

BRB No. 11-0716 BLA

DAVID A. DARNELL)
)
 Claimant-Petitioner)
)
 v.)
)
 CLINCHFIELD COAL COMPANY)
 c/o WELLS FARGO DISABILITY) DATE ISSUED: 06/25/2012
 MANAGEMENT)
)
 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 of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

David A. Darnell, Gate City, Virginia, *pro se*.¹

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer/carrier.

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

PER CURIAM:

¹ Jerry Murphree, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Claimant appeals, without the assistance of counsel, the Decision and Order (09-BLA-5143) of Administrative Law Judge Paul C. Johnson, Jr., denying benefits 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 claim filed on October 8, 2007.

In considering the claim, the administrative law judge properly noted that Congress 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 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 he or she is totally disabled due to pneumoconiosis.² 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 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, because claimant established at least fifteen years of qualifying coal mine employment,³ and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), claimant invoked the rebuttable presumption. However, the administrative law judge found that employer established that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment. Therefore, the administrative law judge found that employer rebutted the presumption. Accordingly, the administrative law judge denied benefits.

² In an April 2, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), and of its potential applicability to this case. The administrative law judge set a schedule for the parties to submit position statements, and to submit additional evidence. Employer and the Director, Office of Workers' Compensation Programs, submitted position statements. No party submitted any additional evidence.

³ The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 3, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer/carrier (employer) responds in support of the administrative law judge's denial of benefits.⁴ 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.

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); Decision and Order at 13.

In addressing whether employer proved that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," his coal mine employment,⁵ the administrative law judge considered the opinions of Drs. Forehand, Castle, and Hippensteel. Dr. Forehand opined that claimant's respiratory impairment was caused solely by coal worker's pneumoconiosis. Director's Exhibit 9. In contrast, Drs. Castle and Hippensteel opined that claimant's respiratory impairment is unrelated to his coal mine employment. Director's Exhibit 10; Employer's Exhibit 7, 8, 12. Instead, Drs.

⁴ Employer, however, argues that the administrative law judge erred in finding that claimant's wife qualifies as a dependent for the purpose of augmenting any benefits that may be payable. Employer's Brief at 4-5.

⁵ The administrative law judge did not address whether employer could establish the first method of rebuttal, by disproving the existence of pneumoconiosis.

Castle⁶ and Hippensteel⁷ attributed claimant's respiratory impairment to old healed tuberculosis, and to cardiac problems, conditions unrelated to claimant's coal mine dust exposure. *Id.*

In evaluating the conflicting evidence, the administrative law judge acted within his discretion in determining that the opinions of Drs. Castle and Hippensteel, that claimant's respiratory impairment is due solely to his tuberculosis and heart problems, and not to his coal mine employment, were well reasoned, and supported by the objective evidence of record. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533-34, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441-42,

⁶ Based upon his review of claimant's medical records, Dr. Castle noted that claimant had "documented clinical and biopsy proven pulmonary and pericardial tuberculosis," arising in 2002. Director's Exhibit 10. Dr. Castle explained that claimant's "type of disseminated tuberculosis can result in significant physiologic abnormalities as well as symptoms." *Id.* Dr. Castle noted that claimant also had "evidence of a severe nonischemic cardiomyopathy with a markedly reduced ejection fraction." *Id.* Dr. Castle indicated that "this can result in significant shortness of breath as well as physiologic and arterial blood gas abnormalities." *Id.* Dr. Castle opined that claimant's pulmonary impairment was attributable to his tuberculosis and severe heart problems. Employer's Exhibit 8 at 47-48. Dr. Castle explained that all of the abnormalities present on claimant's x-rays are due to his tuberculosis. *Id.* at 20. Dr. Castle further explained that claimant's pulmonary function study revealed a purely restrictive defect without obstruction or a diffusion abnormality, findings consistent with tuberculosis and heart problems, not with pneumoconiosis or coal mine dust exposure. Director's Exhibit 10; Employer's Exhibit 8 at 34-36.

⁷ Dr. Hippensteel took claimant's medical history and reviewed the medical evidence. Based upon this information, Dr. Hippensteel opined that, beginning in 2002, claimant "developed significant abnormalities tied in with [the] development of disseminated tuberculosis causing infiltrates in the lungs, left pleural inflammation, and granulomatous pericarditis." Employer's Exhibit 7. Dr. Hippensteel further diagnosed cardiomyopathy and chronic congestive heart failure. *Id.* Dr. Hippensteel opined that claimant's pulmonary impairment was attributable to his tuberculosis and severe heart problems. Employer's Exhibit 12 at 33. Dr. Hippensteel explained that the abnormalities on claimant's x-ray are due to his tuberculosis, not to his coal mine dust exposure. *Id.* at 16. Like Dr. Castle, Dr. Hippensteel opined that claimant's pulmonary function study results revealed a purely restrictive impairment, a finding consistent with tuberculosis and heart disease. *Id.* at 23-26. Given the absence of an obstructive component or a diffusion abnormality, Dr. Hippensteel opined that claimant's respiratory impairment is not related to his coal mine dust exposure. *Id.* at 26-27.

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); Decision and Order at 13. The administrative law judge found that the opinions of Drs. Castle and Hippensteel were “fully supported by [c]laimant’s medical history and his years of treatment for tuberculosis and heart disease.” *Id.* In contrast, the administrative law judge permissibly determined that the probative value of Dr. Forehand’s opinion was diminished, because he did not have a complete picture of the miner’s health. *See Hicks*, 138 F.3d at 533-34, 21 BLR at 2-335; *Akers*, 131 F.3d at 441-42, 21 BLR at 2-275-76; *Clark*, 12 BLR at 1-155. The administrative law judge noted that Dr. Forehand “was apparently unaware of [claimant’s] history of tuberculosis and heart disease, and did not take those conditions into account when he concluded that [c]laimant’s disability arose from his coal-mine employment.” Decision and Order at 13-14. Because it is supported by substantial evidence, we affirm the administrative law judge’s finding that employer established that claimant’s pulmonary or respiratory impairment “did not arise out of, or in connection with,” coal mine employment. We, therefore, affirm the administrative law judge’s finding that employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

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