BRB No. 12-0658 BLA

MIKEL C. TRADER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McELROY COAL COMPANY	)	
	)	
and	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/24/2013
	)	
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 on Remand - Awarding Benefits and the Decision and Order on Reconsideration - Affirming Award and Setting Date of Entitlement to Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer/Carrier (employer) appeals the Decision and Order on Remand - Awarding Benefits and the Decision and Order on Reconsideration - Affirming Award and Setting Date of Entitlement to Benefits (2008-BLA-5981) of Administrative Law

Judge Michael P. Lesniak (the administrative law judge) rendered on a subsequent claim[1] 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 is before the Board for the second time.

In a Decision and Order dated December 21, 2009, the administrative law judge accepted the parties' stipulation to thirty-one years of coal mine employment, and adjudicated the claim pursuant to the provisions at 20 C.F.R. Parts 718 and 725. Considering the newly submitted evidence, the administrative law judge determined that it was sufficient to establish the existence of both clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). On the merits, the administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Upon employer's appeal, the Board vacated the administrative law judge's findings at 20 C.F.R. §§718.202(a), 718.204(b), (c), and 725.309(d), and remanded the case for further consideration of the evidence thereunder. The Board additionally instructed the administrative law judge, on remand, to determine whether claimant had at least fifteen years of underground coal mine employment or comparable surface mine employment, and to consider whether claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2]

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[1] Claimant's initial claim, filed on March 14, 2001, was denied by Administrative Law Judge Gerald M. Tierney on June 29, 2005, because claimant failed to establish the existence of pneumoconiosis.

[2] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. *Mingo Logan Coal Co. v. Owens*, F.3d , 2013 WL 3929081 (4th Cir. 2013)(Niemeyer, J., concurring).

On remand, the administrative law judge credited claimant with thirty-one years of "qualifying" coal mine employment,[3] and found that the newly submitted evidence is sufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that the weight of the evidence establishes total respiratory disability pursuant to 20 C.F.R. §718.204(b), and that claimant is entitled to invocation of the presumption at amended Section 411(c)(4). The administrative law judge further found that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's finding of total respiratory disability at Section 718.204(b), arguing that the administrative law judge erred in his consideration of the pulmonary function studies and medical opinions of record. Asserting that this case has reached administrative gridlock, employer urges the Board to vacate the award of benefits and direct that this case be assigned to a different administrative law judge on remand. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a substantive response.[4]

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.[5] 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).

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[3] The administrative law judge determined that claimant's coal mine employment was performed either underground or on the surface at an underground mine site, thereby constituting "qualifying" coal mine employment for purposes of amended Section 411(c)(4), 30 U.S.C. §921(c)(4). Decision and Order on Remand at 8; *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011).

[4] We affirm, as unchallenged on appeal, the administrative law judge's findings regarding the length of claimant's qualifying coal mine employment, and his finding that the newly submitted evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202, and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 5.

Employer contends that the administrative law judge erred in finding that the evidence establishes total respiratory disability and that claimant is entitled to invocation of the amended Section 411(c)(4) presumption. In this regard, employer asserts that the administrative law judge failed to consider all relevant evidence pertaining to the issue of disability, and specifically erred in his consideration of the pulmonary function study evidence, which affected his weighing of the conflicting medical opinions of record. Employer maintains that, contrary to the administrative law judge's findings, the pulmonary function studies conducted on January 10, 2008 and November 7, 2008 are invalid and, thus, cannot establish total disability. Employer's Brief at 4-24.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish total respiratory disability at Section 718.204(b), the administrative law judge determined that none of the blood gas studies of record yielded qualifying results[6] pursuant to Section 718.204(b)(2)(ii), and that there is no evidence that claimant suffered from cor pulmonale with right-sided congestive heart failure pursuant to Section 718.204(b)(2)(iii). Decision and Order at 9. Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the pulmonary function studies of record, as well as notations by the administering technicians and various physicians' opinions regarding the validity of the studies. The administrative law judge properly determined that the tests conducted on January 14, 2003, April 22, 2008, October 22, 2008, and the post-bronchodilation portion of the test conducted on January 10, 2008 were invalid and entitled to no weight, based on the uncontradicted invalidations of these tests by the administering technicians and/or reviewing physicians. Decision and Order on Remand at 3-4, 10-14; Director's Exhibits 1, 21, 27; Employer's Exhibit 2. The administrative law judge further found that the test conducted for Dr. Fino on August 30, 2001 was invalid and entitled to no weight, despite Dr. Renn's validation of the test, as the administering technician personally observed, and Dr. Fino agreed, that claimant exhibited poor effort. Decision and Order on Remand at 10-11; Director's Exhibit 1; *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). The administrative law judge determined that the remaining tests were valid for interpretation, based on their conformity to the applicable quality standards, as follows: the test conducted on July 17, 1985, which produced non-qualifying values pre-bronchodilation; the July 13, 2001 test,

[6] A "qualifying" pulmonary function or arterial blood gas study yields values that are equal to or less than the applicable table values contained in Appendices B and C to 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)(i), (ii).

which produced non-qualifying values pre-bronchodilation and qualifying values post-bronchodilation; the December 26, 2007 test, which produced non-qualifying values pre-bronchodilation; the January 10, 2008 test, which produced qualifying values pre-bronchodilation; and the November 7, 2008 test, which produced qualifying values both pre-bronchodilation and post-bronchodilation. Decision and Order on Remand at 13-14; Director's Exhibits 1, 15, 21; Claimant's Exhibit 2; *see* 20 C.F.R. Part 718, Appendix B(2)(ii). While employer contends that the administrative law judge should have found that the tests conducted on January 10, 2008 and November 7, 2008 were invalid, based upon the opinions of Drs. Repsher and Fino that claimant's effort was submaximal, the administrative law judge acted within his discretion in determining that the technicians who personally administered these tests were in a better position to determine claimant's effort and cooperation.[7] Decision and Order on Remand at 11-13; *see Brinkley*, 14 BLR at 1-149 (1990). According more weight to the most recent and valid test results, the administrative law judge rationally determined that the weight of the pulmonary function study evidence was sufficient to establish total disability pursuant to Section 718.204(b)(2)(i), as three of the four most recent tests produced qualifying results. Decision and Order on Remand at 14; *see Workman v. Eastern Associated Coal Corp*., 23 BLR 1-22, 1-27 (2004)(en banc); *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-14 (1993). As substantial evidence supports the administrative law judge's findings, we affirm his determination that claimant initially established total disability by a preponderance of the pulmonary function study evidence pursuant to Section 718.204(b)(2)(i).

Pursuant to Section 718.204(b)(2)(iv), the administrative law judge determined that claimant's usual coal mine employment involved heavy manual labor, and that Drs. Renn, Martin, Schaaf, and Begley opined that claimant lacked the respiratory capacity to perform his usual coal mine employment, whereas Drs. Bellotte, Fino and Repsher found no disabling respiratory or pulmonary impairment. Decision and Order on Remand at 14-16. The administrative law judge properly discounted Dr. Renn's assessment of disability, since it was based on documentation which the administrative law judge deemed unreliable. Decision and Order on Remand at 15; *see Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). The administrative law judge also permissibly discounted Dr. Martin's assessment of disability, finding it poorly reasoned and documented, as it was based on the physician's subjective clinical observations. Decision and Order on Remand at 15; *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Because Dr. Bellotte opined that claimant's normal exercise blood gas study results would not prevent him from performing his usual coal mine employment, but failed to address claimant's

[7] The administrative law judge additionally found that the criticisms by Drs. Repsher and Fino regarding the appearance of claimant's tracings fell short of establishing non-compliance with the applicable quality standards. Decision and Order on Remand at 13-14; 20 C.F.R. Part 718, Appendix B(2)(ii).

qualifying post-bronchodilation pulmonary function study results, the administrative law judge rationally discounted the opinion as poorly reasoned. Decision and Order on Remand at 15; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149(1989)(en banc). Lastly, since Drs. Fino and Repsher found that claimant's qualifying pulmonary function studies were not valid for interpretation, contrary to the administrative law judge's findings, the administrative law judge acted within his discretion in giving little weight to their opinions, and in giving greater weight to the opinions of Drs. Schaaf and Begley, as he found their conclusions to be better supported by the objective evidence of record and consistent with his findings at Section 718.204(b)(2)(i). Decision and Order on Remand at 15-16; *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *King v. Consolidation Coal Co*., 8 BLR 1-262 (1985). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that the medical opinion evidence establishes total disability at Section 718.204(b)(2)(iv), and that the weight of the evidence, like and unlike, establishes total respiratory disability at 20 C.F.R. §718.204(b). Thus, we affirm the administrative law judge's finding that claimant is entitled to invocation of the amended Section 411(c)(4) presumption.

Because employer does not challenge the administrative law judge's determination that the evidence is insufficient to establish rebuttal, *see Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), we affirm the administrative law judge's findings that employer failed to rebut the presumption at amended Section 411(c)(4), and that claimant is entitled to benefits.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits and the Decision and Order on Reconsideration - Affirming Award and Setting Date of Entitlement to Benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge