BRB No. 11-0204 BLA

LILA M. GROOM (Widow of JOHN H. GROOM)	)	
Claimant-Respondent	)	
v.	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED: 12/16/2011
Employer-Petitioner	)	
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.

John Cline, Piney View, West Virginia, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-05694) of Administrative Law Judge Thomas M. Burke rendered on a survivor's claim[1] filed

[1] Claimant is the widow of the miner, who died on July 13, 2000. Claimant filed a survivor's claim on September 24, 2007. Director's Exhibit 2. The miner's claim, filed on November 19, 1997, was denied on August 15, 2001 by the district director following modification proceedings instituted after the miner's death. Director's Exhibit 1;

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). The administrative law judge credited the miner with twenty years of coal mine employment based on the parties' stipulation, and adjudicated this claim pursuant to the regulations set forth at 20 C.F.R. Part 718. Initially, the administrative law judge found that claimant failed to establish that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge found, therefore, that claimant was not entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3). However, the administrative law judge went on to find that, because claimant established that the miner had over fifteen years of underground coal mine employment[2] and the evidence established a total respiratory disability pursuant to 20 C.F.R. §718.204(b), claimant was entitled to invocation of the rebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge further found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding the medical evidence sufficient to establish total respiratory disability and, thus, sufficient to establish invocation of the Section 411(c)(4) presumption. In addition, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not submit a formal response to employer's appeal.

Decision and Order at 10. The denial of the miner's claim became final when no appeal was taken.

[2] The administrative law judge's finding that the miner had over fifteen years of underground coal mine employment is affirmed as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] Section 411(c)(4) provides, in pertinent part, that, if claimant establishes that the miner had at least fifteen years of qualifying coal mine employment and, if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption that the miner's death was 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)).

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.[4] 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).

Section 411(c)(4) Invocation

Weighing the medical evidence relevant to the issue of total respiratory disability, the administrative law judge found that, because the pulmonary function study evidence produced non-qualifying results, it was insufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(i).[5] Decision and Order at 15. Turning to the blood gas study evidence, the administrative law judge found that the weight of the blood gas study evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), as it showed a disabling impairment of gas exchange.[6] Decision and Order at 15; Claimant's Exhibit 7; Employer's Exhibit 1. The administrative law judge found particularly noteworthy the fact that, while the resting values showed "variability and improvement[,]" "the single exercise study show[ed] unrebutted evidence of total disability on exertion." Decision and Order at 15. Considering the medical opinion evidence, the administrative law judge also found that it was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge credited Dr. Rasmussen's opinion, that the miner's disabling respiratory impairment would have prevented him from performing his usual coal mine employment. The administrative law judge found the opinion "well-documented and well-reasoned[,]" because it was based on a "thorough explanation and

[4] As the miner was last employed in the coal mining industry in West Virginia, 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*); Director's Exhibit 3.

[5] The record contains the January 7, 1998 pulmonary function study administered by Dr. Rasmussen, and the August 12, 1998 study administered by Dr. Crisalli, both of which yielded non-qualifying results. Employer's Exhibit 1.

[6] The record contains two blood gas studies: the January 7, 1998 study administered by Dr. Rasmussen, yielded qualifying results at both rest and exercise; and the August 12, 1998 study administered by Dr. Crisalli, which was performed at rest only, yielded non-qualifying values. Claimant's Exhibit 7; Employer's Exhibit 1.

references to the supportive objective data."[7] Decision and Order at 15. The administrative law judge rejected the contrary opinion of Dr. Rosenberg, that the miner was not totally disabled, as not well-reasoned because Dr. Rosenberg failed to sufficiently account for the qualifying results of the miner's *exercise* blood gas study and relied on the non-qualifying results of Dr. Crisalli's *at rest* blood gas study. Decision and Order at 15-16. On weighing the pulmonary function study, blood gas study, and medical opinion evidence together,[8] the administrative law judge concluded that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2) overall, and that claimant was, therefore, entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis.

Employer contends that the administrative law judge erred in failing to credit the opinion of Dr. Rosenberg that the miner was not totally disabled. Contrary to employer's contention, the administrative law judge did not err in discrediting the opinion of Dr. Rosenberg because Dr. Rosenberg failed to sufficiently account for the qualifying exercise blood gas study results conducted by Dr. Rasmussen. In considering Dr. Rosenberg's opinion, the administrative law judge reasonably exercised his discretion in finding that Dr. Rosenberg's opinion was not persuasive, because he did not fully explain his conclusion that the miner was not totally disabled, in light of the qualifying blood gas study values associated with the exercise portion of the blood gas study administered by Dr. Rasmussen. *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); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989)(*en banc*); Decision and Order at 16; Employer's Exhibit 4. Consequently, we affirm the administrative law judge's rejection of Dr. Rosenberg's opinion. Further, as employer has not challenged the administrative law judge's finding crediting Dr. Rasmussen's opinion of total disability, that finding is affirmed.[9] *See Skrack v. Island*

[7] The administrative law judge also found that Dr. Hippensteel diagnosed a "disabling pulmonary impairment," but rejected the opinion as not well-reasoned because Dr. Hippensteel "did not offer an explanation for his opinion." Decision and Order at 15; Employer's Exhibit 9.

[8] The record does not contain evidence of cor pulmonale with right-sided congestive heart failure necessary to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(iii).

[9] Employer also contends that the administrative law judge erred in rejecting Dr. Hippensteel's opinion that the miner had a "disabling pulmonary impairment," as unreasoned. Employer's Brief at 10. Because the administrative law judge rejected Dr. Hippensteel's opinion as unreasoned and did not rely on it to find total respiratory disability established at 20 C.F.R. §718.204(b)(2)(iv), however, we need not address

Creek Coal Co., 6 BLR 1-710 (1983). Additionally, as employer has not challenged the administrative law judge's finding that the blood gas study evidence establishes total respiratory disability at Section 718.204(b)(2)(ii), that finding is affirmed. *See Skrack*, 6 BLR at 1-711. Accordingly, we affirm the administrative law judge's finding that total respiratory disability was established at Section 718.204(b)(2) overall, and that claimant was consequently entitled to invocation of the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Section 411(c)(4) Rebuttal

After finding that claimant established invocation of the Section 411(c)(4) presumption, the administrative law judge considered the evidence relevant to whether employer established rebuttal of the presumption. The administrative law judge found that employer failed to rebut the Section 411(c)(4) presumption by showing that claimant did not have pneumoconiosis, either clinical or legal, or by showing that the miner's death was not due to pneumoconiosis.[10] Decision and Order at 17-18. In finding that employer failed to show that the miner's death was not due to pneumoconiosis, the administrative law judge found that the opinions of Drs. Oesterling, Bush, Hippensteel and Rosenberg, failed to sufficiently address whether the miner's legal pneumoconiosis caused his death.[11] Decision and Order at 21.

Employer contends that the administrative law judge erred in finding that the medical opinions were insufficient to establish rebuttal of the presumption. Employer contends that the administrative law judge erred in rejecting the opinions on rebuttal

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employer's argument. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

[10] We affirm the administrative law judge's finding that employer failed to rebut the presumption by showing that the miner did not have pneumoconiosis, either clinical or legal, as unchallenged on appeal. *See* 30 U.S.C. §921(c)(4); *Skrack*, 6 BLR at 1-711.

[11] The administrative law judge found that the preponderance of the evidence established that the miner's death was not *caused* by his pneumoconiosis, but rather by his "extensive thromboembolic disease, which developed as a consequence of his lung cancer and his untreated, inoperable gangrene in his lower, right leg." Decision and Order at 18-19. The administrative law judge, therefore, stated that the issue before him was whether pneumoconiosis *substantially contributed to* or *hastened* the miner's death. Decision and Order at 19.

based on his finding that they did not fully address whether the miner's legal pneumoconiosis caused his death. Employer's contention lacks merit.

Contrary to employer's contention, the administrative law judge properly found that neither Dr. Bush nor Dr. Oesterling offered an opinion as to whether the miner's legal pneumoconiosis substantially contributed to, or hastened, the miner's death. Decision and Order at 19; Director's Exhibits 9, 24. Specifically, the administrative law judge properly found that Dr. Bush's opinion, that the moderate changes of simple pneumoconiosis were too limited to have contributed to the miner's death, Director's Exhibit 9, and Dr. Oesterling's opinion, that the moderate changes in the miner's micronodular coal workers' pneumoconiosis were too minimal to have played a role in his death, Director's Exhibit 24, failed to address whether the miner's *legal pneumoconiosis* played any role in his death. *See* 20 C.F.R. §718.201; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 19. Consequently, we affirm the administrative law judge's finding that the opinions of Drs. Oesterling and Bush are insufficient to rebut the Section 411(c)(4) presumption.

Further, we reject employer's contention that the administrative law judge erred in his weighing of the opinions of Drs. Rosenberg and Hippensteel. Contrary to employer's contention, the administrative law judge properly found that the opinions of Drs. Hippensteel and Rosenberg did not sufficiently address whether the miner's legal pneumoconiosis played a role in his death, because they did not reflect adequate consideration of the qualifying results of the miner's *exercise* blood gas study, when providing the conclusion that the miner was not totally disabled or that the miner's disabling respiratory impairment was not due to coal mine employment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155; Decision and Order at 21. Consequently, we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Hippensteel failed to establish that the miner's death was not due to pneumoconiosis. Because the administrative law judge properly determined that employer failed to show that the miner did not have pneumoconiosis or that the miner's death was not due to pneumoconiosis, we uphold the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption. Consequently, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge