**U.S. Department of Labor**

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

BRB No. 17-0553 BLA

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| THOMAS H. PETERS | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| DAVID STANLEY CONSULTANTS | ) | DATE ISSUED: 08/30/2018 |
| | ) | |
| and | ) | |
| | ) | |
| CHARTIS CASUALTY COMPANY | ) | |
| | ) | |
| 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 on Remand Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick, & Long), Ebensburg, Pennsylvania, for claimant.

H. Brett Stonecipher and Brian W. Davidson (Fogle Keller Purdy, PLLC), Lexington, Kentucky, 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 on Remand Awarding Benefits (2014-BLA-05063) of Administrative Law Judge Drew A. Swank, rendered on a miner's claim filed on December 31, 2012 pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case is before the Board for the second time.

Pursuant to employer's previous appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established at least fifteen years of qualifying coal mine employment.[1] *Peters v. David Stanley Consultants*, BRB No. 16-0170 BLA, slip op. at 3 n.3 (Dec. 22, 2016) (unpub.). The Board rejected employer's argument that the administrative law judge abused his discretion when he denied employer's request to have claimant attend two post-hearing medical evaluations so that employer could submit them as its two affirmative medical reports pursuant to 20 C.F.R. §725.414(a). *Id*. at 3-5. However, the Board agreed with employer that the administrative law judge erred in finding that claimant established a totally disabling respiratory or pulmonary impairment based on the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Id*. at 5-7. Therefore the Board vacated the administrative law judge's findings that claimant established total disability and invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The Board also held that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[3] *Id*. at 7-10. Thus the Board vacated the award of benefits and remanded the case for further consideration. *Id*.

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[1] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third 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 when the miner has fifteen or more years of underground or substantially similar coal mine employment, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); 20 C.F.R. §718.305(b), (c)(1).

[3] Specifically, the Board held that the administrative law judge did not consider whether employer disproved the existence of legal and clinical pneumoconiosis at 20 C.F.R. §718.305(d)(1)(i). *Peters v. David Stanley Consultants*, BRB No. 16-0170 BLA, slip op. at 7-10 (Dec. 22, 2016) (unpub.). Further, the Board explained that the

On remand, the administrative law judge again found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer reiterates its argument that the administrative law judge abused his discretion by denying its request to compel claimant to attend post-hearing medical examinations. Employer also asserts that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant 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. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.[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).

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administrative law judge did not apply the proper rebuttal standard set forth at 20 C.F.R. §718.305(d)(1)(ii), and failed to address whether employer established that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in 20 C.F.R. §718.201. *Id*.

[4] On July 24, 2018, employer filed a Motion to Remand this case to the Office of Administrative Law Judges for a new hearing before a different administrative law judge, based on the Supreme Court's holding in *Lucia v. SEC*, 585 U.S. , 138 S. Ct. 2044 (2018), that the manner in which certain administrative law judges are appointed violates the Appointments Clause of the Constitution, Art. II §2, cl. 2. Claimant and the Director, Office of Workers' Compensation Programs, respond that employer forfeited this argument by failing to raise it in its opening brief. We agree. Because employer first raised its Appointments Clause argument eleven months after filing its opening brief in support of its petition for review, employer forfeited the issue. *See Lucia*, 138 S. Ct. at 2055 (requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *see also Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995) (the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal); *Senick v. Keystone Coal Mining Co.*, 5 BLR 1-395, 1-398 (1982).

## I. Evidentiary Issue

We decline to consider employer's argument that the administrative law judge erred in denying its request to have claimant attend two medical evaluations after the hearing had already been conducted in this matter. Employer's Brief at 24-28. As noted *supra*, employer raised this argument in its prior appeal, and the Board rejected it. *Peters*, BRB No. 16-0170 BLA, slip op. at 3-5. Because employer has not shown that the Board's decision was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb the Board's prior disposition. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-151 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

## II. Invocation of the Section 411(c)(4) Presumption – 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. *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 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).

The administrative law judge found that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[5] Specifically, the administrative law judge found that claimant's usual coal mine employment required heavy manual labor.[6] Decision and Order on Remand at 6. He then considered the medical opinions of Drs. Zlupko, Begley, Cohen, and Broudy, that claimant is totally disabled by a respiratory or pulmonary impairment, and the medical opinion of Dr. Rosenberg, that claimant is not

[5] The administrative law judge reiterated his previous findings that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii). Decision and Order on Remand at 4.

[6] The administrative law judge considered claimant's deposition testimony that his mine examiner job required him to shovel coal and rock dust, which required him to lift and carry 50 pound bags of rock dust, sometimes carrying over 100 bags a night. Decision and Order on Remand at 4-5; Employer's Exhibit 9 at 6. Because it is unchallenged, we affirm the administrative law judge's finding that claimant's usual coal mine employment required heavy manual labor. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

totally disabled. *Id*. at 6-10. The administrative law judge credited the opinions of Drs. Cohen and Broudy because he found that they were well-reasoned and documented. *Id*. at 5-6, 9-10. He found that Dr. Zlupko's opinion was conclusory and lacked any discussion of the exertional requirements of claimant's usual coal mine employment. *Id*. at 5-7. He found that Dr. Begley's opinion was also conclusory. *Id*. at 10. Finally, he assigned diminished weight to Dr. Rosenberg's opinion because Dr. Rosenberg lacked an understanding of the exertional requirements of claimant's usual coal mine employment and because Dr. Rosenberg "provided little analysis to support his diagnoses and conclusions." *Id*. at 6, 8-9. The administrative law judge also discredited Dr. Rosenberg's opinion because Dr. Rosenberg focused on whether claimant could perform his usual coal mine employment in a dust-free environment. *Id*.

Employer does not challenge the administrative law judge's findings that the opinions of Drs. Cohen and Broudy are well-reasoned and documented and support claimant's burden of establishing total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order on Remand at 5-6, 9-10. Rather, employer asserts that the administrative law judge erred in discrediting Dr. Rosenberg's opinion on the issue of total disability. Employer's Brief at 18-22. We disagree.

Dr. Rosenberg opined that claimant is not totally disabled because his pulmonary function studies and arterial blood gas tests are not qualifying for total disability.[7] Employer's Exhibits 1, 2. However, he conceded that the pulmonary function testing revealed a moderate obstructive ventilatory impairment. *Id*.; Employer's Exhibit 4 at 58. During his deposition, Dr. Rosenberg reiterated that claimant could perform his usual coal mine work based on the non-qualifying objective studies. Employer's Exhibit 4 at 33-34, 65-66, 91-92. Moreover, notwithstanding the moderate obstructive respiratory impairment evidenced by pulmonary function testing, Dr. Rosenberg testified that claimant could still perform his usual coal mine employment if he worked in a dust-free environment. *Id*. at 33-34, 66-67. On cross-examination, he acknowledged that if claimant worked in an environment where he needed a respirator to filter dust, then claimant could not return to his usual coal mine employment because breathing with the respirator would be too difficult. *Id*. at 68-70, 87-91. Dr. Rosenberg was not aware if claimant was required to wear a respirator when working in underground coal mining. *Id*. at 68-70. He testified

[7] A "qualifying" pulmonary function study yields values for claimant's applicable height and age that are equal to or less than the values specified in the table at 20 C.F.R. Part 718, Appendix B. A non-qualifying study exceeds these values. *See* 20 C.F.R. §718.204(b)(2)(i).

that if claimant was exposed to coal mine dust in his employment, claimant could not return to that employment. *Id*. at 85.

As the administrative law judge recognized, even if the pulmonary function and arterial blood gas testing is not qualifying, total disability may nevertheless be found if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes that the miner's respiratory or pulmonary condition prevents him from performing his usual coal mine employment. 20 C.F.R. §718.204(b)(2)(iv); Decision and Order on Remand at 9. Contrary to employer's argument, the administrative law judge permissibly found that Dr. Rosenberg's opinion is not well-reasoned because Dr. Rosenberg "did not discuss why the [pulmonary function and arterial blood gas] results reinforced his determination" that claimant is not disabled, but simply stated that claimant "is not disabled because his pulmonary function and blood gas studies are non-qualifying" under the regulatory criteria. *Id*.; *see Balsavage v. Director, OWCP*, 295 F.3d 390, 397 (3d Cir. 2002); *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). Moreover, the administrative law judge permissibly found that Dr. Rosenberg's opinion was not well-reasoned with respect to whether claimant is totally disabled by his moderate obstructive respiratory impairment because Dr. Rosenberg required the "stipulation" that claimant work in a dust-free environment and without a respirator in order to perform his usual coal mine work.[8] *Id*.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence establishes total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Because employer raises no other allegation of error with respect to total disability, we affirm the administrative law judge's finding that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order on Remand at 10. In light of our affirmance of the administrative law judge's findings that claimant has at least fifteen years of qualifying coal mine employment and a totally disabling respiratory or pulmonary impairment, we affirm his determination that claimant invoked the Section 411(c)(4) presumption.

[8] Because we affirm the administrative law judge's decision to discount Dr. Rosenberg's opinion for the reasons set forth above, we need not address employer's additional challenge to the administrative law judge's weighing of that opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-83 n.4 (1983); Employer's Brief at 18-22.

## III. 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,[9] 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)(i), (ii). The administrative law judge found that employer failed to establish rebuttal by either method.

Pursuant to 20 C.F.R. §718.305(d)(1)(i), the administrative law judge found that employer failed to establish that claimant does not have legal pneumoconiosis based on the medical opinions of Drs. Broudy and Rosenberg. Decision and Order on Remand at 13-16. He also found that employer failed to establish that claimant does not have clinical pneumoconiosis based on the x-ray evidence and medical opinions of Drs. Broudy and Rosenberg. *Id*. at 10-13.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of clinical pneumoconiosis. Employer's Brief at 22-24. Employer, however, does not challenge the finding that it failed to disprove legal pneumoconiosis. Because it is unchallenged, we affirm the administrative law judge's finding that employer failed to disprove that claimant has legal pneumoconiosis. *See Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 16. Because employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis, we need not address its contentions with regard to the existence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); Decision and Order on Remand at 10-16.

In addition, as employer does not contest the administrative law judge's finding that it failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by his pneumoconiosis, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption pursuant to 20 C.F.R.

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[9] "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). "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).

§718.305(d)(1)(ii). *See Skrack*, 6 BLR at 1-711; *see also Soubik v. Director, OWCP*, 366 F.3d 226, 234 (3d Cir. 2004); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074 (6th Cir. 2013); Decision and Order on Remand at 16-18.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge