BRB No. 13-0145 BLA

OMAR HELM (Deceased)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	
	)	
	)	DATE ISSUED: 08/29/2013
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.

Omar Helm, Northfork, West Virginia, *pro se*.

Thomas M. Hancock (Bowles Rice LLP), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order Denying Benefits (2010-BLA-05363) of Administrative Law Judge Pamela J. Lakes,

[1] Cindy Viers, an office manager with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order). By letter dated January 21, 2013, Tim Owens, a benefits counselor with Stone Mountain, informed the Board that claimant died on December 25, 2012.

rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Claimant filed this claim on April 27, 2009.[2] Director's Exhibit 6.

In her Decision and Order issued December 4, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress 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 or substantially similar coal mine employment, and establishes that he or she had a totally disabling respiratory impairment, there is a rebuttable presumption that he or she was totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

After crediting claimant with more than fifteen years of qualifying coal mine employment,[3] the administrative law judge found that new evidence established that claimant was totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge thus found that claimant established a change in an applicable condition of entitlement, pursuant to 20 C.F.R. §725.309(d), and considered his claim on its merits. Based on claimant's years of qualifying coal mine employment and the finding of total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. However, the administrative law judge found that employer rebutted the presumption by establishing that claimant did not have pneumoconiosis. Accordingly, the administrative law judge denied benefits.

[2] Claimant filed four previous claims, three of which were finally denied, and one of which was withdrawn. Director's Exhibits 1-4. His most recent prior claim, filed on August 20, 2007, was denied by the district director on March 3, 2008, for failure to establish the existence of pneumoconiosis, or that he had a totally disabling respiratory impairment. Director's Exhibit 4.

[3] Claimant's last coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, the Board will apply the law of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer has filed a response, urging affirmance of the denial 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 (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).

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

Because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the administrative law judge properly noted that the burden of proof shifted to employer to rebut the presumption. Decision and Order at 11. The administrative law judge accurately noted that employer could rebut the presumption by disproving the existence of both clinical and legal pneumoconiosis.[4] 30 U.S.C. §921(c)(4); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995).

Clinical Pneumoconiosis

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge first considered the x-ray evidence. The new evidence includes ten interpretations of four x-rays taken on January 18, 2008, May 6, 2009, November 4, 2009, and February 20, 2012. Dr. Scatarige, who is dually-qualified as a Board-certified radiologist and B reader, interpreted the January 18, 2008 x-ray as negative for pneumoconiosis. Director's Exhibit 22. The administrative law judge noted that claimant did not submit an interpretation rebutting Dr. Scatarige's interpretation, and thus found the January 18, 2008 x-ray to be negative for the existence

[4] "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 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).

of pneumoconiosis. Decision and Order at 13.[5] The May 6, 2009 x-ray was read as positive for pneumoconiosis by Drs. Alexander and Miller, both of whom are dually-qualified, and by Dr. Forehand, a B reader; Drs. Scott and Wheeler, both of whom are dually-qualified, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibits 1, 5; Director's Exhibits 14, 22; Employer's Exhibit 1. Because the readings by the dually-qualified physicians conflicted, the administrative law judge found the May 6, 2009 x-ray to be in equipoise regarding the existence of pneumoconiosis. Decision and Order at 12-13. Dr. Scott read the November 4, 2009 x-ray as negative for pneumoconiosis, and Dr. Alexander read it as positive. Director's Exhibit 22; Claimant's Exhibit 4. Because Drs. Scott and Alexander are equally qualified, the administrative law judge found the readings of the November 4, 2009 x-ray to be in equipoise. Decision and Order at 13. For the same reason, the administrative law judge found the conflicting interpretations of the February 20, 2012 x-ray to be in equipoise, because Dr. Miller interpreted the x-ray as positive for pneumoconiosis, and Dr. Scott interpreted it as negative.[6] Claimant's Exhibit 2; Employer's Exhibit 2; Decision and Order at 13. The administrative law judge concluded that, "[a]s a whole, in view of the negative x-ray, I find that the analog x-ray evidence admitted for the instant claim weighs slightly against a finding of clinical pneumoconiosis." Decision and Order at 13.

The administrative law judge also considered the x-ray evidence from claimant's prior claims and, after assigning more weight to the interpretations of dually-qualified readers, determined that the weight of those interpretations was negative for pneumoconiosis. Decision and Order at 13; Director's Exhibits 1, 2, 4. Thus, the administrative law judge concluded that "the x-ray evidence as a whole tends to weigh against a finding of clinical pneumoconiosis." *Id*.

The administrative law judge conducted a proper qualitative analysis of all the relevant x-ray interpretations. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992). Because substantial evidence supports the administrative law judge's finding that the weight of the x-ray evidence was negative for pneumoconiosis,

[5] The administrative law judge stated in her Decision and Order that Dr. Scatarige's reading "may be deemed to be positive," but we conclude that her statement was an editorial error, given Dr. Scatarige's determination that the x-ray showed no evidence of pneumoconiosis, and the administrative law judge's subsequent finding that the January 18, 2008 x-ray was negative for the existence of pneumoconiosis. Decision and Order at 13; Director's Exhibit 22.

[6] The administrative law judge stated that Dr. Wheeler provided the negative interpretation of the February 20, 2012 x-ray, but the record reflects that Dr. Scott provided the negative interpretation. Decision and Order at 13; Employer's Exhibit 2.

we affirm her determination that the x-ray evidence established that claimant did not suffer from clinical pneumoconiosis.[7] *See* 20 C.F.R. §718.202(a)(1).

In addition, pursuant to 20 C.F.R. §718.107, the administrative law judge considered two readings of a CT scan dated August 3, 2010.[8] The administrative law judge noted that a reading of that CT scan contained in claimant's medical treatment records did not address the existence of pneumoconiosis, but that Dr. Scott later read the same CT scan as negative for small opacities that would suggest pneumoconiosis. Employer's Exhibit 4; Decision and Order at 15. Therefore, the administrative law judge concluded that the CT scan evidence weighed against a finding of clinical pneumoconiosis. Decision and Order at 15.

The administrative law judge also considered the medical opinion evidence, beginning with new opinions from Drs. Zaldivar, Tuteur, and Forehand. Drs. Zaldivar and Tuteur both opined that claimant did not have clinical pneumoconiosis. Dr. Zaldivar opined that Dr. Scott's CT scan interpretation demonstrated that "there was no evidence" of any coal dust retained in claimant's lungs, and discounted positive x-ray interpretations because of his belief that "[t]he CT scan is a far more precise tool than the chest x-ray to determine if there are any abnormalities that may indicate retention of dust." Employer's Exhibit 8 at 6-7, 12-13. Dr. Tuteur opined that claimant did not display the hallmarks of clinical pneumoconiosis, such as breathlessness, "persistent late inspiratory crackling sounds," restrictive abnormality, and impaired gas exchange. Employer's Exhibit 9 at 6-7. Dr. Tuteur also cited the negative CT scan, which he described as "a much more resolute test for the presence of an interstitial pulmonary process such as coalworkers' pneumoconiosis," as support for the majority of x-ray readings, which were negative for pneumoconiosis. *Id*. at 7-8. Dr. Forehand diagnosed claimant with "coal workers' pneumoconiosis," based on his positive reading of the May 6, 2009 x-ray. Director's Exhibit 14 at 3.

The administrative law judge found that Dr. Zaldivar's opinion was "well reasoned and documented" and "highly persuasive." Decision and Order at 14. Although she found Dr. Tuteur's opinion to be "less clear" than that of Dr. Zaldivar, the

[7] As the administrative law judge noted, there was no pathology evidence, pursuant to 20 C.F.R. §718.202(a)(2), and no evidence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a). Decision and Order at 13.

[8] Relying on the opinions of Drs. Zaldivar and Tuteur attesting to the reliability of CT scans for detecting pneumoconiosis, the administrative law judge found that the CT scan readings were medically acceptable and relevant, and therefore admissible as other medical evidence under 20 C.F.R. §718.107(b). Decision and Order at 14-15.

administrative law judge found that it corroborated Dr. Zaldivar's opinion. *Id*. The administrative law judge found that Dr. Forehand's diagnosis of clinical pneumoconiosis was "based upon his own x-ray reading," and that "he did not have the benefit of reviewing the CT scan findings." Director's Exhibit 14; Decision and Order at 13. The administrative law judge also assigned less weight to the medical opinion evidence from claimant's prior claims, because she found that those medical opinions were based upon a comparatively limited amount of evidence, and were "essentially conclusory in nature." Decision and Order at 14; Director's Exhibits 1, 2, 4. Relying primarily on Dr. Zaldivar's opinion, the administrative law judge concluded that the weight of the medical opinion evidence tended to disprove the existence of clinical pneumoconiosis. *Id*.

The administrative law judge permissibly credited the "well reasoned" and "highly persuasive" opinion of Dr. Zaldivar, and Dr. Tuteur's supporting opinion, over Dr. Forehand's contrary opinion, and acted within her discretion in assigning less weight to the medical opinion evidence from claimant's prior claims. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order at 13-14. Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence established that claimant did not have clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4). Therefore, we also affirm the administrative law judge's finding that employer disproved the existence of clinical pneumoconiosis. Decision and Order at 14.

Legal Pneumoconiosis

The administrative law judge considered the medical opinions of Drs. Zaldivar, Tuteur, and Forehand, and determined that employer disproved the existence of legal pneumoconiosis. Dr. Zaldivar opined that claimant did not have legal pneumoconiosis, but had a restrictive impairment that was due to an elevated diaphragm, and hypoxemia due to cardiac disease, and concluded that claimant's impairments were unrelated to coal mine dust exposure. Employer's Exhibit 8 at 8-14. Dr. Tuteur also opined that claimant did not have legal pneumoconiosis. Employer's Exhibits 3, 7, 9. Dr. Forehand diagnosed claimant as having a "significant respiratory impairment," the principal cause of which was his coal mine dust exposure. Director's Exhibit 14 at 4.

The administrative law judge permissibly credited Dr. Zaldivar's opinion as "well reasoned and documented" and "highly persuasive," because Dr. Zaldivar reviewed "a complete set of records and assess[ed] the likely cause of the dramatic change" in claimant's condition over time, and explained that "coal mine dust exposure played no part" in claimant's impairment. Decision and Order at 14; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. The administrative law judge again found Dr. Tuteur's opinion to be less clear than Dr. Zaldivar's opinion, but

reasonably determined that it corroborated Dr. Zaldivar's opinion. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Employer's Exhibit 3 at 5-7; Employer's Exhibit 9 at 14; Decision and Order at 14. Additionally, the administrative law judge acted within her discretion in discounting Dr. Forehand's opinion, because Dr. Forehand did not address claimant's heart disease as a possible cause of his impairment, and he did not have the advantage of reviewing a complete set of medical records, as did Drs. Zaldivar and Tuteur. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Cooper v. U.S. Steel Corp.*, 7 BLR 1-842, 1-844-45 (1985); Decision and Order at 14. Finally, the administrative law judge permissibly accorded little weight to the medical opinions from claimant's prior claims, reasoning that they were based on limited evidence and were of limited probative value in determining the cause of claimant's impairment, which did not develop until 2009. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 14. According the most weight to Dr. Zaldivar's opinion, the administrative law judge found that the medical opinion evidence disproved the existence of legal pneumoconiosis. *Id*. at 14-15.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence established that claimant did not have legal pneumoconiosis. *See* 20 C.F.R. §718.202(a)(4). Therefore, we also affirm the administrative law judge's finding that employer disproved the existence of legal pneumoconiosis. Decision and Order at 14. In light of our affirmance of the administrative law judge's findings that employer disproved the existence of clinical and legal pneumoconiosis, we affirm the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

Finally, the administrative law judge determined that claimant could not affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, in view of her determination that "the evidence preponderat[ed] against a finding" of pneumoconiosis, an essential element of entitlement. Decision and Order at 15. Substantial evidence supports the administrative law judge's determination, which is, therefore, affirmed. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

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