BRB No. 10-0289 BLA

DELMER KEEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HARMAN BROTHERS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 01/10/2011
	)	
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 Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Delmer Keen, Richlands, Virginia, *pro se*.

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

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2007-BLA-5634) of Administrative Law Judge Edward Terhune Miller (the administrative law judge) on a claim filed on May 15, 2006, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). Director's Exhibit 2. The administrative law judge credited claimant with thirteen years and 158 days of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge further found that claimant established total disability at 20 C.F.R. §718.204(b), but failed to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a).[2] Accordingly, benefits were denied.

On appeal, claimant generally contends that he is entitled to benefits. Employer responds, urging affirmance of the administrative law judge's decision denying benefits based on the finding that the existence of pneumoconiosis was not established. The Director, Office of Workers' Compensation Programs (the Director), has indicated that he will not file a substantive response.

In an appeal 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). The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence and in accordance with law.[3] 33 U.S.C. §921(b)(3), as incorporated

[1] Carol Ann Blankenship, a benefits counselor 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. Blankenship is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] In addition, because the administrative law judge found that pneumoconiosis was not established, he found that claimant could not establish the necessary link between pneumoconiosis and coal mine employment and pneumoconiosis and total disability at 20 C.F.R. §718.203(b) and 20 C.F.R. §718.204(c).

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

into the Act 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 filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis, if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

By Order dated October 19, 2010, the Board provided the parties with the opportunity to address the impact, if any, of the 2010 amendments on this case. *Keen v. Harman Brothers Coal Co.*, BRB No. 10-0289 BLA (Oct. 19, 2010)(unpub. Order). The Director responds, noting that, if the Board affirms the administrative law judge's finding of fewer than fifteen years of coal mine employment, the Section 411(c)(4) presumption would be unavailable in this case, and the new amendments would have no impact. If, however, the Board vacates the administrative law judge's finding regarding length of coal mine employment, the Director contends that the case should be remanded for consideration under Section 411(c)(4). 30 U.S.C. §921(c)(4).

At the outset, we affirm the administrative law judge's length of coal mine employment finding. In addressing the merits of a case, the administrative law judge must render a determination of the length of a miner's coal mine employment. 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. 2003); *Kephart v. Director, OWCP*, 8 BLR 1-185, 1-186 (1985). The administrative law judge is given great latitude in the computation of years of coal mine employment and, as such, his calculation of years of coal mine work will be upheld, when based on a reasonable method of computation and supported by substantial evidence in the record considered as a whole. *Hunt v. Director, OWCP*, 7 BLR 1-709, 1-710-711 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984); *Caldrone v. Director, OWCP*, 6 BLR 1-575, 1-578 (1983).

In this case, the evidence regarding length of coal mine employment consists of claimant's Social Security records, other employment records, and hearing testimony.[4] In finding that thirteen years and 158 days of coal mine employment were established, the administrative law judge acknowledged that claimant alleged sixteen years of coal mine employment, but declined to credit claimant's testimony because claimant was "uncertain and equivocal as to his coal mine employment." Decision and Order at 11. Instead, the administrative law judge based his length of coal mine employment finding on claimant's Social Security and other employment records. *See* Decision and Order at 11-14. Because the administrative law judge properly relied on this evidence,[5] in light of claimant's "uncertain and equivocal" testimony regarding the length of his coal mine employment, we affirm the administrative law judge's length of coal mine employment finding as supported by substantial evidence. *Kephart*, 8 BLR at 1-186; *Hunt*, 7 BLR at 1-710-711. Because claimant failed to establish fifteen years of coal mine employment, we need not remand this case for consideration under Section 411(c)(4). 30 U.S.C. §921(c)(4).

We next consider the administrative law judge's finding that claimant failed to establish pneumoconiosis at Section 718.202(a). At Section 718.202(a)(1), the administrative law judge properly found that the preponderance of the x-ray evidence was negative, since the September 19, 2004, February 15, 2006 and June 27, 2006 x-rays were read by an equal number of dually-qualified readers as both positive and negative, and the October 26, 2006 and November 14, 2006 x-rays were each read by B readers as negative. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). Accordingly, we affirm the administrative law judge's finding that clinical pneumoconiosis was not established at Section 718.202(a)(1).

Turning to Section 718.202(a)(4), the administrative law judge found that the medical opinion evidence failed to establish either clinical or legal pneumoconiosis. The administrative law judge found that the preponderance of the medical opinion evidence did not establish clinical pneumoconiosis, as Drs. Hippensteel and Fino did not find the presence of clinical pneumoconiosis, and the findings of clinical pneumoconiosis made by Drs. Roatsey and Forehand were not based on reasoned medical opinions.

[4] The administrative law judge noted that claimant had not submitted any "pay stubs, affidavits, or other documentation" relevant to the length of his coal mine employment. Decision and Order at 11.

[5] The administrative law judge delineated the earnings claimant received for each period of coal mine employment reflected on claimant's Social Security and other employment records. Decision and Order at 11-13.

Specifically, the administrative law judge properly accorded little weight to Dr. Roatsey's diagnosis of coal workers' pneumoconiosis because his diagnosis was "conclusory," noting that "it contain[ed] almost no explanation or analysis to support his diagnosis beyond listing the results of [a positive] x-ray and spirometry." *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 17. Additionally, the administrative law judge permissibly accorded less weight to the opinion of Dr. Roatsey because his "credentials [were] also not as strong as the other reviewing physicians."[6] Decision and Order at 17; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113, 1-114 (1988). Regarding Dr. Forehand's diagnosis of coal workers' pneumoconiosis, the administrative law judge properly accorded it little weight as Dr. Forehand failed to analyze the significance of claimant's "dramatic improvement in spirometry testing" with the use of bronchodilators and because the doctor relied on incomplete evidence of claimant's employment and medical histories. *See Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986).

Turning to the issue of legal pneumoconiosis, the administrative law judge found that the only opinions diagnosing the presence of legal pneumoconiosis were not credible. Specifically, the administrative law judge properly found that the opinion of Dr. Roatsey did not establish legal pneumoconiosis, as Dr. Roatsey, while diagnosing a chronic obstructive pulmonary disease (COPD), did not discuss the etiology of the COPD and made little mention of "the effects of [c]laimant's smoking history." *See* 20 C.F.R. §718.201; *Stark*, 9 BLR at 1-37; Decision and Order at 17. The administrative law judge properly accorded little weight to the opinion of Dr. Forehand, diagnosing legal pneumoconiosis, for the same reasons he accorded Dr. Forehand's diagnosis of clinical pneumoconiosis little weight, *supra*. *Stark*, 9 BLR at 1-37. The administrative law judge, therefore, properly found that the medical opinion evidence failed to establish legal pneumoconiosis at Section 718.202(a)(4). Further, as the administrative law judge properly found that pneumoconiosis was not established "by any other means[,]" *see* 20 C.F.R. §718.202(a)(2)-(3); Decision and Order at 18, we affirm the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis, an essential element of entitlement. The administrative law judge, therefore, properly found that claimant failed to establish entitlement under the Act, *see Anderson*, 12 BLR at 1-112, and we must affirm the denial of benefits.

[6] Dr. Roatsey is Board-certified in Family Medicine. Claimant's Exhibit 6. Dr. Forehand is Board-certified in Allergy, Immunology, and Pediatric Medicine. Director's Exhibit 12. Dr. Fino is Board-certified in Internal Medicine and Pulmonary Disease. Employer's Exhibit 1. Dr. Hippensteel is Board-certified in Internal Medicine, Pulmonary Disease, and Critical Care Medicine. Employer's Exhibit 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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BETTY JEAN HALL
Administrative Appeals Judge