BRB No. 12-0092 BLA

LUTHER W. MANNS (deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KRISTI-ANN COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/29/2012
	)	
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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonnell (Black Lung Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (09-BLA-5292) 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 (Supp. 2011) (the Act). This case involves a miner's claim filed on April 11, 2008.

The administrative law judge noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this claim, Section 1556 of Public Law No. 111-148 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 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 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); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant[1] established twenty-three years of underground coal mine employment,[2] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. The administrative law judge also found that employer failed to establish either that claimant did not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge 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 failed to rebut the Section 411(c)(4) 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.

[1] Claimant died on November 19, 2011. Claimant's Brief at 2.

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction 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).

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).

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

Employer contends that the administrative law judge 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 evidence established the existence of a totally disabling respiratory impairment.[3]

After finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), the administrative law judge considered whether 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 Fino. Dr. Rasmussen examined claimant on August 11, 2010.[4] Dr. Rasmussen interpreted the non-qualifying results of an August 11, 2010 exercise arterial blood gas study[5] as revealing "a moderate loss of lung function as reflected principally by [the] impairment in oxygen transfer during very light exercise." Claimant's Exhibit 6. Dr. Rasmussen opined that claimant's moderate pulmonary impairment would render him incapable of performing his last job as a scoop operator, which he noted required "heavy and very heavy manual labor." *Id.*

[3] Because employer does not challenge the administrative law judge's finding that claimant established twenty-three years of underground coal mine employment, that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] Dr. Rasmussen previously examined claimant on May 12, 2008. Director's Exhibit 11. As part of this examination, Dr. Rasmussen administered an arterial blood gas study. *Id.*

[5] 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).

During his September 23, 2010 deposition, Dr. Rasmussen explained how the May 12, 2008 exercise blood gas study results supported his opinion:

> [T]he oxygen consumption that [claimant] made during exercise was 16.9 milliliters per kilogram per minute. Now, that would be a moderate exercise level. He actually required, to do his work, which was heavy and some very heavy, say, 25 to 30 milliliters of oxygen per kilogram per minute, so that exercise study in which his blood gases became quite abnormal was much less than that which he would require during his regular work, so it's obvious that he could not continue to perform at those – at the levels that he achieved, let alone at the higher levels that his work required. So, on that basis, I can say that he does not retain the pulmonary capacity to perform his regular coal mine work.

Claimant's Exhibit 15 at 24.

Dr. Rasmussen also explained how claimant's August 11, 2010 exercise blood gas study results supported his opinion:

> [Claimant] did achieve a little higher exercise level and he did exceed his anaerobic threshold, I think, normally at about 63 percent of predicted oxygen uptake. His pO2 was not as low as it was in 2008, it was within two milliliters of mercury of the listing by the Department of Labor, but the alveolar to arterial oxygen tension gradient was more abnormal, which probably is a reflection of the increased work that he did, but, actually, even though the pO2 and pCO2 values were not as abnormal as they were in 2008, his actual gas exchange impairment was greater based on that alveolar to arterial oxygen tension gradient.
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> [The abnormal alveolar to arterial oxygen tension gradient] indicates that [claimant] has an abnormal resistance to transferring oxygen from his lung to the blood.

Claimant's Exhibit 15 at 28-29.

Dr. Houser reviewed the medical evidence. Dr. Houser opined that the results of claimant's exercise blood gas studies conducted on May 12, 2008 and August 11, 2010 demonstrated "exercise-induced hypoxemia." Claimant's Exhibit 17. Dr. Houser,

therefore, opined that claimant did not retain the respiratory capacity to perform his last coal mine employment as a scoop operator.[6] *Id.*

Dr. Zaldivar examined claimant on August 20, 2008. As part of his examination, Dr. Zaldivar conducted a blood gas study. Although the resting blood sample clotted and could not be analyzed, Dr. Zaldivar interpreted the exercise portion of the August 20, 2008 blood gas study as normal. Employer's Exhibits 2, 3, 5. In a report dated September 30, 2008, Dr. Zaldivar opined that there was "no pulmonary impairment." Employer's Exhibit 2. Dr. Zaldivar subsequently reviewed the blood gas studies conducted by Dr. Rasmussen on May 12, 2008 and August 11, 2010, noting that both of the exercise blood gas studies were "abnormal." Employer's Exhibit 5. Dr. Zaldivar opined that there were "no physiological bases for the blood gases to deteriorate with exercise unless [claimant] has developed left ventricular dysfunction." Employer's Exhibit 5.

Dr. Fino reviewed the medical evidence, including the results of the exercise studies conducted on May 12, 2008 and August 20, 2008. Dr. Fino noted that while the May 12, 2008 exercise blood gas study results revealed an impairment in oxygen transfer, the August 20, 2008 exercise blood gas study did not. Employer's Exhibit 4. Based upon these results, Dr. Fino opined that claimant "has a reversible oxygen transfer abnormality," and was "not disabled." *Id.*

The administrative law judge found that Dr. Rasmussen's opinion was well-reasoned, and entitled to significant weight. Decision and Order at 19. The administrative law judge further found that Dr. Rasmussen's opinion was supported by that of Dr. Houser. *Id.* The administrative law judge found that the opinions of Drs. Zaldivar and Fino, that claimant was not totally disabled from a pulmonary standpoint, were not well-reasoned. *Id.* at 19-20. The administrative law judge, therefore, found that the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer argues that the administrative law judge erred in crediting Dr. Rasmussen's opinion, that claimant was totally disabled from a pulmonary standpoint,

[6] As the administrative law judge accurately noted, claimant testified that, as a scoop operator, he frequently rock dusted, using multiple bags of rock dust, and generally shoveled for several hours during his shift. Decision and Order at 3; Hearing Transcript at 45-46.

over Dr. Zaldivar's contrary opinion.[7] We disagree. The administrative law judge found that Dr. Rasmussen provided a detailed explanation of how claimant's exercise blood gas study results supported his opinion that claimant suffered from a totally disabling respiratory impairment. Decision and Order at 19. Consequently, the administrative law judge permissibly found that Dr. Rasmussen's opinion was well-reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985). The administrative law judge permissibly determined that Dr. Zaldivar's opinion was not well-reasoned, because the doctor did not adequately address how the length of time that claimant was exercised may have affected the exercise blood gas study results.[8] *See Hicks*, 138 F.3d at 533**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441**,** 21 BLR at 2-275-76; Decision and Order at 20. The administrative law judge also found that Dr. Zaldivar failed to adequately explain why the exercise blood gas study results obtained by Dr. Rasmussen (which Dr. Zaldivar acknowledged were "abnormal") did not support a finding of a totally disabling pulmonary impairment. *Id.* Because it is supported by substantial evidence, 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). 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*

[7] Because employer does not challenge the administrative law judge's finding, that Dr. Fino's disability assessment was not sufficiently reasoned, it is affirmed. *Skrack*, 6 BLR at 1-711.

[8] The administrative law judge noted that Drs. Rasmussen, Houser, and Zaldivar all recognized that Dr. Zaldivar's August 20, 2008 exercise blood gas study subjected claimant to a lesser degree of exercise than did the exercise blood gas studies conducted by Dr. Rasmussen. Decision and Order at 8. (Dr. Zaldivar explained that the August 20, 2008 exercise blood gas study was stopped because claimant complained of dizziness. Employer's Exhibit 5.) Drs. Rasmussen and Houser opined that the short duration of Dr. Zaldivar's exercise blood gas study was significant. Dr. Rasmussen explained that Dr. Zaldivar's exercise blood gas study was "very short," lasting only "around maybe two minutes." Claimant's Exhibit 15 at 36. Dr. Rasmussen opined that such a length of exercise is "much too short to assess gas exchange." *Id.* at 36-37. Dr. Houser similarly opined that "the most likely explanation for the discrepancy in the values obtained by Dr. Zaldivar [versus] those obtained by Dr. Rasmussen is related to the submaximal nature of the study performed by Dr. Zaldivar." Claimant's Exhibit 17. The administrative law judge further noted that Dr. Zaldivar acknowledged that claimant "did not exercise his lung" during the exercise blood gas study that he conducted. Employer's Exhibit 5.

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 at 20. This finding is, therefore, affirmed.

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

Employer also argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption. Employer specifically asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption, by establishing that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[9] 30 U.S.C. §921(c)(4). In addressing this second method of rebuttal, the administrative law judge considered the opinions of Drs. Zaldivar and Fino.

Dr. Zaldivar opined that there was no reason for claimant's "blood gases to deteriorate with exercise unless [claimant] has developed left ventricular dysfunction." Employer's Exhibit 5. Based on the reversibility of claimant's pulmonary impairment, Dr. Fino opined that the impairment was not due to pneumoconiosis. Employer's Exhibit 4.

The administrative law judge found that Dr. Zaldivar did not address whether claimant's pneumoconiosis contributed to his pulmonary impairment. Decision and Order at 21. The administrative law judge further found that Dr. Fino's basis for excluding pneumoconiosis as a cause of claimant's pulmonary impairment, *i.e.*, that claimant's pulmonary impairment was reversible, was not reasoned. *Id.* at 19-20. The administrative law judge, therefore, found that employer failed to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.* at 22.

[9] In light of employer's stipulation that claimant suffers from pneumoconiosis arising out of his coal mine employment, the administrative law judge properly found that employer is precluded from rebutting the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. Decision and Order at 20.

Employer argues that the administrative law judge erred in his consideration of the opinions of Drs. Zaldivar and Fino. We disagree. The administrative law judge permissibly found that Dr. Zaldivar's opinion was insufficient to establish rebuttal because the doctor failed to address whether the miner's coal mine dust exposure contributed to his pulmonary impairment. *See Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. In regard to Dr. Fino, the administrative law judge noted that the doctor, in ruling out pneumoconiosis as a cause of claimant's pulmonary impairment, relied upon the improvement in claimant's exercise pO2 values from May 12, 2008 to August 20, 2008. The administrative law judge, however, accurately noted that Dr. Fino did not review the results of claimant's August 11, 2010 blood gas study, a study that revealed exercise pO2 values similar to the lower exercise pO2 values obtained on May 12, 2008.[10] The administrative law judge further noted that Dr. Fino did not address the significance of the shorter duration of exercise that claimant underwent during his August 20, 2008 blood gas study. The administrative law judge, therefore, permissibly found that Dr. Fino's basis for excluding coal mine dust exposure as a cause of claimant's pulmonary impairment (the reversibility of the impairment) was not well-reasoned. *See Hicks*, 138 F.3d at 533**,** 21 BLR at 2-335; *Akers*, 131 F.3d at 441**,** 21 BLR at 2-275-76. As the administrative law judge's reasons for discrediting the opinions of Drs. Zaldivar and Fino are rational and supported by substantial evidence, they are affirmed. We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal. *See Rose* 614 F.2d at 939, 2 BLR at 2-43.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

[10] While the exercise blood gas study conducted on August 20, 2008 produced a pO2 value of 81, the exercise blood gas studies conducted on May 12, 2008 and August 11, 2010 produced pO2 values of 63 and 67, respectively. Director's Exhibit 11; Claimant's Exhibit 4; Employer's Exhibit 2.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge