BRB No. 12-0015 BLA

GORDON LEE CRAFT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SLAB FORK COAL COMPANY	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 10/10/2012
	)	
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 Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (09-BLA-5858) of Administrative Law Judge Thomas M. Burke rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944

(2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). This case involves a subsequent claim filed on November 14, 2008.[1] Director's Exhibit 6.

The administrative law judge credited claimant with thirty-seven years of underground coal mine employment,[2] based on the evidence of record, and noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. 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 Section 411(c)(4), if a miner 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 that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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).

Applying amended Section 411(c)(4), the administrative law judge found that claimant worked in underground coal mine employment for thirty-seven years. Additionally, the administrative law judge found that the new medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, and demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

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[1] Claimant filed four prior claims, all of which were finally denied. Director's Exhibits 1-4. His most recent prior claim, filed on September 11, 2006, was denied on June 12, 2007, because claimant did not establish the existence of a totally disabling respiratory impairment. Director's Exhibit 4.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 7. 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, 1-202 (1989) (en banc).

On appeal, employer contends that the administrative law judge erred in finding that claimant was totally disabled, and therefore erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also asserts that the administrative law judge erred in weighing the medical opinion evidence when he found that employer did not rebut the presumption. Claimant responds,[3] urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not submitted a brief in this 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 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).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's last claim was denied because he did not establish total disability. Director's Exhibit 4. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing total disability. 20 C.F.R. §725.309(d)(2), (3). The administrative law judge found that the new evidence established total disability, demonstrating both a change in the applicable condition, and a necessary fact for invocation of the Section 411(c)(4) presumption.

[3] Claimant died on July 8, 2010, while his claim was pending before the administrative law judge. Claimant's claim is being pursued by his surviving spouse. Decision and Order at 3; Claimant's Exhibit 9; Hearing Tr. at 4, 10.

[4] Employer does not challenge the administrative law judge's finding of thirty-seven years of underground coal mine employment. Therefore, it is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

Employer initially argues that the administrative law judge erred in finding that claimant established invocation of the Section 411(c)(4) presumption. Specifically, employer contends that the administrative law judge erred in finding that the new blood gas study and medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iv).

Pursuant 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of three new blood gas studies conducted on January 29, 2007 and January 14, 2009, by Dr. Rasmussen, and on July 13, 2009, by Dr. Crisalli. Dr. Rasmussen's January 29, 2007 and January 14, 2009 blood gas studies produced qualifying values[5] at rest, and non-qualifying values during exercise.[6] Director's Exhibit 16; Claimant's Exhibit 7. Dr. Crisalli's July 13, 2009 blood gas study, performed only at rest, produced non-qualifying values.[7] Employer's Exhibit 8.

The administrative law judge accorded the greatest weight to the qualifying, resting blood gas studies performed by Dr. Rasmussen on January 29, 2007 and January 14, 2009. The administrative law judge explained that Dr. Rasmussen's 2007 and 2009 resting values were identical, and thus corroborated each other. Decision and Order at 10. The administrative law judge further found Dr. Rasmussen's test results to be supported by the testimony of Drs. Houser and Rasmussen, who explained that there was a worsening in the A-a gradient from 2007 to 2009, indicating that lung disease was interfering with claimant's gas exchange. Decision and Order at 10; Claimant's Exhibits 19 at 28-31; 20 at 20-22. Finally, the administrative law judge found that the qualifying, resting values were further corroborated by Dr. Houser's testimony that Dr. Rasmussen's January 14, 2009 diffusion capacity test also evidenced a gas exchange problem. Decision and Order at 10.

Employer contends that the administrative law judge failed to provide a reasonable explanation for crediting Dr. Rasmussen's January 29, 2007 and January 14, 2009

[5] A "qualifying" arterial blood gas study yields values that are equal to or less than the values specified in the tables found in Appendix C to Part 718. 20 C.F.R. Part 718, App. C. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(ii).

[6] The results of Dr. Rasmussen's blood gas studies were found to be valid by Drs. Gaziano and Ranavaya. Claimant's Exhibits 11, 12.

[7] Dr. Crisalli indicated that an exercise test was not performed in light of claimant's cardiac history. Employer's Exhibit 8.

qualifying blood gas study results over Dr. Crisalli's July 13, 2009, non-qualifying blood gas study. Employer's Brief at 35. We disagree. Contrary to employer's contention, the administrative law judge permissibly concluded that, in light of the corroborating evidence of record, Dr. Rasmussen's qualifying, resting tests constituted the best evidence of claimant's pulmonary condition, and supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (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 at 9-10. Substantial evidence supports the administrative law judge's finding regarding the blood gas study evidence. We, therefore, affirm the administrative law judge's finding that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 10.

We further conclude that substantial evidence supports the administrative law judge's credibility determinations regarding the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the new medical opinions of Drs. Rasmussen, Houser, and Crisalli. Decision and Order at 11-12. Drs. Rasmussen and Houser opined that claimant was totally disabled from a pulmonary standpoint. Director's Exhibit 16; Claimant's Exhibits 8, 19, 20. In contrast, Dr. Crisalli opined that claimant retained the respiratory capacity to perform his previous coal mine employment, and that the blood gas studies suggested that cardiac disease was the factor limiting claimant's exertion. Employer's Exhibit 8 at 7. Contrary to employer's contention, the administrative law judge permissibly credited the opinions of Drs. Rasmussen and Houser over the contrary opinion of Dr. Crisalli, as better supported by the objective evidence of record, including the qualifying blood gas study evidence, the rise in the A-a gradient with exercise indicating impaired gas exchange, and claimant's abnormal diffusion capacity results. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 11-12. Further, the administrative law judge found that Dr. Rasmussen explained how his exercise blood gas study results, though non-qualifying, indicated the presence of a disabling impairment, because while they initially improved with exercise, they deteriorated as claimant continued to exercise.[8] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 11-12. Moreover, contrary to

[8] Dr. Rasmussen explained that his January 14, 2009 arterial blood gas study was abnormal at rest, and initially improved with exercise, but then deteriorated, so that claimant's final exercise blood gas study showed a worsening of the gas exchange, even though the oxygen tension itself rose. Dr. Rasmussen stated that, because the resistance to transfer of oxygen, measured by the "alveolar to arterial oxygen tension gradient," increased significantly, he concluded that claimant had a moderate to marked loss of lung function based on that impairment in gas exchange. Claimant's Exhibit 20 at 20.

employer's assertion, the administrative law judge specifically considered Dr. Crisalli's opinion that claimant's exercise limitations were cardiac in nature, but having found that the credible blood gas study evidence established the presence of a disabling *respiratory* impairment, the administrative law judge permissibly accorded Dr. Crisalli's opinion less weight. Decision and Order at 8, 11-12.

Therefore, because the administrative law judge's evaluation of the new medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv) is supported by substantial evidence, it is affirmed. *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997). Further, we affirm the administrative law judge's finding that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 198 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (en banc); Decision and Order at 12.

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying 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 established invocation of the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 12-13.

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

Because the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4), he properly noted that the burden of proof shifted to employer to establish rebuttal 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," coal mine employment. 30 U.S.C. §921(c)(4); *see Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Decision and Order at 13. The administrative law judge found that employer did not establish rebuttal by either method.[9] Decision and Order at 13-15.

[9] In considering whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge combined his discussion of whether employer disproved the existence of pneumoconiosis, with his discussion of whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Decision and Order at 13-15. Employer does not challenge this aspect of the administrative law judge's decision.

In determining whether employer rebutted the Section 411(c)(4) presumption, the administrative law judge considered the medical opinions of Drs. Rasmussen, Houser, and Crisalli. Dr. Rasmussen opined that claimant had legal pneumoconiosis,[10] in the form of emphysema and interstitial fibrosis, due, in part, to coal mine dust exposure, and that claimant's resulting disabling respiratory impairment was due to both coal mine dust exposure and smoking.[11] Director's Exhibit 16; Claimant's Exhibit 20 at 32-34. Dr. Houser also diagnosed emphysema and interstitial fibrosis, due in part to coal mine dust exposure, and opined that claimant's disabling respiratory impairment was due to coal mine dust exposure.[12] Claimant's Exhibit 19 at 23, 34-36, 39. In contrast, Dr. Crisalli opined that claimant did not suffer from a pulmonary disability, and that any impairment he had was related to cardiac disease. Employer's Exhibit 8. The administrative law judge found that the opinion of Dr. Crisalli was not sufficiently persuasive to establish either method of rebuttal. Decision and Order at 14-15.

Contrary to employer's assertion, the administrative law judge provided valid reasons for discounting the opinion of Dr. Crisalli, that any impairment claimant had was due to cardiac disease. The administrative law judge found that, as Dr. Crisalli did not diagnose a pulmonary or respiratory impairment, contrary to the administrative law judge's finding, he offered no explanation as to the cause of claimant's disabling respiratory impairment. Decision and Order at 15.

Employer was required to rule out a connection between claimant's disabling respiratory impairment and his coal mine employment. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. In light of that standard, the administrative law judge permissibly found that Dr. Crisalli's opinion is not sufficient to rule out claimant's thirty-seven years of coal mine dust exposure as a contributing cause of claimant's disabling respiratory impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d 441, 21 BLR 2-275-76.

In sum, substantial evidence supports the administrative law judge's finding that the opinion of Dr. Crisalli did not meet employer's burden to disprove the existence of legal pneumoconiosis, or to establish that claimant's impairment did not arise out of, or in

[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).

[11] Dr. Rasmussen explained that claimant's emphysema and interstitial fibrosis resulted in impaired gas exchange, causing a disabling respiratory impairment. Claimant's Exhibit 20 at 29-30.

[12] Dr. Houser explained that claimant had a disabling respiratory impairment due to moderate to severe hypoxemia, or impaired gas exchange, due to emphysema and interstitial fibrosis. Claimant's Exhibit 19 at 25-27, 29-32, 35-36, 39.

connection with, coal mine employment.[13] Decision and Order at 15. Therefore, we affirm the administrative law judge's determination that employer did not rebut the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and we affirm the award of benefits. 30 U.S.C. §921(c)(4).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[13] Employer's failure to disprove the existence of legal pneumoconiosis precludes a rebuttal finding that claimant did not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Therefore, we need not address employer's contention that the administrative law judge erred in his analysis of the x-ray and medical opinion evidence when he found that employer did not disprove the existence of clinical pneumoconiosis.