

BRB No. 12-0251 BLA

STANLEY MILES WHITLEY)
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 Claimant-Petitioner)
)
 v.)
) DATE ISSUED: 12/05/2012
 ART COAL COMPANY, INCORPORATED)
)
 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.

Stanley Miles Whitley, Winfield, Alabama, *pro se*.

Ward Ballerstedt (Ferreri & Fogle, PLLC), Louisville, Kentucky, 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 (10-BLA-5695) 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 (Supp. 2011) (the Act). This case involves a claim filed on September 21, 2009. After crediting claimant with 3.03 years of coal mine employment,¹ the

¹ The record reflects that claimant's coal mine employment was in Alabama. Director's Exhibit 3. 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

administrative law judge found that the evidence of record did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer responds in support of the administrative law judge's 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'Keefe 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).

Impact of the Recent Amendments

Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's 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 that he or she has 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). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

1-200 (1989) (en banc).

Because claimant failed to establish fifteen years of coal mine employment, the administrative law judge found that claimant did not invoke the Section 411(c)(4) presumption. Decision and Order at 9. Because there is no evidence, and no allegation, that claimant had at least fifteen years of coal mine employment,² we affirm the administrative law judge's finding that claimant did not invoke the Section 411(c)(4) presumption.

Existence of Pneumoconiosis

Section 718.202(a)(1)

The administrative law judge correctly found that there are no positive x-ray interpretations in the record.³ Decision and Order at 8. Consequently, we affirm the administrative law judge's finding that the x-ray evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Section 718.202(a)(2), (3)

The administrative law judge considered a biopsy performed on July 9, 1998. The reviewing pathologist interpreted the lung tissue sample as "consistent with sarcoidosis." Claimant's Exhibit 1. Because the biopsy report did not indicate that the sarcoidosis arose out of claimant's coal mine employment, the administrative law judge correctly found that the biopsy evidence did not support a finding of legal pneumoconiosis.⁴ Decision and Order at 9. The administrative law judge further correctly found that a diagnosis of sarcoidosis does not constitute a finding of clinical pneumoconiosis.⁵ *Id.*

² On his claim for benefits, claimant alleged that he worked in the coal mines from 1978 to 1986. Director's Exhibit 2. At the hearing, claimant acknowledged that he did not have fifteen years of coal mine employment. Hearing Transcript at 17-19.

³ The record contains Dr. Hasson's negative interpretation of a November 5, 2009 x-ray. Director's Exhibit 11. Dr. Barrett interpreted this x-ray for quality purposes only. *Id.*

⁴ 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).

⁵ "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).

We, therefore, affirm the administrative law judge's finding that the biopsy evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Furthermore, the administrative law judge properly found that claimant is not entitled to any of the statutory presumptions set forth at 20 C.F.R. §718.202(a)(3).⁶

Section 718.202(a)(4)

A finding of either clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, *see* 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The only medical report of record is a November 5, 2009 report submitted by Dr. Hasson. Although Dr. Hasson diagnosed two pulmonary conditions (asthma and sarcoidosis), he did not attribute either of these conditions to claimant's coal mine employment.⁷ Director's Exhibit 11. Moreover, Dr. Hasson opined that there was "no evidence of pneumoconiosis." *Id.* Because the administrative law judge properly found that Dr. Hasson's opinion did not support a finding of pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Because the medical evidence of record does not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential 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.

⁶ Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. With respect to the presumption set forth in 20 C.F.R. §718.305, the statutory provision that it implements was amended, by Section 1556 of Public Law No. 111-148, to delete the requirement that the claim be filed before January 1, 1982. However, as indicated *supra*, this amendment does not apply in the present case, as there is no evidence or allegation that claimant has at least fifteen years of coal mine employment. Finally, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306.

⁷ Dr. Hasson indicated that claimant's asthma was "intrinsic," and that claimant's sarcoidosis was "idiopathic." Director's Exhibit 11.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge