BRB No. 11-0575 BLA

MITCHELL L. NOBLE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 04/24/2012
	)	
STAR FIRE COALS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN ZURICH	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Mitchell L. Noble, Bulan, Kentucky, *pro se*.

Carl M. Brashear (Hoskins Law Offices PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (09-BLA-5013) of Administrative Law Judge Theresa C. Timlin denying benefits on a claim filed 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). This case involves a subsequent claim filed

on December 26, 2007.[1] Because the administrative law judge found that the new evidence established that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), she found 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(d).

Considering the claim on its merits, the administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, BLR (6th Cir. 2011).

Applying amended Section 411(c)(4), the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment,[2] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. 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.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's denial

[1] Claimant initially filed a claim for benefits on May 11, 2004. Director's Exhibit 1. The district director denied the claim on November 15, 2006 because claimant did not establish any of the elements of entitlement. *Id.*

[2] The record reflects that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 3, 15. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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

Because she found that claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the administrative law judge properly noted that 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); *Morrison*, 644 F.3d at 479-80. The administrative law judge found that employer established the first method of rebuttal by disproving the existence of clinical and legal pneumoconiosis.[3]

In evaluating whether the evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered the x-ray evidence of record. The record contains five interpretations of three x-rays taken on November 9, 2004, August 29, 2005, and February 5, 2008. While Dr. Patel, a B reader and Board-certified

[3] "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). "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).

radiologist, interpreted the November 9, 2004 x-ray as positive for pneumoconiosis, Director's Exhibit 1, Dr. Wiot, a B reader and Board-certified radiologist, interpreted the x-ray as negative for the disease. Employer's Exhibit 2. Although the administrative law judge noted that Drs. Patel and Wiot were each dually qualified as B readers and Board-certified radiologists, the administrative law judge acted within her discretion in according greater weight to Dr. Wiot's negative interpretation based upon his additional status as a C reader. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc); Decision and Order at 9. Consequently, the administrative law judge permissibly found that the November 9, 2004 x-ray is negative for pneumoconiosis.

Since the August 29, 2005 and February 5, 2008 x-rays were uniformly interpreted as negative for pneumoconiosis,[4] Director's Exhibits 1, 11; Employer's Exhibit 2, the administrative law judge properly found that these x-rays are negative for the disease. Decision and Order at 9. Because the administrative law judge properly found that all of the x-rays are negative for pneumoconiosis, we affirm her finding that the x-ray evidence established that claimant does not suffer from clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order at 9, 19.

In evaluating whether the medical opinion evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Castle, Broudy, and Rasmussen. The administrative law judge credited Dr. Castle's opinion, that claimant does not suffer from clinical pneumoconiosis, because she found that it was supported by the x-ray evidence and the physical findings. Decision and Order at 13, 16, 19; Employer's Exhibit 1. The administrative law judge further found that Dr. Castle's opinion was supported by that of Dr. Broudy, who similarly concluded that claimant does not suffer from clinical pneumoconiosis. Decision and Order at 19; Director's Exhibit 1. Although Dr. Rasmussen initially diagnosed clinical pneumoconiosis in a 2004 report, the administrative law judge permissibly questioned this diagnosis in light of the fact that Dr. Rasmussen, in a subsequent 2008 report, opined that claimant does not suffer from clinical pneumoconiosis.[5] Decision and Order at 19;

[4] Dr. Broudy, a B reader, interpreted the August 29, 2005 x-ray as negative for pneumoconiosis. Director's Exhibit 1. Dr. Rasmussen, a B reader, and Dr. Wiot, a B reader and Board-certified radiologist, interpreted the February 5, 2008 x-ray as negative for pneumoconiosis. Director's Exhibit 11; Employer's Exhibit 2.

[5] The administrative law judge noted that diagnoses of clinical pneumoconiosis are found in Dr. Chaney's treatment records, and in records from the Kentucky Lung Clinic. Director's Exhibit 9; Claimant's Exhibits 1, 2. However, because there is no explanation provided for the diagnoses, the administrative law judge properly found that these

Director's Exhibits 1, 11. Because it is based upon substantial evidence, the administrative law judge's finding, that the medical opinion evidence established that claimant does not suffer from clinical pneumoconiosis, is affirmed. 20 C.F.R. §718.202(a)(4).

In evaluating whether the evidence disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Castle, Broudy, and Rasmussen. Although Dr. Castle diagnosed mild restrictive lung disease and mild resting hypoxia, he opined that these conditions were related to claimant's morbid obesity, not to his coal mine dust exposure. Employer's Exhibit 1. The administrative law judge credited Dr. Castle's opinion as well-reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 19. The administrative law judge noted that Dr. Broudy similarly attributed claimant's restrictive defect to his obesity, and not his coal mine dust exposure. Decision and Order at 19; Director's Exhibit 1. Although Dr. Rasmussen, in 2004, initially attributed some of claimant's lung impairment to his coal mine dust exposure, the administrative law judge permissibly questioned this diagnosis in light of the fact that Dr. Rasmussen, in a subsequent 2008 report, opined that claimant does not suffer from legal pneumoconiosis.[6] Decision and Order at 19; Director's Exhibits 1, 11. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis. Decision and Order at 19. Consequently, we affirm, as supported by substantial evidence, the administrative law judge's determination that employer rebutted the amended Section 411(c)(4) presumption by disproving the existence of pneumoconiosis. 30 U.S.C. §921(c)(4).

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diagnoses are not sufficiently reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); Decision and Order at 17.

[6] In his 2008 report, Dr. Rasmussen, like Drs. Castle and Broudy, attributed claimant's restrictive lung disease to his obesity. Director's Exhibit 11.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge