U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0323 BLA

TONY N. KOURIANOS Claimant-Respondent v. HIDDEN SPLENDOR RESOURCES, INCORPORATED and ROCKWOOD CASUALTY INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 03/29/2018 DECISION and ORDER

Appeal of the Decision and Order of Paul R. Almanza, Administrative Law Judge United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Cheryl L. Intravaia (Feirich/Mager/Green/Ryan), Carbondale, Illinois, for employer/carrier.

Rita Roppolo (Kate S. O'Scannlain, Solicitor of Labor; Maia S. Fisher, 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: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order (2014-BLA-05171) of Administrative Law Judge Paul R. Almanza awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on June 27, 2012.

After crediting claimant with 27.27 years of underground coal mine employment,[1] the administrative law judge found that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[2] The administrative law judge further determined that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that it is the responsible operator. Employer also contends that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer also contends that the administrative law judge erred in finding that it did not rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a

[1] Claimant's coal mine employment was in Utah. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

limited response, urging affirmance of the administrative law judge's designation of employer as the responsible operator. In separate reply briefs, employer reiterates its previous contentions of error.[3]

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. 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). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-55 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

Responsible Operator

Employer initially challenges its designation as the responsible operator. The responsible operator is the "potentially liable operator, as determined in accordance with [20 C.F.R.] §725.494, that most recently employed the miner." 20 C.F.R. §725.495(a)(1). A coal mine operator is a "potentially liable operator" if it meets the criteria set forth at 20 C.F.R. §725.494(a)-(e), one of which is that the operator must have employed the miner for a cumulative period of not less than one year.

Procedural Background

The district director issued a Notice of Claim to employer on October 23, 2012, identifying it as a potentially liable operator. Director's Exhibit 25. Although employer initially disputed that it employed claimant as a miner for a cumulative period of at least one year, it subsequently filed an amended response and accepted liability as the responsible operator. Director's Exhibits 26, 27. On February 6, 2013, employer's Senior Staff Accountant faxed documentation to the district director indicating that claimant worked for employer "[i]n the mine" from December 26, 2006 to April 11, 2007 and then from November 16, 2010 to January 21, 2011. Director's Exhibit 11. Claimant also worked for employer "outside at the loadout" from April 5, 2011 to October 14, 2011. *Id.*

The district director issued a Schedule for the Submission for Additional Evidence on May 8, 2013, identifying employer as the named responsible operator based on its

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding of 27.27 years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 9.

concession.[4] Director's Exhibit 28. The district director also preliminarily determined that claimant was entitled to benefits. *Id*. Employer responded to the schedule and disputed claimant's entitlement to benefits, but again conceded that it was the responsible operator. Director's Exhibit 29. The district director then issued a Proposed Decision and Order, finding that employer was the responsible operator and that claimant was entitled to benefits. Director's Exhibit 30. Employer requested a hearing, and the case was forwarded to the Office of Administrative Law Judges (OALJ) by the district director. Director's Exhibits 32, 37. In sending the case to the OALJ, the district director indicated that the responsible operator issue was uncontested. Director's Exhibit 37.

Before the administrative law judge, claimant testified with respect to the nature of the work that he performed for employer. Specifically, claimant stated that the "very last section" of his employment involved work as a mine security guard and lasted for four to five months. Hearing Transcript (Tr.) at 51-57, 64-71. Claimant also testified that this work did not expose him to coal mine dust because the mine was not operational during this time. *Id*. Based on claimant's testimony, employer requested that the administrative law judge allow it to withdraw its responsible operator concession. Tr. at 60-63, 71-72; Employer's Post-Hearing Motion to Withdraw Responsible Operator Stipulation. Employer argued that it should be dismissed as responsible operator because claimant's time as a mine security guard did not constitute coal mine employment and, once that time was deducted from claimant's time with employer, claimant worked for employer for a cumulative period of less than one year. *Id*.

In an Order issued on April 12, 2016, the administrative law judge denied employer's request to withdraw its responsible operator concession, finding that the nature of claimant's employment with employer was reasonably ascertainable when the claim was before the district director. April 12, 2016 Order at 2-3. Therefore, the administrative law judge found that he was precluded from reconsidering the responsible operator issue pursuant to 20 C.F.R. §725.463. *Id*.

Discussion

Employer argues that the administrative law judge erred in declining to reconsider the responsible operator issue, notwithstanding its concession to the district director.

[4] The district director also issued a Notice of Claim to another operator, West Ridge Resources, which disputed that it was a potentially liable operator. Director's Exhibits 23, 25. Based on employer's concession that it was the responsible operator, the district director dismissed West Ridge Resources as a potentially liable operator. Director's Exhibit 31.

Employer's Brief at 4-13. We disagree. In any case referred to the OALJ for a hearing, the district director is required to provide a "statement . . . of contested and uncontested issues in the claim." 20 C.F.R. §725.421(b)(7). The regulations further provide that "the hearing shall be confined to those contested issues which have been identified by the district director . . . or any other issue raised in writing before the district director." 20 C.F.R. §725.463(a). An administrative law judge may consider a new issue "only if such issue was not reasonably ascertainable by the parties at the time the claim was before the district director." 20 C.F.R. §725.463(b).

The administrative law judge found that the time that claimant worked at the "[l]oadout," as listed on the documentation faxed to the district director by employer, corresponds with the time that claimant testified that he worked as a security guard. Decision and Order at 4. As the administrative law judge noted, employer's Senior Staff Accountant submitted the document that distinguished the time period that claimant worked "in the mine" and the period he worked "outside at the [l]oadout."[5] April 12, 2016 Order at 2-3; *see* Director's Exhibit 11. Therefore, the administrative law judge found that employer could have ascertained the nature of claimant's job duties "at the [l]oadout" by "interviewing its own agent regarding the evidence it submitted." *Id*. Contrary to employer's argument, the administrative law judge did not abuse his discretion in finding that claimant's job duties with employer were reasonably ascertainable when this matter

[5] We reject employer's argument that it did not have time to investigate the nature of claimant's work because of the limited time frame in which to submit evidence before the district director. Employer's Brief at 12-13. Specifically, employer argues that it had ninety days from the issuance of the October 23, 2012 Notice of Claim to submit additional documentary evidence, which corresponds to January 21, 2013. *Id*. Employer contends that the February 6, 2013 fax from its Senior Staff Accountant was brought to the attention of its counsel on May 13, 2013, well past the ninety-day deadline. *Id*. at 13 n.4. However, as the Director, Office of Workers' Compensation Programs, accurately notes, employer never sought an extension of the ninety-day deadline from the district director. Director's Brief at 3. We note further that employer determined the terms of claimant's work and therefore normally would have records relevant to the nature of his employment (job title, etc.). Employer has not averred that it had no records or access to relevant personnel with the requisite information. Rather, it has argued that its counsel lacked timely notice of the relevant information. However, the test is not that the information was not readily ascertainable by counsel, given the information furnished up to that point by the represented party, it is that it was not reasonably ascertainable by the parties. *See* 20 C.F.R. §725.463(b).

was before the district director.[6] *Dempsey*, 23 BLR at 1-55; *Clark*, 12 BLR at 1-153; *see* April 12, 2016 Order at 2-3. In light of this finding, the administrative law judge properly found that he was precluded from considering the responsible operator issue after employer conceded it before the district director. 20 C.F.R. §725.463. Therefore, we affirm the finding that employer is the responsible operator.

Invocation of the Section 411(c)(4) Presumption

Employer argues that the administrative law judge erred in finding that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2). A miner is totally disabled if the miner has a respiratory or pulmonary impairment which, standing alone, prevents the miner from performing his usual coal mine work. 20 C.F.R. §718.204(b)(1). A claimant may establish total disability using any of four types of evidence: pulmonary function study evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, and medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc).

The administrative law judge found that the pulmonary function study and arterial blood gas study evidence was "equivocal," and, therefore, insufficient to support a finding of a total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii).[7] Decision and Order at 19. However, the administrative law judge found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id*.

Employer contends that the administrative law judge erred in his consideration of the arterial blood gas study and medical opinion evidence.[8] The administrative law judge

[6] We note that under the regulation the test is whether the issue was *not* reasonably ascertainable by the parties at the time the claim was before the district director. 20 C.F.R. §725.463(b).

[7] The administrative law judge did not make a finding pursuant to 20 C.F.R. §718.204(b)(2)(iii). However, a review of the record does not reveal any evidence of cor pulmonale with right-sided congestive heart failure. Claimant is therefore precluded from establishing total disability pursuant to this subsection.

[8] Employer argues that the administrative law judge erred in finding that the pulmonary function study evidence was "equivocal." Employer's Brief at 18. Employer asserts that all of the studies are non-qualifying and, therefore, this evidence unequivocally establishes that claimant has no obstructive respiratory impairment. *Id*. However, as

considered two arterial blood gas studies conducted on May 26, 2010 and August 23, 2012. Decision and Order at 12-13; Director's Exhibit 16; Employer's Exhibit 8. The administrative law judge found that the May 26, 2010 and August 23, 2012 resting blood gas studies were non-qualifying,[9] but that the exercise blood gas study conducted on August 23, 2012 was qualifying.[10] Decision and Order at 19. The administrative law judge assigned more weight to the more recent blood gas study and found that the arterial blood gas study evidence was "equivocal" on the issue of total disability. *Id.*

Employer argues that the administrative law judge erred in weighing the arterial blood gas study evidence. Employer's Brief at 19. Specifically, employer argues that the administrative law judge erred in finding that the August 23, 2012 exercise blood gas study, which was taken in Price, Utah at an elevated altitude, supported a finding of total disability. *Id*. Although employer concedes that this study produced qualifying values under the table at Appendix C to 20 C.F.R. Part 718 for the applicable altitude range of 3000 to 5,999 feet,[11] employer argues that Drs. Zaldivar and Selby credibly explained why this study was still "normal." *Id*. Therefore, employer argues that the arterial blood gas study evidence is not "equivocal." *Id*. We disagree. Because the relevant inquiry at 20

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discussed below, the administrative law judge ultimately found that claimant established total disability based upon Dr. Gagon's credible diagnosis of arterial hypoxemia, evidenced by an exercise arterial blood gas study. Decision and Order at 13-14, 19. As pulmonary function studies and arterial blood gas studies measure different types of impairment, the administrative law judge's error, if any, in his consideration of the pulmonary function study evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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

[10] The May 26, 2010 blood gas study does not include any exercise blood gas results. Employer's Exhibit 8.

[11] As the administrative law judge recognized, the August 23, 2012 exercise blood gas study was performed at an altitude of 3,000 to 5,999 feet above sea level and produced an arterial pCO2 value of 33. Decision and Order at 13; Director's Exhibit 16. Under the regulatory criteria, blood gas studies performed at this altitude and with this arterial pCO2 value are qualifying for total disability if they produce a corresponding arterial pO2 value equal to or less than 62. 20 C.F.R. Part 718, Appendix C. The August 23, 2012 exercise blood gas study produced an arterial pO2 value of 59. Director's Exhibit 16.

C.F.R. §718.204(b)(2)(ii) is whether the arterial blood gas studies "show the values listed in Appendix C to this part," the administrative law judge did not err in finding that the August 23, 2012 exercise blood gas study was qualifying for total disability under the regulations.

In considering the medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge initially found that claimant's usual coal mine work was that of a fire boss and that this work required medium exertional labor.[12] Decision and Order at 10. The administrative law judge then weighed the medical opinions of Drs. Gagon, Zaldivar, and Selby. *Id*. at 19.

Based on his examination, Dr. Gagon diagnosed a moderate respiratory impairment, evidenced by subjective chronic shortness of breath and a reduction in the pO2 value with exercise on the August 23, 2012 arterial blood gas study. Director's Exhibit 16. In a supplemental report, Dr. Gagon disagreed with Dr. Zaldivar that claimant's exercise pO2 results were normal based on the altitude of the study. Director's Exhibit 39. Dr. Gagon explained that the Department of Labor (DOL) regulations take into account the altitude of arterial blood gas studies, and that the August 23, 2012 arterial blood gas study "indicate[d] hypoxemia with exercise meeting the requirements for disability" at the 3000 to 5,999 altitude range. *Id*. In his deposition, Dr. Gagon conceded that the exercise pO2 value itself would be considered normal based on the range used by Castleview Hospital, where the study was conducted. Employer's Exhibit 12 at 11-12. However, he reiterated that the August 23, 2012 blood gas study was still "abnormal" based on the drop in the pO2 value from the resting to exercise blood gas study. *Id*. After claimant informed Dr. Gagon of the physical work involved in being a fire boss, Dr. Gagon opined that claimant would not be able to perform that physical work and would be totally disabled. *Id*. at 15-17.

In contrast to Dr. Gagon, both Dr. Zaldivar and Dr. Selby opined that claimant was not totally disabled by a respiratory or pulmonary impairment. Employer's Exhibits 2-5. They acknowledged that claimant's oxygen levels were reduced when he went from rest to exercise on the August 23, 2012 blood gas study, but opined that the exercise value was

[12] The administrative law judge found that, as a fire boss, claimant was required to perform pre-shift and weekly examinations of the coal mining operations and coal mining equipment, and wear a tool belt that weighed thirty-two pounds or more. Decision and Order at 10. Because employer does not challenge the administrative law judge's findings that claimant's usual coal mine employment was that of a fire boss and that this position required medium exertional labor, they are affirmed. *See Skrack*, 6 BLR at 1-711.

still not low enough to evidence a respiratory or pulmonary impairment.[13] Employer's Exhibits 2 at 8-9; 5 at 10-11.

In explaining why claimant's exercise blood gas values were normal, Drs. Zaldivar and Selby disputed whether Appendix C and the DOL regulations accurately assess the effects of age, altitude, and barometric pressure on arterial blood gas study results. Employer's Exhibits 2-5. Drs. Zaldivar and Selby explained that the DOL's disability standards in Appendix C do not accurately assess the existence of a respiratory or pulmonary impairment because the standards are based on too broad a range of altitudes within which a single blood gas measurement is considered disabling. Employer's Exhibits 2 at 1-2, 4-9; 3 at 32-33. Both doctors explained that normal pO2 values are expected to drop linearly as altitude increases and, therefore, based on the exact altitude of Price, Utah, one can assess a more precise pO2 value to determine the existence of a respiratory impairment. *Id*. Dr. Zaldivar indicated that the exact altitude of Price, Utah was 5,566 feet and Dr. Selby indicated that the exact altitude was between 5,566 feet and 5957 feet. *Id*. Utilizing these altitude figures, Drs. Zaldivar and Selby indicated that the exercise blood gas study was normal, notwithstanding the DOL regulations.[14] *Id*. Therefore, they opined that claimant does not suffer from a respiratory or pulmonary impairment. *Id*.

The administrative law judge assigned "great weight" to Dr. Gagon's opinion because he found that it was well-reasoned and documented, and because he found that Dr.

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[13] Dr. Zaldivar stated that the "only abnormality in these blood gases is the fact that the pO2 dropped with exercise," but opined that the post exercise values were still normal. Employer's Exhibit 2 at 8-9. Dr. Selby indicated that claimant's blood gas values went down, but went from "normal" to "[s]till within normal." Employer's Exhibit 5 at 10-11.

[14] Dr. Zaldivar cited an article entitled *Arterial blood gas reference value for sea level and an altitude of 1,400 meters*, and Table 26 in *Clinical pulmonary function testing, a manual of uniform laboratory procedures, Second Edition* published by the Intermountain Thoracic Society in 1984. Employer's Exhibit 2 at 8-9. The article indicated that at 1400 meters, which is lower than the altitude of Price, Utah where claimant's arterial blood gas study was conducted, normal pO2 is 70.8, plus or minus 4.9. *Id*. The manual indicated that a normal pO2 should fall in the range between 57 and 68. Dr. Selby noted that the Intermountain Thoracic Society is based in Salt Lake City, Utah. *Id*. Dr. Selby explained that the more accurate qualifying pO2 value should be from the table in Appendix C for an altitude above 6000 feet, because the altitude of Price, Utah was close to 6000 feet. Employer's Exhibit 3 at 32-33. Therefore, he applied the value of 57 to assess whether this study supported total disability. *Id*. Because the study produced a pO2 value of 59, both doctors opined that it was normal. Director's Exhibit 16.

Gagon discussed the specific duties of claimant's job as a fire boss. Decision and Order at 19. The administrative law judge found that neither Dr. Zaldivar nor Dr. Selby demonstrated a clear understanding of the detailed exertional requirements of claimant's work. Further, he found their opinions that claimant's testing results were normal to be inconsistent with the DOL regulations and the table at Appendix C to 20 C.F.R. Part 718. Therefore, the administrative law judge assigned their opinions little weight. *Id*.

We reject employer's argument that the administrative law judge erred in finding disability established based on his weighing of the medical opinion evidence, as he permissibly found that, in Dr. Gagon's deposition testimony finding disability, Dr. Gagnon considered the specific exertional requirements of claimant's usual coal mine employment, and that Drs. Zaldivar and Selby did not demonstrate that they were aware of claimant's specific job requirements.[15] *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23

[15] Any error committed by the administrative law judge as a consequence of his determination that the opinions of Drs. Zaldivar and Selby were inconsistent with the regulations relating to qualifying arterial blood gas studies is therefore harmless. *See Larioni*, 6 BLR at 1-1278. We note that a medical opinion is to be evaluated based on its documentation and reasoning. *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-315 (10th Cir. 2010). The regulations and appendix pertaining to qualifying arterial blood gas studies are not dispositive as to the credibility of a doctor's opinion that a given blood gas level is "normal" although they are relevant. Here, Drs. Zaldivar and Selby argued that the qualifying figures in the regulations were insufficiently adjusted for the testing altitude. Dr. Zaldivar argued that other references were better, and Dr. Selby argued that the next referenced qualifying point should be employed. The administrative law judge did not consider the merits of their arguments and their documentation. We observe that in response to comments received before the final version of Appendix C was promulgated, the DOL acknowledged that altitude affects arterial blood gas values, but explained that there is not a "straight-forward linear lowering of arterial blood oxygen tension as the oxygen pressure in the atmosphere decreases with altitude." 45 Fed. Reg. 13,678, 13,712 (Feb. 29, 1980). Consequently, the DOL adopted a sliding scale that designated three levels of altitude. *Id.* The DOL also changed the tables of Appendix C to establish a level of arterial oxygen tension below which a miner can be considered to be disabled regardless of age. *Id*. Therefore, the values set forth in Appendix C were determined by the DOL after consideration of elevation and the advanced age of many miners filing claims for benefits. *Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 893-96, 13 BLR 2-348, 2-355-56 (7th Cir. 1990); *Big Horn v. Director, OWCP* [*Alley*], 897 F.2d 1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990)(explaining that tables in Appendix C reflect the DOL's best estimate of the extent to which altitude may affect blood gas tests in the black lung context).

BLR 2-250, 2-258-60 (7th Cir. 2005). Because the administrative law judge permissibly found that Dr. Gagon's opinion was entitled to greater weight because it was well-reasoned and documented and he displayed a complete understanding of the exertional requirements of claimant's usual coal mine employment while those of employer's doctors did not, we affirm his determination of disability.[16] *See Gunderson v. U.S. Dep't of Labor*, 601 F.3d 1013, 1024, 24 BLR 2-297, 2-315 (10th Cir. 2010); *Killman*, 415 F.3d at 721-22, 23 BLR at 2-258-60; *Poole*, 897 F.2d at 893-95, 13 BLR at 2-355-56; *Clark*, 12 BLR at 1-155.

We also affirm the administrative law judge's conclusion that the evidence, when weighed together, established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Shedlock*, 9 BLR at 1-198; Decision and Order at 19. In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment and the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[17] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(ii). The administrative law

[16] Drs. Zaldivar and Selby agreed that there was an abnormality in claimant's blood gas study results because the oxygen level decreased with exercise. Thus, the administrative law judge reasonably looked to whether the physicians adequately understood the exertional demands of claimant's usual coal mine work in declaring him not totally disabled. *See Killman v. Director, OWCP*, 415 F.3d 716, 721-22, 23 BLR 2-250, 2-258-60 (7th Cir. 2005).

[17] "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 definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment that is significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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." 20 C.F.R. §718.201(a)(1).

judge found that employer failed to establish rebuttal by either method.

In determining whether employer established that claimant does not have legal pneumoconiosis,[18] the administrative law judge considered the medical opinions of Drs. Zaldivar and Selby.[19] Decision and Order at 22-23. Dr. Zaldivar opined that any respiratory or pulmonary impairment evidenced by claimant's arterial blood gas studies would be unrelated to coal mine dust exposure and would be due to pulmonary fibrosis or bronchiolitis caused by cigarette smoking. Employer's Exhibits 2, 4. Dr. Selby opined that claimant "does not have any permanent impairment of a respiratory nature," but that if claimant did suffer from a permanent respiratory or pulmonary impairment based on arterial blood gas testing, it was due to the effects of asthma and would be unrelated to coal mine dust exposure. Employer's Exhibit 3 at 31-32.

The administrative law judge assigned little weight to Dr. Zaldivar's opinion because he found that it was unpersuasive, explaining that it was inconsistent with the regulations and was based on generalities, rather than claimant's specific condition. Decision and Order at 21. The administrative law judge assigned little weight to Dr. Selby's opinion, finding that his diagnosis of asthma was not well-documented and was inconsistent with the other medical evidence of record. *Id.*

In challenging the administrative law judge's finding on the issue of legal pneumoconiosis, employer asserts that the record contains no evidence of a chronic lung disease or impairment that can meet the definition of legal pneumoconiosis. Employer's Brief at 23-25. However, as discussed *supra*, Dr. Gagon's credible medical opinion established that claimant suffers from a disabling moderate respiratory impairment with exercise, as evidenced by his arterial blood gas studies. Therefore, employer was required to establish that this impairment was not significantly related to, or substantially aggravated by, coal mine dust exposure. *See Energy W. Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 821-22, BLR (10th Cir. 2017); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, 743 F.3d 1331, 1345-46, 25 BLR 2-549, 2-567-68 (10th Cir. 2014); *Minich v. Keystone*

[18] The administrative law judge found that employer established that claimant does not have clinical pneumoconiosis. Decision and Order at 20.

[19] Employer argues that the revised regulation at 20 C.F.R. §718.305(d) impermissibly requires a showing that the miner does not have legal pneumoconiosis. Employer's Brief at 23-24 n.6. This argument was recently rejected by the Unites States Court of Appeals for the Tenth Circuit in *Consolidation Coal Co. v. Director, OWCP* [*Noyes*], 864 F.3d 1142, BLR (10th Cir. 2017). For the reasons set forth in *Noyes*, we reject employer's argument.

Coal Mining Co., 25 BLR 1-149, 154-56 (2015) (Boggs, J., concurring and dissenting); 20 C.F.R. §718.201.

Employer asserts that "[e]ven if there had been a diagnosis of legal pneumoconiosis, both Dr. Zaldivar and Dr. Selby specifically provided opinions as to why [claimant] did not have legal pneumoconiosis." Employer's Brief at 25. Employer, however, alleges no specific error in regard to the administrative law judge's reasons for discrediting their opinions. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Because the Board is not empowered to reweigh the evidence, or to engage in a de novo proceeding or unrestricted review of a case brought before it, the Board must limit its review to contentions of error that are specifically raised by the parties. *See* 20 C.F.R. §§802.211, 802.301; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Consequently, we affirm the administrative law judge's finding that employer failed to establish that claimant does not suffer from legal pneumoconiosis.[20] *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal by establishing that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, pursuant to 20 C.F.R. §718.305(d)(1)(ii). We disagree. The administrative law judge rationally discounted the opinions of Drs. Zaldivar and Selby because neither physician diagnosed legal pneumoconiosis, contrary to the administrative law judge's finding. *See Goodin*, 743 F.3d at 1346, 25 BLR at 2-579; *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-713, 2-721 (4th Cir. 2015); Decision and Order at 22. We therefore affirm the administrative law judge's finding that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

[20] Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

I concur:

JUDITH S. BOGGS
Administrative Appeals Judge

ROLFE, Administrative Appeals Judge, concurring:

I agree with my colleagues that the administrative law judge's findings and the award of benefits are supported by substantial evidence. I write separately to indicate I am not convinced the administrative law judge simply disregarded the medical opinions of Drs. Selby and Zaldivar because they conflicted with the regulation regarding the qualifying levels for blood gas studies at 20 C.F.R. §718.204(b)(2)(ii). I believe he provided a rationale for finding their opinions unpersuasive and for choosing to apply the regulatory standard when he noted, accurately, that the DOL regulations already account for the effects of elevation and altitude. *See Big Horn v. Director, OWCP* [*Alley*], 897 F.2d

1052, 1055, 13 BLR 2-372, 2-379 (10th Cir. 1990); Decision and Order at 19. Given that he accurately characterized their opinions and provided a rational basis for rejecting them, his additional statement that he was not "permitted" to consider further altitude adjustments was, at worst, a harmless error, in my view. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

JONATHAN ROLFE
Administrative Appeals Judge