drs. Forehand, Dahhan, and Fino. He found that claimant established total disability based on the reasoned and documented opinions of Drs.

Order at 5. Based on the administrative law judge's factual determination, which is supported by the record, the Board will apply the law of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); *see* Director's Exhibits 1, 2, 6, 9, 10.

[5] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C to 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)(i), (ii).

[6] The March 19, 2008 and May 15, 2008 arterial blood gas studies were conducted at rest only. Director's Exhibit 18; Employer's Exhibit 1.

[7] The administrative law judge found that claimant was unable to establish total disability at 20 C.F.R. §718.204(b)(2)(iii), as there was no evidence indicating that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 9 n.6.

Forehand and Dahhan, assigning little weight to Dr. Fino's contrary opinion. Weighing all of the evidence together, the administrative law judge concluded that claimant satisfied his burden to prove total disability. Because claimant established a totally disabling respiratory or pulmonary impairment, the administrative law judge held that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and that claimant invoked the rebuttable presumption of total disability due pneumoconiosis at amended Section 411(c)(4).

Employer argues that the administrative law judge erred in crediting the opinions of Drs. Forehand and Dahhan, as reasoned and supported by the objective evidence, in light of the administrative law judge's specific findings that claimant's pulmonary function studies are non-qualifying and the arterial blood gas study evidence is inconclusive. Employer maintains that Dr. Fino's opinion is the only one consistent with the administrative law judge's "own findings on whether or not objective measures of pulmonary impairment, spirometry and [arterial] blood gases, support total disability in the first instance." Employer's Petition for Review and Brief at 11. Employer's arguments are rejected as without merit.

The regulation at 20 C.F.R. §718.204(b)(2)(iv) provides:

> Where total disability cannot be shown under paragraphs (b)(2)(i), (ii), or (iii) of this section, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may nevertheless be found if a physician exercising reasoned medical judgment, based on medically accepted clinical and laboratory diagnostic techniques, concludes that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment in paragraph (b)(1) of this section.

20 C.F.R. §718.204(b)(2)(iv). In this case, the administrative law judge found correctly that Drs. Forehand and Dahhan diagnosed "significant" respiratory impairment or hypoxemia, based on the results of their respective arterial blood gas studies, and opined that claimant was totally disabled, taking into consideration claimant's work history, their findings on physical examination, and claimant's use of oxygen.[8] *See Consolidation*

[8] Dr. Forehand examined claimant on November 30, 2007, and reported that the arterial blood gas study revealed arterial hypoxemia. Director's Exhibit 14. Dr. Forehand diagnosed "significant respiratory impairment" due to "insufficient residual gas exchange capacity," and opined that claimant was totally disabled from returning to his usual coal mine job as a mechanic. *Id*. Dr. Dahhan examined claimant on March 19, 2008 and, based on the arterial blood gas study he obtained, opined that claimant suffers from "significant hypoxemia rendering him oxygen dependent [and] resulting in total disability." Director's Exhibit 18.

Coal Co. v. Director, OWCP [*Stein*], 294 F.3d 885, 896, 22 BLR 2-409, 2-426 (7th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 10, 12. Contrary to employer's contention, the administrative law judge permissibly determined that the disability opinions of Drs. Forehand and Dahhan are reasoned and documented, and also supported by the arterial blood gas evidence "which, while not qualifying overall, consistently demonstrated hypoxemia." Decision and Order at 14; *see Stein*, 294 F.3d at 896, 22 BLR at 2-426; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-265, 2-280 (7th Cir. 2001).

Furthermore, there is no merit to employer's argument that Dr. Fino's opinion was improperly rejected.[9] The administrative law judge rationally found that Dr. Fino did not fully explain the bases for his change in conclusion as to whether claimant is totally disabled:

> [Dr. Fino] initially opined that Claimant's hypoxemia "would probably prevent him from returning to his last mining job or a job requiring similar effort." However, in the deposition, he changed his opinion and stated that Claimant would not be restricted from a pulmonary standpoint from working in the coal mines. He stated that he based his opinion on the non-qualifying nature of Claimant's [arterial blood gas study]; however, the [arterial blood gas study] upon which he based his initial opinion was also non-qualifying. Dr. Fino fails to explain how it is that an individual on

[9] Dr. Fino examined claimant on May 15, 2008, and diagnosed that claimant suffers from significant resting hypoxemia, stating that it "would probably prevent [claimant] from returning to his last mining job or a job requiring similar effort." Employer's Exhibit 1. However, during a deposition conducted on February 20, 2011, Dr. Fino indicated that he had reviewed the arterial blood gas study results obtained by Drs. Forehand and Dahhan and revised his opinion as follows:

> [T]aking everything together, I would change my opinion, especially looking at the new information that you sent to me. My opinion is no longer that [claimant] would not be able to return to his last mining job. He clearly would. He does not have a qualifying [arterial] blood gas for me, and he has – he did not have a qualifying [arterial] blood gas two months earlier for Dr. Dahhan, and . . . every time that he's been excercised, his pCO2 goes up, which would be atypical, and not expected if you had disabling coal workers' pneumoconiosis.

Employer's Exhibit 7.

> supplemental oxygen retains the respiratory or pulmonary capacity to perform manual labor in an underground coal mine.

Decision and Order at 14 (citations omitted); *see Stein*, 294 F.3d at 896, 22 BLR at 2-426; *Summers*, 272 F.3d at 483, 22 BLR at 2-280.[10]

Because the administrative law judge acted within his discretion in giving controlling weight to the opinions of Drs. Forehand and Dahhan, who opined that claimant has a totally disabling respiratory impairment, and "little weight" to Dr. Fino's contrary opinion, we affirm his finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See Stein*, 294 F.3d at 896, 22 BLR at 2-426; *Summers*, 272 F.3d at 483, 22 BLR at 2-280; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). We further affirm, as supported by substantial evidence, the administrative law judge's overall determination that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b), that he demonstrated a change in an applicable condition of entitlement under 20 C.F.R. §725.309, and that claimant is entitled to the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

II. REBUTTAL OF THE PRESUMPTION

In order to rebut the amended Section 411(c)(4) presumption, employer must establish that claimant does not suffer from either clinical or legal pneumoconiosis, [11] or

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[10] Claimant testified that he was prescribed supplemental oxygen in 2004, and was on three liters a day at the time of the hearing. *See* Decision and Order at 3-4; Hearing Transcript at 15-16.

[11] The regulations provide:

> "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.

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. This definition

that his disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4); *see* 77 Fed. Reg. 19,456, 19,475 (proposed Mar. 30, 2012) (to be codified at 20 C.F.R. §718.305). The administrative law judge determined that the analog x-ray evidence is inconclusive,[12] that there is no biopsy evidence of record, that the one digital x-ray of record is positive for pneumoconiosis,[13] and that "there are no well-reasoned and well-documented medical opinions that claimant does not have clinical pneumoconiosis."[14] Decision and Order at 18, 24-25. On the issue of legal pneumoconiosis, the administrative law judge gave "full probative weight to the well-reasoned and well-documented medical opinion of Dr. Forehand, who opined that [c]laimant had the disease." *Id*. at 24. The administrative law judge specifically determined that the opinions of Drs. Dahhan and Fino are "unreasoned" as to whether claimant has a coal dust-related respiratory or pulmonary condition. *Id.* at 25. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have clinical or legal pneumoconiosis. *Id*.

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includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

[12] The newly submitted x-ray evidence consists of eight readings of four analog x-rays. The administrative law judge found the x-rays, dated November 30, 2007, August 15, 2007 and June 10, 2009, "inconclusive," as to the presence or absence of pneumoconiosis, because each x-ray has one positive reading by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, and one negative reading by Dr. Wheeler, also dually qualified. Decision and Order at 18; *see* Director's Exhibits 14, 16; Claimant's Exhibit 1; Employer's Exhibit 8. The administrative law judge found that the March 19, 2008 x-ray is positive for pneumoconiosis, because he credited the positive reading by Dr. Alexander over the negative reading of that x-ray by Dr. Dahhan, a B reader. Decision and Order at 18; *see* Director's Exhibit 18; Claimant's Exhibit 2.

[13] Relying on the credentials of the readers, the administrative law judge permissibly found that the digital x-ray dated May 15, 2008 is positive for pneumoconiosis, crediting the positive reading by Dr. Alexander, dually qualified, over the negative reading by Dr. Fino, a B reader. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 24; Claimant's Exhibit 3; Employer's Exhibit 1.

[14] In considering whether employer established rebuttal, the administrative law judge weighed the conflicting medical opinions of Drs. Forehand, Dahhan, and Fino.

Relevant to the issue of the disability causation, the administrative law judge rejected the opinions of Drs. Dahhan and Fino, that claimant's disabling hypoxemia was unrelated to coal dust exposure. Decision and Order at 20-23. Thus, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant's respiratory disability did not arise out of, or in connection with, coal mine employment. *Id*. at 26.

Employer's primary assertion is that claimant has the burden to establish the existence of pneumoconiosis and that Dr. Forehand's opinion is insufficient to establish that claimant suffers from either clinical or legal pneumoconiosis. Employer's Petition for Review and Brief at 7. This argument has no merit. Once the amended Section 411(c)(4) presumption was invoked, the burden shifted to employer to establish with affirmative evidence that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4); 77 Fed. Reg. at 19,475; *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995).

We affirm, as unchallenged by employer on appeal, the administrative law judge's findings with respect to each analog x-ray and his overall determination that the analog x-ray evidence is inconclusive. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 25. We further affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Fino are insufficient to establish that claimant does not have clinical pneumoconiosis. As noted by the administrative law judge, Dr. Dahhan based his opinion that claimant does not have clinical pneumoconiosis on his own negative reading of the March 19, 2008 x-ray, which was interpreted by a more qualified physician as positive for pneumoconiosis. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); Decision and Order at 20; Employer's Exhibit 3.

Dr. Fino also opined that claimant does not have clinical pneumoconiosis, citing "the overwhelming majority" of x-rays he reviewed as being negative for pneumoconiosis. Employer's Exhibit 1. The administrative law judge permissibly determined that Dr. Fino's opinion is entitled to little weight, in light of administrative law judge's findings that the most recent x-ray evidence, as a whole, is inconclusive.[15] *See Furgerson v. Jericol Mining Co.*, 22 BLR 1-216 (2002) (en banc); Decision and Order at 22. Because the administrative law judge acted within his discretion in finding that employer did not disprove the existence of clinical pneumoconiosis, we affirm the administrative law judge's finding that employer did not rebut the presumption under that method.

[15] The administrative law judge also noted that Dr. Fino based his opinion on a review of "x-rays going all the way back to 1971, well before [c]laimant quit the mines." Decision and Order at 22.

We also reject employer's argument that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Fino as to the existence of legal pneumoconiosis. The administrative law judge found correctly that Drs. Dahhan and Fino eliminated coal dust exposure as a cause for claimant's hypoxemia on the ground that claimant had not been exposed to coal dust since 1994.[16] *See* Decision and Order at 20, 22; Employer's Exhibits 1, 3. Contrary to employer's contention, the administrative law judge acted within his discretion in consulting the preamble to the regulations and concluding that their "statement[s] regarding the period of time since [c]laimant's coal mine employment ceased [are] at odds with the Department of Labor's determination that coal mine dust exposure can cause a chronic pulmonary impairment after a latent period." Decision and Order at 21, 22-23; *see* 65 Fed. Reg. 79,971 (Dec 20, 2000); *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004).

Additionally, the administrative law judge acted within his discretion in rejecting Dr. Dahhan's explanation that claimant does not have coal dust-related disability because he "is being treated with multiple bronchodilator agents indicating that his [treating] physician believes his condition is responsive to such measures, a finding that is inconsistent with the permanent adverse effects of coal dust on the respiratory system." Director's Exhibit 18; *see Stein*, 294 F.3d at 896, 22 BLR at 2-426; *Summers*, 272 F.3d at 483, 22 BLR at 2-280. The administrative law judge permissibly determined that the fact that claimant was prescribed a bronchodilator was "irrelevant given that claimant's impairment manifested itself on the [arterial blood gas studies], not the [pulmonary function tests]." Decision and Order at 21; s*ee Clark*, 12 BLR at 1-155; *see generally Sheranko v. Jones and Laughlin Steel Corp.* 6 BLR 1-797 (1984) (pulmonary function and arterial blood gas studies measure different types of impairment).

Because the administrative law judge acted within his discretion in rendering his credibility determinations with respect to Drs. Dahhan and Fino, we affirm his finding that their opinions are not sufficiently reasoned to rebut the presumption that claimant has

[16] Dr. Dahhan cited three reasons for eliminating coal dust exposure as a causative factor for claimant's disabling hypoxemia: 1) he pointed out that claimant "had no exposure to coal dust since 1994"; 2) claimant was prescribed a bronchodilator by his treating physician; and 3) lack of radiological evidence for clinical pneumoconiosis. Employer's Exhibit 3. Dr. Fino opined that claimant's hypoxemia, which he did not believe to be disabling, is unrelated to coal dust exposure because claimant showed improvement between the February 5, 2003 and April 23, 2003 arterial blood gas studies and because it would be "unusual for coal mine dust to first present with hypoxemia more than ten years after the miner leaves the mines." Employer's Exhibit 1.

legal pneumoconiosis.[17] *See Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 890, 22 BLR 2-514, 2-528 (7th Cir. 2002); *Clark*, 12 BLR at 1-155. We also affirm the administrative law judge's finding that the opinions of Drs. Dahhan and Fino are insufficient to establish that claimant's disability did not arise out of, or in connection with, coal mine employment, as they did not diagnose legal pneumoconiosis, contrary to the administrative law judge's finding. *See Stalcup v. Peabody Coal Co.*, 477 F.3d 482, 484, 24 BLR 2-33, 2-37 (7th Cir. 2007); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 468-69, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 895, 13 BLR 2-348, 2-355 (7th Cir. 1990). Consequently, we affirm the administrative law judge's overall determination in this case that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.

[17] Because the sufficiency of claimant's evidence is not at issue on rebuttal, it is not necessary that we address employer's argument that the administrative law judge erred in finding that Dr. Forehand provided a reasoned and documented opinion that claimant has legal pneumoconiosis. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in a Subsequent Claim is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge