

BRB No. 11-0383 BLA

DANNY DALE BROWN)	
)	
Claimant-Respondent)	
)	
v.)	
)	
NEW HOPE COMPANY OF KENTUCKY)	DATE ISSUED: 02/14/2012
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order on Subsequent Claim Awarding Benefits of Robert B. Rae, Administrative Law Judge, United States Department of Labor.

William A. Lyons (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Ann Marie Scarpino (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Subsequent Claim Awarding Benefits (2009-BLA-05445) on a claim filed on May 1, 2008, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(l))(the Act). After finding that claimant had established twenty-two years of underground coal mine employment, the administrative law judge found that the newly

submitted evidence established that the miner is totally disabled pursuant to 20 C.F.R. §718.204(b), and that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309(d). The administrative law judge also found that the record, as a whole, established total disability pursuant to Section 718.204(b).¹ Based on his finding that claimant had twenty-two years of underground coal mine employment and his finding that claimant is totally disabled, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis.² 30 U.S.C. §921(c)(4). The administrative law judge further found that the presumption was not rebutted. *Id.* Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding total disability established pursuant to Section 718.204(b) and, therefore, erred in finding the Section 411(c)(4) presumption invoked.³ Employer also contends that the administrative law judge erred in finding that claimant established entitlement to benefits pursuant to 20 C.F.R. Part 718. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the Section 411(c)(4) presumption is applicable to the instant claim. The Director contends, however, that, if the Board affirms the administrative law judge's finding that entitlement to benefits is established pursuant to Part 718, the Board need not consider the administrative law judge's Section 411(c)(4) findings.

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 The administrative law judge also found, based on the record as a whole, that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

² Section 411(c)(4) provides, in pertinent part, that, if it is established that a miner had at least fifteen years of qualifying coal mine employment, and the evidence establishes the presence of a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4).

³ Employer does not challenge the administrative law judge's finding that claimant had twenty-two years of underground coal mine employment. That finding is, therefore, affirmed, as unchallenged on appeal. *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).

Section 411(c)(4) Invocation
Total Disability – 20 C.F.R. §718.204(b)

In finding total respiratory disability established pursuant to Section 718.204(b), the administrative law judge found that the most recent medical opinion evidence, together with the pulmonary function study evidence, established total respiratory disability pursuant to Section 718.204(b). The Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

In this case, the administrative law judge failed to sufficiently discuss and explain his reasons for finding that the pulmonary function study and medical opinion evidence established total respiratory disability pursuant to Section 718.204(b), in accordance with the requirements of the APA. *See* Decision and Order at 13-14. Moreover, the administrative law judge failed to weigh, as required, the evidence supportive of a finding of total respiratory disability against contrary probative evidence, in determining whether the evidence, as a whole, established total respiratory disability.⁵ *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1986). Consequently, we vacate the administrative law judge’s finding of total respiratory disability pursuant to Section 718.204(b) and remand the case for further consideration of all the relevant evidence thereunder. Because we vacate the administrative law judge’s finding that total respiratory disability was established at Section 718.204(b), we also vacate the administrative law judge’s finding that the Section 411(c)(4) presumption was invoked and remand the case for consideration thereunder, if reached.

⁴ Because claimant’s last coal mine employment was in Kentucky, Director’s Exhibit 4, we 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*).

⁵ The administrative law judge noted that, in addition to qualifying pulmonary function studies, there were also non-qualifying pulmonary function studies, and that all of the blood gas study evidence was non-qualifying. Decision and Order at 7-8.

Section 411(c)(4) Rebuttal

Further, if reached, the administrative law judge must reconsider his finding that the Section 411(c)(4) presumption was not rebutted. The burden of establishing rebuttal of the Section 411(c)(4) presumption rests on employer. *See* 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order on Subsequent Claim Awarding Benefits is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge