



BRB No. 19-0493 BLA

KENNETH A. BROWNING)	
)	
Claimant- Respondent)	
)	
v.)	
)	
JIM WALTER RESOURCES,)	
INCORPORATED)	
)	
and)	
)	DATE ISSUED: 09/23/2020
WALTER ENERGY, INCORPORATED)	
)	
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 Tracy A. Daly, Administrative Law Judge, United States Department of Labor.

J. Thomas Walker and John R. Jacobs (Maples, Tucker & Jacobs, LLC), Birmingham, Alabama, for Claimant.

Aaron D. Ashcraft and John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for Employer/Carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge Tracy A. Daly's Decision and Order Awarding Benefits (2017-BLA-06161) rendered on a claim

filed on September 14, 2015, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge credited Claimant with at least nineteen years and eleven months of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). He thus found Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act.¹ 30 U.S.C. §921(c)(4) (2012). He further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer challenges the administrative law judge's findings that Claimant established total disability and therefore invoked the Section 411(c)(4) presumption.² Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response.

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.³ 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).

A miner is totally disabled if he has a pulmonary or respiratory impairment which, standing alone, prevents him from performing his usual coal mine work and comparable gainful work.⁴ See 20 C.F.R. §718.204(b)(1). A claimant may establish total disability

¹ Section 411(c)(4) provides a rebuttable presumption that a miner's total disability is due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); see 20 C.F.R. §718.305.

² We affirm, as unchallenged on appeal, the administrative law judge's finding Claimant established at least nineteen years and eleven months of underground coal mine employment. See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 4.

³ This case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit because Claimant's coal mine employment occurred in Alabama. See *Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 6.

⁴ The administrative law judge found Claimant's usual coal mine employment was as a loader operator. Decision and Order at 13. This finding is affirmed as unchallenged. See *Skrack*, 6 BLR at 1-711.

based on pulmonary function studies, arterial blood gas studies, evidence of pneumoconiosis and cor pulmonale with right-sided congestive heart failure, or medical opinions. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must weigh all relevant supporting evidence against all relevant contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found Claimant established total disability based on the medical opinions.⁵ 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 8-14. He credited Dr. O'Reilly's opinion that Claimant is totally disabled by an obstructive respiratory impairment. *Id.* He found Drs. Zaldivar and Goldstein did not adequately address whether Claimant has a disabling respiratory or pulmonary impairment. *Id.*

We first reject Employer's argument the administrative law judge mischaracterized Dr. Zaldivar's opinion by suggesting he diagnosed a totally disabling respiratory or pulmonary impairment. Employer's Brief at 7-8. As the administrative law judge correctly noted, Dr. Zaldivar opined Claimant has a "pulmonary impairment . . . unrelated to his occupation" but due to smoking and bronchospastic lung disease. Decision and Order at 11-14, *citing* Employer's Exhibit 2. He also properly recognized that Dr. Zaldivar then stated Claimant's coronary artery disease and advanced age "are not related to his occupation, but they, too, represent disabilities that would prevent active work in the coal mines." *Id.* To the extent some of the wording the administrative law judge used might suggest that he was finding Dr. Zaldivar diagnosed a totally disabling respiratory or pulmonary impairment, any potential error is harmless,⁶ as his analysis and determinations are to the contrary. The administrative law judge permissibly assigned the opinion "minimal probative value" on the issue of total respiratory or pulmonary disability because his identification of a pulmonary impairment unrelated to coal dust exposure focused on the cause of the impairment, when the relevant inquiry at 20 C.F.R. §718.204(b)(2) is whether the impairment precludes the performance of Claimant's usual coal mine work. Decision and Order at 13-14; *see Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998). The etiology of Claimant's pulmonary condition concerns the issues of disease and total disability causation, which are addressed at 20 C.F.R. §§718.201, 718.204(c), or in regard

⁵ The administrative law judge found Claimant did not establish total disability based on the pulmonary function studies, arterial blood gas studies, or evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii); Decision and Order at 6-8.

⁶ *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

to the issue of Employer's rebuttal of the Section 411(c)(4) presumption.⁷ See 20 C.F.R. §718.305(d)(1). From this it is apparent the administrative law judge did not find that Dr. Zaldivar diagnosed a totally disabling pulmonary or respiratory impairment, as that would have been a finding that related to the relevant inquiry.

The administrative law judge also assigned Dr. Zaldivar's opinion "less probative value because, in forming his opinion, he relied on a January 11, 2016 pulmonary function study that is not included in the record." Decision and Order at 14. As Employer does not specifically challenge this credibility finding, it is affirmed. *Jordan*, 876 F.2d at 1460; *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-67 (2004); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

We also are not persuaded by Employer's argument the administrative law judge erred in weighing Dr. O'Reilly's opinion. Employer's Brief at 4-7. Dr. O'Reilly diagnosed a moderate obstructive lung impairment based on pulmonary function testing that revealed an FEV1 value sixty percent of predicted and an FEV1/FVC ratio of 0.6. Director's Exhibit 15. He noted Claimant worked as a loader operator requiring him to load coal from the face of the mine to the shuttle car and belt lines. *Id.* He opined Claimant's moderate impairment would preclude Claimant from performing the loader operator job. *Id.* In a supplemental report, Dr. O'Reilly acknowledged Claimant's pulmonary function testing is non-qualifying. Director's Exhibit 22. He reiterated, however, his finding Claimant is totally disabled as a result of his moderate obstructive impairment and chronic symptoms of dyspnea, cough, and wheezing. *Id.*

Contrary to Employer's argument, Dr. O'Reilly did not limit his total disability opinion to a statement that Claimant should avoid further dust exposure. Employer's Brief at 4-7. Rather, as the administrative law judge found, he repeatedly diagnosed Claimant with a moderate obstructive pulmonary impairment and opined it would prevent him from working in the loader operator job. Decision and Order at 13; Director's Exhibits 15, 22.

⁷ Although Dr. Goldstein opined Claimant is totally disabled by coronary artery disease, the administrative law judge assigned his opinion reduced weight because he did not address whether Claimant is totally disabled by a respiratory or pulmonary impairment. *Id.* We affirm this finding as it is not challenged. See *Jordan v. Benefits Review Board*, 876 F.2d 1455, 1460 (11th Cir. 1989); *Skrack*, 6 BLR at 1-711.

Moreover, he indicated this disabling obstructive impairment “would be exacerbated by a dusty environment.” Director’s Exhibit 22.

Employer raises no other argument with respect to the crediting of Dr. O’Reilly’s opinion. Consequently, we affirm the administrative law judge’s finding the medical opinions established total disability. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order at 14. As Employer raises no additional challenge, we affirm the administrative law judge’s finding Claimant invoked the Section 411(c)(4) presumption. 20 C.F.R. §§718.204(b)(2), 718.305(b)(1); *Rafferty*, 9 BLR at 1-232; Decision and Order at 14. Further, as Employer has not challenged the administrative law judge’s determination that it did not rebut the presumption, we affirm this finding and the award of benefits. *See Skrack*, 6 BLR at 1-711; Decision and Order at 14-22.

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

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge