BRB No. 13-0380 BLA

WILLIE E. CARSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
JIM WALTER RESOURCES, INCORPORATED	)	
	)	DATE ISSUED: 04/03/2014
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Willie E. Carson, Bessemer, Alabama, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (2011-BLA-05192) of Administrative Law Judge Adele Higgins Odegard denying 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 April 9, 2010.[1]

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. Claimant's most recent prior claim, filed on March 7, 2006, was denied by

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment.[3] The administrative law judge further noted that employer conceded that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). However, the administrative law judge found that employer rebutted the presumption by disproving the existence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of

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the district director on December 28, 2006 because claimant did not establish any of the elements of entitlement. Director's Exhibit 3.

[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) (2012). 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. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The record indicates that claimant's coal mine employment occurred in Alabama. Director's Exhibit 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Based upon employer's concession that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), the administrative law judge found that claimant established a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[5]

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 (1986). We 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 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 claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal. Decision and Order at 5. The administrative law judge accurately noted that employer could rebut the Section 411(c)(4) presumption 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); 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(1)); Decision and Order at 5. The administrative law judge found that employer established the first method of rebuttal by disproving the existence of clinical and legal pneumoconiosis.[6]

[5] Because they are unchallenged on appeal, we affirm the administrative law judge's findings that (1) claimant had at least fifteen years of qualifying coal mine employment; (2) the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b); (3) claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309; and (4) claimant invoked the Section 411(c)(4) presumption. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] "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

Clinical Pneumoconiosis

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge initially considered the new x-ray evidence. The record contains four interpretations of two new x-rays taken on May 20, 2010 and February 8, 2011. Although Dr. Meyer, a B reader and Board-certified radiologist, interpreted the May 20, 2010 x-ray as negative for pneumoconiosis, Employer's Exhibit 2, Dr. Ahmed, an equally qualified physician, found that the x-ray showed pleural abnormalities consistent with the disease. Director's Exhibit 13. Because equally qualified physicians disagreed as to whether the May 20, 2010 x-ray established the existence of pneumoconiosis, the administrative law judge permissibly found the readings were "in equipoise." *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 9.

Dr. Wheeler, a B reader and Board-certified radiologist, and Dr. Goldstein, a B reader, interpreted the February 8, 2011 x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 3. The administrative law judge, therefore, found that the February 8, 2011 x-ray was negative for pneumoconiosis. Decision and Order at 9.

Having found that the May 20, 2010 x-ray was "in equipoise" regarding the existence of pneumoconiosis, and that the February 8, 2011 x-ray was negative for pneumoconiosis, the administrative law judge found that the new x-ray evidence as a whole was negative for pneumoconiosis. Decision and Order at 9. Because it is based on substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence supported a finding that claimant does not suffer from clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1).

In considering whether the new medical opinion evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered the reports of Drs. Barney, Goldstein, and Fino. Dr. Barney, the physician who conducted the Department of Labor-sponsored pulmonary evaluation, did not diagnose clinical pneumoconiosis. Director's Exhibit 13. Drs. Goldstein and Fino each specifically opined that claimant does not suffer from clinical pneumoconiosis. Employer's Exhibits 1, 4. The administrative law judge permissibly found that the opinions of Drs. Goldstein and Fino, that the x-ray evidence was not indicative of clinical pneumoconiosis, were well-reasoned. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc);

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reaction of the lung to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1) (2013). "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).

Lucostic v. United States Steel Corp., 8 BLR 1-46 (1985); Decision and Order at 12. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new medical opinion evidence established that claimant does not suffer from clinical pneumoconiosis. 20 C.F.R. §718.202(a)(4).

Legal Pneumoconiosis

The administrative law judge finally considered whether the new medical opinion evidence disproved the existence of legal pneumoconiosis. The administrative law judge considered the medical opinions of Drs. Barney, Goldstein, and Fino. Dr. Barney's sole cardiopulmonary diagnosis was a pulmonary embolus, which he characterized as "hereditary." Director's Exhibit 13. Although Dr. Goldstein diagnosed an elevated left diaphragm and reversible airways disease,[7] the doctor opined that neither of these conditions is related to claimant's coal mine dust exposure. Employer's Exhibit 1. Dr. Fino diagnosed an elevated left diaphragm, an enlarged heart, and "an asthma type condition that improves following bronchodilator." Employer's Exhibit 4. Dr. Fino, like Dr. Goldstein, opined that claimant's lung disease was not caused, or contributed to, by coal mine dust exposure. *Id.* The administrative law judge permissibly found that Dr. Barney's diagnosis of a pulmonary embolus was conclusory and, therefore, not well-reasoned. *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47; Decision and Order at 12-13. Conversely, the administrative law judge permissibly found that the opinions of Drs. Goldstein and Fino, that claimant's diagnosed conditions were not attributable to his coal mine dust exposure, were reasoned and probative.[8] *Id.* There is no new medical opinion evidence attributing any of claimant's impairments to his coal mine dust exposure. Because it is based upon substantial evidence, we affirm the administrative law judge's findings that the opinions of Drs. Goldstein and Fino are well-reasoned, and sufficient to carry employer's burden to demonstrate that claimant does not have legal pneumoconiosis.

[7] Dr. Goldstein noted that claimant's reversible airways disease was manifested by a change in his pulmonary functions following the administration of a bronchodilator. Employer's Exhibit 1.

[8] In a statement in support of his appeal, claimant alleges that Dr. Fino's findings were based on an inaccurate assumption that claimant was currently smoking. Contrary to claimant's assertion, a review of Dr. Fino's 2011 report reveals that the doctor noted that claimant had stopped smoking in 1990. Employer's Exhibit 4.

In light of our affirmance of the administrative law judge's finding that employer disproved the existence of clinical and legal pneumoconiosis,[9] we affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption.[10] 30 U.S.C. §921(c)(4).

[9] The administrative law judge did not address medical evidence from the prior claims. Our review of the record demonstrates that the medical evidence from the prior claims, which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is not relevant to whether employer has rebutted the presumption. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based). Thus, under the facts of this case, we find no error in the administrative law judge's decision not to discuss the prior claim evidence at rebuttal.

[10] Absent the application of amended Section 411(c)(4), claimant's entitlement to benefits is precluded, as he cannot establish the existence of either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

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