BRB No. 11-0306 BLA

DONALD SMOUSE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	DATE ISSUED: 01/26/2012
	)	
CONSOLIDATION COAL COMPANY	)	
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Donald Smouse, Uniontown, Pennsylvania, *pro se.*

William S. Mattingly and Amy J. Holley (Jackson Kelly PLLC), Morgantown, 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, the Decision and Order-Denying Benefits (09-BLA-5905) of Administrative Law Judge Daniel L. Leland rendered on a claim filed 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). This case involves a miner's subsequent claim filed on July 9, 2008.[1] Director's Exhibit 3.

In his decision, the administrative law judge credited claimant with twenty-five years and three months of coal mine employment, all of which was in underground mines.[2] The administrative law judge properly noted that Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living 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 qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 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 claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

Applying amended Section 411(c)(4), the administrative law judge found that, as claimant established at least fifteen years of underground coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), as conceded by employer, claimant established invocation of the rebuttable presumption. The administrative law judge also found that employer established rebuttal by proving that claimant does not have clinical or legal pneumoconiosis[3] pursuant to 20 C.F.R. §718.202(a)(1)-(4), and that his pulmonary or

[1] Claimant's prior claim, filed on November 21, 1980, was finally denied on July 9, 1992, because claimant did not establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1.

[2] The record reflects that claimant's last coal mine employment was in West Virginia. Hearing Transcript at 24-26; Employer's Brief at 5 n.5. 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*).

[3] 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). Legal pneumoconiosis is defined as "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

respiratory impairment "did not arise out of, or in connection with," coal mine employment. Because the administrative law judge found that the basis of the denial of the prior claim was that claimant did not establish pneumoconiosis, he determined that claimant did not establish a change in an applicable condition of entitlement in this claim pursuant to 20 C.F.R. §725.309(d). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits. Employer responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue to be whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (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).

We first address employer's challenge to the administrative law judge's application of amended Section 411(c)(4). *See Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 370, 18 BLR 2-113, 2-121 (4th Cir. 1994); *King v. Tenn. Consol. Coal Co.*, 6 BLR 1-87, 1-92 (1983). Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against a responsible operator, and asserts that the retroactive application of amended Section 411(c)(4) is unconstitutional, as a violation of employer's due process rights and as an unlawful taking of employer's property, in violation of the Fifth Amendment to the United States Constitution. Employer's Brief at 9-10. Employer's contentions are substantially similar to the ones that the Board recently rejected in *Owens v. Mingo Logan Coal Co.*, BLR , BRB No. 11-0154 BLA, slip op. at 4 (Oct. 28, 2011), *appeal docketed*, No. 11-2418 (4th Cir. Dec. 29, 2011), and we reject them here for the reasons set forth in that decision. Consequently, we affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as the claim was filed after January 1, 2005, and was pending on March 23, 2010.

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

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pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis or a totally disabling respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing that he has pneumoconiosis or is totally disabled. 20 C.F.R. §725.309(d)(2), (3).[4]

Because employer conceded that claimant has a totally disabling respiratory or pulmonary impairment, Hearing Transcript at 6, a change in an applicable condition of entitlement pursuant to Section 725.309(d) was established as a matter of law. Further, because claimant established at least fifteen years of underground coal mine employment and the presence of a totally disabling respiratory or pulmonary impairment, we affirm the administrative law judge's finding that claimant established invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis. Thus, we consider whether substantial evidence supports the administrative law judge's findings that employer established rebuttal by proving either that claimant does not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.

Clinical Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered the readings of the October 22, 2007, November 17, 2008, and November 11, 2009 x-rays,[5]

[4] The administrative law judge incorrectly stated that claimant's prior claim was denied solely because claimant did not establish the existence of pneumoconiosis. The record reflects that claimant's prior claim was denied because he did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 2, 9; Director's Exhibit 1.

[5] The record reflects that the November 11, 2009 x-ray is a digital x-ray. Employer's Exhibits 3, 13. The admissibility and consideration of digital x-rays is governed by 20 C.F.R. §718.107, rather than 20 C.F.R. §718.202(a)(1). *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-133 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*). Upon review, we conclude that any error in the

and considered the readers' radiological qualifications. Decision and Order at 3, 8. Dr. Colella, whose radiological qualifications are not in the record,[6] interpreted the October 22, 2007 x-ray as positive for pneumoconiosis. Claimant's Exhibit 6. Dr. Meyer, a Board-certified radiologist and B reader, and Dr. Abrahams, a B reader, interpreted the November 17, 2008 x-ray as negative for pneumoconiosis.[7] Director's Exhibit 15; Employer's Exhibit 1. Dr. Wiot, a Board-certified radiologist and B reader, and Dr. Renn, a B reader, interpreted the November 11, 2009 x-ray as negative for pneumoconiosis. Employer's Exhibits 3, 13. After setting forth the readers' radiological qualifications, Decision and Order at 3, the administrative law judge found that, although Dr. Colella read the October 22, 2007 x-ray as positive for clinical pneumoconiosis, the preponderance of the x-ray evidence was negative for the disease, as the other two x-rays were read "exclusively as negative for pneumoconiosis." Decision and Order at 8.

The administrative law judge's finding that the preponderance of the x-ray evidence establishes that claimant does not have clinical pneumoconiosis pursuant to Section 718.202(a)(1) is supported by substantial evidence, in view of the negative readings by the more highly qualified readers.[8] *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); n.6, *supra*. The administrative law judge's finding is therefore affirmed.

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administrative law judge's oversight does not affect the case, as substantial evidence supports his finding that the preponderance of the x-ray evidence establishes the absence of clinical pneumoconiosis, even without the two negative readings of the November 11, 2009, digital x-ray. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[6] The administrative law judge found that Dr. Colella is a B reader. The basis for the administrative law judge's finding does not appear in the record. Claimant, who was represented by counsel below, submitted Dr. Colella's x-ray reading, but did not submit Dr. Colella's radiological qualifications. Claimant's Exhibit 6. The party who attempts to rely upon an x-ray interpretation has the burden of establishing for the record the qualifications of the x-ray reader in question. *Rankin v. Keystone Coal Mining Corp.*, 8 BLR 1-54, 1-56 (1985).

[7] Dr. Navani, a Board-certified radiologist and B reader, reviewed the November 17, 2008 x-ray to assess its film quality only. Director's Exhibit 15.

[8] The administrative law judge committed no reversible error in not discussing and weighing the treatment x-ray evidence, as none of the treatment x-rays was read for the presence or absence of pneumoconiosis. Employer's Exhibits 5, 10, 12.

In considering whether employer established the absence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), the administrative law judge stated that the record contains no biopsy evidence. The record reflects that a fine needle aspiration biopsy of the upper lobe of claimant's left lung was performed on February 11, 2009. Employer's Exhibit 10. The report of the February 11, 2009 biopsy listed a diagnosis of non-small cell lung cancer, and made no mention of either the presence or absence of clinical pneumoconiosis. *Id*. Both of employer's physicians, Drs. Renn and Castle, addressed the biopsy report and related claimant's non-small cell lung cancer entirely to his smoking. Employer's Exhibit 3 at 7; Employer's Exhibit 7 at 31; Employer's Exhibit 6 at 17; Employer's Exhibit 17 at 11. We therefore conclude that any error in the administrative law judge's statement that there is no biopsy evidence is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 8.

Pursuant to 20 C.F.R. §718.202(a)(3), the administrative law judge accurately found that the presumptions at 20 C.F.R. §§718.304 and 718.306 are not applicable, because the record contains no evidence of complicated pneumoconiosis, and because this case involves a living miner's claim. Thus, substantial evidence supports the administrative law judge's finding that employer established that claimant does not have clinical pneumoconiosis pursuant to Section 718.202(a)(3).

Pursuant to 20 C.F.R. §718.107, the administrative law judge found that the two CT scans of record, dated February 11, 2009 and March 14, 2009, were read as negative for pneumoconiosis by Dr. Renn.[9] Decision and Order at 8; Employer's Exhibits 5, 9. Substantial evidence supports the administrative law judge's finding that the CT scan evidence establishes that claimant does not have clinical pneumoconiosis, and we therefore affirm it.

Legal Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Renn, Castle, Schuchert, Jaworski, and Fiehler. Decision and Order at 8-9. Dr. Schuchert, who treated claimant for lung cancer, initially opined that claimant has chronic obstructive pulmonary disease (COPD) due to occupational lung disease, and stated that claimant's coal mine dust exposure "could contribute" to his lung

[9] The record reflects that Dr. Renn testified that a CT scan is "much better" than a conventional x-ray because the CT scan allows for a three-dimensional view of the lungs. Employer's Exhibit 16 at 11. Dr. Castle testified that a CT scan is "more sensitive" than an x-ray, and would detect pneumoconiosis "probably before" an x-ray. Employer's Exhibit 17 at 20-21; *see* 20 C.F.R. §718.107(b).

cancer. Director's Exhibit 14; Claimant's Exhibit 5. Later, however, Dr. Schuchert testified that he would defer to a pulmonary specialist on which risk factors caused claimant's pulmonary disease, and would state only that claimant's coal mine employment was a potential risk factor in his lung disease. Employer's Exhibit 11 at 15-19, 21-22, 32-33. Drs. Jaworksi and Fiehler opined that claimant has COPD and emphysema due to both smoking and coal mine dust exposure. Director's Exhibits 15, 17; Claimant's Exhibit 1; Employer's Exhibit 15. In contrast, Drs. Renn and Castle opined that claimant does not have legal pneumoconiosis, but suffers from chronic bronchitis, emphysema, COPD, and lung cancer, all of which are due to claimant's continuing smoking habit. Employer's Exhibits 3, 7, 16, 17.

The administrative law judge discounted Dr. Schuchert's opinion on the source of claimant's pulmonary disease because he found it to be contradictory, and because Dr. Schuchert testified that he "lacks the qualifications to render an opinion on etiology." Decision and Order at 8. Further, the administrative law judge found that the opinions of Drs. Jaworski and Fiehler had "little probative value," Decision and Order at 8, because the physicians relied on inaccurate smoking histories.[10] Specifically, the administrative law judge found that, although claimant testified that he smoked for approximately eighteen to twenty pack years before quitting in 1980, his testimony was "not credible," Decision and Order at 8, because treatment notes from Dr. Korinek reported that claimant was a heavy smoker for most of his adult life and was still smoking in 2009, and because Dr. Renn obtained objective test results in 2009 that indicated claimant was still smoking.[11] In contrast, the administrative law judge found the medical opinions of Drs. Renn and Castle, that claimant's pulmonary disease is due to smoking and that coal mine dust did not contribute, to be well-reasoned and documented, because the physicians adequately explained how they determined that claimant's impairment is consistent with lung disease related solely to smoking.

The administrative law judge's decision to discount the opinions of Drs. Schuchert, Jaworski, and Fiehler is supported by substantial evidence. Specifically, substantial evidence supports the administrative law judge's findings that Dr. Schuchert,

[10] As summarized by the administrative law judge, Dr. Jaworski relied on a smoking history of one-half pack of cigarettes a day for twenty years, or ten pack years, and Dr. Fiehler relied on a history of one-half pack per day for ten years, or five pack years. Decision and Order at 8.

[11] Dr. Renn explained that these objective tests measured the levels of carboxyhemoglobin, nicotine, and cotinine that were present in claimant's bloodstream when Dr. Renn examined him on November 11, 2009. Employer's Exhibit 3 at 4-5; Employer's Exhibit 16 at 15-16.

a Board-certified general and thoracic surgeon, retreated from his initial assessment on the etiology of claimant's lung diseases, and testified that he would defer to a pulmonologist on that issue. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); Employer's Exhibit 11 at 5-17, 21-22. Further, the administrative law judge rationally accorded little weight to the opinions of Drs. Jaworski and Fiehler, because they were based on inaccurate smoking histories. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76. On this issue, substantial evidence supports the administrative law judge's finding that claimant's smoking history was more extensive than he reported to the physicians and, contrary to claimant's testimony, continued until at least 2009. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-126 (4th Cir. 1993).

Further, we conclude that substantial evidence supports the administrative law judge's finding that the opinions of Drs. Renn and Castle were well-reasoned and documented, and sufficient to carry employer's burden to demonstrate that claimant does not have legal pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-65 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43 (4th Cir. 1980). A review of the record reflects that Drs. Renn and Castle addressed each of claimant's lung impairments or diseases, and explained that they were due solely to smoking, and that claimant's coal mine dust exposure did not contribute.[12]

[12] Dr. Renn opined that claimant's x-rays, CT scans, and biopsy were negative for clinical coal workers' pneumoconiosis, and that his small-cell lung cancer is a type of cancer that is unrelated to coal mine dust exposure, but is due to smoking. Employer's Exhibit 3; Employer's Exhibit 16 at 17-19. Dr. Renn further opined that claimant's severe chronic obstructive pulmonary disease (COPD) with an asthmatic component, emphysema, and chronic bronchitis are due solely to smoking, because claimant has a continuing history of smoking, he has bullae in his lungs that are visible on x-rays, and his lungs show hyperinflation and air trapping that are typical of smoking-related disease, and inconsistent with disease related to coal mine dust exposure. Employer's Exhibit 16 at 9-11, 19. Similarly, Dr. Castle opined that claimant's x-rays are negative for clinical pneumoconiosis, and his biopsy revealed a form of cancer that is typical of smoking-related cancer. Employer's Exhibit 7 at 30-33; Employer's Exhibit 17 at 18. Dr. Castle further opined that claimant's severe COPD with asthma, emphysema, and chronic bronchitis are unrelated to claimant's coal mine dust exposure, because claimant has hyperinflation of the lungs with gas trapping, indicative of lung disease due to smoking. Employer's Exhibit 17 at 8, 15-16, 23. While Dr. Castle acknowledged that it is possible for legal pneumoconiosis to progress, he noted that, in this particular case, claimant left coal mine employment in 1980, but "continued to smoke heavily for a number of years,"

The administrative law judge found that the physicians' opinions were well-reasoned, in that the physicians explained how claimant's specific medical findings were consistent with lung disease due solely to claimant's ongoing history of heavy smoking. Decision and Order at 9. The determination of whether a medical report is documented and reasoned is committed to the discretion of the administrative law judge. *See Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 440-41, 21 BLR at 2-275-76; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*). As substantial evidence supports the administrative law judge's credibility determination with respect to the opinions of Drs. Renn and Castle, it is affirmed. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

Because substantial evidence supports the administrative law judge's findings that employer established that claimant does not have clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a), those findings are affirmed. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-174 (4th Cir. 2000). We therefore affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption by demonstrating that claimant does not have pneumoconiosis. Further, as the existence of pneumoconiosis is a necessary element of entitlement in a miner's claim under 20 C.F.R. Part 718, claimant's entitlement is precluded under the Act. *See Anderson*, 12 BLR at 1-112.

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a factor that Dr. Castle took into account in opining that coal mine dust exposure did not aggravate claimant's lung disease. Employer's Exhibit 17 at 35-37.

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