BRB No. 14-0106 BLA

JACKIE E. FORTNER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BRESEE TRUCKING COMPANY, INCORPORATED	)	DATE ISSUED: 10/29/2014
	)	
and	)	
	)	
AMERICAN MINING 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 Granting Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Nate D. Moore (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits (2011-BLA-06215) of Administrative Law Judge Pamela J. Lakes with respect to a miner's claim filed on December 3, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge found that claimant established 33.13 years of coal mine employment, with at least

fifteen years in conditions substantially similar to those in an underground coal mine, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2) and, therefore, invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge also concluded that employer did not rebut the presumption. Therefore, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that claimant established total disability at 20 C.F.R. §718.204(b)(2), based on the sole qualifying exercise blood gas study, and, therefore, erred in determining that claimant invoked the presumption at amended Section 411(c)(4). Employer also asserts that the administrative law judge erred in finding that it did not rebut the amended Section 411(c)(4) presumption. Claimant and the Director, Office of Workers' Compensation Programs, have not filed response briefs in this appeal.[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 supported by substantial evidence, is rational, and is 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).

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 33.13 years of coal mine employment, with at least fifteen years in conditions substantially similar to those in an underground coal mine. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. 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 (1989)(en banc).

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

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of five pulmonary function studies. Decision and Order at 11. The administrative law judge noted that the physicians performing the pulmonary function studies recorded heights for claimant that ranged from sixty-six to sixty-eight inches. *Id*. The administrative law judge resolved this discrepancy by using an average of the recorded heights, which she calculated as sixty-seven inches. *Id*. The administrative law judge indicated that the pulmonary function study performed by Dr. Baker on January 21, 2011 produced qualifying values pre-bronchodilator, regardless of the height applied, and that post-bronchodilator values were not taken.[4] *Id*.; Director's Exhibit 13. The administrative law judge found that the study conducted by Dr. Rosenberg on April 27, 2011 produced non-qualifying values, both pre-bronchodilator and post-bronchodilator, regardless of the height used. Decision and Order at 11; Employer's Exhibit 57. The administrative law judge determined that Dr. Craven conducted solely a pre-bronchodilator pulmonary function study on September 30, 2011, which produced non-qualifying values, regardless of the height applied. Decision and Order at 11; Claimant's Exhibit 2. The administrative law judge stated that Dr. Craven conducted another pre-bronchodilator study on February 2, 2012, which produced qualifying values at the recorded height of sixty-eight inches, and produced borderline qualifying values when the average height of sixty-seven inches was used. Decision and Order at 11; Claimant's Exhibit 3. Finally, the administrative law judge found that the study performed by Dr. Fino on February 22, 2012 produced non-qualifying values before and after the administration of bronchodilators, regardless of the height applied.[5] Decision and Order

[4] A "qualifying" pulmonary function study or blood gas study yields results that are equal to or less than the values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study produces results that exceed those values. See 20 C.F.R. §718.204(b)(2)(i), (ii).

[5] This finding by the administrative law judge is not completely accurate. Dr. Fino observed a FEV1 of 1.59, a FVC of 2.38, and a FEV1/FVC ratio of 66% prior to the administration of a bronchodilator. Employer's Exhibit 58. After the administration of bronchodilators, Dr. Fino observed a FEV1 of 1.71, a FVC of 2.73 and a FEV1/FVC ratio of 62%. *Id*. At the time of the study, claimant was sixty-one years old. *Id*. For a height of 66.9 inches, a qualifying FEV1 would be, at a maximum, 1.79 and for a height of 68.1 inches, it would be, at a maximum, 1.89. 20 C.F.R. §718.204(b)(2)(i); 20 C.F.R. Part 718, Appendix B. For a height of 66.9 inches, a qualifying FVC would be, at a maximum, 2.29 and for a height of 68.1 inches, it would be, at a maximum, 2.41. *Id*. For the FEV1/FVC ratio, a qualifying amount would be a percentage of 55 or less. 20 C.F.R. §718.204(b)(2)(i)(C). Therefore, the study was actually qualifying before the

at 11; Employer's Exhibit 58. Overall, the administrative law judge determined that the pulmonary function studies were insufficient to establish the existence of total disability at 20 C.F.R. §718.204(b)(2)(i), as the majority of them, including the most recent study, are non-qualifying. Decision and Order at 11.

Concerning the blood gas study evidence relevant to 20 C.F.R. §718.204(b)(2)(ii), the resting study performed by Dr. Rosenberg on April 27, 2011, produced non-qualifying results. Employer's Exhibit 57. Dr. Rosenberg did not perform an exercise study, as claimant experienced a "recent episode of near syncope." Employer's Exhibit 57. The study performed by Dr. Fino on February 22, 2012, produced non-qualifying results at rest and qualifying results after exercise. Employer's Exhibit 58. The administrative law judge concluded:

> It is unclear whether the earlier gas study would have resulted in post-exercise qualifying levels or not, but the qualifying levels were taken almost a year later and are indicative of the possible progression of pneumoconiosis. Furthermore, while the requirement that the miner be offered exercise testing may involve difficulties, as in this instance where Claimant experienced a near episode of syncope, blood gas levels taken during exercise are very helpful as exercise requires that the body be able to oxygenate blood more quickly. Consequently, an insufficiency in gas transfers may manifest during exercise before it is evident at rest, and exercise results are particularly relevant in determining whether a worker is capable of exerting himself on the job. Accordingly, I have given greater probative value to the February 22, 2012 study, and I find that the arterial blood gases, standing alone, support a finding of total disability under 20 C.F.R. §718.204(b)(2)(ii).

Decision and Order at 12.

Relevant to 20 C.F.R. §718.204(b)(2)(iii), the administrative law judge indicated that, because there was no evidence that claimant has cor pulmonale with right-sided congestive heart failure, claimant did not establish total disability at this subsection. Decision and Order at 12.

At 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Fino, and Rosenberg. Drs. Baker and Fino diagnosed a totally

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administration of bronchodilators at a height of sixty-eight inches, but non-qualifying at a height of sixty-seven inches.

disabling respiratory impairment, while Dr. Rosenberg stated that claimant is not totally disabled from a respiratory or pulmonary standpoint. Director's Exhibit 13; Employer's Exhibits 57, 58. The administrative law judge observed that Drs. Baker, Fino, and Rosenberg are Board-certified in internal medicine, with a subspecialty in pulmonary diseases. Decision and Order at 13. The administrative law judge gave greatest weight to Dr. Fino's opinion, as he "had the advantage of reviewing later testing data (i.e., his own), and he also reviewed" Dr. Rosenberg's pulmonary function and blood gas study results and Dr. Baker's pulmonary function study results.[6] *Id*. She concluded, therefore, that claimant established total disability under 20 C.F.R. §718.204(b)(2)(iv), by a preponderance of the evidence. *Id*. at 14.

Weighing all of the evidence together, the administrative law judge determined that the qualifying exercise blood gas study and the medical opinion evidence were sufficient to establish that claimant is totally disabled from a respiratory standpoint pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 14. In making this determination, the administrative law judge discussed the "relatively light manual labor requirement of [claimant's] last or usual job" and found that claimant's testimony, and the medical evidence, were sufficient to prove that he would be unable to perform his previous coal mine employment. *Id*.

Employer argues that the administrative law judge substituted her opinion for that of the physicians when she found that claimant's qualifying blood gas study values were indicative of the progression of pneumoconiosis. Similarly, employer asserts that the administrative law judge did not correctly interpret the medical data in discussing the effect of exercise on the oxygenation process. Employer also contends that the administrative law judge erred in giving the most weight to Dr. Fino's opinion concerning total disability, as Dr. Fino did not discuss how the objective evidence supported his diagnosis of total disability, and that the administrative law judge made conflicting conclusions concerning Dr. Fino's opinion. In this regard, employer

[6] Dr. Rosenberg diagnosed claimant with a moderate airflow obstruction, with a significant bronchodilator response resulting in a mild obstruction and no restriction, based on the pulmonary function and blood gas studies he performed. Employer's Exhibit 57. Dr. Rosenberg found that, although claimant has disabling vascular issues, he is not disabled from a pulmonary perspective from performing his previous coal mine employment. *Id*. Dr. Rosenberg reiterated his findings after reviewing the report in which Dr. Caffrey concluded that there was no evidence of coal workers' pneumoconiosis on biopsy. Employer's Exhibit 69. Dr. Baker determined that claimant's pulmonary function studies met the federal disability guidelines for vital capacity and FEV1 values and that claimant would not have the respiratory capacity to perform his previous coal mine employment. Director's Exhibit 13.

maintains that the administrative law judge did not consider that the pulmonary function study relied on by Dr. Fino was qualifying at the recorded height of sixty-eight inches, but was non-qualifying for a man sixty-seven inches tall, which the administrative law judge determined to be claimant's height for the purpose of analyzing the pulmonary function study evidence. Further, employer argues that the administrative law judge erred in giving less weight to Dr. Rosenberg's opinion, that claimant does not have a totally disabling respiratory impairment on the ground that he examined claimant prior to Dr. Fino, when only a few months separated their exams.

In crediting the qualifying exercise blood gas study at 20 C.F.R. §718.204(b)(2)(ii), the administrative law judge acted within her discretion as fact-finder in giving greater probative weight to the qualifying exercise blood gas study, as "exercise results are particularly relevant in determining whether a worker is capable of exerting himself on the job." Decision and Order at 12; *see Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 2-124 (6th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 534, 21 BLR 2-323, 2-336 (4th Cir.1998); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Accordingly, we reject employer's allegation of error and affirm the administrative law judge's finding that the blood gas study evidence supported a finding of total disability at 20 C.F.R. §718.204(b)(2)(ii).

With respect to the administrative law judge's weighing of the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv), employer is correct that, contrary to the administrative law judge's finding, the February 22, 2012 pulmonary function study, cited by Dr. Fino in support of his opinion, produced qualifying values pre-bronchodilator at the recorded height of sixty-eight inches, while the study was nonqualifying, both pre-bronchodilator and post-bronchodilator, at the height of sixty-seven inches, which was used by the administrative law judge. Employer's Exhibit 58. This inaccuracy does not require remand, however, as the administrative law judge rationally determined that Dr. Fino's diagnosis was supported by his statement that "[t]he spirometry shows a moderately severe obstructive ventilatory defect, as evidenced by a reduction in the FEV1 and in the FEV1/FVC ratio," regardless of whether the study produced qualifying values. *Id*.; *see Johnson v. Jeddo-Highland Coal Co*., 12 BLR 1-53 (1988); *Smith v. Director, OWCP*, 8 BLR 1-258 (1985); *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985).

Furthermore, although the administrative law judge's statement that "two doctors (Baker and Fino) found that Claimant was totally disabled from a pulmonary or respiratory standpoint, with Dr. Fino[7] instead focusing on the cause of his disability" is

[7] Although the administrative law judge stated that Dr. Fino focused on the cause of claimant's disability, it appears from the context of her statement, and the medical

somewhat ambiguous, we reject employer's allegation of error regarding the administrative law judge's weighing of Dr. Fino's opinion. The administrative law judge's ultimate conclusion is rational and supported by substantial evidence, as Dr. Fino reviewed a larger amount of data and had access to the most recent data,. *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984). Consequently, we affirm the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2)(ii), (iv) and that claimant invoked the presumption at amended Section 411(c)(4).

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

The party opposing entitlement may rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Under the implementing regulation, employer may rebut the presumption by establishing that claimant does not have either clinical[8] or legal pneumoconiosis,[9] 20 C.F.R. §718.305(d)(1)(i), or by establishing that "no part of the

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opinion evidence, that she meant to refer to Dr. Rosenberg, who opined that claimant's impairment stems from vascular disease and is not respiratory or pulmonary in nature. *See* Employer's Exhibit 57.

[8] The regulation at 20 C.F.R. §718.201(a)(1) provides:

> "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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> 20 C.F.R. §718.201(a)(1).

[9] Pursuant to 20 C.F.R. §718.201(a)(2), "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).

miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 20 C.F.R. §718.305(d)(1)(ii).

With respect to disproving the existence of pneumoconiosis, the administrative law judge determined that the x-ray evidence did not rebut the presumed existence of clinical pneumoconiosis, as she found that the interpretations of the three x-rays dated March 18, 2009, January 21, 2011, and April 27, 2011, were in equipoise. Decision and Order at 16; Director's Exhibits 13, 15-18; Claimant's Exhibit 1; Employer's Exhibit 57. The administrative law judge also found that the pathology evidence "neither confirms nor excludes a diagnosis of pneumoconiosis[,]" particularly when the biopsy was performed "over seven years ago, before the Claimant stopped working in the mines in 2008." Decision and Order at 17; Employer's Exhibits 26-28, 67, 70. The administrative law judge concluded that the medical opinions were insufficient to rebut the existence of clinical pneumoconiosis, as they were based on the inconclusive pathology evidence, and the x-ray evidence, which she found was in equipoise. Decision and Order at 17.

Employer contends that the administrative law judge erred in giving less weight to the opinions of Drs. Fino and Rosenberg, concerning clinical pneumoconiosis, because they relied upon claimant's 2004 and 2006 biopsy reports, which the administrative law judge determined were inconclusive on the issue of the existence of pneumoconiosis. Employer asserts that the administrative law judge's "outright rejection of the biopsy results is remarkable considering that it is the only pathology evidence in the record" and that "the amount of anthracotic pigment in [claimant's] lungs after thirty-one years is certainly relevant to the issue of clinical pneumoconiosis." Employer's Brief at 11.

We reject employer's arguments with respect to the administrative law judge's consideration of the pathology evidence. Contrary to employer's contention, the administrative law judge did not simply reject the biopsy results, but rather considered Dr. Caffrey's report, based on a review of biopsies done on September 20, 2004 and September 29, 2006, and documentation concerning these procedures in claimant's hospital records, and permissibly found that the negative biopsy evidence was insufficient to rebut the existence of clinical pneumoconiosis.[10] 20 C.F.R. §718.106(c); *see Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; Decision and Order at 16-17. Therefore, the

[10] Dr. Caffrey reviewed pathology slides and pathology reports from September 20, 2004 and September 29, 2006 and identified a mild amount of anthracotic pigment in the 2004 pathology slides but indicated that it would not have caused "any discernible pulmonary impairment or disability." Employer's Exhibit 67. The September 20, 2004 pathology report stated that there was "only some carbonaceous pigment." Employer's Exhibit 70. The September 29, 2006 pathology report did not contain any evidence of coal workers' pneumoconiosis. Employer's Exhibits 26-27.

administrative law judge also acted within her discretion in giving less weight to the opinions of Drs. Fino and Rosenberg concerning the existence of clinical pneumoconiosis, as they relied, in part, on the biopsy evidence. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Consequently, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of clinical pneumoconiosis.

Employer's failure to rebut the presumed existence of clinical pneumoconiosis precluded it from rebutting the amended Section 411(c)(4) presumption by disproving the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i); *see Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Thus, the administrative law judge was not required to address the issue of the existence of legal pneumoconiosis. The administrative law judge rendered findings on this issue, however, and relied on them to conclude that employer did not rebut the presumption of total disability causation. Employer has challenged these findings in relation to both the existence of legal pneumoconiosis and total disability causation. For this reason, we will review the administrative law judge's determination that employer failed to establish that claimant is not suffering from legal pneumoconiosis.

When considering the evidence relevant to the presence of legal pneumoconiosis, the administrative law judge gave less weight to the opinions of Drs. Fino and Rosenberg, that claimant's disabling respiratory impairment was due solely to smoking, because they did not explain why coal dust could not have been a contributing or aggravating factor, and because their opinions were inconsistent with the preamble to the regulations.[11] Decision and Order at 20-23. The administrative law judge concluded, therefore, that employer did not rebut the presumed existence of legal pneumoconiosis. *Id*. at 23.

Employer argues that the administrative law judge erred in crediting Dr. Baker's opinion as she did not adequately explain why his diagnosis of legal pneumoconiosis is reasoned. Employer also states that the administrative law judge improperly gave less weight to Dr. Fino's opinion because it is inconsistent with the preamble to the regulations. Additionally, employer maintains that the administrative law judge mischaracterized Dr. Fino's opinion when she found that Dr. Fino concluded that any contribution from coal dust to claimant's impairment would not be significant because

[11] The administrative law judge also considered interpretations of a digital x-ray, dated February 22, 2012, and hospitalization and treatment records from March 26, 2001 to September 4, 2012. Decision and Order at 22-23. The administrative law judge found the interpretations of the digital x-ray to be in equipoise and determined that the hospitalization and treatment records did not exclude the existence of clinical or legal pneumoconiosis. *Id*.

claimant would be totally disabled without the exposure. Further, employer argues that the administrative law judge erred in not making a determination concerning the length of claimant's smoking history, as it was relevant to identifying the cause of claimant's totally disabling impairment.

Contrary to employer's argument, the administrative law judge acted within her discretion in giving less weight to Dr. Fino's opinion, that claimant does not have legal pneumoconiosis, as she permissibly determined that Dr. Fino did not adequately explain why claimant's coal dust exposure could not have been a contributing factor to his disabling respiratory impairment. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; 65 Fed. Reg. 79, 943 (Dec. 20, 2000). As the administrative law judge provided a valid reason for discrediting Dr. Fino's opinion, it is not necessary to address employer's additional arguments concerning his opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). Therefore, we affirm the administrative law judge's finding that employer did not rebut the presumed existence of legal pneumoconiosis.[12] We also affirm her determination that employer did not rebut the presumption that claimant is totally disabled due to pneumoconiosis, based on her permissible discrediting of Dr. Fino's opinion on the ground that he did not adequately explain why claimant's coal dust exposure could not have been a contributing cause of his totally disabling respiratory impairment. *See Looney*, 678 F.3d at 316-17, 25 BLR at 2-133; 65 Fed. Reg. 79, 943 (Dec. 20, 2000).

[12] Employer did not challenge the administrative law judge's finding that Dr. Rosenberg's opinion, that claimant does not have legal pneumoconiosis, is insufficient to rebut the presumption. Thus, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

Accordingly, the administrative law judge's Decision and Order Granting Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge