BRB No. 13-0510 BLA

ARCHIE GLEN ELKINS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEBSTER COUNTY COAL CORPORATION	)	DATE ISSUED: 06/30/2014
	)	
and	)	
	)	
ALLIANCE COAL, LLC	)	
	)	
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 Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Anthony K. Finaldi and Matthew J. Zanetti (Fogle Keller Purdy, PLLC), Louisville, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2009-BLA-5325) of Administrative Law Judge Alice M. Craft rendered on a miner's subsequent claim filed on February 26, 2008,[1] pursuant to the provisions of the Black

[1] Claimant has filed two prior applications for benefits. The first claim, filed on August 28, 1986, was denied by the district director on November 14, 2006. Director's

Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Adjudicating the claim pursuant to 20 C.F.R. Part 718, the administrative law judge credited claimant with thirty-one years of underground coal mine employment, based on a stipulation of the parties. The administrative law judge then found that the new evidence established that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), an element of entitlement previously adjudicated against claimant. She therefore found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(c).[2] Consequently, based on her length of coal mine employment finding and her finding of total respiratory disability, the administrative law judge determined that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).[3] 30 U.S.C. §921(c)(4) (2012). She also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that the administrative law judge erred in weighing the medical opinion evidence of record. Claimant has not responded in this appeal. The Director, Office of Workers'

Exhibit 1. Claimant filed a second application for benefits on October 29, 1987, which was treated as a request for modification. *Id.* The modification request was denied by the district director in a proposed Decision and Order issued on December 14, 1987. *Id.* Claimant filed a second claim on February 9, 1998, which was finally denied by Administrative Law Judge Rudolf Jansen, in a Decision and Order issued on September 25, 2002, finding that claimant failed to establish any of the elements of entitlement. *Id*. The Board affirmed Judge Jansen's denial of benefits in a Decision and Order issued on July 21, 2003. *Id*. Claimant took no further action on this claim.

[2] The applicable language formerly set forth at 20 C.F.R. §725.309(d) is now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013) (to be codified at 20 C.F.R. §725.309(c)).

[3] 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. In pertinent part, amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis if claimant establishes at least fifteen years of underground, or substantially similar, coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish 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) (2012).

Compensation Programs, has filed a letter stating that he is not responding to employer's appeal.

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).

When 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(c); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(2). In this case, claimant's prior claim was denied because he failed to establish any of the elements of entitlement pursuant to 20 C.F.R. Part 718. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements in order to obtain review of the merits of his claim. See 20 C.F.R. §725.309(c)(2), (3); *White*, 23 BLR at 1-3.

Invocation of Amended Section 411(c)(4)

In light of claimant's filing date and the administrative law judge's finding of more than fifteen years of underground coal mine employment, the administrative law judge initially considered whether the newly submitted evidence was sufficient to establish total respiratory disability pursuant to Section 718.204(b)(2) and, thus, whether it was sufficient to establish invocation of amended Section 411(c)(4). Relevant to the issue of total disability, the record contains the results of eight pulmonary function studies administered since the denial of the prior claim, two newly submitted blood gas studies, and three newly submitted medical opinions by Drs. Baker, Houser and Selby.

Weighing the newly submitted pulmonary function studies,[5] the administrative law

[4] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 1, 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] The record contains pulmonary function studies administered on September 2, 2003, September 14, 2004, May 4, 2006, May 8, 2007, October 28, 2008 and June 25, 2009, by Dr. Houser, each of which yielded non-qualifying results. Claimant's Exhibit 3.

judge found that two of the eight studies yielded qualifying values,[6] namely, the pre-bronchodilator portion of the April 29, 2008 study administered by Dr. Baker and the post-bronchodilator portion of the March 2, 2009 study administered by Dr. Selby. Decision and Order at 13, 26; Director's Exhibit 12; Employer's Exhibit 4. Noting that the weight of the newly submitted pulmonary function studies produced non-qualifying values, the administrative law judge determined that they were insufficient to establish total respiratory disability at 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 26. However, the administrative law judge further stated that the pulmonary function study results demonstrated a continued decline in claimant's respiratory condition since April 1986, when claimant left coal mine employment. *Id*.

With regard to the arterial blood gas studies, the administrative law judge found that both of the newly submitted blood gas studies were non-qualifying under 20 C.F.R. §718.204(b)(2)(ii), and, thus, that they did not establish total respiratory disability thereunder. Decision and Order at 16, 26; Director's Exhibit 12; Employer's Exhibit 4.

Relevant to 20 C.F.R. §718.204(b)(2)(iv), the record contains the newly submitted medical opinions of Drs. Baker, Houser and Selby. The administrative law judge found that Dr. Baker[7] and Dr. Houser,[8] claimant's treating physician, opined that claimant is

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In addition, the record contains the April 29, 2008 pulmonary function study administered by Dr. Baker, which yielded qualifying values pre-bronchodilator, but non-qualifying results post-bronchodilator. Director's Exhibit 12. Lastly, the March 2, 2009 pulmonary function study administered by Dr. Selby yielded non-qualifying pre-bronchodilator results, but qualifying post-bronchodilator results. Employer's Exhibit 4.

[6] A qualifying pulmonary function study or blood gas study yields values that are equal to, or less than, the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A non-qualifying study produces results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[7] Dr. Baker, based on his April 29, 2008 examination of claimant, diagnosed coal workers' pneumoconiosis, 1/0; minimal bronchitis; mild resting arterial hypoxemia; and chronic obstructive airway disease with a mild obstructive defect on pulmonary function testing. Director's Exhibit 12. Dr. Baker opined that these conditions were caused by claimant's coal dust exposure and/ or cigarette smoking. *Id*. Dr. Baker then opined that claimant has a Class 2 impairment, which is a 10 to 25% impairment of the whole person. *Id*. In an addendum to his initial report, Dr. Baker revised his opinion regarding the extent of claimant's respiratory disability, noting that it is more properly classified as a Class 1 impairment, or 0% impairment. Director's Exhibit 12 at 26. However, in a supplemental letter dated July 15, 2008, Dr. Baker revised his opinion, based on a further

totally disabled by a pulmonary impairment, Director's Exhibits 12, 15, 20; Claimant's Exhibit 4, whereas Dr. Selby[9] opined that claimant is not totally disabled from a respiratory or pulmonary standpoint, Employer's Exhibit 4. Decision and Order at 26-27.

Employer contends that the administrative law judge erred in weighing the medical opinion evidence of record. Employer contends that the administrative law judge erred in according no probative weight to the opinion of Dr. Selby, arguing that the administrative law judge mischaracterized Dr. Selby's opinion regarding whether claimant is totally disabled by a pulmonary impairment. Employer's Brief at 7-9. Employer further contends that the administrative law judge erred in according more weight to the opinion of Dr. Baker than that of Dr. Selby, arguing that the administrative law judge erred in finding Dr. Baker's opinion well-reasoned. Employer's Brief at 10-11. Employer's arguments are without merit.

Contrary to employer's contention, the administrative law judge rationally found that Dr. Selby's opinion, that claimant retains the respiratory capacity to return to his previous coal mine employment, was not well-reasoned, as it was not adequately

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review of the medical evidence, and opined that claimant's respiratory impairment would be classified as a Class 2 impairment, as he originally opined. Director's Exhibit 15.

[8] Dr. Houser, based on his treatment of claimant since 1986, diagnosed clinical pneumoconiosis and legal pneumoconiosis in the form of moderately severe chronic obstructive pulmonary disease, due to the inhalation of coal dust and claimant's former cigarette smoking. Claimant's Exhibit 4. Dr. Houser further stated that, at the present time, claimant is unable to perform any further pulmonary function studies as a result of the effects from a 2010 stroke. *Id.* Dr. Houser concluded that, on the basis of his care and treatment of claimant for over twenty-five years, claimant has both clinical and legal pneumoconiosis and that, from a respiratory standpoint, claimant has a disabling severe respiratory impairment, which physically precludes him from performing his last coal mine employment. *Id*.

[9] Based on his March 12, 2009 examination of claimant, as well as his review of medical evidence dating back to 1986, Dr. Selby opined that neither clinical nor legal pneumoconiosis was present. Employer's Exhibit 4. In addition, Dr. Selby opined that claimant has the respiratory capacity to perform any and all of his prior coal mine employment duties. *Id*. Dr. Selby diagnosed a moderate obstructive lung disease, but opined that it was due to claimant's many years of cigarette smoking, and that none of the obstructive impairment was due to his coal dust exposure. *Id*. Additionally, Dr. Selby stated that the "coal mine protected [claimant] from even more cigarette smoke inhalation." *Id.*

supported by its underlying documentation. Decision and Order at 27. Specifically, the administrative law judge reasonably found that Dr. Selby's opinion was not consistent with the results of his pulmonary function studies, which showed respiratory impairment. Moreover, the administrative law judge acted within her purview when she found that Dr. Selby relied on the degree of impairment claimant had when he left coal mining in 1986, rather than the degree of impairment he had at the time Dr. Selby examined claimant in 2009. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 623-24, 11 BLR 2-147, 2-148 (6th Cir. 1988); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 27.

With respect to employer's challenge to the administrative law judge's finding that Dr. Baker's opinion was well-reasoned, the administrative law judge properly considered the evidence upon which Dr. Baker based his opinion and found that the objective studies upon which Dr. Baker based his opinion were supportive of his conclusion. Decision and Order at 26-27. Contrary to employer's contention, the administrative law judge rationally found that Dr. Baker's opinion was well-reasoned, as it was supported by its underlying documentation. The administrative law judge was not required, in discussing Dr. Baker's opinion at Section 718.204(b)(2)(iv), to weigh his opinion against the weight of the non-qualifying pulmonary function studies. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (holding that a reasoned opinion is one in which the administrative law judge finds the physician's underlying documentation adequate to support his conclusions). Because the administrative law judge acted within her discretion in finding this opinion well-reasoned and documented, based on its underlying documentation, we affirm her decision to accord Dr. Baker's opinion probative value.[10] *Id*.

Moreover, contrary to employer's contention, the administrative law judge properly considered Dr. Baker's opinion, as well as all of the like and unlike evidence, in finding that claimant established a total respiratory disability pursuant to Section 718.204(b). 20 C.F.R. §718.204(b)(2); s*ee Fields*, 10 BLR at 1-22; *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987) (en banc); Decision and Order at 27-28.

[10] We affirm the administrative law judge's decision to accord determinative weight to the opinion of Dr. Houser, claimant's treating physician, as unchallenged by employer on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 27.

Rebuttal of Amended Section 411(c)(4)

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[11] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *See* 30 U.S.C. §921(c)(4) (2012); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 33-35.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis, arguing that the administrative law judge erred in failing to accord probative weight to the opinion of Dr. Selby. In evaluating whether employer disproved the existence of both clinical and legal pneumoconiosis, the administrative law judge considered the opinions of Drs. Selby, Baker and Houser. Dr. Selby opined that claimant does not suffer from either clinical or legal pneumoconiosis, but suffers from severe obstructive pulmonary disease due to cigarette smoking. Employer's Exhibit 4. In contrast, Drs. Baker and Houser diagnosed claimant with clinical pneumoconiosis, as well as chronic obstructive pulmonary disease caused by a combination of cigarette smoking and coal mine dust exposure. Director's Exhibits 12, 15, 20; Claimant's Exhibit 4.

[11] The regulation at 20 C.F.R. §718.201(a) provides:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). "'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).

Weighing the medical opinions, the administrative law judge discredited Dr. Selby's opinion because she found it to be inadequately explained. Decision and Order at 32-33. Specifically, the administrative law judge permissibly discounted Dr. Selby's opinion, in part, because he failed to adequately explain why claimant's thirty-one years of coal mine dust exposure could not have contributed to his pulmonary impairment, along with his cigarette smoking. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *Crockett Colleries, Inc. v. Barrett,* 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Director, OWCP v. Rowe,* 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 33. Because the administrative law judge provided valid bases for according less weight to the opinion of Dr. Selby, the only opinion supportive of employer's burden of establishing rebuttal, we need not address employer's remaining arguments regarding the weight she accorded to his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We, therefore, affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis.[12] *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Because claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, and employer failed to rebut the presumption, we affirm the administrative law judge's award of benefits.

[12] Because employer does not challenge the administrative law judge's findings that employer failed to disprove either the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or disability causation pursuant to 20 C.F.R. §718.204(c), these findings are affirmed. *Skrack*, 6 BLR at 1-711.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge