

BRB No. 12-0095 BLA

CURTIS CAUDILL )  
 )  
 Claimant-Respondent )  
 )  
 v. )  
 )  
 IGG KNOTT COUNTY, LIMITED ) DATE ISSUED: 11/20/2012  
 LIABILITY CORPORATION c/o WELLS )  
 FARGO DISABILITY MANAGEMENT )  
 )  
 and )  
 )  
 AMERICAN INTERNATIONAL SOUTH )  
 INSURANCE )  
 )  
 Employer/Carrier- )  
 Petitioners )  
 )  
 DIRECTOR, OFFICE OF WORKERS' )  
 COMPENSATION PROGRAMS, UNITED )  
 STATES DEPARTMENT OF LABOR )  
 )  
 Party-in-Interest ) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Christine L. Kirby,  
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg,  
Kentucky, for claimant.

Lois A. Kitts and James M. Kennedy (Baird and Baird, P.S.C.), Pikeville,  
Kentucky, for employer.

Richard A. Seid (M. Patricia Smith, Solicitor of Labor; Rae Ellen James,  
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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2010-BLA-05043) of Administrative Law Judge Christine L. Kirby, with respect to a subsequent claim filed on December 19, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).<sup>1</sup> The administrative law judge accepted employer's concession that claimant had at least fifteen years of underground coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Based upon employer's concession that claimant has clinical pneumoconiosis, the administrative law judge determined that claimant established a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). The administrative law judge further found that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv), and, therefore invoked the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).<sup>2</sup> The administrative law judge concluded that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in awarding benefits based on the application of amended Section 411(c)(4).<sup>3</sup> Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, also responds and states that he will not take a position on the

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<sup>1</sup> Claimant filed an initial claim for benefits on December 3, 1979, which was denied by the district director because claimant did not establish any element of entitlement. Director's Exhibit 1. Claimant did not take any further action until he filed the present claim.

<sup>2</sup> In pertinent part, the amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

<sup>3</sup> Employer's request that this case be held in abeyance, pending resolution of the challenges to the Patient Protection and Affordable Care Act, is moot. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566, 2012 WL 2427810 (June 28, 2012).

administrative law judge's findings under 20 C.F.R. §718.204(b)(2) and with respect to rebuttal of the amended Section 411(c)(4) presumption.<sup>4</sup>

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.<sup>5</sup> 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

## **I. Invocation of the Presumption – Total Disability**

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge determined that the pulmonary function studies did not establish the existence of a totally disabling respiratory or pulmonary impairment, as none of the studies produced qualifying values.<sup>6</sup> Decision and Order at 6. Regarding 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge considered the results of blood gas studies obtained on February 11, 2009, June 18, 2009, and September 29, 2010. *Id.* The February 11, 2009 study produced qualifying values at rest and after exercise, while the two remaining studies, performed only at rest, were nonqualifying. Director's Exhibit 14; Employer's Exhibits 4, 7. The administrative law judge then reviewed the opinions of Drs. Rasmussen, Jarboe, Rosenberg and Alam as to whether the blood gas studies established the presence of a totally disabling respiratory or pulmonary impairment.<sup>7</sup> Decision and Order at 6-9. The administrative law judge

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<sup>4</sup> We affirm, as unchallenged on appeal, the administrative law judge's findings of at least fifteen years of underground coal mine employment, that claimant established both the existence of clinical pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

<sup>5</sup> The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. 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 (1989)(en banc).

<sup>6</sup> A "qualifying" pulmonary function study or blood gas study yields values equal to or less than those listed in the tables at 20 C.F.R. Part 718, Appendices B, C for establishing total disability. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

<sup>7</sup> Drs. Rasmussen and Alam stated that claimant's exercise blood gas study results established that he is totally disabled from performing his usual coal mine employment. Director's Exhibit 14; Claimant's Exhibit 9. Drs. Jarboe and Rosenberg indicated that

determined that claimant proved that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(ii), as “[t]he qualifying exercise study, coupled with the well-reasoned medical opinion of Dr. Rasmussen, as supported by the opinion of Dr. Alam, leads this tribunal to conclude that [c]laimant is totally disabled from a respiratory standpoint.” *Id.* at 9.

The administrative law judge relied upon her findings at 20 C.F.R. §718.204(b)(2)(ii) to determine that the medical opinion evidence was sufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(iv).<sup>8</sup> Decision and Order at 10. Upon weighing all of the evidence relevant to 20 C.F.R. §718.204(b)(2) together, the administrative law judge concluded that claimant demonstrated that he is suffering from a totally disabling respiratory impairment. *Id.* Accordingly, the administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4). *Id.* at 11.

Employer contends that the administrative law judge erred in finding total disability established at 20 C.F.R. §718.204(b)(2)(ii), as she did not consider whether additional weight should be given to the more recent blood gas studies. Employer also alleges that the administrative law judge’s finding was inconsistent with the testing as a whole. Further, employer maintains that the administrative law judge erred in failing to weigh the blood gas study evidence and the medical opinion evidence separately and, thus, “erred in her assessment of the evidence and in finding claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).” Employer’s Brief at 22.

Upon review of the administrative law judge’s findings and employer’s contentions on appeal, we hold that the administrative law judge’s determination that claimant established total disability at 20 C.F.R. §718.204(b)(2) does not contain error requiring remand. Contrary to employer’s argument, the administrative law judge was not required to give greater weight to the more recent blood gas studies pursuant to 20 C.F.R. §718.204(b)(2)(ii). See *Schetroma v. Director, OWCP*, 18 BLR 1-17 (1993). In addition, the administrative law judge rationally found that the exercise blood gas study was most probative, “[b]ecause [c]laimant’s last job in the mines required heavy manual

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claimant’s blood gas studies do not support a diagnosis of a totally disabling impairment and that the results suggest that claimant’s gas exchange abnormalities are attributable to heart disease, rather than a respiratory or pulmonary condition. Employer’s Exhibits 4-7.

<sup>8</sup> The administrative law judge noted that there was no evidence in the record of cor pulmonale with right-sided congestive heart failure pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 6.

labor.” Decision and Order at 9; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989).

Regarding employer’s allegation that the administrative law judge erred in addressing the medical opinions and blood gas studies together at 20 C.F.R. §718.204(b)(2)(ii), employer is technically correct in asserting that, consistent with the plain language of the regulation, the administrative law judge should have rendered a finding solely as to whether the “[a]rterial blood-gas tests show the values listed in Appendix C.” 20 C.F.R. §718.204(b)(2)(ii). However, if the administrative law judge finds that total disability has been demonstrated under one or more of the subsections of 20 C.F.R. §718.204(b)(2), he or she must weigh the evidence supportive of a finding of total disability against any contrary probative evidence of record, and reach a conclusion as to whether claimant satisfied his burden to establish a totally disabling respiratory impairment. *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). The administrative law judge’s discussion of the opinions of Drs. Rasmussen, Jarboe, Rosenberg and Alam at 20 C.F.R. §718.204(b)(2)(ii) as to the significance of the blood gas study results, although misplaced, accorded with this requirement. In addition, besides identifying the administrative law judge’s technical violation of 20 C.F.R. §718.204(b)(2)(ii), employer has not identified any harm resulting from the administrative law judge’s action. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the “error to which [it] points could have made any difference.”); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). We affirm, therefore, the administrative law judge’s finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on the qualifying exercise blood gas study and the opinions of Drs. Rasmussen and Alam. Accordingly, we also affirm her determination that claimant invoked the rebuttable presumption at amended Section 411(c)(4).

## **II. Rebuttal of the Presumption**

Employer contends that, “because the proof did not reasonably establish that pneumoconiosis caused or contributed to the claimant’s total disability,” the administrative law judge erred in finding that employer did not rebut the amended Section 411(c)(4) presumption. Employer’s Brief at 23. Employer maintains that the administrative law judge discredited the opinions of Drs. Jarboe and Rosenberg without weighing their opinions against the contrary medical opinion evidence at 20 C.F.R. §718.204(c).<sup>9</sup> In addition, employer asserts that the administrative law judge’s erroneous

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<sup>9</sup> Employer stated in its brief that the administrative law judge discredited the opinions of Drs. Dahhan and Broudy. *See* Employer’s Brief at 23. However, as neither

finding concerning the blood gas study evidence at 20 C.F.R. §718.204(b)(2) caused her to err in weighing the medical opinion evidence relevant to rebuttal.

As an initial matter, we note that employer has misstated the burden of proof on rebuttal. Employer, not claimant, bears the burden of rebutting the amended Section 411(c)(4) presumption by proving that claimant's total disability did not arise out of coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). Therefore, the administrative law judge's determination that the medical opinions upon which employer relied are not well-reasoned, precluded employer from meeting its burden, regardless of the weight assigned to the opinions submitted by claimant. See *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

In addition, because the Board affirmed the administrative law judge's determination that the blood gas study evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2), we reject employer's argument that the administrative law judge erred in relying upon this finding when weighing the medical opinion evidence relevant to rebuttal. We affirm, therefore, the administrative law judge's determination that employer did not rebut the presumption at amended Section 411(c)(4) by proving that claimant's total disability was not due to pneumoconiosis.

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physician offered an opinion in this case, it is assumed that employer meant Drs. Jarboe and Rosenberg.

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