BRB No. 13-0085 BLA

STEVEN T. REYNOLDS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HERITAGE COAL COMPANY	)	DATE ISSUED: 08/15/2013
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Denying Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Steven T. Reynolds, Central City, Kentucky, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order Denying Benefits (2010-BLA-05613) of Administrative Law Judge Alice M. Craft rendered on a claim filed on June 29, 2009, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). The administrative law judge found that claimant worked twelve years in surface coal mine

employment. Because claimant worked less than fifteen years in coal mine employment and based on the administrative law judge's determination that claimant does not have a totally disabling respiratory or pulmonary impairment, the administrative law judge concluded that claimant was not entitled to the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] Furthermore, as the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), and total disability at 20 §718.204(b), the administrative law judge found that claimant failed to establish entitlement under 20 C.F.R. Part 718. Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the denial of his claim. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

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 administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we address the administrative law judge's finding as to 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. *Mills v. Director, OWCP*, 348 F.3d 133, 136, 23 BLR 2-12, 2-16 (6th Cir.

[1] 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, amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis, if claimant establishes at least fifteen years of underground coal mine employment, or employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

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

2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). 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. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-11 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

The administrative law judge noted correctly that claimant alleged thirteen and one-half years of coal mine employment, that the district director found twelve years established based on the evidence, and that employer stipulated that claimant worked twelve years in coal mine employment. *See* Decision and Order at 4; Director's Exhibits 2, 26; Hearing Transcript at 5. The administrative law judge observed that "claimant testified that he began working in the mines in September 1975, and did not return after he was ultimately laid off in January 1989," and that all of his work was on the surface. Decision and Order at 4; *see* Hearing Transcript at 10-12. The administrative law judge found that the "Social Security records show that [claimant] was employed for less than a full year in 1979 and in 1980." Decision and Order at 4; *see* Director's Exhibit 8. The administrative law judge concluded that claimant established twelve years of coal mine employment, "[b]ased on the evidence, claimant's testimony and the stipulations in the record." Decision and Order at 4. Because we detect no error in the administrative law judge's finding that claimant has less than fifteen years of coal mine employment, we affirm the administrative law judge's determination that claimant is unable to 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, 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 administrative law judge found that claimant failed to establish that he suffers from either clinical or legal pneumoconiosis.[3] The regulation at 20 C.F.R. §718.202(a)

[3] 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

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) application of the presumption contained 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 three ILO-classified[4] readings of two x-rays dated July 30, 2009 and February 16, 2010. Decision and Order at 6; Director's Exhibits 12, 14; Employer's Exhibit 3. The July 30, 2009 x-ray had one reading, by Dr. Westerfield, which was negative for pneumoconiosis. Director's Exhibit 12. The February 16, 2010 x-ray had two readings, by Drs. Repsher and Meyer, both of which were negative for pneumoconiosis. Director's Exhibit 14; Employer's Exhibit 3. As there are no positive x-ray readings for the existence of pneumoconiosis in the record,[5] we affirm the administrative law judge's finding that claimant "failed to establish that he has pneumoconiosis based on the x-ray evidence." Decision and Order at 17.

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 17. Additionally, the administrative law judge determined correctly that claimant is unable to establish the existence of

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> 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).

[4] Pursuant to 20 C.F.R. §718.102(b), "[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] The record also contains an October 5, 2006 chest x-ray from Muhlenberg Medical Center that was read by Dr. Sison as revealing "[n]o acute or active cardiopulmonary disease." Claimant's Exhibit 2.

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3). *Id*. She properly determined that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis, set forth at 20 C.F.R. §718.304, as there is no evidence that claimant has complicated pneumoconiosis. *See* 20 C.F.R. §718.304; Decision and Order at 17.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered treatment records[6] submitted by claimant and observed:

> None of [claimant's] treating physicians diagnosed coal workers' pneumoconiosis. Histories noted both [claimant's] smoking, and his coal mine employment. Although there are references throughout [claimant's] treatment records to various symptoms and diagnoses, the treating physicians did not diagnose any chronic lung disease, nor did they prescribe any medication to treat any pulmonary condition or symptoms.

Decision and Order at 18. The administrative law judge also considered three medical opinions by Drs. Chavda, Repsher and Fino. *Id*. Dr. Chavda examined claimant on July 30, 2009, at the request of the Department of Labor. Director's Exhibit 12. Although the x-ray taken in conjunction with the examination was read as negative for clinical pneumoconiosis, Dr. Chavda diagnosed legal pneumoconiosis, based on the results of claimant's pulmonary function test, which Dr. Chavda described as showing a moderate obstructive and restrictive respiratory impairment.[7] *Id*. Dr. Chavda attributed claimant's pulmonary function study results to a combination of his histories of smoking and coal dust exposure, and obesity. *Id*. Dr. Chavda further noted that an arterial blood gas study showed mild hypoxemia, which he attributed to obesity, obesity hypoventilation syndrome and heart failure. *Id.* In supplemental notes dated September 15, 2009 and September 29, 2009, Dr. Chavda described claimant as suffering from an "obstructive and restrictive airway disease" that was "caused and/or aggravated by coal dust exposure." *Id*.

Dr. Repsher examined claimant on February 16, 2010. Director's Exhibit 14. The x-ray taken in conjunction with the examination was read by Dr. Repsher as negative for pneumoconiosis. *Id.* Dr. Repsher noted that pulmonary function testing was "entirely normal, despite poor effort and cooperation" and did not show any obstructive or restrictive respiratory impairment. *Id*. He further noted that an arterial blood gas study showed mild hypoxemia, which he attributed to obesity and congestive heart failure. *Id.*

[6] The records from Muhlenberg Medical Center include a June 10, 2008 CT Scan that revealed "[n]o significant abnormality[.]" Claimant's Exhibit 2.

[7] The technician who performed the July 30, 2009 pulmonary function test described claimant's effort as "fair." Director's Exhibit 12.

Dr. Repsher also reviewed the pulmonary function test results of Dr. Chavda and concluded that the test is "medically invalid for interpretation due to very poor effort and cooperation with testing[.]" *Id*. Dr. Repsher concluded that claimant does not have clinical or legal pneumoconiosis. *Id*.

In a report dated May 2, 2011, Dr. Fino indicated that he reviewed the reports and testing obtained by Drs. Chavda and Repsher. Employer's Exhibit 1. He agreed with Dr. Repsher that the "pulmonary function study from 2009 is invalid," explaining that it "revealed poor patient effort, and therefore the values for the pulmonary function study underestimated [claimant's] true lung function." *Id*. Based on the 2010 pulmonary function study results obtained by Dr. Repsher, which Dr. Fino considered to be valid, Dr. Fino concluded that there is no "evidence of obstruction, restriction or ventilatory impairment." *Id.* Dr. Fino further opined that claimant's mild to moderate hypoxemia on arterial blood gas testing was due entirely to claimant's obesity. *Id*. Dr. Fino concluded that claimant does not suffer from clinical or legal pneumoconiosis. *Id.*

As none of the physicians of record opined that claimant has clinical pneumoconiosis, the issue presented to the administrative law judge was whether claimant established the existence of legal pneumoconiosis, based on Dr. Chavda's opinion. The administrative law judge was not persuaded by Dr. Chavda's diagnosis of legal pneumoconiosis, "[b]ased on the improvement of the pulmonary function test results between the July 2009 and the February 2010 tests, and the fact that neither [Dr. Repsher nor Dr. Fino] found any pulmonary or respiratory impairment in [claimant] despite his poor cooperation with the testing."[8] Decision and Order at 18. Consequently, the administrative law judge found that claimant "failed to meet his burden of showing that he has a pulmonary or respiratory disease attributable to his exposure to coal mine dust." *Id*.

Because the administrative law judge has discretion to determine the credibility of the medical evidence, we affirm the administrative law judge's rational finding that claimant did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. 20 C.F.R. §718.202(a)(4). *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002); *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As claimant failed to prove that he has

[8] The administrative law judge noted that, during a deposition conducted on July 19, 2010, Dr. Chavda "agreed that the pulmonary function testing that took place in February 2010 would be a more accurate representation of the [c]laimant's present pulmonary function system." Decision and Order at 14, *citing* Employer's Exhibit 2 at 25.

pneumoconiosis, a requisite element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *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.

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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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JUDITH S. BOGGS
Administrative Appeals Judge