BRB Nos. 11-0589 BLA
and 11-0589 BLA-A

LARRY WARD	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
NORTH STAR CONTRACTORS, INCORPORATED	)	DATE ISSUED: 06/27/2012
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
Employer-Petitioner Cross-Respondent	)	
	)	
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 Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Karin L. Weingart (Spilman Thomas & Battle, PLLC), Charleston, West Virginia, for employer.

Jonathan Rolfe (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, and claimant cross-appeals, the Decision and Order Awarding Benefits (2008-BLA-06008) of Administrative Law Judge Ralph A. Romano rendered on a claim filed on November 30, 2007, 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). In a Proposed Decision and Order dated February 20, 2009, the district director determined that claimant was entitled to benefits. Director's Exhibit 33. At employer's request, the case was transferred to the Office of Administrative Law Judges for a hearing, which the administrative law judge held on January 13, 2010.

On March 23, 2010, Congress passed the Patient Protection and Affordable Care Act (PPACA), which included amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010. The administrative law judge subsequently issued an order directing the parties to submit statements regarding the applicability of the amendments to this case.[1] After considering the parties' responses, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), as he had 15.54[2] years of underground coal mine employment and established that he is totally disabled pursuant to 20 C.F.R. §718.204(b). The administrative law judge further found that employer did not rebut the presumption. The administrative law judge also determined, in the alternative, that claimant established

[1] Section 1556 of Pub. L. No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. In order to invoke the Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(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. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §921(c)(4)).

[2] The administrative law judge credited claimant with 15.56 years of coal mine employment for the years 1976 through 2005, all underground except for 0.02 years with ProClean Pressure Washing in 1997 because claimant testified that his work with ProClean Washing was above ground and he did not present any evidence that those conditions were similar to underground coal mining. Decision and Order at 7.

the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that claimant established invocation of the amended Section 411(c)(4) presumption, arguing that the evidence is insufficient to establish fifteen years of underground coal mine employment and the presence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(iv).[3] Employer further argues that "claimant failed to establish the existence of pneumoconiosis" at 20 C.F.R. §718.202(a)(1), that "claimant is not afforded the benefit of the presumption at 20 C.F.R. §718.203(b) when establishing legal pneumoconiosis," and that the administrative law judge erred in his analysis of the medical opinion evidence at 20 C.F.R. §§718.202(a)(4) and 718.204(c). Employer's Brief at 25. In response, claimant urges the Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response and argues that the administrative law judge's determination that claimant established 15.54 years of underground coal mine employment is based on substantial evidence and should be affirmed.[4]

Claimant has filed a cross-appeal and contends that if the Board remands this case, the administrative law judge should reconsider his finding that claimant did not establish the existence of clinical pneumoconiosis under 20 C.F.R. §718.202(a)(1), (4). Neither employer nor the Director has responded to claimant's cross-appeal.[5]

---

[3] Employer cites to the provision pertaining to total disability as previously set out at 20 C.F.R. §718.204(c)(4) (2000), which is now found at 20 C.F.R. §718.204(b)(2)(iv). The provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b) (2000), is now found at 20 C.F.R. §718.204(c).

[4] The Director, Office of Workers' Compensation Programs, notes, however, that if the administrative law judge's findings on duration of coal mine employment and total disability are affirmed, the Board should reject employer's argument that, even on rebuttal, claimant bears the burden of demonstrating that his legal pneumoconiosis "arises from[,] or is significantly related to[,] dust exposure in coal mine employment." Director's Brief at 2 n.2, *quoting* Employer's Brief at 25.

[5] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the claim was filed after January 1, 2005, and that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), but did not establish total disability at 20 C.F.R. §718.204(b)(2)(i), (iii). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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.[6] 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

A. Underground Coal Mine Employment

In finding that claimant established 15.54 years of underground coal mine employment between 1976 and 2005, the administrative law judge relied on claimant's Social Security Administration (SSA) records and hearing testimony. Decision and Order at 4-7. For the period between 1976 and 1977, the administrative law judge credited claimant for each quarter in which he earned at least $50.00 from coal mine employment. *Id*. at 4. The administrative law judge applied the average daily earnings formula set forth in 20 C.F.R. §725.101(a)(32)(iii) to the period between 1978 and 2005. *Id*.

Employer initially challenges the administrative law judge's finding that claimant had one quarter-year of coal mine employment in 1976, based on his earnings of $525.00 between October and December. Employer maintains that the administrative law judge should have used the daily earnings method of computation to credit claimant with 0.06 of a year of employment because it is more accurate and it was the method that the administrative law judge relied upon in making his other calculations. We disagree.

Because the Act does not provide any specific guidelines for computation of time spent in coal mine employment, the Board will uphold the administrative law judge's determination if it is based on a reasonable method and supported by substantial evidence in the record as a whole. *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). The administrative law judge's decision to credit claimant with one quarter-year of coal mine employment for each quarter in which he earned at least $50.00 from coal mine employment represented a reasonable method of calculation. *See Clark v. Barnwell Coal Co.*, 22 BLR 1-275, 1-280-81 (2003). Moreover, contrary to employer's contention, the administrative law judge was not required to apply the method set forth in 20 C.F.R. §725.101(a)(32)(iii) to claimant's earnings in 1976. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-27 (2011). The regulation provides only that an administrative law judge "may" use such a method when the miner's employment lasted less than one year, or where the beginning and ending dates of the miner's coal mine employment cannot be established.

[6] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as claimant's last 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.

See 20 C.F.R. §725.101(a)(32)(iii). *Id*. In this case, the administrative law judge correctly found that the SSA earning statements indicate that, in 1976, claimant earned $525.00 as a coal miner from October through December, thereby totaling one quarter-year of coal mine employment. Director's Exhibit 19. Therefore, the administrative law judge did not err in declining to apply the formula at 20 C.F.R.§725.101(a)(32)(iii) to claimant's coal mine employment income in 1976. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 335, 24 BLR 2-1, 2-24-25 (4th Cir. 2007); *Muncy*, 25 BLR at 1-27.

Employer further argues that the administrative law judge's computation is inflated by two years because claimant was on workers' compensation for "almost two" years after sustaining an injury in 1989. Employer's Brief at 19, *quoting* Hearing Transcript at 25. We disagree. In considering claimant's coal mine employment from 1976 through 2005, the administrative law judge excluded the years 1990 and 1991, based on claimant's SSA earnings records. Decision and Order at 5. The administrative law judge did, however, credit claimant with 0.24 years of coal mine employment in 1989, a finding that we affirm as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1984); Decision and Order at 5.

Employer also contends that the administrative law judge erred in finding that claimant had 3.41 years of underground coal mine employment with Production Efficiency Corporation from 1992 through 1995. Employer maintains that claimant spent a majority of his time on the surface, away from the mine site, and should have been credited with only 1.71 years of underground employment. Contrary to employer's argument, the administrative law judge rationally found that claimant had 3.41 years of underground coal employment at Production Efficiency Corporation, after crediting claimant's testimony that he was at "the mine site daily and would go underground for long periods of time," cleaning and maintaining batteries. Decision and Order at 7; *see Muncy*, 25 BLR at 1-29; *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979). Because the administrative law judge credited claimant's testimony that he had to go "underground," claimant was not required to show comparability of conditions regarding other duties performed aboveground, at an underground mine, to qualify for the Section 411(c)(4) presumption. *See Muncy*, 25 BLR at 1-29, *citing Alexander*, 2 BLR at 1-504.

Employer next challenges the administrative law judge's finding of 0.51 years of coal mine employment in 2003, arguing that, because claimant sustained a compensable injury on April 17, 2003, he only worked 3.5 months out of twelve months in 2003, consistent with 0.29 years. The administrative law judge used the formula provided at 20 C.F.R. §725.101(a)(32)(iii), after finding that the SSA earnings records for 2003 list claimant's annual earnings without a breakdown by quarters. Decision and Order at 4, 6; Director's Exhibit 19. Even if, in 2003, claimant was credited with 0.29, instead of 0.51 years of coal mine employment, the difference would not change the administrative law judge's ultimate finding that claimant established over fifteen years of underground coal

mine employment. Therefore, error, if any, is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Thus, we affirm the administrative law judge's finding that claimant established over fifteen years of underground coal mine employment, sufficient to invoke the amended Section 411(c)(4) presumption. Decision and Order Awarding Benefits at 19.

B. Total Disability

Employer next contends that the administrative law judge erred in determining that both Dr. Rasmussen and Dr. Crisalli diagnosed a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Dr. Rasmussen examined claimant on January 29, 2008 and opined that claimant does not retain the pulmonary capacity to perform his last regular coal mine employment, which he described as involving heavy, and some very heavy, manual labor, based on the marked impairment in oxygen transfer and hypoxia revealed in his qualifying exercise blood gas study. Director's Exhibit 25; Claimant's Exhibit 3. Dr. Rasmussen also determined that claimant's mild degree of reduction in single breath diffusing capacity is consistent with fibrosis and coal mine dust and cigarette smoke-induced emphysema. *Id.* Dr. Crisalli examined claimant on April 20, 2009 and reviewed the results of Dr. Rasmussen's examination. Employer's Exhibit 3. Dr. Crisalli determined that the qualifying exercise blood gas study administered by Dr. Rasmussen on January 29, 2008, shows hypoxemia with exertion and that "it is likely he could not perform the exertional requirements of his usual coal mine job. . . ." Employer's Exhibit 3 at 6. Dr. Crisalli opined that the cause of claimant's hypoxemia during exertion was undetermined and that the "cause may or may not actually relate to lung disease." *Id.* In a supplemental opinion dated April 7, 2010, Dr. Crisalli opined that claimant's hypoxemia was caused by a mild right-to-left shunt in the atrial septum and is unrelated to lung disease. Employer's Exhibit 4 at 7.

The administrative law judge found that Drs. Rasmussen and Crisalli both opined that claimant has a totally disabling respiratory impairment that prevents him from performing his previous coal mining work. Decision and Order at 10; Director's Exhibit 25; Employer's Exhibit 3. The administrative law judge accorded their opinions equal weight, finding them well-reasoned "in that they took into account claimant's work history and his studies," including claimant's January 29, 2008 qualifying exercise blood gas study administered by Dr. Rasmussen.[7] Decision and Order at 10. The

[7] The administrative law judge considered a November 16, 2004 determination by the West Virginia Occupational Pneumoconiosis Board that claimant had a 10% pulmonary impairment, but gave it less weight because their finding did not indicate whether claimant's pulmonary impairment would prevent him from returning to his previous coal mine employment. Decision and Order at 10.

administrative law judge found, therefore, that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer alleges that, because Dr. Crisalli stated that claimant's impairment was due to a heart defect, rather than a respiratory or pulmonary condition, he did not conclude that claimant is totally disabled under the terms of 20 C.F.R. §718.204(b)(2)(iv). This contention is without merit. Dr. Crisalli agreed with Dr. Rasmussen that claimant's qualifying exercise blood gas study showed hypoxemia on exertion and he relied on it to conclude that it is likely that claimant could not perform the exertional requirements of his usual coal mine job. Employer's Exhibit 3 at 6. Thus, this portion of Dr. Crisalli's opinion supports the administrative law judge's finding that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986)(en banc), *aff'd*, 9 BLR 1-104 (1986)(en banc). The remainder of Dr. Crisalli's opinion, that claimant's hypoxemia is caused by an atrial shunt unrelated to lung disease, is relevant to determining whether employer has rebutted the amended Section 411(c)(4) presumption that claimant's totally disabling impairment is due to pneumoconiosis. We affirm, therefore, the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to Section 718.204(b)(2)(iv). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-555 (1989)(en banc); Decision and Order at 10.

As employer has not identified any error in the administrative law judge's determination, that the evidence that is supportive of a finding of total disability outweighs the contrary probative evidence at Section 718.204(b)(2), we affirm this finding. *See Skrack*, 6 BLR 1-710. We also affirm, therefore, the administrative law judge's finding that claimant invoked the presumption under amended Section 411(c)(4).

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

Employer next contends that it has rebutted the amended Section 411(c)(4) presumption by establishing that claimant is not totally disabled due to pneumoconiosis. In this regard, employer alleges that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that claimant's totally disabling impairment was due to both smoking and coal dust exposure, over the opinion of Dr. Crisalli, that claimant's exercise-induced hypoxemia was caused solely by an atrial shunt. Employer maintains that, contrary to the administrative law judge's finding, Dr. Crisalli identified the clinical indications that pointed to a shunt as the cause of claimant's hypoxemia, including blood gas study results showing a decrease in the ratio of dead space to tidal volume and clubbing of claimant's fingers. Employer's Brief at 36; Employer's Exhibit 3. Employer argues that the administrative law judge ignored that "there may be a whole host of reasons unrelated to claimant's exercise induced hypoxemia for why claimant's primary

physician would not want to close the shunt." Employer's Brief at 36. Employer argues that, in contrast, the administrative law judge did not question the credibility of Dr. Rasmussen's opinion that claimant's hypoxemia could not be caused by a shunt without being accompanied by pulmonary hypertension. *Id.* at 37.

The administrative law judge acknowledged that Dr. Crisalli attributed claimant's impairment solely to an atrial shunt that was unrelated to lung disease, but stated: "Dr. Crisalli discusses how a shunt can cause elevated levels of carbon dioxide to shunt over to the left side. However, Dr. Crisalli does not fully analyze [c]laimant's *specific shunt* other than saying his exercise hypoxemia was consistent with shunting." Decision and Order at 19 (emphasis added). The administrative law judge further determined that the hospital report containing the diagnosis of claimant's shunt indicated that it was mild and that claimant's treating physician, Dr. Barebo, stated that the shunt "did not look significant enough to warrant closure." *Id*., *quoting* Employer's Exhibit 4. The administrative law judge rationally concluded, therefore, that Dr. Crisalli did not adequately explain whether claimant's "mild" shunt, that "did not look significant enough to warrant closure," could still be the sole cause of the exercise hypoxemia exhibited by claimant. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.2d 473, 479-480 (6th Cir. 2011); Decision and Order at 19. Because the administrative law judge reasonably exercised his discretion in finding that Dr. Crisalli's opinion was insufficient to affirmatively establish that claimant's total respiratory disability did not arise out of, or in connection with, his coal mine employment, we affirm his finding that employer failed to rebut the amended Section 411(c)(4) presumption.[8] *See Morrison*, 644 F.2d at 479-480. Therefore, we need not reach employer's arguments concerning the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) or claimant's arguments on cross-appeal. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni*, 6 BLR 1-1276.

[8]The administrative law judge's rational determination that employer did not rebut the amended Section 411(c)(4) presumption by proving that claimant's impairment did not arise out of, or in connection with, his coal mine employment, also precludes a finding that employer rebutted the presumption by proving that claimant does not have legal pneumoconiosis, i.e., "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge