BRB No. 12-0042 BLA

EUGENE WALKER Claimant-Respondent v. SUMATE MINING COMPANY, INCORPORATED and WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/17/2012 DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2009-BLA-5630) of Administrative Law Judge Thomas M. Burke, with respect to a subsequent claim filed on September 9, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act).[1] The administrative law judge determined that claimant had fifteen or more years of underground coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found, based on the newly submitted evidence, that claimant established that he is totally disabled at 20 C.F.R. §718.204(b)(2) and that claimant is entitled to the rebuttable presumption, set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), that he is totally disabled due to pneumoconiosis.[2] The administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence was insufficient to rebut the presumption at amended Section 411(c)(4). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[3]

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,

[1] Claimant filed an initial claim for benefits on December 7, 2001, which the district director denied because, although claimant established the existence of pneumoconiosis, he did not establish that he was totally disabled or that his total disability was due to pneumoconiosis. Director's Exhibit 1. Claimant did not take any further action until he filed the present claim.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (codified at 30 U.S.C. §§921(c)(4) and 932(*l*) (Supp. 2011)). Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant had at least fifteen years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.[4] 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 Presumption – Total Disability

Employer stated in its post-hearing brief that it "concedes that claimant invokes the [20 C.F.R.] §718.305 presumption. Claimant has the requisite amount of coal mine employment . . . and the record contains evidence of a totally disabling respiratory or pulmonary impairment."[5] Employer's Post-Hearing Brief at 4. The administrative law judge acknowledged employer's concession, weighed the evidence relevant to total disability at 20 C.F.R. §718.204(b)(2), and concluded that "the evidence of record supports [e]mployer's concession in its brief that [c]laimant suffers [from] a totally disabling pulmonary impairment." Decision and Order at 15. The administrative law judge further determined that claimant invoked the rebuttable presumption at amended Section 411(c)(4).

On appeal, employer reiterates its concession that claimant has invoked the presumption, but argues that the administrative law judge erred in finding total disability established based on the pulmonary function study and medical opinion evidence.[6] We reject employer's allegations of error.

[4] The documents relevant to claimant's history of coal mine employment indicate that employer is located in Kentucky. Director's Exhibits 1, 4, 5. However, when designating employer as the responsible operator, the district director found that the mine at which claimant worked was in West Virginia. Director's Exhibit 23. Based upon this determination, and the participation of the West Virginia Coal Workers' Pneumoconiosis Fund as carrier, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[5] Contrary to employer's understanding, invocation of the amended Section 411(c)(4) presumption requires claimant to establish, by a preponderance of the evidence, that he is totally disabled, in addition to establishing the requisite amount of coal mine employment. 30 U.S.C. §921(c)(4).

[6] The administrative law judge determined that claimant did not establish total disability at 20 C.F.R. §718.204(b)(2)(ii) and (iii), as the preponderance of the blood gas studies was non-qualifying and there is no evidence that claimant is suffering from cor pulmonale with right-sided congestive heart failure. Decision and Order at 11.

Pursuant to 20 C.F.R. §718.204(b)(2)(i), the administrative law judge considered the results of pulmonary function studies obtained on December 2, 2008, May 20, 2009, October 21, 2009, and January 26, 2010. Decision and Order at 11-12; Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 3-4. The administrative law judge acted within his discretion in crediting the qualifying[7] pre-bronchodilator and post-bronchodilator results obtained by Dr. Habre on October 21, 2009, despite Dr. Habre's comments that claimant had suboptimal effort, as Dr. Habre did not state that the study's results were invalid and he relied on them to diagnose a totally disabling respiratory impairment. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 12; Employer's Exhibit 4. The administrative law judge permissibly gave greater weight, therefore, to the more recent, qualifying pre-bronchodilator and post-bronchodilator results of the October 21, 2009 pulmonary function study and the qualifying pre-bronchodilator results of the January 25, 2010 study. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); Decision and Order at 12. Accordingly, the administrative law judge rationally determined that the preponderance of the more recent pulmonary function study evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *See Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(en banc); *Workman v. Eastern Associated Coal Corp*., 23 BLR 1-22 (2004)(en banc); Decision and Order at 12.

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge weighed the opinions in which Drs. Rasmussen and Habre stated that claimant has a totally disabling pulmonary impairment and the contrary opinion of Dr. Crisalli. Decision and Order at 13-15; Claimant's Exhibit 1; Employer's Exhibits 3, 4. The administrative law judge acted within his discretion in giving greater weight to the opinions of Drs. Rasmussen and Habre, as he found their conclusions to be better supported by the objective evidence of record. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Grizzle v. Pickands Mather & Co*., 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Decision and Order at 15. Therefore, we affirm the administrative law judge's determination that claimant established total disability at 20 C.F.R. §718.204(b)(2) and invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4).[8]

[7] 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).

[8] The administrative law judge's finding that claimant established total disability at 20 C.F.R. §718.204(b)(2) also constitutes a finding that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

II. Rebuttal of the Presumption

In evaluating whether employer rebutted the presumption at amended Section 411(c)(4), the administrative law judge considered whether employer proved that claimant does not have pneumoconiosis or is not totally disabled due to pneumoconiosis. Decision and Order at 16. The administrative law judge found that the preponderance of the x-ray evidence was insufficient to establish the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1). *Id*. at 17. However, the administrative law judge determined that the evidence was sufficient to establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), as Dr. Rasmussen's opinion outweighed the contrary opinions of Drs. Crisalli and Habre. *Id*. at 18-20. The administrative law judge determined, therefore, that employer did not rebut the presumption by proving that claimant does not have pneumoconiosis. *Id*. at 19. Based on his findings at 20 C.F.R. §718.202(a)(4), the administrative law judge further found that employer did not rebut the presumption by establishing that claimant's totally disabling respiratory impairment was not due to pneumoconiosis. *Id*. at 19-20.

Regarding the administrative law judge's finding that employer failed to establish that claimant does not have legal pneumoconiosis, employer alleges that the administrative law judge erred in finding that Dr. Crisalli's opinion conflicts with the views of the Department of Labor (DOL), as expressed in the preamble to the amended regulations. Employer's contention is without merit. Dr. Crisalli indicated that "[t]he literature clearly shows that the emphysema seen in coal dust exposure is a focal type of emphysema related to the coal dust macule, but the emphysema seen in cigarette smokers is not focal." Employer's Exhibit 3 at 9. The administrative law judge found that Dr. Crisalli's opinion conflicted with the DOL's recognition that there is a causal connection between coal dust exposure and emphysema, without any specification that this causal effect exists only with respect to certain types of emphysema. Decision and Order at 18, *citing* 65 Fed. Reg. 79,943 (Dec. 20, 2000). Because the administrative law judge correctly determined that Dr. Crisalli's opinion conflicted with the interpretation of the scientific literature adopted by the DOL and set forth in the preamble, the administrative law judge rationally found that Dr. Crisalli's opinion was insufficient to establish that claimant does not have legal pneumoconiosis at 20 C.F.R. §718.202(a)(4).[9] *See* 65 Fed. Reg. 79,923, 79,938-39, 79,941-42 (Dec. 20, 2000); *A & E Coal Co. v. Adams*, F.3d ,

[9] Because the administrative law judge provided a valid rationale for discrediting Dr. Crisalli's opinion, we decline to address employer's additional allegations of error regarding the administrative law judge's weighing of Dr. Crisalli's opinion. *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

No. 11-3926, 2012 WL 3932113 (6th Cir. Sept. 11, 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011).

The administrative law judge also acted within his discretion in according little weight to Dr. Habre's opinion because, contrary to the administrative law judge's determination, he believed that claimant was mainly a surface miner and was, therefore, exposed to lower levels of coal dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order at 19; Employer's Exhibit 4. Further, the administrative law judge acted within his discretion in determining that Dr. Habre did not rule out coal dust exposure as a contributing cause of claimant's impairment but rather stated "[e]ven [though claimant] can be diagnosed with legal pneumoconiosis . . . it is not the main etiology of his disabling lung disease." Employer's Exhibit 4; *see Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); Decision and Order at 19. Because the administrative law judge provided valid rationales for discrediting the opinions of Drs. Crisalli and Habre, we affirm the administrative law judge's finding that employer did not rebut the presumption at amended Section 411(c)(4), by proving that claimant does not have legal pneumoconiosis.

With respect to the administrative law judge's determination that employer did not rebut the presumption at amended Section 411(c)(4) by proving that claimant's totally disabling impairment was not due to pneumoconiosis, employer argues that the objective tests and medical opinions of record do not establish that claimant has a totally disabling respiratory or pulmonary impairment.[10] However, this is not a valid basis for rebutting the presumption at amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4). Furthermore, we have affirmed the administrative law judge's finding that the preponderance of the evidence supports a finding of total disability at 20 C.F.R. §718.204(b)(2). We affirm, therefore, the administrative law judge's determination that employer did not rebut the presumption at amended Section 411(c)(4) by establishing that the miner's disabling respiratory impairment is not due to pneumoconiosis.

[10] In arguing that the evidence is insufficient to establish total disability, employer cites to 20 C.F.R. §718.204(c). Employer's Brief at 16. Under the revised regulations, which became effective on January 19, 2001, the provision pertaining to total disability, previously set forth at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b)(2).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge