BRB No. 12-0493 BLA

EDDIE L. OWENS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
POSTAR COAL COMPANY	)	
	)	
and	)	
	)	
BRICKSTREET MUTUTAL INSURANCE COMPANY	)	DATE ISSUED: 07/09/2013
	)	
	)	
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Kevin Gillen and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2011-BLA-5058) of Administrative Law Judge Michael P. Lesniak rendered on a claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge credited claimant with thirty-two years of underground coal mine employment, as supported by the record, and adjudicated this claim pursuant to 20 C.F.R. Part 718. The administrative law judge found that claimant was not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as the evidence failed to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c). However, the administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the applicability of amended Section 411(c)(4) to this case. Employer also contends that the administrative law judge erred in finding total respiratory disability established at Section 718.204(b), and in finding invocation of the amended Section 411(c)(4) presumption established, with no rebuttal. Claimant has not filed a response to employer's appeal. The Director, Office of Workers' Compensation Programs, has filed a limited response letter, urging the Board to reject employer's arguments regarding the applicability of amended Section 411(c)(4).[3]

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[1] Claimant, Eddie L. Owens, filed his claim for benefits on September 23, 2009. Director's Exhibit 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established thirty-two years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 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.[4] 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).

Initially, employer maintains that the provisions of amended Section 411(c)(4) are not applicable in cases where an employer is liable for benefits, as the plain language of 30 U.S.C. §921(c)(4) provides limitations on rebuttal evidence which apply only to claims brought against "the Secretary." The Board rejected this identical argument in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1 (2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject it here for the same reasons set forth in *Owens*. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Keene v. Consolidation Coal Co.*, 645 F.3d 844, 24 BLR 2-385 (7th Cir. 2011). Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending on March 23, 2010.[5]

Employer next contends that the administrative law judge erred in finding total respiratory disability established pursuant to Section 718.204(b), based on his weighing of the pulmonary function studies of record and his finding that the blood gas study evidence was inconclusive. At Section 718.204(b)(2)(i), employer asserts that the administrative law judge improperly relied on the pre-bronchodilator results of claimant's pulmonary function studies, which yielded qualifying values,[6] without looking "to the medical opinions to determine . . . the importance of the post-bronchodilator results in this case." Employer's Brief at 6. Specifically, employer maintains that the administrative law judge did not consider Dr. Repsher's testimony that, "based upon the post-bronchodilator results, [claimant's] pulmonary health would benefit from the regular

[4] 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. Decision and Order at 8 n.17; Director's Exhibit 3; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[5] We reject employer's additional objection to the application of amended Section 411(c)(4) in the absence of implementing regulations for guidance, Employer's Brief at 5 n.2, for the reason set forth in *Mathews v. Pocahontas Coal Co.*, 24 BLR 1-193 (2010).

[6] A "qualifying" pulmonary function study or arterial blood gas study yields values that are equal to or less than the applicable table values contained in 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study yields values that exceed the requisite table values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

and routine use of Combivent." Employer's Brief at 6, *citing* Employer's Exhibit 3 at 12. Employer argues that "[b]y implication, [claimant's] post-bronchodilator results show that he could possibly perform his last coal mine job given proper treatment of his asthma." Employer's Brief at 6. Employer's arguments lack merit.

During his deposition on January 20, 2011, Dr. Repsher testified that claimant's pulmonary function studies demonstrated "significant reversibility of mild to moderate airways obstruction." Employer's Exhibit 3 at 11. When employer's counsel asked whether claimant "would benefit from the use of Combivent on a regular and routine basis," Dr. Repsher replied, "[*p*]*robably*, yes." Employer's Exhibit 3 at 12-13 (emphasis added). We reject employer's argument that it was incumbent upon the administrative law judge to address Dr. Repsher's equivocal testimony regarding the benefit to claimant's pulmonary health from the regular use of Combivent, and draw the inference suggested by employer in evaluating the pulmonary function study evidence at Section 718.204(b)(2)(i). The administrative law judge accurately determined that the three pulmonary function studies of record, obtained on December 1, 2009, June 1, 2010, and September 8, 2010, all produced qualifying values prior to the administration of bronchodilators, and all produced non-qualifying values post-bronchodilation. Decision and Order at 10; Director's Exhibits 14, 18; Employer's Exhibit 1. The administrative law judge weighed this conflicting pulmonary function study evidence and, within a rational exercise of his discretion, found that the pre-bronchodilator tests were more probative of disability and entitled to greater weight. *See Keen v. Jewell Ridge Coal Co.*, 6 BLR 1-454, 1-459 (1983). The administrative law judge explained that this determination was consistent with the Department of Labor's acknowledgment that "the use of a bronchodilator does not provide an adequate assessment of the miner's disability, [although] it may aid in determining the presence of absence of pneumoconiosis." 25 Fed. Reg. 13,682 (Feb. 29, 1980); Decision and Order at 11. Thus, the administrative law judge permissibly concluded that the weight of the pulmonary function study evidence initially supported a finding of total respiratory disability at Section 718.204(b)(2)(i).

At Section 718.204(b)(2)(ii), employer contends that the administrative law judge erred in finding that the blood gas study evidence was inconclusive, arguing that the administrative law judge should have construed Dr. Repsher's testimony as an invalidation of the qualifying exercise portion of the blood gas study dated December 1, 2009. Employer also argues that the administrative law judge failed to explain how Dr. Hippensteel's attribution of claimant's gas exchange impairment solely to his cardiac condition rendered the blood gas study evidence inconclusive on the issue of total disability. Employer's Brief at 6-7. Employer's arguments lack merit.

In reviewing the blood gas studies of record, obtained on December 1, 2009, June 1, 2010 and September 8, 2010, the administrative law judge correctly determined that all of the resting studies produced non-qualifying values, and that one of the two exercise

studies produced qualifying values. The administrative law judge permissibly concluded that the exercise studies were "more probative of [claimant's] impairment, as they assess oxygen levels during physical exertion, which was required by claimant's last coal mine employment." Decision and Order at 11; *see generally Mahan v. Kerr-McGee Coal Corp.*, 7 BLR 1-159 (1984) (administrative law judge must weigh both qualifying and non-qualifying studies and determine whether the preponderance of the evidence supports invocation). The administrative law judge acknowledged Dr. Repsher's deposition testimony, that "[i]t appears to me that [claimant] did not cooperate with the [qualifying] exercise study," Employer's Exhibit 13 at 16, but noted that Dr. Repsher's explanation related to claimant's VO2 abnormality, rather than his PO2 or PCO2 values. Decision and Order at 4, n.9; Employer's Exhibit 13 at 16-17. As Dr. Repsher did not explicitly state that the qualifying test was invalid or improperly administered, the administrative law judge acted within his discretion in finding that the conflicting results of the two exercise blood gas studies rendered the evidence inconclusive as to the presence of a totally disabling *respiratory or pulmonary impairment* at Section 718.204(b)(2)(ii), particularly since Dr. Hippensteel opined that the impairment demonstrated on exercise resulted solely from claimant's cardiac condition, and the remaining physicians did not indicate whether the gas exchange impairment resulted from an intrinsic respiratory or pulmonary condition. Decision and Order at 11 (emphasis added). Thus, the administrative law judge permissibly concluded that the blood gas study evidence, as a whole, was inconclusive as to the presence of a totally disabling respiratory impairment at Section 718.204(b)(2)(ii).

After finding that the record contained no evidence of cor pulmonale with right-sided congestive heart failure at Section 718.204(b)(2)(iii), the administrative law judge reviewed the medical opinions of record at Section 718.204(b)(2)(iv), and determined that Dr. Repsher did not indicate whether claimant's mild to moderate impairment would prevent him from performing his usual coal mine employment as a roof bolter, whereas Dr. Rasmussen found that the impairment was totally disabling. Decision and Order at 11. The administrative law judge discounted Dr. Hippensteel's opinion, that claimant could perform his usual coal mine employment because his moderate impairment improved to a mild one after bronchodilation, on the ground that it was inconsistent with the Department of Labor's position that post-bronchodilation results are not dispositive of disability. *Id.* As employer has not challenged the administrative law judge's weighing of the medical opinions at Section 718.204(b)(2)(iv), we affirm the administrative law judge's finding that claimant established total respiratory disability at Section 718.204(b), based on his conclusion that the qualifying pulmonary function study evidence was the most probative. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We further affirm the administrative law judge's determination that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), based on the administrative law judge's unchallenged findings that claimant

established more than fifteen years of qualifying coal mine employment and total respiratory disability. *Id.*; Decision and Order at 2.

Lastly, employer contends that the administrative law judge's erred in requiring employer to "rule out" a connection between claimant's disabling impairment and his coal mine employment in order to establish rebuttal of the amended Section 411(c)(4) presumption.[7] Employer maintains that, under the appropriate standard, the administrative law judge should have shifted the burden at 20 C.F.R. §718.204(c) to employer to prove that pneumoconiosis did not have a material adverse effect on the miner's respiratory or pulmonary condition, or that pneumoconiosis did not materially worsen a totally disabling respiratory or pulmonary impairment that was caused by a disease or exposure unrelated to coal mine employment. Employer's Brief at 7-9. Employer asserts that, consistent with this correct standard, "Dr. Hippensteel's opinion does not support a finding of disability due to pneumoconiosis." Employer's Brief at 9.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that, in the absence of substantial evidence that "ruled out" a causal connection between the miner's impairment and his coal mine employment, an employer failed to establish rebuttal by proving that a miner's disabling respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine, as required under Section 411(c)(4), 30 U.S.C. §921(c)(4)(B). *See Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980); *accord Morrison*, 644 F.2d at 479-80, 25 BLR at 2-8-9. Hence, we reject employer's argument that the administrative law judge enunciated an incorrect standard in determining that employer was required "to '*rule out*' a possible causal connection between [claimant's] disability and his coal mine employment" in order to establish rebuttal of the amended Section 411(c)(4) presumption in this case. Decision and Order at 15 [emphasis in original]. The administrative law judge concluded that the evidence of record was insufficient to establish rebuttal of the Section 411(c)(4) presumption under this standard. Decision and Order at 15-16. As employer has not identified any specific legal or factual errors in the administrative law judge's consideration of the evidence relevant to rebuttal, we decline to review the administrative law judge's specific rebuttal findings. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Etzweiler v. Cleveland Brothers Equipment Co.*, 16 BLR 1-38 (1992); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director,*

[7] We affirm, as unchallenged on appeal, the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis. *See Skrack*, 6 BLR at 1-711.

OWCP, 6 BLR 1-107 (1983). Consequently, we affirm the administrative law judge's award of benefits.

Accordingly, the Decision and Order of the administrative law judge 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