BRB Nos. 13-0073 BLA
and 13-0073 BLA-A

ELIJAH D. FARMER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
HOBET MINING LLC	)	DATE ISSUED: 11/26/2013
	)	
and	)	
	)	
ARCH COAL, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Anne B. Rembrandt (Jackson Kelly, PLLC), Charleston, West Virginia, for employer.

Helen H. Cox (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals, and claimant cross-appeals, the Decision and Order Granting Benefits (2011-BLA-05840) of Administrative Law Judge Thomas M. Burke with respect to a claim filed on July 29, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with twenty-two years of coal mine employment, as stipulated by the parties and supported by the record, and found that the conditions in claimant's surface mine employment were substantially similar to those in underground coal mining. The administrative law judge further found that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) (2013), and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), but not rebuttal.[1] Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge improperly evaluated the blood gas study evidence and, thus, erred in determining that claimant established total disability at 20 C.F.R. §718.204(b)(2) (2013), for purposes of invoking the amended Section 411(c)(4) presumption. In addition, employer asserts that the administrative law judge erroneously concluded that employer failed to establish that claimant does not have legal pneumoconiosis, and failed to properly evaluate the medical evidence or provide an analysis that comports with the requirements of the Administrative Procedure Act (APA)[2] in finding that employer failed to establish that

[1] Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305. The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013)(to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[2] The Administrative Procedure Act, 5 U.S.C. §500 *et seq.*, provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law, or discretion

claimant's disabling respiratory impairment was not due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject the arguments preserved by employer for future appeals concerning the application and interpretation of the reinstated Section 411(c)(4) presumption.[3] In a cross-appeal, claimant argues that, if the award of benefits is not affirmed, the Board should instruct the administrative law judge, on remand, to consider additional deficiencies in the medical opinion evidence submitted by employer. Employer responds in support of its position. The Director has declined to substantively respond to claimant's cross-appeal.[4]

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.[5] 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).

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presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[3] We agree with the Director, Office of Workers' Compensation Programs, that employer's challenges to the interpretation and application of the reinstated Section 411(c)(4) presumption are meritless. Contrary to employer's assertions, employer was not restricted in the evidence it offered in rebuttal; the absence of implementing regulations did not prevent application of the presumption; and employer's due process rights were not violated by a lack of notice of the change of law, or by proceeding without implementing regulations. Director's Response at 1-2; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J. concurring); *Fairman v. Helen Mining Co.*, 24 BLR 1-227, 1-229 (2011). As the United States Court of Appeals for the Fourth Circuit has issued its decision in *Owens*, employer's request to hold this case in abeyance pending that decision is moot.

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established twenty-two years of coal mine employment, of which more than fifteen years were performed in conditions substantially similar to those in underground coal mining, and that employer established the absence of clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. Director's Exhibit 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

Employer initially challenges the administrative law judge's finding of total respiratory disability at Section 718.204(b)(2) (2013), arguing that the administrative law judge's findings of fact are not supported by the evidence of record. Specifically, employer maintains that, contrary to the administrative law judge's findings, the blood gas study evidence, the Social Security Administration (SSA) award of benefits, and claimant's testimony regarding his prescriptions and renewals for oxygen do not support a finding of total disability. Employer's arguments lack merit.

In assessing the evidence relevant to disability at Section 718.204(b)(2)(i), (ii) (2013), the administrative law judge accurately determined that the more recent and valid pulmonary function study evidence produced qualifying values and supported a finding of total disability, while neither of the blood gas studies of record produced qualifying results.[6] Decision and Order at 5, 13-14; Director's Exhibit 13; Employer's Exhibit 2. However, because Dr. Gaziano indicated that the arterial blood gas study he conducted demonstrated a moderate impairment, and Dr. Zaldivar indicated that the blood gas study he conducted showed resting hypoxemia, the administrative law judge concluded that "the weight of the arterial blood gas study evidence also supports a finding of total disability." Decision and Order at 14. The administrative law judge further determined that all of the medical opinions at Section 718.204(b)(2)(iv) (2013) found that claimant was totally disabled from performing his usual coal mine employment. Decision and Order at 14; Director's Exhibit 13; Employer's Exhibits 2, 3, 6, 7. Next, the administrative law judge credited claimant's testimony[7] regarding his physical limitations, breathing difficulties and oxygen usage, and concluded that the lay testimony also supported a finding of total pulmonary disability. Decision and Order at 15. Additionally, the administrative law judge considered a 2001 SSA award of benefits which found claimant to be "disabled due to, among other things, pneumoconiosis," but accorded it little weight because SSA attributed some of claimant's disability to non-pulmonary conditions. *Id*.; Director's Exhibit 11. Nevertheless, "for what little weight it carries," the administrative law judge found that "this determination supports a finding of total disability." *Id*. Finally, the administrative law judge considered claimant's treatment records demonstrating that he has required oxygen via nasal cannula since

[6] 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).

[7] Claimant testified that his coal mine employment duties included lifting 50-100 pounds; that he is unable to walk more than 150 feet at a time; that he must walk with a cane when he grows short of breath; and that his breathing is now so bad that he cannot lift anything heavier than a gallon of milk. Decision and Order at 14-15; *see* Hearing Transcript at 11-12, 14, 18.

2004, and that claimant's "life is in danger if he is without his oxygen cannula for more than two hours." Decision and Order at 15. The administrative law judge inferred that if claimant's breathing is "so impaired that he cannot be without access to an external oxygen supply for more than two hours," then he "would be unable to perform a physical labor job" such as claimant's usual coal mine employment. *Id*.

In sum, as the administrative law judge found that the weight of the relevant evidence supported a finding of total disability, he concluded that claimant established total disability at 20 C.F.R. §718.204(b)(2) (2013), and that claimant invoked the presumption at amended Section 411(c)(4), that his disabling respiratory impairment is due to pneumoconiosis. *Id*. at 15-17.

We reject employer's argument that the administrative law judge erred in finding that the non-qualifying blood gas study evidence supports a finding of total disability. While the non-qualifying blood gas studies are insufficient to *establish* total disability, the administrative law judge is not precluded from considering the medical experts' estimates of the level of impairment demonstrated by such tests, and determining that they *support* a finding of total disability. Similarly, employer has not shown how claimant's testimony, the SSA award of benefits, and claimant's treatment records do not support a finding of total disability or demonstrate that claimant retains the respiratory capacity to perform his usual coal mine employment. As employer has not challenged the administrative law judge's finding that the weight of the pulmonary function study evidence of record and all of the medical opinions of record are sufficient to establish total respiratory disability, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we affirm, as supported by substantial evidence, the administrative law judge's conclusion that claimant has established total disability at Section 718.204(b) (2013), and is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *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).

Employer next maintains that the opinions of Drs. Castle[8] and Zaldivar[9] rebut the presumption at amended Section 411(c)(4), and were improperly discounted in favor of

[8] Dr. Castle found no clinical or legal pneumoconiosis and opined that claimant is "very likely permanently disabled as a result of bronchial asthma and tobacco smoke induced airway obstruction." Employer's Exhibit 3 at 9. He opined that claimant has moderately severe airway obstruction, and explained that obstruction can be caused by chronic bronchitis, emphysema, asthma, bronchiectasis, or "may be seen with coal workers' pneumoconiosis; generally not to this degree but not with the discrepancy between the amount of reduction and the FVC and the FEV_1." Employer's Exhibit 6 at 21. Dr. Castle stated that claimant's asthma is not consistent with coal workers'

the contrary opinion of Dr. Gaziano.[10] Employer asserts that the opinions of Drs. Castle and Zaldivar credibly establish that claimant does not have legal pneumoconiosis and that his disabling respiratory impairment is due to non-occupational asthma aggravated by smoking, not coal dust exposure. Employer argues that Dr. Gaziano's opinion, by comparison, is poorly reasoned, and his position, that impairment due to coal dust exposure and smoking cannot be differentiated, is unsupported in the record. Employer contends that the administrative law judge failed to critically analyze Dr. Gaziano's opinion, while ignoring the testimony of Drs. Castle and Zaldivar setting forth the multiple reasons why they concluded that claimant's respiratory impairment is unrelated to coal dust exposure. Employer's Brief at 18-33.

We reject employer's allegations of error. While finding that employer successfully rebutted the presumption of clinical pneumoconiosis, the administrative law judge properly determined that the opinions of Drs. Castle and Zaldivar, attributing claimant's disabling respiratory impairment to asthma, are "no bar to Black Lung benefits," since the preamble recognizes asthma as a form of chronic obstructive pulmonary disease (COPD) that can be considered legal pneumoconiosis if it arises out of coal mine employment.[11] Decision and Order at 19; *see* 65 Fed. Reg. 79,920, 79,939,

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pneumoconiosis because it was significantly reversible and variable over time, and it showed no evidence of restriction. Employer's Exhibit 6 at 25.

[9] Dr. Zaldivar opined that claimant is totally disabled from performing his usual coal mine work or work requiring similar exertion. He found no evidence to justify a diagnosis of either clinical pneumoconiosis or legal pneumoconiosis; rather, he found that claimant "is a smoker who also has asthma, and this combination fully explains the status of his lungs at this time." Employer's Exhibit 2 at 5. Dr. Zaldivar attributed claimant's disabling respiratory impairment to "asthma complicated by smoking," leading to lung remodeling. Employer's Exhibit 7 at 31, 37-38.

[10] Dr. Gaziano stated that claimant is totally and permanently disabled by a severe pulmonary impairment. He diagnosed legal pneumoconiosis due to twenty years of exposure to rock and coal dust operating heavy machinery and a coal auger, and stated that smoking and coal mine dust exposure cause pulmonary impairment by similar mechanisms. Decision and Order at 2, 6-8, 18-19; Director's Exhibit 13 at 5, 8; Claimant's Exhibit 1 at 13, 16-18, 19-20.

[11] Dr. Zaldivar "exclude[d] coal dust exposure as a causative factor in claimant's impairment," based on claimant's family history of asthma, continued smoking, and normal chest x-ray. Dr. Zaldivar concluded that claimant "could just as easily have been working in any other occupation and still have exactly the same disease." Similarly, Dr. Castle attributed claimant's impairment to bronchial asthma and smoking, stating that

79,944 (Dec. 20, 2000). In so doing, the administrative law judge appropriately considered the opinions of Drs. Zaldivar and Castle in light of the scientific views accepted by the Department of Labor (DOL) in defining the disease of pneumoconiosis, and permissibly found them wanting. *See Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, BLR (4th Cir. 2013); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Moreover, the administrative law judge found that, although Drs. Castle and Zaldivar "explained in detail why they had ruled out pneumoconiosis," their explanations related to clinical pneumoconiosis, rather than legal pneumoconiosis. Decision and Order at 19; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012). Because all of the physicians agreed that claimant "suffers from some form of COPD," the administrative law judge properly observed that the relevant question is whether claimant's disabling COPD arose out of his coal mine employment, *i.e.*, whether his "chronic pulmonary disease or respiratory or pulmonary impairment [is] significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b) (2013). The administrative law judge noted Dr. Gaziano's testimony, that he could not differentiate between COPD caused or aggravated by coal dust and COPD caused or aggravated by smoking, since both smoking and coal dust cause pulmonary impairment by the same mechanism, a view that is consistent with the preamble and regulations. *See* 65 Fed. Reg. 79,943 (Dec. 21, 2000). By contrast, the administrative law judge found that neither Dr. Castle nor Dr. Zaldivar discussed how they made the distinction between COPD aggravated by coal dust and COPD aggravated by smoking, nor did either provide "any support for their choice of tobacco smoke, rather than coal dust, as the aggravating factor of Claimant's COPD." Decision and Order at 19; *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). The administrative law judge acted within his discretion in finding that the opinions of Drs. Castle and Zaldivar failed to satisfy employer's burden under amended Section 411(c)(4) of proving that claimant's disabling COPD did not arise out of, or in connection with, coal mine employment, or constitute legal pneumoconiosis, and we affirm this finding, as supported by substantial evidence. 30 U.S.C. §921(c)(4); *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, BLR (4th Cir. 2013)(Niemeyer, J. concurring). As the administrative law judge permissibly discounted the opinions of Drs. Castle and Zaldivar, the only evidence supportive of employer's burden on rebuttal, we need not address employer's arguments alleging deficiencies in Dr. Gaziano's opinion, or claimant's arguments on cross-appeal. Thus, we affirm the administrative law judge's award of benefits.

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these are "both conditions of the general public at large and are unrelated to coal mine dust exposure or coal worker's pneumoconiosis." Employer's Exhibit 7 at 9, 32-33.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge