BRB No. 11-0441 BLA

LARRY A. PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY	)	DATE ISSUED: 03/28/2012
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Howard G. Salisbury, Jr. (Kay, Casto & Chaney PLLC), Charleston, West Virginia, for employer.

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

Employer appeals the Decision and Order – Awarding Benefits (2009-BLA-05815) of Administrative Law Judge Kenneth A. Krantz, rendered on a subsequent claim filed on November 13, 2008,[1] 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). The administrative

[1] Claimant filed an initial claim for benefits on July 7, 1995, which was denied by the district director on November 1, 1995, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no further action until he filed his current subsequent claim. Director's Exhibit 3.

law judge credited claimant with twenty-one years of underground coal mine employment and considered this claim under the regulations at 20 C.F.R. Part 718. He found that the newly submitted evidence was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) and, thus, found that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. Considering the claim on the merits, the administrative law judge determined that, because claimant had at least fifteen years of qualifying coal mine employment and established a totally disabling respiratory impairment under 20 C.F.R. §718.204(b)(2), claimant invoked the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that claimant is totally disabled. Employer further asserts that a preponderance of the evidence establishes that claimant does not have pneumoconiosis and that his breathing impairment is caused by heart disease and neuromuscular problems, as opposed to coal dust exposure. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[2] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

When 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."[3] 20 C.F.R.

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

[3] In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of

§725.309(d); *see 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). In this case, claimant's prior claim was denied for failure to establish any of the requisite elements of entitlement. Therefore, claimant had to establish one of the requisite elements in order to obtain a review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

I. INVOCATION OF THE 411(c)(4) PRESUMPTION

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.SC. §921(c)(4)).

In this case, the administrative law judge determined that claimant established total disability, pursuant to 20 C.F.R. §718.204(b)(2)(i), as all of the newly submitted pulmonary function studies, dated November 26, 2008, April 8, 2009, April 15, 2009 and July 1, 2009, were qualifying for total disability under the regulations.[4] Decision and Order at 9, 24-25; *see* Director's Exhibit 11; Claimant's Exhibit 1; Employer's Exhibits 1-2. The administrative law judge found, pursuant to 20 C.F.R. §718.204(b)(2)(ii), (iii), that all of the arterial blood gas studies were non-qualifying for total disability under the regulations,[5] and that that the record did not contain evidence that claimant has cor pulmonale with right-sided congestive heart failure. Decision and Order at 24-25.

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entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

[4] A "qualifying" pulmonary function test yields results that are equal to, or less than, the appropriate values set out in the table at 20 C.F.R. Part 718, Appendix B. Specifically, the FEV1 and either the MVV, FVC or the FEV1/FVC values must qualify. A "non-qualifying" test yields results that exceed those values. *See* 20 C.F.R. §718.204(b)(2)(i).

[5] A "non-qualifying" arterial blood gas study yields values that exceed the requisite table values at Appendix C of 20 C.F.R. Part 718. *See* 20 C.F.R. §718.204(b)(2)(ii).

Pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered three medical opinions by Drs. Forehand, Zaldivar and Hippensteel. Decision and Order at 26. The record reflects that Dr. Forehand examined claimant on November 26, 2008, at the request of the Department of Labor. Director's Exhibit 11. He obtained a chest x-ray that was positive for pneumoconiosis, a pulmonary function study, which he interpreted as showing an obstructive respiratory impairment, a normal arterial blood gas study and an EKG indicating ischemic heart disease. *Id*. Dr. Forehand opined that claimant suffers from coal workers' pneumoconiosis and coronary artery disease, and a significant respiratory impairment that prevents claimant from returning to his usual coal mine employment. *Id*. Dr. Forehand attributed claimant's respiratory disability to coal mine employment, noting that claimant is a non-smoker and "[a]lthough coronary artery disease may contribute to shortness of breath, it plays no role in [the] obstructive ventilatory pattern." *Id*.

Dr. Zaldivar examined claimant on April 8, 2009 and reviewed the report from Dr. Forehand. Employer's Exhibit 1. Based on the results of all of the pulmonary function and arterial blood gas testing, he opined that claimant suffers from a moderate restrictive impairment, a moderate diffusion impairment and mild hypoxemia. *Id*. Dr. Zaldivar noted that the chest x-ray "shows obvious shrinkage of volume with a large pleural effusion . . . [the] large heart is also occupying the space and displacing the lung. All of this contributes to the restriction." *Id*. Dr. Zaldivar opined that claimant's restrictive impairment, diffusion impairment and hypoxemia are "all due to severe cardiac disease and not in the least related to his occupation nor to any intrinsic lung problem." *Id*. He further stated, "[it] is my opinion that there is no pulmonary impairment at all" and that claimant's lungs are "adversely affected by the malfunctioning heart." *Id*.

Dr. Hippensteel examined claimant on April 15, 2009, and also reviewed Dr. Forehand's report. Employer's Exhibit 2, 5. He specifically disagreed with Dr. Forehand that the pulmonary function study of November 28, 2008 represented an obstructive respiratory impairment, noting that while the FVC and FEV1 values were low, the FEV1/FVC ratio was in the normal range. Director's Exhibit 5. Based on the results of the November 28, 2008 pulmonary function study and the study he obtained in conjunction with his April 15, 2009 examination, Dr. Hippensteel diagnosed that claimant has "evidence of severe cardiac disease and dysfunction with bilateral pleural effusion contributing to restrictive impairment on pulmonary function tests." *Id*. Dr. Hippensteel further noted that claimant has a history of a muscular disorder, "myositis or possibly myasthenia gravis," which may result in restrictive impairment findings on a pulmonary function testing. *Id*. Dr. Hippensteel disagreed with Dr. Forehand that claimant is totally disabled due to coal workers' pneumoconiosis, suggesting that, "as a pediatrician Dr. Forehand has not had much experience with problems related to congestive heart failure or adult muscle diseases and therefore failed to appreciate the impact of these problems extrinsic to [claimant's] lungs [that] affect his lung function and

even abnormalities on his chest x-ray." *Id*. Dr. Hippensteel diagnosed a "secondary breathing impairment," caused by the combined affects of claimant's heart condition, pleural effusions and muscular disorder. *Id*. He also stated that claimant "certainly is unable as a whole man to be able to go back to his previous job in the mines." *Id*.

In considering the medical opinion evidence, the administrative law judge found that Dr. Forehand provided a reasoned and documented opinion that claimant is totally disabled. Decision and Order at 26. The administrative law judge found that Dr. Zaldivar did not specifically address the issue of whether claimant is totally disabled, even though the pulmonary function study he obtained was qualifying for total disability under the regulations. *Id*. With respect to Dr. Hippensteel, the administrative law judge found that his opinion was less reasoned than that of Dr. Forehand but still supported a finding of total disability, as Dr. Hippensteel identified a "secondary breathing impairment," which precluded claimant from returning to his usual coal mine work. *Id*. Thus, the administrative law judge found that claimant established a totally disabling respiratory impairment based the medical opinion evidence at 20 C.F.R. §718.204(b)(2)(iv). *Id*. Accordingly, the administrative law judge determined that claimant invoked the presumption at amended Section 411(c)(4).

Employer asserts that the administrative law judge erred in finding that claimant is totally disabled, because the medical opinions of Drs. Zaldivar and Hippensteel establish that claimant's qualifying pulmonary function studies are the result of his heart disease. Memorandum of Law on Behalf of Petitioner at 8. Contrary to employer's assertion, however, the proper inquiry at 20 C.F.R. §718.204(b) is whether claimant has a totally disabling respiratory or pulmonary impairment. The etiology of that impairment is addressed at 20 C.F.R. §718.204(c), or, if claimant has successfully invoked the Section 411(c)(4) presumption, when evaluating the evidence on rebuttal. *See* 20 C.F.R. §718.204(b)(2), 30 U.S.C. §921(c)(4). Because employer does not challenge the administrative law judge's finding that the pulmonary function studies are qualifying for total disability, that finding is affirmed. *See Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Furthermore, as the administrative law judge rationally concluded that the opinions of Drs. Forehand and Hippensteel support a finding that claimant is unable to return to his usual coal mine work, based on the results of the pulmonary function testing, we affirm the administrative law judge's finding of total disability at 20 C.F.R. §718.204(b)(2)(iv). *See Milburn Colliery Co. v. Hicks*, 138 F. 3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998). Thus, we affirm the administrative law judge's finding that claimant established a totally disabling respiratory or pulmonary impairment and that he is entitled to invocation of the

amended Section 411(c)(4) presumption.[6] Additionally, insofar as total disability was an element of entitlement previously adjudicated against claimant, claimant has demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.[7] Decision and Order at 30; Director's Exhibit 1; *White*, 23 BLR at 1-3.

II. REBUTTAL OF THE PRESUMPTION

The administrative law judge noted that in order to rebut the presumption at amended Section 411(c)(4), employer was required to prove that claimant does not have pneumoconiosis or that his "respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine." Decision and Order at 27. In considering the evidence, the administrative law judge found that employer failed to prove that claimant does not have pneumoconiosis or that his respiratory disability is unrelated to coal dust exposure. Thus, the administrative law judge found that employer did not satisfy its burden to establish rebuttal. We address employer's arguments with regard to the rebuttal provisions below.

A. Existence of Clinical Pneumoconiosis

The administrative law judge found that employer did not disprove that claimant has pneumoconiosis, referencing his initial finding in this subsequent claim that the newly submitted x-ray evidence established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *See* Decision and Order at 20, 28. The administrative law judge weighed the x-ray evidence as follows.

The administrative law judge noted that the record contained six interpretations of two analog x-rays dated November 26, 2008 and April 8, 2009. Decision and Order at 6-7, 18-20. The November 26, 2008 x-ray was read as positive for pneumoconiosis by Dr. Forehand, a B reader, and by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, but as negative by Dr. Willis, also dually qualified as a Board-

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant established twenty-one years of underground coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[7] The administrative law judge determined that claimant satisfied the requirement of 20 C.F.R. §725.309 because the newly submitted evidence established the existence of pneumoconiosis. Decision and Order at 23. As discussed *infra*, because we affirm the administrative law judge's finding that claimant has pneumoconiosis, we also affirm his finding at 20 C.F.R. §725.309.

certified radiologist and B reader.[8] Director's Exhibit 11; Claimant's Exhibit 2; Employer's Exhibit 3. The April 8, 2009 x-ray was read as positive by Dr. Alexander, but as negative by Dr. Zaldivar, a B reader. Claimant's Exhibit 3; Employer's Exhibit 1.

The administrative law judge noted that while Drs. Alexander and Willis were both dually qualified radiologists, he assigned greater weight to Dr. Alexander's opinion, based on the fact that he holds "additional radiological qualifications: a special competency in Nuclear Medicine from the American Board of Radiology, and a board certification in Diagnostic and Therapeutic Nuclear Medicine." Decision and Order at 19. Therefore, based on Dr. Alexander's credentials, the administrative law judge found that both the November 26, 2008 x-ray and the April 8, 2009 x-ray are positive for pneumoconiosis.[9] *Id.*

Employer generally asserts on appeal that the weight of the x-ray evidence is in equipoise and fails to show that claimant has pneumoconiosis. Memorandum of Law on Behalf of Petitioner at 6. The administrative law judge, however, did not find the evidence to be in equipoise, but rather relied on Dr. Alexander's qualifications to credit the positive readings for pneumoconiosis of the analog x-rays dated November 26, 2008 and April 8, 2009, and conclude that the existence of pneumoconiosis was established by a preponderance of the evidence. Decision and Order at 19-20. Because the administrative law judge explained how he resolved the conflict in the evidence and employer does not explain with any specificity any error by the administrative law judge in weighing the conflicting x-ray readings, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant has clinical pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sarf*, 10 BLR at 1-120; *Fish*, 6 BLR at 1-109.

[8] The November 26, 2008 x-ray was also read by Dr. Gaziano for quality purposes only. Director's Exhibit 11.

[9] The administrative law judge noted that employer submitted Dr. Hippensteel's positive reading of a digital x-ray dated April 15, 2009, which was excluded from the record because employer submitted no evidence establishing that digital x-rays are medically acceptable or relevant pursuant to 20 C.F.R. §718.107(b). Decision and Order at 19-20, *citing* 20 C.F.R. §718.107(b); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(en banc)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery & Hall, JJ., concurring and dissenting). Therefore, the administrative law judge did not weigh this x-ray on the issue of clinical pneumoconiosis.

Turning to the medical opinion evidence, the administrative law judge noted that employer relied on the opinions of Drs. Zaldivar and Hippensteel to establish rebuttal of the amended Section 411(c)(4) presumption. Contrary to employer's argument, the administrative law judge permissibly assigned little weight to the opinions of Drs. Zaldivar and Hippensteel, that claimant does not have coal workers' pneumoconiosis, since their opinions were based on negative x-ray readings, contrary to the administrative law judge's finding that the x-ray evidence is positive for pneumoconiosis.[10] *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Abshire v. D & L Coal Co.*, 22 BLR 1-202 (2002) (en banc).

Furthermore, we reject employer's contention that the administrative law judge ignored the significance of the radiological findings of pleural effusions in this case. Memorandum of Law on Behalf of Petitioner at 7. The administrative law judge specifically noted that while Dr. Zaldivar, a B reader, identified pleural effusions but did not attribute them to coal dust exposure, Dr. Alexander, a dually qualified radiologist, reported that the findings were consistent with coal workers' pneumoconiosis. Decision and Order at 22. As discussed supra, we see no error in the administrative law judge's crediting of Dr. Alexander's radiological findings. We therefore affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. Decision and Order at 23, 28.

With regard to the issue of legal pneumoconiosis, the administrative law judge found that Drs. Hippensteel and Zaldivar offered no explanation as to how they eliminated coal dust exposure as a causative factor for claimant's "productive cough, wheezing, 10-12 years of shortness of breath, pleural effusions, or restrictive impairment." Decision and Order at 28. Although employer challenges this finding, employer's arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Because the administrative law judge acted within his discretion in rendering his credibility determinations, we affirm his findings that the opinions of Drs. Hippensteel and Zaldivar do not disprove a causal connection between claimant's respiratory condition and his coal

[10] The administrative law judge also permissibly assigned less weight to Dr. Hippensteel's diagnosis of clinical pneumoconiosis because it was based on Dr. Hippensteel's positive reading of a digital x-ray dated April 15, 2009, which was excluded from the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-242 n.15 (2007) (en banc); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris*, 23 BLR at 1-98; Decision and Order at 22.

dust exposure.[11] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441; Decision and Order at 28. Thus, we affirm, as supported by substantial evidence, the administrative law judge's conclusion that employer failed to disprove that claimant has legal pneumoconiosis. Decision and Order at 23, 28.

Additionally, we reject employer's assertion that the opinions of Drs. Zaldivar and Hippensteel establish that claimant's respiratory disability is unrelated to his coal mine employment. Memorandum of Law on Behalf of Petitioner at 13. The administrative law judge permissibly concluded that the opinions of Drs. Zaldivar and Hippensteel "carry little weight" regarding the etiology of claimant's respiratory disability and fail to rebut the presumption that claimant is totally disabled due to clinical pneumoconiosis, as neither physician diagnosed the disease. Decision and Order at 29, *citing Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002) and *Toler*, 43 F.3d at 116, 19 BLR at 2-83; *see also Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 23 BLR 2-393 (4th Cir. 2006). We therefore affirm, as supported by substantial evidence, the administrative law judge's determination that employer failed to rebut the presumption at amended Section 411(c)(4), by establishing either that claimant does not have pneumoconiosis or that his respiratory disability did not arise out of, or in connection with, his coal mine employment.

[11] A majority of employer's brief is devoted to employer's argument that the administrative law judge erred in crediting Dr. Forehand's opinion because he is not as qualified as employer's experts and allegedly "misinterpreted" the pulmonary function study evidence as showing an obstructive respiratory impairment. Memorandum of Law on Behalf of Petitioner at 8-13. However, in considering whether employer rebutted the amended Section 411(c)(4) presumption, the administrative law judge did not discuss Dr. Forehand's opinion. Rather, the administrative law judge focused on the sufficiency of employer's evidence. This was proper as employer bears the burden to affirmatively establish that claimant does not have pneumoconiosis or that his disability is unrelated to coal dust exposure. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, BLR (6th Cir. 2011). Because the administrative law judge permissibly determined that the opinions of Drs. Hippensteel and Zaldivar were insufficiently reasoned to satisfy employer's burden of proof on rebuttal, it is not necessary to address employer's arguments with regard to Dr. Forehand.

Accordingly, the administrative law judge's Decision and Order – Awarding 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