

BRB No. 14-0007 BLA

STEPHEN W. ROBBINS)
)
 Claimant-Petitioner)
)
 v.)
)
 WESTMORELAND COAL COMPANY) DATE ISSUED: 04/30/2014
)
 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 Denying Benefits of Pamela J. Lakes,
Administrative Law Judge, United States Department of Labor.

Stephen W. Robbins, Pennington Gap, Virginia, *pro se*.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,¹ the Decision and Order Denying Benefits (2010-BLA-05736) of Administrative Law Judge Pamela J. Lakes, rendered on a claim filed on September 1, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C §§901-944 (2012) (the Act). Based on the filing date of this claim, the administrative law judge considered claimant's entitlement

¹ Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).² The administrative law judge found that claimant established at most 12.49 years of underground coal mine employment. Therefore, the administrative law judge found that claimant was unable to invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). The administrative law judge also found that claimant's entitlement to benefits was precluded under 20 C.F.R. Part 718, as he failed to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer, nor the Director, Office of Workers' Compensation Programs, has 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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (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.³ 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the administrative law judge's determination regarding the length of claimant's coal mine employment, as it is relevant to whether claimant may invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Claimant bears the burden of proof in establishing the length of his coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). The administrative law judge's finding as to the length of coal mine employment will be upheld if it is based on a reasonable method of computation and is supported by substantial evidence in the record considered as a whole.

² Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

³ This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Hunt v. Director, OWCP, 7 BLR 1-709, 1-710-11 (1985); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

Claimant alleged twenty years of coal mine employment. Director's Exhibit 1. The administrative law judge noted that "the district director found that [c]laimant had 11.17 years of coal mine employment based on the earnings reflected in claimant's Social Security Administration records and four United Mine Workers of America Health and Retirement Funds Hours Verification for Pension Eligibility letters." Decision and Order at 5; *see* Director's Exhibit 23. The administrative law judge found that the Social Security records showed either quarterly or yearly earnings from 1975 to 1990. Decision and Order at 6, n 10. The administrative law judge observed that [i]f a miner worked in or around coal mines for at least 125 working days during a calendar year or partial periods totaling one year, then the miner has worked one year in coal mine employment for all purposes under the Act." Decision and Order at 5, quoting 20 C.F.R. §725.101(a)(32)(i). In calculating the length of claimant's coal mine employment, the administrative law judge compared the total earnings for each year with the average amount of earnings a miner was expected to receive for a period of 125 days of work, as set forth in Exhibit 610 of the Black Lung Benefits Act Procedure Manual. *Id.* at 5-6. Based on this reasonable method, the administrative law judge credited claimant with at most 12.49 years of coal mine employment. *Hunt*, 7 BLR at 1-710-11; *Caldrone*, 6 BLR at 1-578. Because we detect no error in the administrative law judge's calculation, we affirm her length of coal mine employment finding and her determination that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See* 30 U.S.C. §921(c)(4).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, without benefit of the amended Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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).

The regulation at 20 C.F.R. §718.202(a) provides four methods by which claimant may establish the existence of pneumoconiosis in a living miner's claim: 1) x-ray evidence; 2) biopsy evidence; 3) the presumption set forth in 20 C.F.R. §718.304; and 4) medical opinion evidence. 20 C.F.R. §718.202(a)(1)-(4).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven ILO-classified⁴ readings of two x-rays dated August 12, 2009 and October 2, 2009. Decision and Order at 12; Director's Exhibit 13; Claimant's Exhibits 1-2; Employer's Exhibits 1-3, 10. The August 12, 2009 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander and as negative by Dr. Wheeler. Claimant's Exhibit 1; Employer's Exhibit 10. Because Drs. Alexander and Wheeler are each dually qualified as Board-certified radiologists and B readers, we affirm the administrative law judge's rational finding that the August 12, 2009 x-ray evidence is in equipoise. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 5.

With regard to the October 2, 2009 x-ray, the administrative law judge found that it had one positive reading by Dr. Alexander and four negative readings by Dr. Baker, a B reader, and Drs. Meyer, Wiot and Shipley, each dually qualified as Board-certified radiologists and B readers. Decision and Order at 12; Director's Exhibit 13; Claimant's Exhibit 2; Employer's Exhibits 1-3. We affirm the administrative law judge's finding that the October 2, 2009 is negative, based on the preponderance of the negative readings by the dually qualified radiologists. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; Decision and Order at 12. Consequently, as the administrative law judge reasonably concluded that the "x-ray evidence is at best in equipoise," we affirm the administrative law judge's determination that claimant failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 12.

Since there is no biopsy evidence of record, we affirm the administrative law judge's finding that claimant is unable to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2). Decision and Order at 12. Additionally, the administrative law judge properly found that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3).⁵ *Id.*

⁴ In accordance with the regulations, "[a] chest X-ray to establish the existence of pneumoconiosis shall be classified as Category 1, 2, 3, A, B, or C, according to the International Labour Organization Union Internationale Contra Cancer/Cincinnati (1971) International Classification of Radiographs of the Pneumoconioses (ILO-U/C 1971)[.]" 20 C.F.R. §718.102(b).

⁵ Because there is no evidence of complicated pneumoconiosis in the record, claimant is not entitled to the irrebuttable presumption at 20 C.F.R. §718.304. As discussed *infra*, claimant is not eligible for the amended Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305). Since this claim is not a survivor's claim, the presumption at 20 C.F.R. §718.306 is also inapplicable.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge noted that CT scans contained in claimant's treatment records were negative for pneumoconiosis, and while "[c]laimant was repeatedly admitted to the hospital with exacerbation of [chronic obstructive pulmonary disease (COPD)], these records do not address whether claimant's conditions were significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *Id.* at 18.

The administrative law judge further considered the medical opinions of Drs. Baker, Hippensteel and Rosenberg, relevant to whether claimant has clinical or legal pneumoconiosis.⁶ She noted that none of these physicians diagnosed clinical pneumoconiosis, and that only Dr. Baker diagnosed legal pneumoconiosis. Decision and Order at 13-16. Specifically, Dr. Baker opined that claimant's arterial blood gas testing showed severe resting arterial hypoxemia and severe hypercarbia. Director's Exhibit 13. He diagnosed COPD, based on pulmonary function testing, and bronchitis by history. Dr. Baker attributed claimant's respiratory condition, in part, to coal dust exposure, but primarily to smoking. The administrative law judge determined that Dr. Baker's opinion was not sufficiently explained in light of the objective evidence and gave it less weight because Dr. Baker "relies on generalities without discussing the specifics of [c]laimant's case."⁷ Decision and Order at 13-14. Because the administrative law judge has discretion to determine the credibility of the evidence, we affirm her finding with respect to Dr. Baker, and her determination that claimant did not establish the existence of

⁶ The regulation at 20 C.F.R. §718.201(a) provides:

"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. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

⁷ Dr. Baker stated that it was "*possible* that [claimant] actually has clinical pneumoconiosis, but his x-ray was read as negative at 0/1." Director's Exhibit 13 (emphasis added).

pneumoconiosis at 20 C.F.R. §718.202(a)(4). *See Harman Mining Co. v. Director, OWCP [Looney]*, 678 F.3d 305, 316-17, 25 BLR 2-115, 2-133 (4th Cir. 2012); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 528, 21 BLR 2-323, 2-326 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Because claimant failed to establish pneumoconiosis, a requisite element of entitlement, we affirm the administrative law judge's finding that claimant is not entitled to benefits. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge