BRB No. 12-0135 BLA

SIE HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOUGLAS COAL CORPORATION	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 12/20/2012
	)	
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-Denial of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order-Denial of Benefits (2005-BLA-6002) of Administrative Law Judge Richard T. Stansell-Gamm, rendered on a request for

modification of a denied subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). Adjudicating this claim pursuant to the regulations contained in 20 C.F.R. Part 718, the administrative law judge credited claimant with fourteen years and two months of coal mine employment and determined that claimant established total disability at 20 C.F.R. §718.204(b)(2). The administrative law judge further determined that consideration of claimant's request for modification under 20 C.F.R. §725.310 was subsumed in the analysis of whether denial of his subsequent claim was appropriate under 20 C.F.R. §725.309. Therefore, the administrative law judge found that, because claimant proved that he is totally disabled, he demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge also determined that the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), does not apply in this case, as claimant established less than fifteen years of coal mine employment.[2] The administrative law judge further found that claimant did not establish the presence of pneumoconiosis. Accordingly, the administrative law judge denied benefits.

[1] Claimant's first claim, filed on November 28, 1988, was denied by Administrative Law Judge Rudolf L. Jansen in a Decision and Order dated February 28, 1992, because claimant did not establish the existence of pneumoconiosis or that he was totally disabled. Director's Exhibit 1. Judge Jansen denied claimant's request for reconsideration on March 30, 1992. *Id.* Claimant filed his present subsequent claim on November 3, 2003, which was denied by the district director, as claimant did not establish the existence of pneumoconiosis or total disability. Director's Exhibits 3, 27. On September 15, 2004, claimant submitted additional medical evidence, which the district director treated as a request of modification. Director's Exhibits 31, 32. The district director issued an initial finding of entitlement on March 21, 2005. Director's Exhibit 51. Employer contested the district director's award of benefits and requested a hearing. The case was assigned to Administrative Law Judge Richard T. Stansell-Gamm (the administrative law judge), whose Decision and Order-Denial of Benefits is the subject of this appeal.

[2] Relevant to this 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 establishes 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).

On appeal, claimant alleges that the administrative law judge erred in omitting consideration of the applicability of the recent amendments to the Act and in finding that claimant has not established the existence of clinical or legal pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has indicated that he will not file a substantive response unless specifically requested to do so by the Board.[3]

The Board's scope of review is defined by statute. 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.[4] 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 in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Trent v. Director, OWCP*, 11 BLR 1-26 (1987). Failure to establish any one of these elements precludes entitlement. *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Initially, we reject claimant's contention that the administrative law judge failed to review the claim pursuant to the recent amendments to the Act. The administrative law judge found that amended Section 411(c)(4) does not apply in this case, because claimant established only fourteen years and two months of coal mine employment. Decision and Order-Denial of Benefits at 5 n.5, 13 n.36. The Board's circumscribed scope of review requires that the party challenging the Decision and Order below identify any errors made by the administrative law judge and cite evidence and legal authority that support these allegations. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Although claimant asserts that he worked seventeen years as a coal miner, he does not raise any specific errors in the administrative law judge's

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order-Denial of Benefits at 12, 31.

[4] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 1, 6. 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, 1-202 (1989) (en banc).

determination that claimant failed to establish at least fifteen years of coal mine employment to invoke the rebuttable presumption under amended Section 411(c)(4). Accordingly, we affirm the administrative law judge's determination that claimant is not entitled to the amended Section 411(c)(4) presumption. *See Cox*, 791 F.2d at 446-47, 9 BLR at 2-47-48; *Sarf*, 10 BLR at 120-21.

Regarding the merits of entitlement, the administrative law judge found that claimant did not establish the existence of clinical pneumoconiosis[5] at 20 C.F.R. §718.202(a)(1), as the preponderance of x-ray readings by dually qualified Board-certified radiologists and B readers is negative for pneumoconiosis. Decision and Order-Denial of Benefits at 16. Under 20 C.F.R. §718.202(a)(4), the administrative law judge found that, "due to various documentation and reasoning issues," the opinions of Drs. Hussain, Forehand, Baker, Fino and Dahhan regarding the existence of legal pneumoconiosis[6] "have diminished probative value." *Id*. In addition, the administrative law judge determined that the opinions in which Drs. Hussain and Baker diagnosed clinical pneumoconiosis "also have diminished probative value," as they are based on "inaccurate documentation." *Id*. The administrative law judge further found that the opinions of Drs. Fino and Dahhan, that the evidence is insufficient to diagnose clinical pneumoconiosis, are consistent with the preponderance of the probative x-ray evidence. *Id.* at 31; Employer's Exhibits 4-5, 7, 8, 12-15, 19-20. The administrative law judge concluded, therefore, that claimant did not establish the existence of either clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a).[7]

[5] Clinical pneumoconiosis is defined as "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).

[6] 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[7] We affirm, as unchallenged on appeal, the administrative law judge determination that that 20 C.F.R. §718.202(a)(2) and the presumption set forth in 20 C.F.R. §718.304, and referenced in 20 C.F.R. §718.202(a)(3), do not apply in this case, as the record contains no biopsy evidence and no evidence of complicated pneumoconiosis. *See Skrack*, 6 BLR at 1-711. In addition, the presumption at 20 C.F.R.

Claimant asserts generally that the evidence of record is sufficient to establish the existence of clinical and legal pneumoconiosis and that the administrative law judge erred in failing to fully discuss the issue of legal pneumoconiosis. Claimant further maintains that the administrative law judge failed to accord proper weight to the opinion of Dr. Forehand, a treating physician, and accorded "too much weight" to the opinions of Drs. Fino and Dahhan, who were "one[-]time evaluators." Claimant's Petition for Review and Brief at 2.

Although claimant maintains that the evidence is sufficient to establish the existence of clinical pneumoconiosis, he does not identify any specific errors in the administrative law judge's determination that the x-ray evidence is insufficient to satisfy claimant's burden under 20 C.F.R. §718.202(a)(1). Accordingly, the administrative law judge's finding is affirmed. *See Cox*, 791 F.2d at 446-47, 9 BLR at 2-47-48; *Sarf*, 10 BLR at 120-21.

With respect to 20 C.F.R. §718.202(a)(4), contrary to claimant's contention, the administrative law judge explicitly addressed the issue of legal pneumoconiosis and engaged in a detailed consideration of the medical opinions in which Drs. Hussain, Forehand, and Baker diagnosed legal pneumoconiosis, and the contrary opinions of Drs. Fino and Dahhan. Decision and Order-Denial of Benefits at 17-31. The administrative law judge acted within his discretion as fact-finder in discrediting Dr. Hussain's diagnosis of legal pneumoconiosis because he did not explain how the objective medical evidence allowed him to conclude that claimant's coal mine dust exposure was a significant contributing factor in the development of claimant's chronic obstructive pulmonary disease. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); Decision and Order-Denial of Benefits at 27-28. Similarly, the administrative law judge reasonably determined that Dr. Hussain's diagnosis of clinical pneumoconiosis had little probative value, as he relied upon an x-ray that the administrative law judge determined was negative for coal workers' pneumoconiosis. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); Decision and Order-Denial of Benefits at 27.

Regarding Dr. Forehand's opinion, the administrative law judge acknowledged his status as a treating physician and stated that he was "well-positioned" to render a probative assessment of claimant's condition. Decision and Order-Denial of Benefits at 28. The administrative law judge permissibly gave diminished weight to Dr. Forehand's

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§718.306, also referenced in 20 C.F.R. §718.202(a)(3), is not available in this subsequent claim filed by a living miner.

diagnosis of a respiratory impairment caused by dust exposure, however, because Dr. Forehand failed to cite any support for his statement that a thirty-five pack year smoking history usually does not cause respiratory problems. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003) (holding that the "case law and applicable regulatory scheme clearly provide that the [administrative law judge] must evaluate treating physicians just as they consider other experts."); Decision and Order-Denial of Benefits at 28. The administrative law judge also acted within his discretion in discrediting Dr. Forehand's opinion, because he did not explain whether the variability in claimant's blood gas studies was consistent with a diagnosis of legal pneumoconiosis and asserted that all but one of the blood gas studies are invalid, which was contrary to the administrative law judge's finding that all of the blood gas studies are conforming and valid. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order-Denial of Benefits at 28-29.

Furthermore, the administrative law judge rationally found that Dr. Baker's diagnosis of legal pneumoconiosis was entitled to little weight, as he did not discuss whether claimant's significant variable oxygenation impairment supported or contradicted his diagnosis of legal pneumoconiosis, and did not explain how the objective medical evidence supported his conclusion that the possible synergistic effect observed in the medical studies actually occurred in this case. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; Decision and Order-Denial of Benefits at 27-28. The administrative law judge also permissibly determined that Dr. Baker's diagnosis of clinical pneumoconiosis was not adequately documented because he relied on an x-ray that the administrative law judge determined was negative for coal workers' pneumoconiosis. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-512.

With respect to the administrative law judge's weighing of the opinions of Drs. Fino and Dahhan, that claimant is not suffering from legal pneumoconiosis, claimant is incorrect in maintaining that the administrative law judge accorded them more weight. Rather, the administrative law judge concluded that the probative value of these opinions is as diminished as the probative value of the opinions of Drs. Hussain, Forehand, and Baker on the issue of the existence of legal pneumoconiosis. Decision and Order-Denial of Benefits at 31. In contrast, the administrative law judge rationally found that the statements by Drs. Fino and Dahhan, that clinical pneumoconiosis is not present, are "documented, reasoned, and probative" because they are consistent with the preponderance of x-ray evidence. Decision and Order-Denial of Benefits at 31; *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-308, 23 BLR 2-261, 2-284-287 (6th Cir. 2005); *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122. Thus, we affirm the administrative law judge's determination that claimant failed to establish the existence of either clinical or legal pneumoconiosis under 20 C.F.R. §718.202(a)(4).

Because we have affirmed the administrative law judge's findings at 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis, an essential element of entitlement.[8] We further affirm, therefore, the denial of benefits. *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-Denial of 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

[8] Subsequent to the filing of briefs in this appeal, the Sixth Circuit held in *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], No. 11-4298, 2012 WL 5935574 (6th Cir. Nov. 28, 2012), that all types of relevant evidence must be weighed together at 20 C.F.R. §718.202(a) to determine whether claimant suffers from pneumoconiosis. Because the administrative law judge addressed the x-ray evidence relevant to 20 C.F.R. §718.202(a)(1) when weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), remand to the administrative law judge for application of *Hensley* is not required.