**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0549 BLA

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| ARCHIE C. RUNYON | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| KESSLER COALS, INCORPORATED | ) | |
| | ) | |
| and | ) | DATE ISSUED: 08/28/2018 |
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| WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND | ) | |
| | ) | |
| 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 of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2015-BLA-05907) of Administrative Law Judge Scott R. Morris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on November 5, 2014.

The administrative law judge accepted the parties' stipulation that claimant has twenty-two years of qualifying coal mine employment,[1] and he found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). He therefore determined that claimant invoked the rebuttable presumption that he is totally disabled due to pneumoconiosis at Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4)(2012). The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that claimant is totally disabled and, therefore, erred in finding that he invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it failed to rebut 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. 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).

**Total Disability**

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

[1] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, the Board will apply the law 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).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where claimant establishes fifteen or more 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 impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Because employer does not challenge the administrative law judge's finding of twenty-two years of qualifying coal mine employment, that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

all of the relevant evidence and weigh the evidence supporting a finding of total disability against the 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).

Employer argues that the administrative law judge erred in finding that the medical opinions establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] The administrative law judge considered the medical opinions of Drs. Rasmussen, Gaziano, Zaldivar, and Castle.

Dr. Rasmussen conducted an arterial blood gas study on January 20, 2014. Director's Exhibit 11. Although the arterial blood gas study produced non-qualifying[5] values at rest, it produced qualifying values when claimant exercised for seven minutes on a treadmill. *Id*. Dr. Rasmussen opined that the blood gas study indicated "moderate loss of lung function as reflected by [claimant's] impairment in oxygen transfer to [sic] moderate exercise." Director's Exhibit 11 at 8. Dr. Rasmussen therefore opined that claimant "does not retain the pulmonary capacity to perform his regular coal mine employment."[6] *Id.*

Dr. Zaldivar conducted an arterial blood gas study on July 23, 2014, which produced non-qualifying values both at rest and when claimant exercised for six and a half minutes on a stationary bicycle. Director's Exhibit 22. Dr. Zaldivar found no pulmonary

[4] The administrative law judge found that the pulmonary function study evidence and blood gas study evidence do not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i),(ii), and that there is no evidence of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6-8.

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

[6] Dr. Rasmussen noted that claimant's last job was as a section and maintenance foreman, which required him to lift and carry "heavy tools," to do "heavy lifting of various parts," and to operate equipment. Director's Exhibit 11 at 1. Dr. Rasmussen characterized claimant's job as requiring "heavy and some very heavy manual labor." *Id.*

impairment and opined that claimant was capable, from a pulmonary standpoint, of performing "even very heavy manual labor."[7] Director's Exhibit 22 at 3.

Dr. Rasmussen reviewed Dr. Zaldivar's blood gas study and opined that there were indications that claimant's blood sample may have been obtained after he stopped exercising, rather than during exercise.[8] Director's Exhibit 24 at 2. Moreover, even assuming that the blood sample was obtained during exercise, Dr. Rasmussen opined that the drop in claimant's pO2, from a resting value of 86 to an exercise value of 73, was "distinctly abnormal." *Id.* Dr. Rasmussen opined that Dr. Zaldivar's exercise blood gas study results, while non-qualifying, "actually confirm a trend as demonstrated in our own study, which w[as] of somewhat greater intensity." *Id.* at 3.

Dr. Gaziano reviewed the blood gas studies and medical opinions of Drs. Rasmussen and Zaldivar, and explained that claimant's blood gas studies demonstrate that he has a disabling impairment:

> [D]uring the exercise blood gas studies[,] there was reduction in arterial oxygen tension with exercise on both Dr. Rasmussen's and Dr. Zaldivar's studies which would indicate a significant impairment of oxygen transfer. Dr. Rasmussen's exercise blood gases met the . . . Department of Labor criteria for disabling pulmonary impairment due to oxygen transport. While . . . Dr. Zaldivar's blood gas values did not meet that standard, with exercise there was a significant fall in pO2 with a widening of the A-a gradient indicating impairment of oxygen transport. In my opinion[,] the difference in these two values is due to the level of exercise achieved at the two sources. I believe that . . . claimant has disabling legal pneumoconiosis . . . .

Claimant's Exhibit 3 at 2.

During a deposition, Dr. Zaldivar acknowledged that claimant's pO2 value dropped during the exercise portion of the blood gas study he conducted. Employer's Exhibit 7 at 40. Although Dr. Zaldivar further acknowledged that such a drop was "not normal," he opined that it was "not impairing." *Id.* at 41.

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[7] Dr. Zaldivar noted that claimant "did heavy labor as part of his work" as a "tipple foreman" and "general outside foreman." Employer's Exhibit 7 at 18.

[8] As summarized by the administrative law judge, Dr. Rasmussen explained that because oxygen tension rises promptly following the termination of exercise, blood sampling must be performed during exercise, not post-exercise. Decision and Order at 19; Director's Exhibit 24 at 2.

Dr. Castle also reviewed the blood gas studies and medical opinions of Drs. Rasmussen and Zaldivar. Dr. Castle opined that the blood gas study conducted by Dr. Rasmussen was "normal at rest and . . . essentially normal or very nearly so after exercise." Employer's Exhibit 3 at 8. Dr. Castle characterized Dr. Zaldivar's blood gas study as normal both at rest and with exercise, "despite the fact that there was an insignificant decline in the pO2 with exercise." *Id.* Dr. Castle noted that the more recent blood gas study conducted by Dr. Zaldivar was normal and "did not demonstrate a disabling abnormality of blood gas transfer mechanisms." *Id.* at 8-9. Dr. Castle therefore opined that claimant retains the pulmonary capacity to perform his previous coal mine employment. *Id.* at 9.

In evaluating the conflicting evidence, the administrative law judge credited the opinions of Drs. Rasmussen and Gaziano:

> [I] credit[] the conclusions of Dr. Rasmussen and Dr. Gaziano, that the [c]laimant has a disabling impairment of oxygen transfer, based on the qualifying exercise blood gas results obtained by Dr. Rasmussen, and the results obtained by Dr. Zaldivar which, although not qualifying, showed a drop between resting and exercise results. While the evidence does not conclusively establish that Dr. Zaldivar obtained his sample after the [c]laimant stopped exercising as Dr. Rasmussen suspected, the values dropped nevertheless, even though the [c]laimant performed less exercise and reached a lower oxygen consumption than at Dr. Rasmussen's testing.

Decision and Order at 21. The administrative law judge further found that Dr. Rasmussen's opinion was entitled to the "greatest weight" based upon his superior qualifications[9] and, therefore, credited Dr. Rasmussen's opinion, as supported by that of Dr. Gaziano, to find that the preponderance of the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

We reject employer's argument that the administrative law judge improperly substituted his opinion for that of Dr. Zaldivar by assessing the significance of the drop in the pO2 level that occurred during the exercise portion of Dr. Zaldivar's blood gas study. Employer's Brief at 14. The administrative law judge did not independently assess the

[9] The administrative law judge found that while the credentials of all of the physicians are impressive, "the depth and breadth of Dr. Rasmussen's professional experience, particularly in the area of black lung disease, add[ed] to the weight of his opinion" regarding total disability. Decision and Order at 22. Because the administrative law judge's finding regarding the physicians' comparative credentials is unchallenged on appeal, it is affirmed. *See Skrack*, 6 BLR at 1-711.

blood gas study evidence. Instead, he credited Dr. Rasmussen's medical opinion that the drop in claimant's pO2 value during the exercise portion of Dr. Zaldivar's blood gas study, while not qualifying, was nevertheless abnormal. Decision and Order at 19-22. The administrative law judge further noted that Dr. Rasmussen's opinion regarding the exercise blood gas studies was supported by that of Dr. Gaziano, who opined that the drop in claimant's pO2 value indicated an "impairment of oxygen transport." *Id.* Additionally, the administrative law judge explained that he found Dr. Rasmussen's opinion to be entitled to the greatest weight based upon Dr. Rasmussen's superior qualifications, a finding that employer does not contest. *Id.* Thus, contrary to employer's contention, the administrative law judge permissibly analyzed the credibility of the conflicting medical opinions on the issue of total disability rather than substituting his own opinion for the physicians'. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998)(requiring the fact finder to consider the comparative credentials of the physicians, the explanations for their conclusions, and the documentation underlying their medical judgments); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997)(same). Because employer has not asserted any additional error, we affirm the administrative law judge's finding that the preponderance of the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer also contends that the administrative law judge erred by not weighing the non-qualifying pulmonary function studies and blood gas studies against the medical opinion evidence. Employer's Brief at 15. Contrary to employer's contention, the administrative law judge did weigh the blood gas studies alongside the medical opinion evidence. As explained above, he permissibly found that, although the blood gas studies are non-qualifying for total disability, the opinions of Drs. Rasmussen and Gaziano nevertheless establish that claimant is totally disabled based on the results of those studies. *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577 (6th Cir. 2000) (holding that a physician may reasonably opine that a miner is totally disabled even if the objective studies are non-qualifying). Although the administrative law judge did not explicitly weigh the non-qualifying pulmonary function studies against the medical opinions and blood gas studies, employer has not established reversible error. The pulmonary function studies measure a different type of impairment than blood gas studies and therefore do not contradict the medical opinions that diagnosed total disability based on the results of blood gas studies. *See Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1040-41 (6th Cir. 1993). Thus, the administrative law judge's failure to weigh the pulmonary function studies together with the blood gas studies and medical opinions is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We therefore affirm the administrative law judge's finding that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

In light of our affirmance of the administrative law judge's findings that claimant established twenty-two years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the

administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[10] 20 C.F.R. §718.305(d)(1)(i), or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge found that employer failed to establish rebuttal by either method.

We reject employer's argument that the administrative law judge erred in finding that it failed to disprove legal pneumoconiosis. To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[11] 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-1-55 n.8 (2015) (Boggs, J., concurring and dissenting). In determining that employer failed to establish that claimant

[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). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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." 20 C.F.R. §718.201(a)(1).

[11] We reject employer's argument that the administrative law judge applied "an inappropriate burden of proof" on the issue of legal pneumoconiosis. Employer's Brief at 16. The administrative law judge accurately stated that it is employer's burden to prove that claimant's "respiratory impairment did not arise [out of] his coal mine employment, in other words, that claimant does not have legal pneumoconiosis." Decision and Order at 26; *see* 20 C.F.R. §718.201(a)(2) (defining legal pneumoconiosis as any chronic lung disease or impairment and its sequelae "arising out of coal mine employment"). The administrative law judge also accurately noted that "legal pneumoconiosis" refers to lung diseases or impairments that are "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 26; 20 C.F.R. §718.201(b).

does not have legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Zaldivar and Castle.

Dr. Zaldivar opined that there is no evidence of legal pneumoconiosis because there "is no pulmonary impairment at all." Director's Exhibit 22 at 3. Because Dr. Zaldivar believed that claimant does not suffer from any impairment in oxygen transfer, he did not address the cause of that impairment, or "explain why . . . [c]laimant's significant history of coal mine dust exposure did not play a part in that impairment." Decision and Order at 27. The administrative law judge therefore properly found that Dr. Zaldivar's opinion does not assist employer in establishing that claimant does not have legal pneumoconiosis. *See* 20 C.F.R. §718.201(b); Decision and Order at 27.

Dr. Castle attributed the fall in claimant's pO2 revealed by Dr. Rasmussen's blood gas study to a "transient" ventilation perfusion mismatch that could have been caused by asthma, allergic rhinitis, sinusitis, or gastroesophageal reflux disease. Employer's Exhibits 3 at 9; 8 at 25-26. He attributed the abnormalities revealed on Dr. Zaldivar's blood gas study to obesity. Employer's Exhibit 8 at 28. The administrative law judge permissibly discredited Dr. Castle's opinion that claimant does not have legal pneumoconiosis because he found that the doctor failed to adequately explain how he eliminated claimant's twenty-two years of coal mine dust exposure as a contributor to his gas exchange impairment. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012); *see also Brandywine Explosives & Supply v. Director, OWCP* [*Kennard*], 790 F.3d 657, 668 (6th Cir. 2015); Decision and Order at 28.

Because the administrative law judge permissibly discredited the opinions of Drs. Zaldivar and Castle, the only opinions supportive of a finding that claimant does not have legal pneumoconiosis, we affirm his finding that employer failed to establish that claimant does not have legal pneumoconiosis.[12] Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis.[13] *See* 20 C.F.R. §718.305(d)(1)(i).

[12] Employer's only clearly defined argument regarding legal pneumoconiosis relates to the alleged application of an improper burden of proof, an argument we rejected *supra*, n.11. Employer's remaining statements amount to a request to reweigh the evidence, which the Board cannot do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); Employer's Brief at 17-19.

[13] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

The administrative law judge next addressed whether employer established rebuttal by proving that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law judge permissibly found that the same reasons for which he discredited the opinions of Drs. Zaldivar and Castle that claimant does not have legal pneumoconiosis also undercut their opinions that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015) (a doctor who mistakenly believes that claimant does not have pneumoconiosis may not be credited on the issue of disability causation absent "specific and persuasive reasons"); *see also Kennard*, 790 F.3d at 668 ("no need for the [administrative law judge] to analyze the opinions a second time" at disability causation where the employer failed to establish that the impairment was not legal pneumoconiosis); Decision and Order at 28-29. Therefore, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge