BRB No. 13-0211 BLA

HERBERT JAMES KEATHLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNNY RIDGE MINING COMPANY, INCORPORATED	)	DATE ISSUED: 11/13/2013
	)	
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 on Remand of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

H. Brett Stonecipher (Fogle Keller Purdy PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (09-BLA-5081) of Administrative Law Judge Richard T. Stansell-Gamm awarding benefits on a claim 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 involves a claim filed on July 20, 2007, and is before the Board for the second time.

In the initial decision, the administrative law judge credited claimant with over fifteen years of qualifying coal mine employment,[1] and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). However, the administrative law judge found that employer rebutted the presumption, by establishing that claimant does not have pneumoconiosis. Accordingly, the administrative law judge denied benefits.

Pursuant to claimant's appeal and employer's cross-appeal, the Board affirmed the administrative law judge's finding that claimant established more than fifteen years of employment in a surface mine with dust conditions substantially similar to those found in underground mines. *Keathley v. Sunny Ridge Mining Co.*, BRB Nos. 11-0205 BLA/A (Nov. 16, 2011) (unpub.). The Board, however, vacated the administrative law judge's

[1] The record reflects that claimant's last coal mine employment was in Kentucky. Claimant's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) (2013) and, therefore, vacated the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis. *Id.* Additionally, the Board vacated the administrative law judge's finding that employer rebutted the presumption by establishing that claimant does not suffer from pneumoconiosis.[3] *Id.*

On remand, the administrative law judge found that the evidence established that claimant suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). Consequently, the administrative law judge determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at Section 411(c)(4). 30 U.S.C. §921(c)(4). The administrative law judge also found that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013) and, therefore, erred in determining that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 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).

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

Employer contends that the administrative law judge erred in finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. The record contains four pulmonary function studies conducted on March 11, 2008, May 23, 2008, October 7, 2008, and October 10, 2008. Director's Exhibit 17; Claimant's Exhibit 1; Employer's Exhibits 3, 4. The first two pulmonary function studies, conducted on March 11, 2008 and May 23, 2008, produced

[3] The Board denied employer's motion for reconsideration. *Keathley v. Sunny Ridge Mining Co.*, BRB Nos. 11-0205 BLA/A (June 14, 2012) (Order) (unpub.).

qualifying values, both before and after the administration of a bronchodilator.[4] Director's Exhibit 17; Employer's Exhibit 4. The October 7, 2008 pulmonary function study, however, produced non-qualifying values both before and after the administration of a bronchodilator. Employer's Exhibit 3. The final pulmonary function study, conducted on October 10, 2008, produced qualifying pre-bronchodilator results, and included no post-bronchodilator results. Claimant's Exhibit 1.

In his initial decision, the administrative law judge found that all of the studies were valid, and that "five of the seven pulmonary function tests met the regulatory threshold to establish total disability. In turn, the preponderance of the conforming and valid pulmonary function tests demonstrate total disability . . . ." Decision and Order at 15.

In its Decision and Order, the Board agreed with employer that the administrative law judge erred in failing to provide a valid reason for according less weight to the non-qualifying October 7, 2008 pulmonary function study. *Keathley*, slip op. at 6. The Board held that the administrative law judge's evaluation of the conflicting pulmonary function study was improperly based solely upon a count of the qualifying versus the non-qualifying studies. *Id.* Consequently, the Board vacated the administrative law judge's finding pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013), and remanded the case for further consideration. *Id.*

On remand, the administrative law judge determined that all of the pulmonary function studies constituted valid representations of claimant's pulmonary function at the time of each test, and found that the pulmonary function study evidence established total disability:

> I consider the four test dates sufficiently contemporaneous to provide a probative assessment of [claimant's] pulmonary function since they were conducted within a seven month period, the later three test dates occurred within the last five months of that time frame, and the most recent, albeit by three days, test nevertheless showed the return of a totally disabling impairment. That is, although on at least one occasion, October 7, 2008, two of [claimant's] pulmonary function tests did not reach the total disability thresholds, on two separate days before the non-qualifying test results, March 11, 2008 and May 23, 2011 [sic], and on one occasion after the non-qualifying test results, October 10, 2008, five other conforming and

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendix B. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i) (2013).

> valid pulmonary function tests demonstrated that [claimant] was totally disabled due to a pulmonary impairment on each of those three other test days. Additionally, while the waxing, waning, and waxing of [claimant's] pulmonary function disability may relate to the cause of his pulmonary impairment, it does not preclude a probative determination that on three out of four days of pulmonary testing over the course of seven months, on two of three more recent test dates, and on the most recent test day, [claimant's] pulmonary function met the total disability thresholds.

Decision and Order on Remand at 8.

The administrative law judge, therefore, found that all seven of the pulmonary function study tests were "equally probative." Decision and Order on Remand at 8. Because five of the seven pulmonary function tests produced qualifying values, the administrative law judge found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013). *Id.*

Employer contends that the administrative law judge erred in his consideration of the pulmonary function study evidence. Employer initially argues that the administrative law judge erred in not according greater weight to the two pulmonary function studies conducted on October 7, 2008 and October 10, 2008, asserting that these studies were conducted substantially later than the studies conducted on March 11, 2008, and May 23, 2008. We disagree. Noting that all four of the pulmonary function studies were conducted within a seven month period, the administrative law judge permissibly found that the studies were "sufficiently contemporaneous." Decision and Order on Remand at 8; *see Aimone v. Morrison Knudson Co.*, 8 BLR 1-32, 1-34 (1985) (holding that it was proper to find that eight months is not a significant period of time separating x-rays). Consequently, contrary to employer's contention, the administrative law judge was not required to accord greater weight to the pulmonary function studies conducted on October 7, 2008 and October 10, 2008.

We also reject employer's contention that the higher, non-qualifying values from the October 7, 2008 pulmonary function study should have been found to be more reliable than the qualifying values obtained during the other three studies.[5] As the

[5] The administrative law judge rejected the argument that the non-qualifying October 7, 1988 pulmonary function study was the most probative:

> I have also considered Dr. Broudy's assertion that . . . Dr. Westerfield's October 7, 2008 pulmonary function test represents the best assessment because it is indicative of [claimant's] peak, or highest, pulmonary capacity, as well as Dr. Westerfield's assertion that the study is the most

administrative law judge accurately noted, there is no evidence calling into question the reliability of the qualifying pulmonary function studies conducted on March 11, 2008, May 23, 2008, and October 10, 2008. Decision and Order on Remand at 8. The administrative law judge permissibly found no basis to conclude that the non-qualifying pulmonary function study results obtained on October 7, 2008 are more reliable than the contemporaneous qualifying results obtained on March 11, 2008, May 23, 2008, and October 10, 2008. *See Greer v. Director, OWCP*, 940 F.2d 88, 90-91, 15 BLR 2-167, 2-170 (4th Cir. 1991) (recognizing that, because pneumoconiosis is a chronic condition, on any given day, it is possible to do better than one's typical condition would permit). Because it is based upon substantial evidence, we affirm the administrative law judge's finding that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i) (2013). Moreover, the administrative law judge properly weighed the medical opinion evidence with the pulmonary function and blood gas study evidence, and found that, when weighed together, the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) (2013). *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); Decision and Order on Remand at 9-10. This finding is, therefore, affirmed.

In light of our affirmance of the administrative law judge's finding that claimant established over fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), we affirm the administrative law judge's finding that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

> accurate. However, under the regulations, if a pulmonary function test conforms to the regulatory standards in terms of consistent effort, and no basis exists to invalidate the study, the test results are considered sufficiently indicative of a claimant's actual pulmonary capacity at that time such that total disability may be established if the results reach the requisite thresholds. Further, under Dr. Broudy's reasoning, every non-qualifying pulmonary function test would be more probative than a qualifying pulmonary function test in a claimant's case, which appears inconsistent with the present regulatory framework for establishing total disability through the preponderance of the pulmonary function tests.

Decision and Order on Remand at 8.

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal 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," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis.[6] Employer specifically contends that the administrative law judge erred in finding that Dr. Broudy's opinion was insufficient to disprove the existence of legal pneumoconiosis. Dr. Broudy diagnosed chronic obstructive pulmonary disease "due to a combination of chronic obstructive asthma and pulmonary emphysema and chronic bronchitis from cigarette smoking." Employer's Exhibit 4.

In his initial decision, the administrative law judge found that Dr. Broudy's opinion was a "documented and reasoned assessment." Decision and Order at 38. Based upon his crediting of Dr. Broudy's opinion, the administrative law judge found that employer disproved the existence of legal pneumoconiosis. *Id.* The administrative law judge also found that employer disproved the existence of clinical pneumoconiosis.[7] *Id.*

In its Decision and Order, the Board agreed with claimant and the Director that the administrative law judge did not adequately examine the reasoning underlying Dr. Broudy's opinion. *Keathley*, slip op. at 10-11. The Board, therefore, vacated the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption, and remanded the case to the administrative law judge for further consideration of Dr. Broudy's opinion regarding legal pneumoconiosis.[8] *Id.*

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[6] "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) (2013).

[7] "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 to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1) (2013).

[8] Although the Board remanded the case to the administrative law judge for his reconsideration of whether employer could disprove the existence of legal

On remand, the administrative law judge reconsidered Dr. Broudy's reasoning, and found that it was inconsistent with the regulations. Decision and Order on Remand at 17. The administrative law judge, therefore, found that Dr. Broudy's opinion was insufficient to disprove the existence of legal pneumoconiosis. *Id.*

Employer argues that the administrative law judge erred in his consideration of Dr. Broudy's opinion. We disagree. As summarized by the administrative law judge, Dr. Broudy excluded coal mine dust exposure as a cause of claimant's chronic bronchitis because "bronchitis associated with coal dust exposure usually ceases with cessation of exposure." Employer's Exhibit 6 at 16. The administrative law judge permissibly found that this reasoning was inconsistent with the regulations, which recognize that pneumoconiosis may be latent and progressive, and "may first become detectable only after the cessation of coal mine dust exposure." 20 C.F.R. §718.201(c) (2013); *see Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003); Decision and Order on Remand at 17. Because the administrative law judge provided a valid reason for discrediting Dr. Broudy's opinion, *see Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983), we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.[9]

Upon finding that employer was unable to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). The administrative law judge rationally discounted the opinions of Drs. Broudy and Westerfield, that claimant's disabling pulmonary impairment did not arise

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pneumoconiosis, the Board affirmed the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis. *Keathley v. Sunny Ridge Mining Co.*, BRB Nos. 11-0205 BLA/A (Nov. 16, 2011) (unpub.), slip op. at 8.

[9] The administrative law judge previously considered whether Dr. Westerfield's opinion was sufficient to disprove the existence of legal pneumoconiosis. Dr. Westerfield diagnosed chronic obstructive pulmonary disease (COPD) due solely to cigarette smoking. Employer's Exhibit 3. The administrative law judge accorded diminished weight to Dr. Westerfield's opinion, as to the etiology of claimant's COPD, because he found that the doctor's opinion failed to recognize that pneumoconiosis is a latent and progressive disease. Decision and Order at 36-37. Because it was unchallenged on appeal, the Board affirmed the administrative law judge's decision to discount Dr. Westerfield's opinion. *Keathley*, slip op. at 9 n.11.

out of his coal mine employment, for the same reasons that he discredited their opinions that claimant does not have legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom.*, *Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 18. Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish rebuttal. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *see Morrison*, 644 F.3d at 479, 25 BLR at 2-8.

Because claimant established invocation of the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, the administrative law judge's award of benefits is affirmed.

Attorney Fee

Claimant's counsel has filed a petition requesting a fee for services performed before the Board in the prior appeals, BRB Nos. 11-0205 BLA/A. 20 C.F.R. §802.203 (2013). Claimant's counsel requests a total fee of $3,900.00 for 13.00 hours of legal services at an hourly rate of $300.00. Employer objects to the number of hours requested.

Specifically, employer argues that claimant's counsel "bill[ed] twice" for legal services performed on June 12, 2011, November 18, 2011, and November 21, 2011. We agree. Review of the fee petition discloses that counsel, after listing the legal services that he performed on June 12, 2011 (1.50 hour), November 18, 2011 (0.25 hour), and November 21, 2011 (0.25 hour), lists the same information again, including the description of the services, and the time spent performing them. *See* Fee Application at 3-4. Consequently, we disallow, as duplicative, 2.00 of the requested hours. We find the remaining 11.0 hours of attorney services to be reasonably commensurate with the necessary work performed in the appeal before the Board, and award a fee for these services. 20 C.F.R. §802.203(e) (2013). Therefore, we award claimant's counsel a fee of $3,300.00 for 11.0 hours of legal services, at an hourly rate of $300.00, to be paid directly to claimant's counsel by employer.[10] 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203 (2013).

[10] An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and claimant's counsel is awarded a fee of $3,300.00.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge