**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0168 BLA

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| NOLAN BRANTLEY | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| JIM WALTER RESOURCES, INCORPORATED / WALTER ENERGY, INCORPORATED | ) | DATE ISSUED: 02/23/2016 |
| | ) | |
| Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Al Jones, Tuscaloosa, Alabama, for claimant.

John C. Webb, V (Lloyd, Gray, Whitehead & Monroe, P.C.), Birmingham, Alabama, for employer.

Before: HALL, Chief Administrative Appeals Judge, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (13-BLA-6004) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of

the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a subsequent claim filed on March 9, 2012.[1]

Applying Section 411(c)(4), 30 U.S.C. §921(c)(4) (2012),[2] the administrative law judge credited claimant with eighteen years and nine months of qualifying coal mine employment,[3] and found that the evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Consequently, the administrative law judge also found that claimant established that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. 20 C.F.R. §725.309(c). Finally, the administrative law judge determined that employer did not rebut the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) and, therefore, erred in finding that claimant invoked the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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[1] Claimant filed previous claims in 2000 and 2007, both of which were finally denied. Director's Exhibit 1. An administrative law judge denied claimant's most recent prior claim on December 13, 2010, because the evidence did not establish any of the elements of entitlement. *Id.*

[2] Section 411(c)(4) of the Act 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) (2012); *see* 20 C.F.R. §718.305.

[3] The record reflects that claimant's last coal mine employment was in Alabama. Director's Exhibit 8. Accordingly, the Board will apply the law of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[4] Because employer does not challenge the administrative law judge's finding that claimant established eighteen years and nine months of qualifying coal mine employment, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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. 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).

Employer argues that the administrative law judge erred in finding that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and therefore erred in finding that claimant invoked the Section 411(c)(4) presumption. Employer specifically argues that the administrative law judge erred in finding that the new pulmonary function study and medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv).[5]

The record contains three new pulmonary function studies conducted on April 26, 2012, June 25, 2012, and June 28, 2012. The April 26, 2012 pulmonary function study administered by Dr. Rao produced qualifying values.[6] Director's Exhibit 12. Although the June 25, 2012 pulmonary function study administered by Dr. Goldstein produced non-qualifying values, Dr. Rao's second pulmonary function study, administered on June 28, 2012, produced qualifying values both before and after the administration of a bronchodilator. Claimant's Exhibit 3.

In addressing the conflicting pulmonary function study evidence, the administrative law judge found that the pulmonary function studies conducted on June 25, 2012 and June 28, 2012 were not valid and, therefore, were entitled to "little weight." Decision and Order at 8. By contrast, the administrative law judge found that the April 26, 2012 qualifying pulmonary function study was valid and, as a result, was entitled to the greatest weight. *Id.* The administrative law judge, therefore, found that the pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). *Id.*

[5] The administrative law judge found that the arterial blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Decision and Order at 9. Moreover, because there is no evidence of cor pulmonale with right-sided congestive heart failure, the administrative law judge found that claimant could not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). *Id.*

[6] 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, for establishing total disability. *See* 20 C.F.R. §718.204(b)(2)(i). A "non-qualifying" study exceeds those values.

Employer argues that the administrative law judge should have found that the April 26, 2012 pulmonary function study was invalid based upon Dr. Ranavaya's invalidation of the study. We disagree. The administrative law judge permissibly credited Dr. Rao's opinion, that the qualifying pulmonary function study dated April 26, 2012 was acceptable, over Dr. Ranavaya's contrary assessment, based upon Dr. Rao's superior pulmonary qualifications.[7] *See Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990) (en banc recon.); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); Decision and Order at 8. Moreover, although Dr. Ranavaya invalidated the April 26, 2012 pulmonary function study by checking boxes on a form to indicate that the study was not acceptable due to less than optimal effort, cooperation, and comprehension, the administrative law judge permissibly discredited the assessment because Dr. Ranavaya "d[id] not provide any rationale to support his rejection of the study."[8] Decision and Order at 8; *Gambino v. Director, OWCP*, 6 BLR 1-134 (1983); Director's Exhibit 12. As employer raises no further arguments regarding the validity of the pulmonary function study, we affirm the administrative law judge's finding that the April 26, 2012 pulmonary function study was qualifying and valid.

Employer also argues that the administrative law judge erred in crediting the qualifying April 26, 2012 pulmonary function study because its results were "spuriously low" in comparison to non-qualifying values obtained during the June 25, 2012 pulmonary function study. Citing *Anderson v. Youghiogeny & Ohio Coal Co.*, 7 BLR 1-152 (1984), employer argues that, because pulmonary function studies are effort-dependent, a non-qualifying study revealing sub-optimal cooperation may still be a valid measure of the lack of respiratory disability. Employer's Brief at 4. Employer therefore asserts that, "[w]ithin her discretion," the administrative law judge could have considered the non-qualifying June 25, 2012 pulmonary function study as evidence of the lack of a pulmonary impairment, despite finding the study to be invalid. *Id.*

While employer accurately notes that an administrative law judge has the

[7] While Dr. Rao is Board-certified in Internal Medicine and Pulmonary Disease, Dr. Ranavaya is Board-certified in Occupational Medicine. Director's Exhibit 12.

[8] Employer asserts that Dr. Rao's notation that claimant "did a lot of coughing during testing" is sufficient to support Dr. Ranavaya's rejection of the study. The administrative law judge, however, noted that claimant's cooperation and comprehension during the study were found to be good, and that Dr. Rao indicated that, despite claimant's coughing, the study was "acceptable and reproducible." Decision and Order at 7 n.8; Director's Exhibit 12 at 4.

discretion to use such a study in this manner, employer cites no authority that the administrative law judge is obligated to do so. Indeed, employer concedes that the administrative law judge "was correct" in discrediting the results of the June 25, 2012 pulmonary function study "for poor effort." *Id.* Moreover, beyond considering the issue of claimant's effort, the administrative law judge noted that Dr. Goldstein, the administering physician, indicated that claimant asked to stop the study due to cough and pain in his chest. Decision and Order at 7 n.9. Based upon claimant's poor effort, as well as Dr. Goldstein's report that claimant asked to stop the study due to coughing and pain, the administrative law judge found that the June 25, 2012 study was not valid. *Id.* Therefore, we reject employer's contention that the administrative law judge erred in not according less weight to the April 26, 2012 pulmonary function study based upon those invalid test results.[9] Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new pulmonary function study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(i).

Employer next argues that the administrative law judge erred in her consideration of the new medical opinion evidence. The administrative law judge considered the new medical opinions of Drs. Rao, Goldstein, and Fino. In a report dated May 16, 2012, Dr. Rao opined that claimant's pulmonary impairment would prevent him from performing his usual coal mine employment, noting that "it is difficult for [claimant] to walk several feet without stopping to catch his breath." Director's Exhibit 12. In a report dated June 25, 2012, Dr. Goldstein reviewed claimant's medical records and reported the results of his examination of claimant. Dr. Goldstein stated that "[i]f one just looked at [claimant's] pulmonary functions it would be unlikely that he could not work in a coal mine. However, his symptoms would have prevented him from working in a coal mine as of the present time." Director's Exhibit 14. Although Dr. Goldstein opined that claimant was currently unable to "do complete pulmonary functions because of shortness of breath," he noted that claimant's April 26, 2012 pulmonary function study administered by Dr. Rao "showed findings that were actually worse than the studies that [were done] today." *Id.* Dr. Goldstein ultimately opined that claimant has a pulmonary impairment. *Id.* Finally, Dr. Fino submitted a July 7, 2014 report, wherein he indicated that he did not find "any valid, objective evidence of an impairment or disability from a

[9] We note that, despite arguing that the June 25, 2012 invalid pulmonary function study should have been viewed as evidence that claimant is not totally disabled, employer does not address the administrative law judge's finding that the results of the June 25, 2012 pulmonary function study were only "border-line non-qualifying." Decision and Order at 8. The record reflects that claimant's FEV1 value of 2.00 was only .09 over the qualifying value of 1.91 and claimant's FVC value of 2.43 was only .01 over the qualifying value of 2.42.

respiratory standpoint." Employer's Exhibit 3. He further opined that if claimant were found to have an impairment or disability, it would be due to asthma. *Id.*

The administrative law judge found that Dr. Rao's opinion, that claimant is totally disabled from a respiratory standpoint, was well reasoned and documented.[10] Decision and Order at 14. The administrative law judge also found that Dr. Goldstein's opinion was entitled to significant weight, finding that it was "well documented and reasoned in his determination of total disability." *Id.* Conversely, the administrative law judge found that Dr. Fino's opinion was entitled to little weight because the doctor did not address claimant's employment history or the exertional requirements of his coal mine employment.[11] *Id.* at 13. The administrative law judge also found that Dr. Fino's opinion was equivocal, because he found claimant to suffer no impairment, but then opined that, if claimant was disabled, the disability would be due to asthma. *Id.* at 14. The administrative law judge, therefore, found that the new medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). *Id.*

Employer initially argues that the administrative law judge erred in crediting Dr. Rao's opinion because it was based upon a pulmonary function study that was invalidated due to poor effort. We disagree. Dr. Rao's opinion, that claimant is totally disabled from a pulmonary standpoint, is supported by the qualifying April 26, 2012 pulmonary function study results found to be valid by the administrative law judge. For the reasons previously addressed, we have rejected employer's contention that the April 26, 2012 pulmonary function study, relied upon by Dr. Rao, is invalid.

Employer also argues that the administrative law judge erred in her consideration of the medical opinions of Drs. Goldstein and Fino. Employer contends that, because Dr. Goldstein did not assess the extent of claimant's pulmonary impairment, the administrative law judge erred in finding Dr. Goldstein's opinion supportive of a finding of a totally disabling pulmonary impairment. Employer further argues that the administrative law judge improperly found Dr. Fino's opinion, that there was no valid objective evidence of a disabling pulmonary impairment, to be equivocal.

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[10] Although the administrative law judge deducted some weight from Dr. Rao's opinion because he relied upon fewer pulmonary function study results than Dr. Goldstein, she nonetheless accorded Dr. Rao's opinion "some weight on the issue of total disability." Decision and Order at 14.

[11] The administrative law judge noted that claimant "performed several different mining jobs, including inside laborer, belt installer, 'bunker' worker, and long wall helper." Decision and Order at 3.

Employer, however, has not set forth a reason that this case should be remanded for further consideration of total disability. Even if we assume that the administrative law judge erred in her consideration of the medical opinions of Drs. Goldstein and Fino, there is no need to remand this case because the outcome is foreordained, on this record as weighed by the administrative law judge. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249, 19 BLR 2-123, 2-133 (6th Cir. 1995) ("If the outcome of a remand is foreordained, we need not order one.").

We have affirmed the administrative law judge's finding that the only valid pulmonary function study of record, the qualifying pulmonary function study conducted on April 26, 2012, is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(1). Moreover, we have affirmed the administrative law judge's decision to credit Dr. Rao's opinion that claimant suffers from a totally disabling pulmonary impairment based on the results of that pulmonary function study, at 20 C.F.R. §718.204(b)(2)(iv). On the facts of this case, employer has not explained how the medical opinions of Drs. Goldstein and Fino would constitute "contrary probative evidence" that must be weighed against the credited pulmonary function study evidence and Dr. Rao's medical opinion. *See* 20 C.F.R. §718.204(b)(2). While, as employer asserts, Dr. Goldstein's diagnosis of a pulmonary impairment, without more, may not support a finding of a totally disabling pulmonary impairment, it does not undermine, or contradict, Dr. Rao's opinion that claimant is totally disabled. Moreover, Dr. Fino's opinion, that there is no valid, objective evidence of a respiratory impairment, is incorrect in view of the administrative law judge's finding that the April 26, 2012, qualifying pulmonary function study is valid. As the outcome of a remand for further consideration of the medical opinions would be foreordained, we affirm the administrative law judge's finding of total disability pursuant to 20 C.F.R. §718.204(b)(2). *See Webb*, 49 F.3d at 249, 19 BLR at 2-133.

In light of our affirmance of the administrative law judge's findings that claimant established over fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment, 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).[12] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305. Moreover, because employer does not challenge the administrative law judge's finding

[12] In light of our affirmance of the administrative law judge's finding that the new evidence establishes that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b), claimant has established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

that it failed to establish rebuttal of the Section 411(c)(4) presumption, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

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, claimant has established his entitlement to benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge