BRB No. 11-0213 BLA

CHARLES SCOTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNITED STATES STEEL CORPORATION	)	
	)	
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 on Remand of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (07-BLA-5533) of Administrative Law Judge Kenneth A. Krantz awarding benefits 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, involving a subsequent claim filed on May 30, 2006,[1] is before the Board for the second time. In the initial decision, the

[1] Claimant's two previous claims, filed on April 4, 1995 and February 8, 1998, were finally denied because claimant failed to establish any element of entitlement.

administrative law judge, after crediting claimant with at least thirty-three years of coal mine employment,[2] found that the new evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, thus, established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that the evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). The administrative law judge also found that claimant was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). The administrative law judge further found that the evidence established that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a), 718.204(b), (c), and 725.309(d), and remanded the case for further consideration.[3] *C.S.* [*Scott*] *v. U.S. Steel Corp.*, BRB No. 08-0552 BLA (Apr. 23, 2009) (unpub.).

On remand, the administrative law judge properly 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 living miner's 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 qualifying coal mine employment, 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

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Director's Exhibit 1. Although claimant also filed a claim on February 15, 2001, it was subsequently withdrawn by claimant, and, therefore, is considered not to have been filed. *See* 20 C.F.R. §725.306(b); Decision and Order at 3 n.3.

[2] The record indicates that claimant's coal mine employment was in Virginia and West Virginia. Director's Exhibit 4. 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*).

[3] The Board's decision to vacate the administrative law judge's findings derived, in substantial part, from the administrative law judge's erroneous exclusion of Dr. Al-Asbahi's negative interpretation of a July 13, 2006 x-ray. *C.S.* [*Scott*] *v. U.S. Steel Corp.*, BRB No. 08-0552 BLA (Apr. 23, 2009) (unpub.).

establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[4] 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge, on remand, found that claimant worked for more than fifteen years in underground coal mine employment. The administrative law judge also found that the evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant established invocation of the Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 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

[4] In a September 8, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements. Employer submitted its position statement on September 23, 2010.

was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he did not establish any element of entitlement. Director's Exhibit 1. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing any element of entitlement. 20 C.F.R. §725.309(d)(2),(3).

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

Employer 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 evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2).[5]

Employer argues that the administrative law judge erred in finding that the arterial blood gas study evidence established total disability pursuant 20 C.F.R. §718.204(b)(2)(ii). The administrative law judge considered the results of three blood gas studies conducted on May 10, 2001, July 13, 2006, and December 6, 2006. Although the May 10, 2001, and December 6, 2006 blood gas studies produced non-qualifying values[6] at rest, Claimant's Exhibit 1; Employer's Exhibit 1, the July 13, 2006 blood gas study produced qualifying values both at rest and during exercise. Director's Exhibit 13.

The administrative law judge accorded less weight to claimant's May 10, 2001 non-qualifying blood gas study, because it was five years older than the July 13, 2006 and December 6, 2006 blood gas studies, a finding previously affirmed by the Board. Decision and Order on Remand at 17; *Scott*, slip op. at 5 n.5. In weighing the two remaining blood gas studies, the administrative law judge noted that claimant's July 13, 2006 blood gas study produced qualifying values both at rest and during exercise. Although claimant's December 6, 2006 blood gas study produced non-qualifying values at rest, the administrative law judge noted that this study did not include results obtained during exercise. The administrative law judge, therefore, found that the preponderance of the relevant blood gas study evidence (the two qualifying results from the July 13, 2006 blood gas study compared to the single non-qualifying result from the December 6, 2006 blood gas study) supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order on Remand at 17-18. The administrative law

[5] Because employer does not challenge the administrative law judge's finding that claimant established more than fifteen years of underground coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] A "qualifying" arterial blood gas study meets the values specified in the tables found in Appendix C to Part 718. 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).

judge, therefore, found that the blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer argues that the administrative law judge erred by failing to scrutinize the blood gas study values to infer that claimant is not totally disabled. Specifically, employer notes that, over a five month period, claimant's resting pO2 improved, from a qualifying level of 62 on July 13, 2006 to a non-qualifying level of 79.7 on December 6, 2006. Employer contends that "there is no reason to doubt that a similar increase (further into the normal range) would have resulted had claimant consented to an exercise test [on December 6, 2006]."[7] Employer's Brief at 11. We disagree. In order to engage in the speculative analysis of the blood gas study values advocated by employer, the administrative law judge would be required to make an improper medical conclusion. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987). Moreover, an administrative law judge may not weigh evidence merely on speculation regarding matters not reflected in the record. *See White,* 23 BLR at 1-7 n.8. Because employer does not raise any additional error regarding the administrative law judge's weighing of the blood gas study evidence, we 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).

Further, because employer does not challenge the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), this finding is also affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We similarly 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).[8] *Id.*

In light of our affirmance of the administrative law judge's findings that claimant established 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

[7] The record does not reveal the reason that claimant did not perform an exercise test as part of the December 6, 2006 blood gas study. However, Dr. Rasmussen reported that on an earlier blood gas study, conducted on May 10, 2001, exercise was not performed "because the patient reported that his cardiologist would not put him on a treadmill and felt this was contraindicated." Claimant's Exhibit 1.

[8] In light of our affirmance of the administrative law judge's finding that the new evidence establishes the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(d).

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).

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

Because claimant established invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4), 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). The administrative law judge found that employer failed to establish either method of rebuttal. Decision and Order on Remand at 21-23.

Employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. We disagree. Because employer does not challenge the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), this finding is affirmed. *Skrack*, 6 BLR at 1-711. Employer's failure to rule out legal pneumoconiosis precludes a rebuttal finding that claimant does 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). Consequently, we affirm the administrative law judge's determination that employer failed to meet its burden to disprove the existence of pneumoconiosis.

Regarding the other method of establishing rebuttal, the administrative law judge rationally discounted Dr. Hippensteel's opinion, that claimant's pulmonary impairment did not arise out of his coal mine employment, because Dr. Hippensteel, contrary to the administrative law judge's finding, did not diagnose legal pneumoconiosis. *See Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 23; Employer's Exhibit 1. Because Dr. Hippensteel's opinion is the only opinion that was submitted by employer, we affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1320, 19 BLR 2-192, 2-203 (7th Cir. 1995); *Alexander v. Island Creek Coal Co.*, 12 BLR 1-44, 1-47 (1988), *aff'd sub nom., Island Creek Coal Co. v. Alexander*, No. 88-3863 (6th Cir., Aug. 29, 1989) (unpub.); *Defore v. Ala. By-Products Corp.*, 12 BLR 1-27, 1-29 (1988).

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge