**U.S. Department of Labor**

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

BRB No. 16-0573 BLA

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| FILBERT C. VIALPANDO | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | |
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| CHEVRON MINING, INCORPORATED | ) | DATE ISSUED: 07/12/2017 |
| | ) | |
| 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 of Scott R. Morris, Administrative Law Judge, United States Department of Labor.

Evan B. Smith (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

Timothy S. Hale (Hale & Dixon, P.C.), Albuquerque, New Mexico, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05572) of Administrative Law Judge Scott R. Morris, rendered on a miner's claim filed on February 25, 2011, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

The administrative law judge credited claimant with over twenty-nine years of underground coal mine employment[1] and determined that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the presumption set forth at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] that he is totally disabled due to pneumoconiosis. The administrative law judge further determined that employer did not rebut the presumption. Accordingly, he 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.[3] Employer further contends that the administrative law judge erred in finding that it failed to rebut the presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response. Employer has filed a reply brief, reiterating its contentions on appeal.

[1] Claimant's coal mine employment was in New Mexico. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Tenth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis when the miner has fifteen or more years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305. Although claimant worked underground and at the surface at various times during his employment, the administrative law judge properly found that all of claimant's work was underground coal mine employment for purposes of invoking the Section 411(c)(4) presumption because all of it was at an underground mine. *See Muncy v. Elkay Mining Co*., 25 BLR 1-21, 1-28-29 (2011); Decision and Order at 3-10, 13.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant worked in underground coal mine employment for over twenty-nine years. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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).

**Invocation of the Section 411(c)(4) Presumption – Total Disability**

A miner is considered totally disabled if his pulmonary or respiratory impairment, standing alone, prevents him from performing his usual coal mine work. *See* 20 C.F.R. §718.204(b)(1). A claimant may establish total disability based on pulmonary function testing evidence, arterial blood gas study evidence, evidence of cor pulmonale with right-sided congestive heart failure, or medical opinion evidence. 20 C.F.R. §718.204(b)(2)(i)-(iv). The administrative law judge must consider all of the relevant evidence and weigh the evidence supporting a finding of total disability against the contrary evidence. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc). In this case, the administrative law judge found that the arterial blood gas study evidence and the medical opinion evidence support a finding of total disability.[4] Decision and Order at 17, 25-27. Giving controlling weight to Dr. Sood's opinion, the administrative law judge determined that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). *Id*. at 27.

Employer argues that the administrative law judge ignored Dr. Repsher's opinion that claimant is not totally disabled, and further contends that Dr. Repsher's opinion is uncontradicted. Employer's Brief at 6-8; Employer's Exhibit 1 at 3. These arguments lack merit. As an initial matter, the administrative law judge found that the arterial blood gas study evidence supports a finding of total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). That finding is affirmed, as it is unchallenged by employer on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 17. Moreover, Dr. Sood's opinion that claimant is totally disabled directly contradicts Dr. Repsher's opinion. The administrative law judge specifically considered and weighed both opinions, and ultimately credited Dr. Sood's opinion over Dr. Repsher's opinion. Decision and Order at 26-27.

[4] The administrative law judge determined that the pulmonary function testing evidence does not support a finding of total disability, and that there is no evidence in the record of cor pulmonale with right-sided congestive heart failure. Decision and Order at 15-16, 18.

In its reply brief, employer contends that the administrative law judge erred by crediting Dr. Sood's opinion over that of Dr. Repsher. Employer's Reply Brief at 2-3. Specifically, employer asserts that Dr. Sood is "new . . . to black lung evaluation and is newly designated to conduct [Department of Labor] examinations," and then suggests that Dr. Sood has a "bias for his position" that always leads him to conclude that miners are totally disabled. *Id*. at 2. This argument is unsubstantiated and lacks merit. If employer is asserting that Dr. Sood conducted the Department of Labor (DOL)-sponsored complete pulmonary evaluation, *see* 20 C.F.R. §725.406, employer is incorrect. Dr. Sood examined claimant in 2013, more than two years after Dr. Klepper performed the DOL-sponsored examination of claimant in 2011.[5] Claimant's Exhibit 1; Director's Exhibit 10. Moreover, the fact that claimant underwent an examination by Dr. Sood to generate additional evidence for his claim does not establish any bias on Dr. Sood's part. *See Richardson v. Perales*, 402 U.S. 389, 402-04 (1971) (refusing to ascribe bias to physicians who received fees for examining claimant, and holding that the fact that physicians' reports were adverse to claim "is not in itself bias"); *see also Van Dyke v. Missouri Mining, Inc.*, 78 F.3d 362, 365, 20 BLR 2-144, 2-151 (8th Cir. 1996).

Employer raises no other arguments on the issue of total disability. We therefore affirm the administrative law judge's decision to credit Dr. Sood's opinion and give it controlling weight.[6] Consequently, we affirm the administrative law judge's determination that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the Section 411(c)(4) presumption.

[5] Dr. Klepper concluded that claimant has a "moderately severe impairment based on shortness of breath and wheezing with minimal exertion," but the administrative law judge discounted her opinion for not assessing claimant's functional respiratory capacity or stating whether claimant's impairment would prevent him from returning to his previous coal mine employment. Director's Exhibit 10; Decision and Order at 26-27.

[6] The administrative law judge discredited Dr. Repsher's opinion for failing to discuss the exertional requirements of claimant's last coal mine employment or explain why he believed claimant could perform his job in spite of Dr. Repsher's diagnosis of moderate COPD. Decision and Order at 26-27. The administrative law judge also discredited Dr. Repsher's opinion for "summarily" dismissing claimant's qualifying arterial blood gas study. *Id*. Dr. Repsher attributed the results to the altitude at which the study was administered, but the administrative law judge noted that the tables in Appendix C of 20 C.F.R. Part 718 take altitude into account. *Id*.; Employer's Exhibit 1 at 2-3, 11. We affirm those credibility determinations, as they are unchallenged by employer on appeal. *See Skrack*, 6 BLR at 1-711.

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to employer to rebut the presumption by establishing that claimant has neither legal nor clinical pneumoconiosis,[7] or by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii); *see Energy West Mining Co. v. Estate of Blackburn*, 857 F.3d 817, 821-22 (10th Cir. 2017). The administrative law judge determined that employer failed to rebut the presumption by either method, finding that although employer established that claimant does not have clinical pneumoconiosis, it failed to establish that he does not have legal pneumoconiosis or that no part of his totally disabling respiratory or pulmonary impairment is due to pneumoconiosis. Decision and Order at 28-37.

Employer argues that the administrative law judge erred by "not adequately considering" Dr. Repsher's opinion that claimant's COPD was due to smoking, and that claimant therefore does not have legal pneumoconiosis. Employer's Reply Brief at 2-3. We disagree. The administrative law judge considered Dr. Repsher's opinion and weighed it against the opposing opinions of Drs. Klepper and Sood.[8] Decision and Order at 31-34; Employer's Exhibit 1 at 3. The administrative law judge discredited Dr. Repsher's opinion for several reasons[9] and ultimately concluded that his opinion on legal

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

[8] Drs. Klepper and Sood each concluded that claimant's smoking and coal mine dust exposure both contributed to his respiratory impairment. Decision and Order at 31-32; Director's Exhibits 10, 28; Claimant's Exhibit 1 at 7. The administrative law judge determined that "Dr. Sood's diagnosis of legal pneumoconiosis, to which Dr. Klepper's opinion lends support, is well-reasoned and supported, and merits probative value." Decision and Order at 34.

[9] The administrative law judge discredited Dr. Repsher's opinion for being contrary to the regulations and the preamble to the 2001 regulatory revisions, and for relying on generalizations without addressing claimant's specific condition. Decision and Order at 32-34. The administrative law judge also discredited the opinion because, in concluding that claimant's lung disease was caused by smoking, Dr. Repsher failed to

pneumoconiosis "merits little to no probative value, and does not constitute affirmative evidence sufficient to rebut the presumption at Section 718.305(d)(1)(i)[(A)] regarding legal pneumoconiosis." Decision and Order at 32-34. The administrative law judge therefore found that employer failed to meet its burden of establishing that claimant does not have legal pneumoconiosis, and thus failed to rebut the Section 411(c)(4) presumption by proving that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i). *Id*. at 34.

We affirm the bases on which the administrative law judge discounted Dr. Repsher's opinion regarding the existence of legal pneumoconiosis, as those findings are unchallenged by employer on appeal. *See Skrack*, 6 BLR at 1-711. Consequently, we also affirm the administrative law judge's findings that employer failed to disprove the existence of legal pneumoconiosis, and therefore failed to rebut the Section 411(c)(4) presumption by establishing that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i).

Finally, we affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that no part of claimant's totally disabling respiratory or pulmonary impairment was caused by pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(ii). Employer offers no arguments against that finding beyond its contention that the administrative law judge erred by not adequately considering Dr. Repsher's opinion. Employer's Reply Brief at 2-3. Employer's argument lacks merit. Because Dr. Repsher did not diagnose claimant with legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove the existence of the disease, the administrative law judge reasonably discounted his opinion on the issue of disability causation, finding it "inextricably linked to his misdiagnosis." *See Antelope Coal Co./Rio Tinto Energy America v. Goodin*, 743 F.3d 1331, 25 BLR 2-549 (10th Cir. 2014); *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505-06, 25 BLR 2-713, 2-720-23 (4th Cir. 2015); Decision and Order at 36-37. Therefore, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption, and affirm the award of benefits.

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consider the additive effects of smoking and coal mine dust exposure, and did not consider whether claimant's coal mine dust exposure could have worsened his disease. *Id*. at 33-34.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge