**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0363 BLA

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| JAMES E. RATCLIFF | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| INDEPENDENCE COAL CORPORATION, INCORPORATED | ) | |
| | ) | |
| | ) | DATE ISSUED: 05/26/2016 |
| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

Ann B. Rembrandt (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (12-BLA-5112) of Administrative Law Judge Adele Higgins Odegard 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 subsequent claim filed on September 14, 2010.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least twenty-eight years of qualifying coal mine employment,[3] and found that the new evidence established 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 set forth at Section 411(c)(4).[4] The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues 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 argues that the administrative law judge erred in finding that employer did not rebut the presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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[1] Claimant filed six previous claims in 1981, 1984, 1997, 2004, 2007, and 2009. Director's Exhibits 1-6. The district director denied claimant's most recent prior claim on August 9, 2009, because the evidence did not establish that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b). Director's Exhibit 6.

[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 qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in West Virginia. Director's Exhibits 6, 9. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309(c).

[5] Because employer does not challenge the administrative law judge's finding that

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).

Employer argues 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 specifically argues that the administrative law judge erred in finding that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

The administrative law judge considered three new blood gas studies conducted on April 9, 2011, September 7, 2011, and November 20, 2012. Although the April 9, 2011 and September 7, 2011 arterial blood gas studies produced non-qualifying values,[6] both at rest and during exercise, Director's Exhibit 16; Employer's Exhibit 1, claimant's subsequent resting arterial blood gas study, conducted on November 20, 2012, produced qualifying values. Claimant's Exhibit 4. In considering the new arterial blood gas evidence, the administrative law judge permissibly found that the qualifying arterial blood gas study taken on November 20, 2012, was more probative of claimant's condition because it was the most recent study of record.[7] *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-323, 2-330 (4th Cir. 1998); *Schetroma v. Director,*

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claimant established at least twenty-eight years of qualifying coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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

[7] We reject employer's contention that the administrative law judge erred in not addressing Dr. Zaldivar's comments regarding the various factors that can affect the validity of an arterial blood gas study. Although Dr. Zaldivar cited numerous factors that could affect the results of an arterial blood gas study (mucus in the lungs, the patient's position during testing, an illness, or a mistake made in the laboratory), Employer's Exhibit 5 at 44-45, the doctor did not indicate that any of the these factors undermined the accuracy of the qualifying November 20, 2012 arterial blood gas study.

*OWCP*, 18 BLR 1-19, 1-22 (1993); Decision and Order at 11. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii).

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge considered the medical opinions of Drs. Rasmussen, Houser, Zaldivar, and Basheda. Noting that claimant's April 19, 2011 arterial blood gas study revealed a moderate loss of lung function, Dr. Rasmussen opined that claimant "would likely not be capable of performing work required in his last coal mine job." Director's Exhibit 16. Dr. Houser opined that claimant's diffusion impairment and hypoxemia "would physically preclude him from being able to perform his last [coal mine employment]." Claimant's Exhibit 1. Dr. Zaldivar opined that, if the qualifying November 20, 2012 arterial blood gas study results are valid, claimant's blood gas exchange impairment "would prevent him from going back to work." Employer's Exhibit 5 at 47. Dr. Basheda opined that claimant is not disabled from a pulmonary standpoint from performing his last coal mine employment. Employer's Exhibit 6 at 36.

The administrative law judge accorded less weight to Dr. Basheda's opinion, that claimant is not totally disabled from a pulmonary standpoint, because the doctor underestimated the exertional requirements of claimant's usual coal mine employment.[8] Decision and Order at 16. The administrative law judge also accorded less weight to Dr. Basheda's opinion because the doctor did not have the benefit of reviewing the most recent arterial blood gas study conducted on November 20, 2012, which produced qualifying values. *Id.* The administrative law judge found that the opinions of Drs. Rasmussen, Houser, and Zaldivar, that claimant is disabled from a pulmonary standpoint, were well-reasoned, and entitled to significant weight. *Id.* at 16-17. The administrative

[8] The administrative law judge found that claimant's two most recent coal mine jobs, as a belt foreman and a section foreman, required heavy manual labor. Contrary to employer's contention, the administrative law judge provided a basis for her determination. The administrative law judge noted that claimant testified that his work as a belt foreman required him to "shovel spillage for about six to seven hours per shift," and carry rock dust bags weighing fifty pounds. Decision and Order at 4; Hearing Transcript at 37-38. The administrative law judge noted that claimant's job as a section foreman required him to hang cables weighing sixty pounds four times a day, and set timbers weighing seventy-five pounds for about six to seven hours a day. Decision and Order at 4; Hearing Transcript at 33.

law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer argues that the administrative law judge erred in finding that Dr. Zaldivar's opinion supported a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We disagree. The administrative law judge noted that Dr. Zaldivar conceded that if the qualifying values from claimant's November 20, 2012 arterial blood gas study were valid, claimant would be disabled from a pulmonary standpoint. Decision and Order at 16. Although Dr. Zaldivar cited numerous factors that could affect the results of an arterial blood gas study, *see* n.7, *infra*, the administrative law judge accurately found that the doctor failed to explain how any of these factors impacted the results of the November 20, 2012 study. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's reliance on Dr. Zaldivar's opinion to support a finding of a totally disabling pulmonary impairment.

Employer does not challenge the administrative law judge's discrediting of Dr. Basheda's opinion based on the doctor's failure to address the significance of the most recent arterial blood gas study conducted on November 20, 2012, which produced qualifying values. We, therefore, affirm the administrative law judge's discrediting of Dr. Basheda's assessment of the extent of claimant's pulmonary impairment.[9] *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Because it is supported by substantial evidence,[10] we affirm the administrative law judge's finding that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

[9] In addition, the administrative law judge permissibly discredited Dr. Basheda's opinion that claimant's pulmonary impairment was not totally disabling, in part, because the doctor based his opinion on an inaccurate account of the exertional requirements of claimant's last coal mine employment. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 17. While the administrative law judge found that claimant's last coal mine employment as a belt man required heavy manual labor, Dr. Basheda indicated that claimant's work as a beltman was "not a very exertional job." Employer's Exhibit 6 at 20.

[10] In light of our affirmance of the administrative law judge's reliance upon Dr. Zaldivar's opinion to support a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), we need not address employer's contentions of error regarding the administrative law judge's consideration of the opinions of Drs. Rasmussen and Houser. *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1984).

Moreover, the administrative law judge properly weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order on 17-19. This finding is, therefore, affirmed.[11]

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[12] 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 judge found that employer failed to establish rebuttal by either method. Decision and Order at 20-36.

Because it is unchallenged on appeal, we affirm the administrative law judge's finding that employer failed to establish that claimant does not have clinical pneumoconiosis. *Skrack*, 6 BLR at 1-711; Decision and Order at 32. Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not

[11] In light of our affirmance of the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), we also affirm her determination that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

[12] "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). "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).

have pneumoconiosis.[13] 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption 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). Employer specifically contends that the opinions of Drs. Basheda and Zaldivar are sufficient to establish this second means of rebuttal. We disagree. The administrative law judge rationally discounted Dr. Basheda's opinion that claimant's disability was not due to pneumoconiosis because the doctor did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013). The administrative law judge further found, as was within her discretion, that Dr. Zaldivar did not adequately explain why claimant's pulmonary impairment was not due, in part, to clinical pneumoconiosis.[14] *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); Decision and Order at 35. As the administrative law judge permissibly discounted the opinions of Drs. Basheda and Zaldivar, we affirm the administrative law judge's determination that employer failed to prove that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis, and affirm the award of benefits. *See* 20

[13] Therefore, we need not address employer's contentions of error regarding the administrative law judge's findings with respect to the existence of legal pneumoconiosis. *See Larioni*, 6 BLR at 1-1278.

[14] Dr. Zaldivar testified that, although claimant has radiographic pneumoconiosis, he does not have clinical pneumoconiosis. Employer's Exhibit 5 at 56. Consequently, Dr. Zaldivar's opinion regarding the cause of claimant's pulmonary disability, like that of Dr. Basheda, is undermined by his failure to diagnose clinical pneumoconiosis. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063, 1074, 25 BLR 2-431, 2-452 (6th Cir. 2013); *Island Creek Ky. Mining v. Ramage*, 737 F.3d 1050, 1062, 25 BLR 2-453, 2-473 (6th Cir. 2013).

C.F.R. §718.305(d)(1)(ii).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge