BRB No. 13-0460 BLA

BALLARD JUSTICE, JR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELKINS ENERGY CORPORATION	)	
	)	
and	)	
	)	
OLD REPUBLIC COAL COMPANY	)	DATE ISSUED: 06/10/2014
	)	
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 Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Ballard Justice, Jr., Clintwood, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant appeals, without the assistance of legal counsel,[1] the Decision and Order Denying Benefits (2011-BLA-05293) of Administrative Law Judge Pamela J. Lakes

[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

rendered on a subsequent miner's claim filed on October 23, 2009,[2] pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). Based on the filing date of the claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012).[3] The administrative law judge found that claimant established a total of 17.75 years of coal mine employment, of which 13.25 years were spent in underground, or substantially equivalent, coal mine employment. Consequently, the administrative law judge found that claimant was not entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). Weighing the newly submitted medical evidence, the administrative law judge found that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and, therefore, she found that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[4] Accordingly, the administrative law judge denied benefits.

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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).

[2] Claimant filed two prior claims for benefits. The first claim, filed on February 22, 2001, was denied by Administrative Law Judge Stephen Purcell in a Decision and Order issued on November 14, 2006. Director's Exhibit 1. Judge Purcell, while finding that claimant established total respiratory disability, denied benefits based on his finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) or disability causation pursuant to 20 C.F.R. §718.204(c). *Id*. The second claim, filed on December 19, 2007, was denied by the district director in a Proposed Decision and Order issued on July 15, 2008 on the same grounds. Director's Exhibit 2. Claimant took no further action on this claim.

[3] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[4] After the administrative law judge issued his decision, the Department of Labor revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The provisions that were applied by the administrative law judge at 20 C.F.R. §725.309(d) are now set forth at 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

On appeal, claimant generally challenges the administrative law judge's denial of benefits. In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he is not participating in this appeal.

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.[5] *McFall v. Jewell Ridge Coal Co*., 12 BLR 1-176, 1-177 (1989). 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 the administrative law judge's finding that claimant is not entitled to invocation of the Section 411(c)(4) presumption of total disability due to pneumoconiosis, because he did not establish the requisite fifteen years of qualifying coal mine employment to invoke the presumption. In order to invoke the presumption, claimant must establish that he has at least fifteen years of underground, or substantially similar, coal mine employment. To establish that the conditions in surface coal mining are substantially similar to those in an underground mine, a surface coal miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001). It is then up to the administrative law judge to compare the dust conditions established by the evidence in the surface mining to those dust conditions known to prevail in underground coal mines. *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988).

In reviewing the evidence, the administrative law judge found that 10.5 years of claimant's coal mine employment were spent in underground coal mines,[6] while 7.25 years were spent "[driving] a coal truck in both underground and strip mining." Decision

[5] Because the miner was employed in coal mine employment in Virginia, 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); Director's Exhibits 1, 2, 5.

[6] The administrative law judge noted that claimant's underground coal mine employment consisted of loading coal on trucks, as well as working on the belt line; operating a shuttle car, bolt machine, and scoop; working as a helper on a cutting machine; and shooting coal. Decision and Order at 8.

and Order at 8; Hearing Transcript at 14-15. Of the 7.25 years claimant spent driving a coal truck, the administrative law judge determined that only 2.75 of those years were spent at underground mines, while the remaining 4.5 years were spent driving at surface mines. The administrative law judge concluded, therefore, that claimant established only 13.25 years at underground coal mines. Regarding the 4.5 years of coal truck driving at the surface coal mines, the administrative law judge found that it did not occur in substantially similar conditions to those of an underground coal mine, based on claimant's testimony that he "drove around in an enclosed cab, and the only dust he was exposed to was road dust that managed to find its way through cracks and holes [in the cab]." Decision and Order at 9. The administrative law judge concluded, therefore, that the conditions in claimant's surface coal mine employment were "in sharp contrast to the extremely dusty conditions to which underground coal miners are routinely exposed." Decision and Order at 9. Consequently, the administrative law judge stated that she was "unable to find the surface mining employment to be substantially equivalent [to that of an underground mine]." Decision and Order at 9.

After reviewing the record and the administrative law judge's findings, we conclude that the administrative law judge reasonably found that the evidence did not establish that the conditions at claimant's surface coal mine were substantially similar to those in an underground mine. *Leachman*, 855 F.2d at 512; *see Summers*, 272 F.3d at 479, 22 BLR at 2-275. Consequently, we affirm the administrative law judge's finding that claimant did not establish the requisite fifteen years of qualifying coal mine employment to entitle him to invoke the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, unassisted by the Section 411(c)(4) presumption, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled, and that his total disability is due to pneumoconiosis. 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).

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(c). The applicable conditions of entitlement "are limited to those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3). Herein, the prior claims were denied, based on the finding that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a), or disability causation pursuant to Section 718.204(c). Decision and Order at 2, 13; Director's Exhibits 1, 2.

Addressing the merits of the case, the administrative law judge found that the newly submitted evidence was insufficient to establish the existence of clinical or legal pneumoconiosis pursuant to Section 718.202(a)(1)-(4).[7] Pursuant to Section 718.202(a)(1), the administrative law judge considered the six readings of the three x-ray films dated January 5, 2010, June 28, 2010 and August 25, 2011. Decision and Order at 10; Director's Exhibits 11, 12, 16, 18, 19; Employer's Exhibit 1. The January 5, 2010 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander, dually-qualified as a Board-certified radiologist and B reader, but as negative for pneumoconiosis by Drs. DePonte and Scott, both of whom are also dually-qualified. Director's Exhibits 11, 16, 19. Finding that Drs. Alexander, DePonte and Scott are equally qualified, the administrative law judge rationally found that "as equally qualified readers disagree, [the January 5, 2010 x-ray] is in equipoise on the issue of [clinical] pneumoconiosis." *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); Decision and Order at 10.

With regard to the June 28, 2010 x-ray, the administrative law judge found that it was read as positive by Dr. Alexander, and as negative by Dr. West, a dually-qualified. Decision and Order at 10; Director's Exhibits 12, 18. The administrative law judge, therefore, reasonably found that, "as equally qualified readers disagree, [the June 28, 2010 x-ray] is in equipoise on the issue of "clinical" pneumoconiosis. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-66; Decision and Order at 10. Finally, the administrative law judge found that the August 25, 2011 x-ray was read as negative for pneumoconiosis by Dr. Fino, a B reader, and did not, therefore, establish the existence of clinical pneumoconiosis. *See* 20 C.F.R. §718.202(a)(1); *Adkins*, 958 F.2d at 52, 16 BLR at 2-66;

[7] The regulation at 20 C.F.R. §718.201(a) provides:

> "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). "'Legal pneumoconiosis' includes 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 pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

Decision and Order at 10; Employer's Exhibit 1. Consequently, the administrative law judge reasonably concluded that, "as equally qualified readers disagree as to whether two of the x-rays were positive for pneumoconiosis, and as the sole reader found the other x-ray to be negative for pneumoconiosis, … the new analog x-ray evidence is at best in equipoise on the issue of clinical pneumoconiosis and [c]laimant cannot establish pneumoconiosis under [Section] 718.202(a)(1)." Decision and Order at 10. Therefore we affirm the administrative law judge's determination that the new evidence failed to establish the existence of clinical pneumoconiosis at Section 718.202(a)(1). Decision and Order at 10.

Next, the administrative law judge found that as there is no biopsy evidence of record, the administrative law judge's finding that claimant is unable to establish the existence of pneumoconiosis at Section 718.202(a)(2) is correct. Decision and Order at 10. Additionally, the administrative law judge properly found that claimant is not entitled to any of the presumptions set forth at Section 718.202(a)(3).[8]

Turning to Section 718.202(a)(4), the administrative law judge considered the newly submitted medical opinions of Drs. Al-Khasawneh,[9] Robinette,[10] Rosenberg[11] and

[8] Because there is no evidence of complicated pneumoconiosis in the record, claimant is not entitled to the irrebuttable presumption at 20 C.F.R. §718.304. As discussed *supra*, claimant is not eligible for consideration under amended Section 411(c)(4), 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305). Further, since this claim is not a survivor's claim, the presumption at 20 C.F.R. §718.306 is also inapplicable.

[9] Dr. Al-Khasawneh, based on his January 5, 2010 examination and objective testing of claimant, diagnosed the presence of legal pneumoconiosis, in the form of a severe pulmonary impairment due to coal mine employment and cigarette smoking. Director's Exhibit 11. Dr. Al-Khasawneh opined that claimant's pulmonary impairment was due to both coal dust exposure and cigarette smoking, but that it was impossible to differentiate between the two exposures. *Id*.

[10] Dr. Robinette, in a report dated May 19, 2008, diagnosed clinical pneumoconiosis and very severe chronic obstructive pulmonary disease (COPD), noting pulmonary emphysema, reduction of diffusion capacity and a profound oxygen desaturation, based on his treatment of claimant since 1997. Director's Exhibit 16. Dr. Robinette further stated that, at the time of his initial examination of claimant in 1997, his impression was that claimant had an "occupational pneumoconiosis" due to his coal mine employment. He also acknowledged at that time that his smoking history contributed to his pulmonary disease. *Id*. Dr. Robinette further noted that claimant's pulmonary condition had worsened since 1997. *Id*. Dr. Robinette concluded that claimant had a

Fino.[12] Considering this medical opinion evidence, the administrative law judge rationally found that clinical pneumoconiosis was not established under Section 718.202(a)(4), as Dr. Robinette was the only physician who diagnosed the existence of clinical pneumoconiosis.[13] The administrative law judge reasonably exercised her discretion in finding that Dr. Robinette's opinion was entitled to little weight, despite the fact that he was a treating physician, because it was based on a positive x-ray reading, which was contrary to her finding that the x-ray evidence did not establish the existence of coal workers' pneumoconiosis. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 12. We, therefore, affirm the administrative law judge's finding that the new medical opinion evidence failed to establish the existence of clinical pneumoconiosis at Section 718.202(a)(4).

With regard to the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge found that the opinions of all four physicians were not well-reasoned. Specifically, she found that they are "lacking in analysis and persuasiveness on the issues that are relevant to my determination as to whether claimant suffers from legal pneumoconiosis." Decision and Order at 12. Within a reasonable exercise of her discretion, the administrative law judge found that the medical opinions of

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severe respiratory impairment that was "chronic and irreversible," and that claimant was totally disabled due to his "intrinsic lung disease." *Id*.

[11] Based on his June 28, 2010 examination of claimant, Dr. Rosenberg opined that neither clinical, nor legal, pneumoconiosis was present. Director's Exhibit 12. While finding that claimant was totally disabled, Dr. Rosenberg opined that it was due to smoking-related COPD. *Id*. Specifically, Dr. Rosenberg opined that claimant's pattern of impairment was consistent with a smoking-related disease and not coal dust exposure. *Id*. Dr. Rosenberg reiterated his opinion in a deposition dated July 30, 2010. Employer's Exhibit 3.

[12] Dr. Fino examined claimant on August 25, 2011, conducted a full range of objective testing, and in a report dated November 9, 2011, diagnosed severe emphysema due to claimant's smoking history and a disabling respiratory impairment due to smoking. Employer's Exhibit 1. Dr. Fino opined, however, that neither clinical, nor legal, pneumoconiosis was present, stating that it was possible to distinguish between the effects of smoking and coal dust exposure. *Id*. In a deposition dated June 26, 2012, Dr. Fino reiterated these opinions. Employer's Exhibit 2.

[13] The administrative law judge found that Drs. Al-Khasawneh, Rosenberg and Fino all opined that clinical pneumoconiosis was not present. Decision and Order at 12.

Drs. Al-Khasawneh and Robinette, the only opinions supportive of claimant's burden, were insufficient to establish the existence of legal pneumoconiosis. With regard to Dr. Al-Khasawneh's opinion, diagnosing legal pneumoconiosis, the administrative law judge found it insufficiently reasoned, as Dr. Al-Khasawneh did not discuss the factors, apart from the presence of a respiratory impairment and a history of coal mining, upon which he based his opinion. *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); *Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); Decision and Order at 12. Likewise, the administrative law judge reasonably accorded little weight to Dr. Robinette's opinion. The administrative law judge found that Dr. Robinette's opinion was "equivocal and not well[-]reasoned and documented on the legal pneumoconiosis issue," Decision and Order at 12, as Dr. Robinette did not sufficiently address "the question as to [whether] coal mine dust exposure … contributed to or aggravated … [c]laimant's … COPD (chronic obstructive pulmonary disease)." *Id*. Because the administrative law judge provided valid bases for according less weight to the opinions of Drs. Al-Khasawneh and Robinette, the opinions supportive of claimant's burden, we need not address the administrative law judge's weighing of the contrary opinions of Drs. Rosenberg and Fino. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

Because the administrative law judge properly found that the newly submitted evidence was insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), we affirm her finding that claimant failed to demonstrate a change in an applicable condition of entitlement since the denial of the prior claim pursuant to Section 725.309(c) (2013). Decision and Order at 16; *see White v. New White Coal Co.*, 23 BLR 1-1 (2004).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge