BRB No. 13-0003 BLA

JOHNNY A. RATLIFF	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: 07/26/2013
ROYALTY SMOKELESS 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 of William S. Colwell, Administrative Law Judge, United States Department of Labor.

Johnny A. Ratliff, Premier, West Virginia, *pro se*.

Christopher M. Green (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, the Decision and Order (10-BLA-5177) of Administrative Law Judge William S. Colwell 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 subsequent claim filed on February 9, 2009.[1]

[1] Claimant's first two claims, filed on February 28, 1973 and July 24, 2005, were finally denied because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2. A third claim, filed on September 5, 1998, was subsequently withdrawn,

After crediting claimant with 8.8 years of coal mine employment,[2] the administrative law judge found that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). The administrative law judge, therefore, found that the applicable condition of entitlement had not changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309(d). 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 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).

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

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and is, therefore, considered not to have been filed. 20 C.F.R. §725.306(b). Claimant filed a fourth claim on April 22, 2003. Director's Exhibit 4. In a Decision and Order dated July 10, 2006, Administrative Law Judge Richard T. Stansell-Gamm found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of the prior claim became final. *See* 20 C.F.R. §725.309. However, Judge Stansell-Gamm, in considering the merits of claimant's 2003 claim, found that the evidence did not establish the existence of pneumoconiosis, and therefore denied benefits. Director's Exhibit 4. The Board subsequently affirmed Judge Stansell-Gamm's denial of benefits. *Ratliff v. Royalty Smokeless Coal Co.*, BRB No. 06-0811 BLA (May 24, 2007) (unpub.).

[2] The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

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).

Length of Coal Mine Employment

Claimant bears the burden of proof to establish the number of years actually worked in coal mine employment. *Kephart v. Director, OWCP*, 8 BLR 1-185 (1985); *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Neither the Act nor the regulations provides specific guidelines for the computation of the number of years of coal mine employment. However, as long as a computation of time is based on a reasonable method and supported by substantial evidence, it will be upheld. *Dawson v. Old Ben Coal Co.*, 11 BLR 1-58 (1988) (en banc); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986).

The administrative law judge found that claimant's testimony and Social Security earnings records established that claimant worked for a "variety of different companies" from 1956 to 1973. Decision and Order at 5. Although the administrative law judge found that claimant was a credible witness, he found that claimant was not "able to recall, with specificity, his . . . employment for periods of time in the 1950s and 1960s." *Id.* Because the evidence was insufficient to establish the beginning and ending dates of claimant's coal mine employment, the administrative law judge elected to apply the formula set forth at 20 C.F.R. §725.101(a)(32)(iii).[3] The administrative law judge adopted the district director's use of this formula to calculate claimant's coal mine employment, and credited claimant with a total of 8.8 years of coal mine employment. *Id.* at 4-5.

Because the administrative law judge reasonably found that the beginning and ending dates of claimant's coal mine employment could not be ascertained,[4] he

[3] Section 725.101(a)(32)(iii) provides that, if the beginning and ending dates of the miner's coal mine employment cannot be ascertained, or the miner's coal mine employment lasted less than a calendar year, the finder-of-fact may, in his discretion, determine the length of the miner's work history by dividing the miner's yearly income from work as a miner by the coal mine industry's average daily earnings for that year, as reported by the Bureau of Labor Statistics. 20 C.F.R. §725.101(a)(32)(iii).

[4] The administrative law judge noted that claimant testified that, during the 1950s, he "worked about every year of it, *off and on when [he] had a job*." Decision and Order at 5 n.2; Hearing Transcript at 23-24 (italics added). Claimant also acknowledged that his memory regarding his coal mine employment was adversely affected by "head injuries" that he had suffered. Hearing Transcript at 26.

permissibly calculated the length of claimant's coal mine employment, based on a review of the earnings reported in claimant's Social Security earnings statement and using the method set forth at 20 C.F.R 725.101(a)(32)(iii). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant established 8.8 years of coal mine employment. *See Dawson*, 11 BLR at 1-60.

The Section 411(c)(4) Presumption

Congress enacted 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 living miner's claim, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). In light of our affirmance of the administrative law judge's finding of 8.8 years of coal mine employment, we hold that claimant cannot invoke the Section 411(c)(4) presumption.[5]

Section 725.309

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 did not establish that he suffers from pneumoconiosis. Director's Exhibit 4. Consequently, claimant had to submit new evidence establishing that he suffers from pneumoconiosis to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

[5] Claimant alleges that he worked in coal mine employment from 1956 to 1973. Director's Exhibit 7. In light of claimant's *pro se* status, we note that, even if claimant is credited with every quarter in which his Social Security earnings statement reveals any coal mine employment from 1958 to 1973 (a total of 49 quarters), and given credit for two additional years of coal mine employment in 1956 and 1957 not reflected on the Social Security earnings statement, the record indicates that claimant could establish a total of only 14.25 years of coal mine employment, an insufficient length of coal mine employment to invoke the Section 411(c)(4) presumption.

Section 718.202(a)(1)

The administrative law judge initially addressed whether the new x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge considered five interpretations of two x-rays taken on March 25, 2009 and August 11, 2010.[6] The administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 7-8.

Because the March 25, 2009 x-ray was uniformly interpreted as negative for pneumoconiosis,[7] the administrative law judge properly found that this x-ray was negative for pneumoconiosis. Decision and Order at 8. While Dr. Ranavaya, a B reader, interpreted the August 11, 2010 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, Dr. Meyer, a B reader and Board-certified radiologist, interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 8. The administrative law judge acted within his discretion in crediting Dr. Meyer's negative interpretation of the August 11, 2010 x-ray, over Ranavaya's positive interpretation, based upon Dr. Meyer's superior qualifications. 20 C.F.R. §718.202(a)(1); *see Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order at 8. The administrative law judge, therefore, permissibly found that this x-ray was negative for pneumoconiosis. *Id.* Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

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

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 7 n.3.

[6] The administrative law judge also considered an interpretation of an x-ray taken on January 3, 2001. Decision and Order at 7-8; Claimant's Exhibit 5. However, because this x-ray was taken prior to the denial of claimant's prior claim, it does not constitute new evidence, and, therefore, cannot support a finding of a change in the applicable condition of entitlement. *See* 20 C.F.R. §725.309(d)(3).

[7] Drs. Forehand, Meyer, and Wiot interpreted the March 25, 2009 x-ray as negative for pneumoconiosis. Director's Exhibit 15; Employer's Exhibits 4, 5.

Furthermore, the administrative law judge properly found that claimant is not entitled to any of the presumptions set forth at 20 C.F.R. §718.202(a)(3).[8] *Id.*

Section 718.202(a)(4)

In considering whether the new medical opinion evidence established the existence of legal pneumoconiosis[9] pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge reviewed the reports of Drs. Forehand, Ranavaya, Patel, Fino and Castle. Dr. Forehand diagnosed "legal coal workers' pneumoconiosis," attributing claimant's respiratory impairment to coal mine dust exposure and cigarette smoking. Director's Exhibit 15. Dr. Ranavaya opined that claimant suffers from chronic obstructive pulmonary disease (COPD), "most probably caused by" coal mine dust exposure and cigarette smoking. Claimant's Exhibit 2. Dr. Patel also diagnosed COPD/emphysema. Claimant's Exhibit 3. On the other hand, Drs. Fino and Castle opined that claimant suffers from asthma unrelated to his coal mine dust exposure. Employer's Exhibits 1, 2. Drs. Fino and Castle opined that claimant does not suffer from any lung disease arising out of his coal mine dust exposure. Employer's Exhibits 6 at 19; 7 at 25.

In addressing the medical opinion evidence, the administrative law judge found that the opinions of Drs. Fino and Castle, that claimant suffers from asthma, are well-reasoned and documented. Decision and Order at 19-20. The administrative law judge found that their diagnoses of asthma are supported by the significant bronchoreversibility revealed by claimant's pulmonary function studies,[10] as well as a documented history of wheezing found in the record.[11] *Id.* Because the administrative law judge found that Drs.

[8] 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. Since this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[9] "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).

[10] The administrative law judge noted that the pulmonary function study conducted by Dr. Fino on December 16, 2009 produced qualifying values before the administration of a bronchodilator, but non-qualifying values thereafter. Decision and Order at 9; Employer's Exhibit 1. Dr. Fino explained that the reversibility revealed by claimant's pulmonary function study was consistent with asthma. Employer's Exhibit 6 at 15-16.

[11] Dr. Forehand noted that claimant reported wheezing "every night." Director's Exhibit 15. Dr. Patel also reported "occasional wheezing." Claimant's Exhibit 3. Dr.

Fino and Castle set forth the rationale for their diagnoses of asthma, based on their interpretation of the medical evidence, we affirm the administrative law judge's permissible finding that the diagnoses of asthma put forth by Drs. Fino and Castle are well-reasoned. *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, 2-275-76 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 19-20.

The administrative law judge found that the opinions of Drs. Forehand and Ranavaya, that claimant suffers from coal mine dust-related lung disease, were called into question by their failure to "explain the effect of [claimant's] asthma on his respiratory condition, particularly in light of the significant reversibility observed on ventilatory testing." Decision and Order at 21; Director's Exhibit 15; Claimant's Exhibit 1. The administrative law judge, therefore, permissibly questioned the reasoning underlying their opinions. *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 also acted within his discretion in discrediting Dr. Patel's opinion, finding that the doctor offered "insufficient, cursory reasoning in support of his diagnoses." Decision and Order at 20; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Because it is supported by substantial evidence, the administrative law judge's finding, that the new medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), is affirmed.[12]

Fino's physical examination revealed "prolonged expiration and wheezes on forced expiration." Employer's Exhibit 1. Dr. Castle noted "a history of episodic attacks of wheezing occurring over a number of years." Employer's Exhibit 2.

[12] A finding of clinical pneumoconiosis, *see* 20 C.F.R. §718.201(a)(1), is also sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Although Dr. Ranavaya diagnosed clinical pneumoconiosis based upon his positive interpretation of an August 11, 2010 x-ray, Claimant's Exhibit 2, the administrative law judge permissibly found that this same x-ray was interpreted by Dr. Meyer, a better qualified physician, as negative for pneumoconiosis, thus calling into question the reliability of Dr. Ranavaya's diagnosis of clinical pneumoconiosis. *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983). The record also contains three interpretations of a new digital x-ray taken on December 16, 2009, considered by the administrative law judge under 20 C.F.R. §718.107. Although Dr. Ahmed, a B reader and Board-certified radiologist, interpreted the digital x-ray as positive for pneumoconiosis, Claimant's Exhibit 5, Dr. Wiot, an equally qualified physician, and Dr. Fino, a B reader, interpreted the same digital x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 3. Because equally qualified physicians disagreed as to whether the December 16, 2009

In light of our affirmance of the administrative law judge's findings that the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's determination that claimant failed to establish that the applicable condition of entitlement has changed since the date of the denial of his prior claim. 20 C.F.R. §725.309(d). We, therefore, affirm the denial of benefits.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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digital x-ray established the existence of pneumoconiosis, the administrative law judge permissibly found that the digital x-ray did not support a finding of clinical pneumoconiosis. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 9.