BRB No. 12-0088 BLA

RAY BOGGS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	
	)	DATE ISSUED: 11/28/2012
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams, Rutherford & Reynolds), Norton, Virginia, for claimant.

James W. Herald, III (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (2010-BLA-5725) of Administrative Law Judge Larry S. Merck, awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on October 15, 2008.[1] Director's Exhibit 5.

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. His most recent prior claim, filed on May 23, 2005, was denied by the

In his Decision and Order, the administrative law judge noted that Congress enacted amendments to the Act that became effective on March 23, 2010, and affect claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under amended Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to the employer to rebut the presumption by disproving the existence of pneumoconiosis, or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

The administrative law judge credited claimant with seventeen years of underground coal mine employment,[2] and found that the new evidence established that claimant has a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in the applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that all of the evidence established that claimant is totally disabled. The administrative law judge therefore determined that claimant invoked the Section 411(c)(4) presumption. The administrative law judge further found that employer failed to establish that claimant does not have pneumoconiosis or that claimant's impairment did not arise out of his coal mine employment, and thus failed to 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 claimant is totally disabled, and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption.[3] Employer also contends that the administrative law

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district director on January 3, 2006, for failure to establish that he had a totally disabling respiratory impairment. Director's Exhibit 3 at 11-16.

[2] Claimant's coal mine employment was in Kentucky. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Employer does not challenge the administrative law judge's findings of seventeen years of underground coal mine employment, and that employer did not rebut

judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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).

To establish entitlement to benefits under the Act, a claimant must establish by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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(d); *White v. New White Coal Co.*, 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(d)(2). Claimant's prior claim was denied because he failed to establish the existence of a totally disabling pulmonary or respiratory impairment. Consequently, to obtain review of the merits of his claim, claimant had to submit new evidence establishing that he is totally disabled. 20 C.F.R. §725.309(d)(2), (3).

The administrative law judge considered new pulmonary function studies, arterial blood gas studies, and medical opinions in determining whether claimant is totally disabled. *See* 20 C.F.R. §718.204(b)(2). Of the five new pulmonary function studies, the administrative law judge gave little weight to three studies that he found to be invalid under the quality standards at 20 C.F.R. Part 718, App. B, and he found a fourth study to be inconclusive, because qualified physicians disagreed on whether that study was valid.[4] Decision and Order at 7-9; Director's Exhibit 14 at 22-24; Employer's Exhibits 1, 2, 4 at

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the Section 411(c)(4) presumption by disproving the existence of clinical pneumoconiosis. Those findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] Specifically, the administrative law judge found that the pulmonary function studies administered on January 15, 2009, June 30, 2010, and July 8, 2010, were invalid, and he found that the March 20, 2009 pulmonary function study was inconclusive. Decision and Order at 7-9.

21. The administrative law judge gave full probative weight to the remaining pulmonary function study, performed by Dr. Baker on June 12, 2009, which was both valid and qualifying,[5] and determined that the new pulmonary function study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). Decision and Order at 9; Claimant's Exhibit 2. Pursuant to 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered four non-qualifying blood gas studies and found that the new blood gas study evidence does not support a finding of total disability. *Id*. at 10. Next, the administrative law judge considered medical opinions from Drs. Agarwal, Baker, Rosenberg and Jarboe. *See* 20 C.F.R. §718.204(b)(2)(iv); Director's Exhibit 14; Claimant's Exhibit 2; Employer's Exhibits 1, 2, 6. The administrative law judge gave little weight to Dr. Agarwal's opinion that claimant is totally disabled, because Dr. Agarwal relied on an inconclusive pulmonary function study. The administrative law judge discounted the opinions of Drs. Rosenberg and Jarboe, that claimant is not totally disabled, because he found their opinions to be inadequately reasoned.[6] *Id*. at 10-16. In contrast, the administrative law judge gave full probative weight to Dr. Baker's opinion that claimant has a severe obstructive ventilatory defect, detected on the June 12, 2009 pulmonary function study, and is unable to perform his coal mine employment. *Id*. at 12. Finally, the administrative law judge weighed all of the new evidence and gave the most weight to "the well-reasoned and well-documented medical report of Dr. Baker as supported by the [pulmonary function study], dated June 12, 2009," to find that a preponderance of the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 16.

Employer contends that the administrative law judge erred in finding total disability established based on Dr. Baker's June 12, 2009 medical opinion, because the opinion was based on "only one out of five pulmonary function testing studies which support a finding of total disability." Employer's Brief at 11. We disagree. The administrative law judge reasonably relied on Dr. Baker's opinion, as he found that it was based on a valid, qualifying pulmonary function study. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). To the extent employer argues that the

[5] 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).

[6] The administrative law judge found the opinions of Drs. Jarboe and Rosenberg to be inadequately reasoned in that both doctors noted that they lacked a valid pulmonary function study with which to assess the degree of claimant's ventilatory impairment, yet they opined that claimant is not totally disabled by a respiratory or pulmonary impairment. Decision and Order at 15-16.

administrative law judge erred in failing to find the pulmonary function study administered by Dr. Baker to be invalid, employer's contention lacks merit.[7] Employer's Brief at 10-11. The administrative law judge found that Dr. Baker, who is Board-certified in Internal Medicine and Pulmonary Disease, certified that the June 12, 2009 pulmonary function study was conducted in conformance with the Department of Labor's specifications and instructions. Claimant's Exhibit 2 at 7; Decision and Order at 9. The record reflects that employer did not submit any evidence as to the validity of the June 12, 2009 pulmonary function study. Employer's argument is essentially a request that we reweigh the evidence, which we may not do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Because claimant established that he has at least seventeen years of underground coal mine employment and that he is totally disabled, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

After finding that claimant invoked the Section 411(c)(4) presumption, the administrative law judge properly noted that the burden of proof shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011) (holding that rebuttal requires employer to "affirmatively prove[] the absence of pneumoconiosis," or show that the disease is unrelated to coal mine work); Decision and Order at 17. The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 17-28.

After finding that the x-ray evidence did not disprove the existence of clinical pneumoconiosis, the administrative law judge considered the medical opinion evidence on the existence of legal pneumoconiosis.[8] The administrative law judge determined that

[7] Employer argues that, "In light of four other studies taken in and around the same time as the [June 12, 2009] pulmonary function testing study that was noted by the technician to only reveal 'fair' effort, it was error to award benefits based upon same in light of the weight of the evidence on reliability and acceptability of the pulmonary function testing studies in the first instance." Employer's Brief at 11.

[8] 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).

only Dr. Baker's opinion was well-reasoned and documented, and afforded full weight to his opinion that claimant has a severe obstructive impairment caused by both smoking and coal mine dust exposure. Decision and Order at 22-23; Claimant's Exhibit 2. Drs. Rosenberg and Jarboe opined that claimant does not have legal pneumoconiosis, but the administrative law judge discounted Dr. Rosenberg's opinion as "equivocal, vague, and confusing," and discounted Dr. Jarboe's opinion as "equivocal and not well-reasoned." Decision and Order at 23-26. The administrative law judge therefore found that employer failed to disprove the existence of legal pneumoconiosis. *Id*. at 26.

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Rosenberg and Jarboe when finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have legal pneumoconiosis. Employer's Brief at 11-12. Employer's arguments lack merit.

Addressing the existence of legal pneumoconiosis, Dr. Jarboe observed that valid pulmonary function studies "would be helpful" to assess claimant's ventilatory function, and noted that claimant's arterial blood gas studies showed no impairment of gas exchange, before concluding that "there is no evidence of an impairment of respiration which has been caused by his occupation as a coal worker. Based on the information available, a diagnosis of legal pneumoconiosis cannot be made." Employer's Exhibit 2. Because Dr. Jarboe stated only that the available evidence does not support a diagnosis of legal pneumoconiosis, while the rebuttal standard requires employer to affirmatively prove that claimant does not have legal pneumoconiosis, the administrative law judge reasonably found Dr. Jarboe's opinion insufficient to rebut the Section 411(c)(4) presumption. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Dr. Rosenberg rejected a diagnosis of legal pneumoconiosis during his deposition, when he testified that claimant suffers from both a restrictive and an obstructive respiratory impairment, but opined that claimant's restrictive impairment is unrelated to coal mine dust exposure.[9] Employer's Exhibit 6 at 13. Dr. Rosenberg asserted that a restrictive impairment due to coal mine dust exposure could occur only in a miner with "advanced pneumoconiosis or progressive massive fibrosis," which claimant does not have. Employer's Exhibit 6 at 13. Therefore, Dr. Rosenberg opined that claimant's "poor muscle strength, his neuropathy, [and] general body weakness . . . would have to be the explanation for his restriction if indeed he did have functional impairment." *Id*.

[9] Review of the record reflects that Dr. Rosenberg did not specifically address whether claimant's obstructive impairment is related to coal dust exposure. Employer's Exhibit 6.

As the administrative law judge noted, Dr. Rosenberg's opinion, that coal mine dust exposure could be a cause of a miner's impairment only if the miner has advanced or complicated pneumoconiosis, is inconsistent with the definition of legal pneumoconiosis. Decision and Order at 25. Legal pneumoconiosis includes "any chronic restrictive or obstructive pulmonary disease" or "impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121-22 (6th Cir. 2000) (holding that fibrosis is not a required element of legal pneumoconiosis). Thus, the administrative law judge reasonably found Dr. Rosenberg's opinion insufficient to rule out the existence of legal pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9. We therefore affirm the administrative law judge's finding that employer failed to rebut the presumption by establishing that claimant does not have legal pneumoconiosis.

Finally, we reject employer's argument that the administrative law judge erred in discounting the opinions of Drs. Rosenberg and Jarboe to find that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of his coal mine employment. The administrative law judge permissibly discredited those opinions, because neither physician diagnosed claimant with pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom.*, *Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consol. Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order at 28. Therefore, we affirm the administrative law judge's finding that employer failed to establish that claimant's impairment did not arise out of his employment, and therefore failed to rebut the presumption.

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

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge