BRB No. 12-0227 BLA

WILLIAM D. VARNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MCCOY ELKHORN COAL CORPORATION	)	
	)	
and	)	
	)	
JAMES RIVER COAL COMPANY	)	DATE ISSUED: 01/22/2013
	)	
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 – Award of Benefits in an Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits in an Initial Claim (2010-BLA-5627) of Administrative Law Judge Larry S. Merck (the administrative law

judge), rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Upon stipulation of the parties, the administrative law judge credited claimant with at least twenty-three years of underground coal mine employment, determined that the claim was timely filed, and adjudicated this claim, filed on August 3, 2009, pursuant to 20 C.F.R. Part 718. The administrative law judge found that the evidence was sufficient to support a finding of total respiratory disability, and was, therefore, sufficient to invoke the rebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4)).[1] The administrative law judge further found that employer failed to establish rebuttal of the presumption.[2] Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding it sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby invoking the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4). Employer also challenges the administrative law judge's finding that employer failed to establish rebuttal of the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief.[3]

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[1] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[2] Upon invocation of the amended Section 411(c)(4) presumption, the burden shifts to employer to rebut the presumption with affirmative proof that claimant does not have pneumoconiosis, or that his disabling respiratory or pulmonary impairment does not arise out of, or in connection with, coal mine employment. *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[3] We affirm, as unchallenged on appeal, the administrative law judge's acceptance of the parties' stipulation to at least twenty-three years of coal mine employment and his determination that the claim was timely filed. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Employer challenges the administrative law judge's finding of total respiratory disability at Section 718.204(b), arguing that the administrative law judge erred in crediting the medical opinion evidence over the other evidence of record. Employer asserts that the administrative law judge erroneously found that the opinions of Drs. Al-Khasawneh and Jarboe, that claimant does not have the respiratory capacity to perform his usual coal mine employment, were "reasoned" when the doctors relied, in part, on objective test results that the administrative law judge found were either not supportive of, or inconclusive for, total disability. Employer's Brief at 6-8. Employer's arguments lack merit.

In evaluating the pulmonary function studies of record at Section 718.204(b)(2)(i), the administrative law judge determined that the studies administered by Dr. Al-Khasawneh on August 27, 2009, and by Dr. Jarboe on February 25, 2010, yielded non-qualifying values before and after the administration of a bronchodilator. Director's Exhibit 19; Claimant's Exhibit 5. Thus, the administrative law judge properly found that the pulmonary function studies failed to establish total respiratory disability at Section 718.204(b)(2)(i). Decision and Order at 7.

The administrative law judge reviewed the blood gas studies at Section 718.204(b)(2)(ii), and determined that the August 27, 2009 study administered by Dr. Al-Khasawneh and the February 25, 2010 study by Dr. Jarboe produced non-qualifying values at rest and qualifying values during the exercise portion of the studies. The administrative law judge concluded that the blood gas study evidence was inconclusive, and that claimant failed to establish total disability by a preponderance of the evidence at Section 718.204(b)(2)(ii). Decision and Order at 8.

In evaluating the conflicting medical opinions at Section 718.204(b)(2)(iv), the administrative law judge accurately summarized the explanations and bases for the various physicians' conclusions, and acted within his discretion in finding that the

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc); Hearing Transcript at 25.

opinions of Drs. Al-Khasawneh[5] and Jarboe,[6] that claimant has a totally disabling pulmonary impairment, were well-reasoned and entitled to full probative weight, as they were supported by claimant's medical history, physical examination findings, and objective medical evidence. Decision and Order at 9-11; *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003), citing *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). Contrary to employer's argument, a claimant may establish total disability with reasoned medical opinion evidence even "where total disability cannot be shown [by the objective studies identified] under paragraphs (b)(2)(i), (ii), or (iii), of this section . . . ." 20 C.F.R. §718.204(b)(2)(iv). Thus, a doctor can offer a reasoned medical opinion diagnosing total disability even though the objective studies are non-qualifying. *See* 20 C.F.R. §718.204(b)(2)(iv); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 577, 22 BLR 2-107, 2-123 (6th Cir. 2000), *citing Jonida Trucking, Inc. v. Hunt*, 124 F.3d 739, 744 (6th Cir. 1997); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-555 (1989)(en banc); *Dillon v. Peabody Coal Co.* 11 BLR 1-113 (1988).

By contrast, the administrative law judge permissibly found that the opinion of Dr. Vuskovich[7] was entitled to less weight because the physician stated in one section of his report that claimant did not have a disabling pulmonary impairment, and then stated in

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[5] Dr. Al-Khasawneh performed the Department of Labor examination on August 27, 2009, and diagnosed clinical and legal pneumoconiosis. He noted a severe restrictive lung pattern with a severe reduction in diffusing capacity and a worsening of claimant's hypoxemia with exercise. He determined that claimant did not have the pulmonary capacity to work as a coal miner due to his clinical and legal pneumoconiosis. Director's Exhibit 19.

[6] Dr. Jarboe examined claimant on February 25, 2010, and diagnosed a mild restrictive defect and a mild airflow obstruction. He noted that claimant also has a significant impairment of gas exchange, evidenced by his reduced diffusing capacity and the fall in oxygen tension with moderate exercise. He opined that claimant is totally disabled from a pulmonary standpoint due to clinical and legal pneumoconiosis. Claimant's Exhibit 5.

[7] Dr. Vuskovich reviewed claimant's medical records from 2008 and 2009, and provided a consulting opinion dated February 16, 2010. He opined that there was no definite evidence that claimant had pneumoconiosis and determined that claimant did not have a disabling pulmonary impairment. He noted that while Dr. Broudy, a treating physician, recorded pulmonary function study results that were consistent with a disabling pulmonary impairment, he could not verify the results without flow volume loops and time volume tracings to review. Employer's Exhibit 2.

the same report that it was not possible to determine if claimant had the pulmonary capacity to work as a coal miner. Decision and Order at 11-12; Employer's Exhibit 2; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986).

After considering all relevant evidence together, like and unlike, the administrative law judge acted within his discretion in finding that the opinions of Drs. Al-Khasawneh and Jarboe were entitled to determinative weight. Decision and Order at 13-14; *see Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that claimant established total respiratory disability pursuant to Section 718.204(b), and was entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4); *see* Decision and Order at 13-14.

Employer next challenges the administrative law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption. Specifically, employer asserts that the opinions of Drs. Al-Khasawneh and Jarboe are not well-reasoned and, thus, are insufficient to establish either that claimant has legal pneumoconiosis or that he is totally disabled due to pneumoconiosis.[8] Employer's Brief at 9-11. Employer's arguments lack merit.

The administrative law judge determined that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing either that claimant does not have pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, coal mine employment. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 479, 25 BLR 2-1, 2-8 (6th Cir. 2011); Decision and Order at 25, 28. Because employer has the burden to affirmatively prove that claimant does not have pneumoconiosis, or that his respiratory disability did not arise out of coal mine employment, the opinions of Drs. Al-Khasawneh and Jarboe, who both diagnosed pneumoconiosis, do not aid employer in rebutting the presumption. Employer raises no specific error with regard to the administrative law judge's finding that employer's evidence is insufficient to rule out a causal connection between claimant's coal dust exposure and his disabling respiratory impairment. We, therefore, affirm the administrative law judge's rebuttal findings under amended Section 411(c)(4), and affirm the award of benefits. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th

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[8] Employer concedes that "the x-ray evidence may have established, at most, simple pneumoconiosis." Employer's Brief at 9.

Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in an Initial Claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge