BRB No. 12-0052 BLA

JIM L. PARKS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OAK GROVE RESOURCES, LLC c/o WELLS FARGO DISABILITY MANAGEMENT	)	DATE ISSUED: 10/31/2012
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
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 Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Brandon J. Burton, Oklahoma City, Oklahoma, for claimant.

William J. Evans and Susan B. Motschiedler (Parsons Behle & Latimer), Salt Lake City, Utah, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order awarding benefits (2010-BLA-05511) of Administrative Law Judge Christine L. Kirby rendered on a claim filed on May 28, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge found that claimant established invocation of the amended Section 411(c)(4) presumption, 30 US.C. §921(c)(4), by establishing at least fifteen years of qualifying coal mine employment and that he has a totally disabling respiratory or pulmonary impairment.[1] The administrative law judge further found that employer did not rebut the presumption. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's finding that claimant established invocation of the amended Section 411(c)(4) presumption, arguing that the evidence is insufficient to establish the presence of a totally disabling impairment at 20 C.F.R. §718.204(b)(2). In addition, employer argues that the administrative law judge erred in finding that it did not rebut the presumption. In response, claimant urges the Board to affirm the award of benefits. The Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board. Employer filed a reply brief, reiterating its initial contentions.[2]

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,

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[1] Section 1556 of Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*)), reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that are pending on or after March 23, 2010. In order to invoke the Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). If a miner establishes at least fifteen years of qualifying coal mine employment, 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.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that the claim was filed after January 1, 2005, that claimant established twenty-six years of underground coal mine employment, and that claimant proved that he has clinical pneumoconiosis, arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and in accordance with applicable law.[3] 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).

I. Invocation of the Amended Section 411(c)(4) Presumption – Total Disability

Upon considering whether claimant established that he is totally disabled under 20 C.F.R. §718.204(b)(2), the administrative law judge noted that claimant did not submit any pulmonary function studies or blood gas studies, while employer submitted a non-qualifying pulmonary function study and a non-qualifying blood gas study. Decision and Order at 6. The administrative law judge further noted that, in a post-hearing brief, employer discussed pulmonary function studies and blood gas studies "that are not contained in its Evidence Summary Form." Decision and Order at 6. In addition, the administrative law judge stated that, although employer submitted claimant's "hospitalization and treatment records[,] which also contained diagnostic testing," employer did not discuss these records "in detail." *Id*. n.4. The administrative law judge also stated that, because the medical reports of Drs. Hastings, Repsher and Farney contained thorough summaries of the records, she would not "engage in a detailed discussion of the content of each exhibit." *Id*.

The administrative law judge concluded that total disability was not established pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), as the pulmonary function studies and blood gas studies were non-qualifying. Decision and Order at 6, 12-13. The administrative law judge further determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(iii), because he did not prove, by a preponderance of the evidence, that he has cor pulmonale with right-sided congestive heart failure. *Id*. at 12-13.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Black, Hastings, Repsher, and Farney. Decision and Order at 14. Dr. Black, who is Board-certified in internal and pulmonary medicine, examined claimant at the request of the Department of Labor (DOL) on July 31, 2009. Director's Exhibit 15. Dr. Black diagnosed coronary artery disease, dyspnea, restrictive lung disease, and pneumoconiosis and opined that claimant is totally disabled, most likely secondary to his occupational exposure. *Id.* In response to a claims examiner's request for clarification, Dr. Black stated that, although claimant does not have a significant abnormality in gas exchange at rest, he has a mild restrictive lung impairment and significant exercise limitation that would not allow him to work as a laborer. Director's

[3] The Board will apply the law of the United States Court of Appeals for the Eleventh Circuit, as claimant's last coal mine employment was in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Decision and Order at 1; Director's Exhibit 3.

Exhibit 16. Dr. Black further stated that he could not exclude the possibility that claimant's heart disease contributes to his exercise limitation. *Id.*

Dr. Hastings, who is Board-certified in internal medicine, examined claimant on April 8, 2010, and reviewed objective testing, including pulmonary function studies administered by Drs. Black and Repsher, and by claimant's treating physicians, Drs. Meade and Garfinkel. Claimant's Exhibit 2. Dr. Hastings indicated that the May 11, 2009 pulmonary function study, which appears in claimant's treatment records, revealed "abnormalities encompassing the forced vital capacity (FVC) and his FEV1, and his FEF 25%/75%." *Id.* He also stated that the July 31, 2009 pulmonary function study, performed by Dr. Black, revealed "evidence of mild to moderate pulmonary restrictive defects [in] small airway function as measured by FEF 25%/75%." *Id.* Dr. Hastings opined that the pulmonary function studies reflected a wide variety of abnormalities and that claimant has cor pulmonale. *Id*. Dr. Hastings concluded that claimant suffers from severe, activity-limiting shortness of breath that precludes him from returning to his work as a miner. *Id.* Dr. Hastings also reviewed treatment notes from Drs. Ghani and Hauser, claimant's cardiologists, and Dr. Meade, claimant's pulmonologist, and opined that testing confirms the absence of active coronary artery disease or congestive heart failure, both of which could cause serious dyspnea. *Id*.

Drs. Repsher and Farney, who are Board-certified in internal and pulmonary medicine, opined that all the pulmonary function studies of record are invalid due to variable or inadequate effort, lack of cooperation, or the absence of reproducible tracings, and also opined that the studies showed no impairment. Employer's Exhibits 1, 10, 46. *Id*. Dr. Repsher concluded, therefore, that there was no objective data supporting a diagnosis of a totally disabling respiratory or pulmonary impairment. Dr. Farney stated, "[t]here is no evidence of obstructive airways disease, chest restriction, hypoxemia, right ventricular disease, or right heart failure. [Claimant] is not limited or impaired[,] even in part[,] by his exposure to coal mine dust." Employer's Exhibit 10.

The administrative law judge determined that the opinions in which Drs. Black and Hastings diagnosed total respiratory disability were documented and reasoned, as they were consistent with the evidence of mild restrictive lung disease, pulmonary abnormalities, including cor pulmonale, and severe exercise limitation. Decision and Order at 14-15. In contrast, the administrative law judge found that Dr. Repsher's contrary opinion was not well-reasoned, as "Dr. Repsher does not comment on whether [c]laimant's progressive dyspnea and exertional limitations due to shortness of breath render him unable to perform his former coal mine duties." *Id*. at 15. Similarly, the administrative law judge determined that Dr. Farney's opinion was not well-reasoned, because it "lacks sufficient comment on whether (regardless of its causation) [c]laimant has a respiratory or pulmonary impairment which would preclude him from further coal mine employment." *Id*. Thus, the administrative law judge found that claimant

established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and based upon a weighing of the evidence as a whole. *Id*.

Employer contends that the administrative law judge erred in finding that the pulmonary function studies addressed by employer's experts are not referenced on employer's Evidence Summary Form. Employer maintains, therefore, that the administrative law judge erred in crediting the opinions of Drs. Black and Hastings, as she did not consider the fact that they relied on pulmonary function studies that were deemed invalid. Employer further asserts that the administrative law judge erred in crediting Dr. Hastings's diagnosis of a totally disabling pulmonary impairment based, in part, on his diagnosis of cor pulmonale. In addition, employer alleges that the administrative law judge did not accurately characterize the opinions of Drs. Repsher and Farney. These arguments have merit.

Contrary to the administrative law judge's determination, employer identified the pulmonary function studies addressed in its post-hearing brief on its February 15, 2011 Evidence Summary Form as Employer's Exhibits 14, 15, 27-29, and 36. At the hearing, the administrative law judge admitted these exhibits into evidence as part of the hospital and treatment records designated by employer.[4] *See* February 15, 2011 Evidence Summary Form; Hearing Transcript at 10. Moreover, employer specifically argued in its post-hearing brief that the May 11, 2009 treatment record pulmonary function study, to which Dr. Hastings referred in rendering his diagnosis of total disability, was qualifying, but invalid, based on the reviews conducted by Drs. Repsher and Farney.[5] Employer's Post-Hearing Brief at 8-9.

[4] There are eight pulmonary function studies in the record. Two were obtained in conjunction with this claim and were performed by Dr. Black on July 31, 2009 and by Dr. Repsher on March 24, 2010. Director's Exhibit 16, Employer's Exhibit 5. Six additional pulmonary function studies, dated September 28, 2005, October 12, 2005, November 23, 2005, May 11, 2009, May 18, 2010 and November 8, 2010, appear in claimant's hospital and treatment records. Employer's Exhibits 14, 15, 27-29, 36.

[5] In Dr. Repsher's report, he opined that the May 11, 2009 pulmonary function study is "medically invalid, due to a marked lack of effort and cooperation with the testing. He has no evident neurologic disorder that could explain these bizarre flow volume curves, which leaves us with no explanation other than malingering . . . [r]eview of the actual tracings is the ultimate arbiter for the assessment of effort and cooperation." Employer's Exhibit 1. Dr. Farney opined that the "tracings . . . show poor effort and were not reproducible . . . . Note for example the discrepancy in the alveolar volume (VA) which was 80% predicted with the single DLCO measurement compared to the FVC of 42% predicted." Employer's Exhibit 10 at 10.

Employer is also correct in asserting that the administrative law judge did not adequately resolve the conflict among Drs. Hastings, Repsher and Farney regarding whether claimant has cor pulmonale. Pursuant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge determined that Dr. Hastings's opinion was "vague," because he diagnosed cor pulmonale and appeared to rule out the presence of left-sided congestive heart failure, without explicitly stating that claimant suffered from right-sided congestive heart failure. Decision and Order at 13. The administrative law judge also found that Dr. Hastings's diagnosis of cor pulmonale was outweighed by the contrary opinions of Drs. Repsher and Farney, based on their superior qualifications. *Id*. However, pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge found that Dr. Hastings's diagnosis of a totally disabling pulmonary impairment was supported, in part, by his diagnosis of cor pulmonale. *Id*. at 14.

Regarding the administrative law judge's discrediting of Dr. Repsher's opinion, we agree with employer that Dr. Repsher's opinion was not premised solely upon the absence of qualifying pulmonary function studies and blood gas studies. Decision and Order at 15. Dr. Repsher noted that the objective studies did not meet the regulatory criteria for establishing total disability, but he also indicated that the pulmonary function studies were either "normal," or were invalid for assessing the existence of an impairment, while claimant's blood gas studies were "supranormal." Employer's Exhibits 1, 3.

Employer also asserts correctly that the administrative law judge did not adequately explain her determination that Dr. Farney failed to comment on whether claimant has a respiratory or pulmonary impairment. The administrative law judge found that Dr. Farney's opinion focused on the source, rather than the existence, of a totally disabling respiratory or pulmonary impairment, but did not explain why she discounted Dr. Farney's statements that there is no credible evidence of obstructive airways disease, chest restriction, hypoxemia, right ventricular disease, or right heart failure. Decision and Order at 15; Employer's Exhibit 10.

Because the administrative law judge did not assess the reliability of the pulmonary function studies in crediting the opinions of Drs. Black and Hastings, rendered inconsistent findings regarding the presence of cor pulmonale, and did not properly consider the opinions of Drs. Repsher and Farney, we vacate her findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv) and invocation of the amended Section 411(c)(4) presumption.[6] *See Tackett v. Director, OWCP*, 7 BLR 1-703

[6] However, we reject employer's allegation that the administrative law judge substituted her own opinion for that of the medical experts. The administrative law judge acted within her discretion as fact-finder in determining that non-qualifying pulmonary function studies can support a physician's diagnosis of total disability if the physician credibly determines that the studies nevertheless establish the existence of a totally

(1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). On remand, the administrative law judge must reconsider whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b)(2). In weighing the relevant medical opinions, the administrative law judge must address the physicians' explanations for their conclusions, the documentation underlying their medical judgments and the sophistication and bases of their diagnoses. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988). In so doing, the administrative law judge must consider the physicians' assessments of claimant's physical limitations, in conjunction with the exertional requirements of claimant's usual coal mine employment. *See Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986) (en banc).

When assessing the documentation underlying the physicians' opinions, the administrative law judge must also determine whether the pulmonary function studies developed in connection with this claim are in substantial compliance with the quality standards.[7] 20 C.F.R. §§718.101, 718.103. If the administrative law judge credits the opinions of Drs. Repsher and Farney regarding the validity of a particular test over the opinion of the physician/technician who actually observed that test, a rationale must be provided. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). The administrative law judge must also discuss all of the evidence relevant to total disability at 20 C.F.R. §718.204(b)(2), including claimant's hospital and treatment records, assign the contrary probative evidence appropriate weight, and determine whether it outweighs the evidence supportive of a finding of total respiratory disability. *See Jordan v. Benefits Review Board*, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989); *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).

II. Rebuttal of the Amended Section 411(c)(4) Presumption

Because employer conceded that claimant has clinical pneumoconiosis arising out of coal mine employment, we affirm the administrative law judge's determination that employer did not rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis. Decision and Order at 16. Regarding the administrative law judge's additional finding that employer did not rebut the presumption

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disabling impairment. Decision and Order at 14 n.6.; 20 C.F.R. §718.204(b)(2)(iv); *see Budash v. Bethlehem Mines Corp.*, 9 BLR 1-48 (1986) (en banc), *aff'd*, 9 BLR 1-104 (1986)(en banc).

[7] The quality standards do not apply to studies obtained during claimant's hospitalizations and treatment. 20 C.F.R. §§718.101, 718.103.

by proving that claimant's total disability did not arise out of, or in connection with, his coal mine employment, employer alleges that the administrative law judge did not properly weigh the medical opinions of Drs. Repsher and Farney. Employer also maintains that the administrative law judge applied the wrong legal standard by discounting Dr. Farney's opinion because he did not offer an alternative etiology for claimant's dyspnea.

As an initial matter, we vacate the administrative law judge's determination that employer did not establish rebuttal of the amended Section 411(c)(4) presumption, as she relied, in part, on the findings we have vacated at 20 C.F.R. 718.204(b)(2)(iv). In addition, employer's contention regarding the administrative law judge's discrediting of Dr. Farney's opinion has merit. Contrary to the administrative law judge's finding, employer is not required to establish the cause of claimant's alleged totally disabling impairment. It is sufficient if employer proves, based on credible medical evidence, that claimant's disabling respiratory or pulmonary disease is not related to his coal mine employment. *Tanner v. Freeman United Coal Co.*, 10 BLR 1-85, 1-87 (1987); *see* 77 Fed. Reg. 19,463 (Mar. 30, 2012)(DOL's position regarding the methods for rebutting the amended Section 411(c)(4) presumption is that the party opposing entitlement is not required to establish the cause of the miner's totally disabling impairment). Therefore, if the administrative law judge, on remand, finds the amended Section 411(c)(4) presumption invoked, she should reconsider Dr. Farney's opinion, relevant to rebuttal of the presumption.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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