BRB No. 12-0186 BLA

ERIC E. MORRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DAKOTA, LLC	)	DATE ISSUED: 01/30/2013
	)	
and	)	
	)	
BRICKSTREET MUTUAL INSURANCE 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell and Anthony Stastny (Washington and Lee University School of Law Black Lung Clinic), Lexington, Virginia, for claimant.

George E. Roeder, III and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2008-BLA-05116) of Administrative Law Judge Richard A. Morgan with respect to a miner's claim, filed on January 10, 2007, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case is before the Board for the second time. Initially, in a Decision and Order issued on November 4, 2009, the administrative law judge credited claimant with over thirty years of coal mine employment and found that the medical opinion evidence was sufficient to establish the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). In addition, the administrative law judge found that claimant established total respiratory disability at 20 C.F.R. §718.204(b)(2), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for reconsideration of the evidence relevant to the existence of pneumoconiosis, total disability, and total disability due to pneumoconiosis. *Morris v. Dakota, LLC*, BRB No. 10-0179 BLA (Nov. 24, 2010)(unpub). In addition, the Board instructed the administrative law judge to determine whether claimant is entitled to the rebuttable presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] *Id.*

In his Decision and Order on Remand, issued on December 7, 2011, the administrative law judge found that claimant established the existence of legal pneumoconiosis and total disability pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(b)(2). Based upon these findings, the filing date of the claim and the length of claimant's qualifying coal mine employment, the administrative law judge determined that claimant invoked the amended Section 411(c)(4) presumption. The administrative law judge further found that employer failed to rebut the presumption, as it did not affirmatively prove that claimant does not have pneumoconiosis or that claimant's total

[1] Amended Section 411(c)(4), 30 U.S.C. §921(c)(4), applies to claims filed on or after January 1, 2005, and pending on or after March 23, 2010. 30 U.S.C. §921(c)(4). It provides that if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory or pulmonary impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. *Id.*

disability did not arise out of, or in connection with, coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2)(iv) and, therefore, also erred in finding that claimant invoked the amended Section 411(c)(4) presumption. Employer further contends that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief in this appeal. Employer has filed a reply brief in which it reiterates its arguments.[2]

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.[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).

I. Invocation of the Amended Section 411(c)(4) Presumption – Total Disability

In considering whether claimant invoked the amended Section 411(c)(4) presumption, the administrative law judge initially noted that claimant's "objective tests did not establish total respiratory disability."[4] Decision and Order on Remand at 8. The administrative law judge then considered the medical opinion evidence under 20 C.F.R. §718.204(b)(2)(iv). *Id*. The administrative law judge determined that Drs. Poling and Mullins diagnosed a totally disabling respiratory impairment, while Dr. Hippensteel found no impairment, and Drs. Zaldivar and Rosenberg indicated that claimant may

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

[4] The record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii).

experience periods during which he is unable to perform his usual coal mine work,[5] particularly if he does not receive treatment for his asthma. *Id*. The administrative law judge concluded:

> If the miner is impaired to the extent he cannot perform his prior mining, he is totally disabled. As I found before, this miner is unable to perform the hard labor involved in his mining because of his breathing affliction. If the miner is disabled at times or perhaps not with treatment, he remains legally totally disabled. He used oxygen regularly while working and had to take breaks to administer a nebulizer. (TR at 27-30). He continues to require oxygen daily. I even observed his shortness of breath when he testified. Thus, I find the claimant has established he is totally disabled.

Id.

Employer asserts that the administrative law judge's finding must be vacated, as Dr. Poling's opinion is not reasoned and documented, as the objective studies of record are nonqualifying and Dr. Poling was not aware of the exertional requirements of claimant's usual coal mine work. Employer further contends that Dr. Poling's opinion is outweighed by the contrary opinions of Drs. Mullins, Hippensteel, Zaldivar and Rosenberg, whose qualifications are superior to those of Dr. Poling. Employer's allegations of error are without merit.

Medical opinion evidence can support a finding of total disability if it provides sufficient information from which the administrative law judge can reasonably infer that a miner is or was unable to do his usual coal mine work. *See Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348, 2-356 (7th Cir. 1990). The administrative law judge may infer disability by considering together the doctor's description of the miner's condition, and the exertional requirements of the miner's former coal mine employment. *See Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). In this case, the administrative law judge found that the miner's usual coal mine work involved heavy

[5] "Usual coal mine work" is the most recent job the miner performed regularly and over a substantial period of time. *See Pifer v. Florence Mining Co.*, 8 BLR 1-153, 1-155 (1985); *Shortridge v. Beatrice Pocahontas Coal Co.*, 4 BLR 1-534, 1-539 (1982). In this case, the record indicates that claimant's usual coal mine work was as a continuous miner operator, which involved cutting coal, hanging curtains, pulling cable, and operating the control box. *See* Director's Exhibit 3; Employer's Exhibit 1. These duties required claimant to carry eight to ten pounds constantly, lift fifty pounds or more occasionally, and lift forty pounds occasionally. *Id*.

manual labor.[6] Decision and Order on Remand at 8; 2009 Decision and Order at 24. The administrative law judge's subsequent determination, that the physicians' diagnoses are sufficient to establish total disability, when considered with claimant's work requirements, is supported by substantial evidence. *See Scott*, 60 F.3d at 1142, 19 BLR at 2-263; *McMath v. Director, OWCP*, 12 BLR at 1-9; Decision and Order on Remand at 8.

Dr. Poling stated that, from a respiratory standpoint, claimant is totally disabled from performing his usual coal mine work, with its requirement for heavy manual labor. Claimant's Exhibits 4, 7. He observed that "after maximum inhaler therapy, nebulizer treatments, steroid (prednisone) bursts, and Xolair[,] he still has what I consider severe wheezing and obvious shortness of breath." Claimant's Exhibit 7. Dr. Zaldivar testified at deposition that, although claimant has the pulmonary capacity to perform his usual coal mine employment, "[w]hether his asthma will allow him to do any kind of meaningful work that requires heavy, strenuous activity is in question . . . considering his history and the fact that he was wheezing when I had exercised him in the laboratory under controlled conditions." Employer's Exhibit 20 at 31-32. Dr. Rosenberg stated, "[w]ith optimal treatment of his asthmatic condition, [claimant] would not be considered disabled from performing his previous coal mining job or similarly arduous types of labor. However, with asthmatic flaring, he would be considered disabled." Employer's Exhibit 14. Dr. Mullins initially determined that claimant had a totally disabling respiratory impairment, but after reviewing the opinions of Drs. Zaldivar and Rosenberg, she noted that she agreed with their conclusion that claimant has no significant impairment from simple coal workers' pneumoconiosis. Employer's Exhibit 18. She further stated, however, that claimant is "fairly impaired" due to his asthma, "without intensive intervention." *Id*.

Based on these opinions, we affirm the administrative law judge's determination that the medical opinions of record support a finding of total disability at 20 C.F.R. §718.204(b)(2)(iv), in light of the exertional requirements of the miner's usual coal mine work, which required him to perform heavy manual labor. *See Scott*, 60 F.3d at 1142, 19 BLR at 2-263; *Hvizdzak v. North Am. Coal Corp*., 7 BLR 1-469 (1984); *Parsons v. Black Diamond Coal Co.*, 7 BLR 1-236 (1984); Decision and Order on Remand at 8. We also reject employer's suggestion that any medical opinion diagnosing total disability in this case is essentially undocumented, as the objective studies of record produced

[6] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that the miner's job as a continuous miner operator required "hard labor." Decision and Order on Remand at 8; *see Skrack*, 6 BLR at 1-711.

nonqualifying values.[7] Nonqualifying test results alone do not establish the absence of disability under the Act, particularly where, as here, the physicians describe symptoms and limitations indicative of reduced pulmonary function. *See Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985); *Estep v. Director, OWCP*, 7 BLR 1-904 (1985). We affirm, therefore, the administrative law judge's finding that claimant satisfied his burden of establishing total disability under 20 C.F.R. §718.204(b)(2), and further affirm his finding that claimant invoked the amended Section 411(c)(4) presumption.

II. Rebuttal of the Amended Section 411(c)(4) Presumption

A. Disproving the Existence of Pneumoconiosis

The administrative law judge indicated that employer could rebut the amended Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis or that his impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 9. The administrative law judge did not explicitly address the first method of rebuttal, however. Rather, in accordance with the Board's remand instructions, he initially reconsidered his finding that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4) and determined that claimant satisfied his burden of proof.[8] *Id*. at 4-7. The administrative law judge then relied on his findings at 20 C.F.R. §718.202(a)(4) to determine that employer failed to rebut the amended Section 411(c)(4) presumption by proving that there was no causal relationship between claimant's totally disabling respiratory impairment and his coal mine employment. *Id*. at 10-11. Accordingly, we will address employer's challenge to these findings, prior to addressing employer's allegations of error regarding the administrative law judge's finding that employer did not rebut the presumption by establishing that claimant's totally disabling impairment was unrelated to his coal mine employment.

Drs. Poling, Hippensteel, Mullins, Zaldivar, and Rosenberg submitted medical opinions relevant to the issue of the existence of legal pneumoconiosis. In a report dated October 24, 2011, Dr. Poling opined that claimant has a "severe respiratory illness in part

[7] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively.

[8] Pursuant to 20 C.F.R. §718.201(a)(2), legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

as a result of his coal mining occupation." Claimant's Exhibit 7. In a report dated May 9, 2005, Dr. Hippensteel stated, "it does not appear like [claimant] has clinically significant emphysema" and "it can be made as a general statement that dusty environments are not good for people with asthma and [I] think that is his main diagnosis." Claimant's Exhibit 6. In a report dated May 16, 2007, Dr. Mullins opined that claimant has chronic obstructive pulmonary disease related to coal workers' pneumoconiosis and asthma. Director's Exhibit 9. In a subsequent letter, Dr. Mullins opined that claimant's asthma was "not occupational, except in the sense that the continued dust exposure may act as a trigger to his asthma." Employer's Exhibit 18. In a report dated September 6, 2007, Dr. Zaldivar opined that claimant has coal workers' pneumoconiosis and asthma. Employer's Exhibit 1. In a supplemental report dated July 6, 2011, Dr. Zaldivar reiterated his earlier conclusions and opined that claimant has clinical pneumoconiosis and non-occupational asthma and that coal dust exposure did not play a role in claimant's pulmonary impairment. Employer's Exhibit 21. In a report dated September 3, 2008, Dr. Rosenberg opined that claimant has a pulmonary impairment caused by asthma that is unrelated to coal mine dust exposure. Employer's Exhibit 14. In a supplemental report dated July 19, 2011, Dr. Rosenberg ruled out coal mine dust as a cause of claimant's pulmonary impairment, based on the absence of fibrosis or airway scarring, the reversibility of the obstruction to normal, no oxygenation abnormalities, no restrictive disease, and normal lung volume and total lung capacity. Employer's Exhibit 23.

In addressing the issue of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge noted that there is no disagreement among the physicians that claimant suffers from asthma and stated that "[t]he question is the asthma's etiology." Decision and Order on Remand at 5. The administrative law judge also observed that "asthma, asthmatic bronchitis, or emphysema may fall under the regulatory definition of pneumoconiosis if they are related to coal dust exposure." *Id*. at 6, *citing* 20 C.F.R. §718.201. The administrative law judge gave special consideration to Dr. Poling's opinion, that "*at least part if not a large part*" of claimant's asthma is due to his dust exposure in his coal mine employment, based on his status as claimant's treating physician and the support provided by the corroborating opinions of Dr. Mullins and Hippensteel. *Id*. at 6-7, *quoting* Claimant's Exhibit 7.

The administrative law judge discounted Dr. Zaldivar's opinion, excluding coal dust as a potential cause of asthma, as inconsistent with the regulations. Decision and Order on Remand at 7. The administrative law judge also discredited Dr. Rosenberg's opinion as inconsistent with the regulations, because the doctor ruled out coal dust as a cause of claimant's asthma and pulmonary impairment, even though he admitted dust can aggravate asthma. *Id*. The regulations provide that coal mine dust is a cause if it merely exacerbates, is significantly related to, or substantially aggravates, the pulmonary condition. *Id*. In addition, the administrative law judge found the credibility of Dr.

Rosenberg's conclusion undermined by consideration of the opinions of Drs. Poling, Mullins and Hippensteel, who reasonably related claimant's asthma to his coal mine employment. *Id*. Hence, based on his determination that Dr. Poling had credibly concluded that claimant's coal mine dust exposure aggravated his asthma, the administrative law judge found that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Rosenberg at 20 C.F.R. §718.202(a)(4). Employer's allegation of error is without merit. Pursuant to 20 C.F.R. §718.201(a)(2), 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 phrase "arising out of coal mine employment" denotes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

In this case, the administrative law judge acted within his discretion in finding that Dr. Zaldivar's opinion was entitled to little weight, as Dr. Zaldivar's view, that asthma is not aggravated by coal dust exposure, conflicts with the authoritative statement of medical principles that the Department of Labor set forth in the preamble to the amended definition of legal pneumoconiosis. 65 Fed. Reg. 79,939 (Dec. 20, 2000); *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-16, 25 BLR 2-115 (4th Cir. 2012); *A & E Coal Co. v. Adams*, 694 F.3d 798, 801-02, 25 BLR 2-203 (6th Cir. 2012). The administrative law judge also rationally found that Dr. Rosenberg acknowledged that inhaling coal dust aggravates asthma and that this view conflicted with his opinion that there was no causal link between coal dust exposure and claimant's asthma. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Therefore, we affirm the administrative law judge's discrediting of the opinions of Drs. Zaldivar and Rosenberg at 20 C.F.R. §718.202(a)(4). *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). Based on these findings, employer could not rebut the amended Section 411(c)(4) presumption by affirmatively proving that claimant does not have legal pneumoconiosis.[9] 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*,

[9] Because employer has the burden of rebutting the amended Section 411(c)(4) presumption by affirmatively disproving the existence of pneumoconiosis, error, if any, in the administrative law judge's weighing of the opinions of the physicians who diagnosed legal pneumoconiosis is harmless. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). We decline to address, therefore, employer's allegations of error regarding the administrative law judge's crediting of Dr. Poling's diagnosis of legal pneumoconiosis.

43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

B. Disproving Total Disability Due to Pneumoconiosis

Employer also argues that the administrative law judge erred in finding that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant's totally disabling impairment did not arise out of, or in connection with, his coal mine employment. Employer maintains that the administrative law judge erred in discrediting the opinions of Drs. Zaldivar and Rosenberg. We disagree. The administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Rosenberg as to disability causation, on the ground that the physicians did not diagnose legal pneumoconiosis. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Hicks*, 138 F.3d at 533-34, 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42, 21 BLR at 2-275-76. Consequently, we affirm the administrative law judge's determination that employer failed to affirmatively prove that the miner is not suffering from a disabling impairment arising out of his coal mine employment. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); *Hicks*, 138 F.3d at 533, 21 BLR at 2-335. Because we have affirmed the administrative law judge's findings that claimant established invocation of the amended Section 411(c)(4) presumption, and that employer has not rebutted the presumption, we affirm the 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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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge