BRB Nos. 12-0308 BLA
and 12-0308 BLA-A

CLARENCE J. BARTON	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
OAKWOOD RED ASH COAL CORPORATION	)	DATE ISSUED: 03/21/2013
	)	
and	)	
	)	
SUN COAL COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
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 Linda S. Chapman, Administrative law Judge, United States Department of Labor.

Clarence J. Barton, Honaker, Virginia, *pro se*.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer/carrier.

Jeffrey S. Goldberg (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] and employer cross-appeals, the Decision and Order Denying Benefits (2009-BLA-5189) of Administrative Law Judge Linda S. Chapman (the administrative law judge), rendered on a subsequent claim,[2] filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). After finding that employer was the properly designated responsible operator herein, the administrative law judge credited claimant with 7.99 years of coal mine employment, and adjudicated this claim, filed on January 28, 2008, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that the newly submitted evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to Section 20 C.F.R. §725.309(d). Reviewing the entire record, however, the administrative law judge found that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, benefits were denied.

On appeal, claimant generally challenges the administrative law judge's weighing of the evidence and her denial of benefits. Employer responds, urging affirmance of the denial of benefits, and cross-appeals, contending that the administrative law judge erred in her designation of the responsible operator herein, and erred in weighing the opinions of Drs. Hippensteel and Fino on the issue of the existence of pneumoconiosis.[3] The

[1] Before the administrative law judge, claimant was represented by M. Seth O'Quinn, a benefits counselor with Stone Mountain Health Services. Mr. O'Quinn has requested, on behalf of claimant, that the Board review the claim in its entirety, as he is not representing claimant on appeal. Claimant's Notice of Appeal; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

[2] Claimant's initial claim, filed on August 18, 1980, was dismissed by Administrative Law Judge Thomas Burke after claimant, or a representative, failed to attend the formal hearing or respond to Judge Burke's subsequent Order to Show Cause why the claim should not be dismissed for failure to attend the hearing pursuant to 20 C.F.R. §725.465.

[3] Employer concedes that its arguments on cross-appeal need not be addressed if the Board affirms the administrative law judge's denial of benefits. Employer's Petition at 2.

Director, Office of Workers' Compensation Programs, has filed a limited response, asserting that substantial evidence exists to support employer's designation as the properly designated responsible operator herein. Employer has filed a reply brief in support of its position.

In an appeal by a claimant proceeding without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hichman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 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 dismissed because he failed to attend the hearing without good cause for his absence. *See* 20 C.F.R. §725.465(a)(2000).[5] An order of dismissal has "the same effect as a decision and order disposing of the claim on its merits . . . ." 20 C.F.R. §725.466(a). Consequently, the administrative law judge properly analyzed whether the newly submitted evidence established any element of entitlement. Decision and Order at 3; *see*

[4] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit, as the miner was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 7.

[5] Although 20 C.F.R. §725.465, the regulation governing dismissals for cause, was revised in 2001, those revisions do not apply to claims that were filed before January 19, 2001. *See* 20 C.F.R. §725.2(c). Because the former regulation remains applicable, for purposes of discussing the dismissal of claimant's 1994 claim, we have cited to the 2000 version of the Code of Federal Regulations.

20 C.F.R. §§725.309(d); 725.466(a). The administrative law judge found that the new evidence established total respiratory disability pursuant to Section 718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to Section 725.309, and these findings are affirmed as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010)(codified at 30 U.S.C. §§921(c)(4) and 932(*l*)). Relevant to this claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

The administrative law judge concluded that claimant could not invoke the amended Section 411(c)(4) presumption because he failed to establish at least fifteen years of coal mine employment. Decision and Order at 22. As there is no evidence, and no allegation, that claimant had fifteen years of coal mine employment,[6] we affirm the administrative law judge's finding that claimant did not invoke the amended Section 411(c)(4) presumption.

Turning to the issue of the existence of pneumoconiosis, at Section 718.202(a)(1), the administrative law judge considered three interpretations of two x-rays taken on February 19, 2008 and July 2, 2009, and properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist.[7] *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211, 1-212 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128, 1-131 (1984); Decision and Order at 19. The administrative law judge determined that the February 19, 2008 x-ray

[6] Claimant alleged, and the Social Security Administration records reflect, coal mine employment during the period between 1969 and 1980. Consequently, claimant cannot establish at least fifteen years of coal mine employment on this record. Director's Exhibits 2, 3, 7.

[7] A Board-certified radiologist is one who is certified as a radiologist or diagnostic roentgenologist by the American Board of Radiology, Inc., or the American Osteopathic Association. 20 C.F.R. §718.202(a)(ii)(C). The terms "A reader" and "B reader" refer to physicians who have demonstrated designated levels of proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute of Safety and Health. *See* 42 C.F.R. §37.51.

did not establish the presence of pneumoconiosis, as it was read as positive by Dr. Forehand, a B reader, Director's Exhibit 10, and as negative by Dr. Wheeler, a dually qualified physician. *See* 20 C.F.R. §718.202(a); Employer's Exhibit 1; Decision and Order at 18-19. The administrative law judge further found that the July 2, 2009 x-ray was interpreted as negative for pneumoconiosis, without contradiction, by Dr. Fino, a B reader. Employer's Exhibit 2; Decision and Order at 19. Lastly, the administrative law judge reviewed claimant's hospitalization and treatment records for narrative x-ray reports, and determined that there were no findings suggestive of pneumoconiosis. Decision and Order at 19; Director's Exhibits 11, 12, 13; Claimant's Exhibit 1.

After determining that all of the x-rays in claimant's earlier claim were interpreted as negative for pneumoconiosis, and that the two new x-rays and treatment record x-rays were negative for pneumoconiosis, the administrative law judge properly found that claimant failed to meet his burden of establishing the existence of clinical pneumoconiosis by x-ray evidence at Section 718.202(a)(1). *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 440-41, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order at 19, 22. As substantial evidence supports the administrative law judge's findings pursuant to Section 718.202(a)(1), they are affirmed.

We also affirm the administrative law judge's finding that claimant did not establish the existence of pneumoconiosis at Section 718.202(a)(2), (3), as the record contains no lung biopsy evidence and the presumptions at 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.

At Section 718.204(a)(4), the administrative law judge accurately summarized claimant's hospitalization and treatment records, the CT scan evidence, the digital x-ray evidence, and the newly submitted medical opinions of Drs. Forehand, Fino, and Hippensteel relevant to the issue of pneumoconiosis.[8] Decision and Order at 6-18; Director's Exhibits 10, 11, 12, 13, 14; Claimant's Exhibit 1; Employer's Exhibits 1, 3, 4.

[8] A finding of either clinical pneumoconiosis or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Clinical pneumoconiosis is defined as "those diseases recognized by the medical community as pneumoconiosis, *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 pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

While Dr. Bailey included a few assessments of coal workers' pneumoconiosis in his most recent treatment notes, the administrative law judge permissibly found that these notations were insufficient to establish the existence of pneumoconiosis, as Dr. Bailey failed to explain the basis for his diagnosis; the x-rays ordered by Dr. Bailey did not include findings of pneumoconiosis; and Dr. Bailey did not indicate that claimant's chronic obstructive pulmonary disease (COPD) was related to coal dust exposure. The administrative law judge properly concluded that the remaining hospitalization and treatment records do not establish the existence of pneumoconiosis, as they did not include findings of pneumoconiosis or any pulmonary impairment related to coal dust exposure. Decision and Order at 20; Director's Exhibits 11, 12, 13; Claimant's Exhibit 1. The administrative law judge also determined that Dr. Hippensteel interpreted a digital x-ray dated July 10, 2008 as negative for pneumoconiosis, Director's Exhibit 14, and no doctor diagnosed pneumoconiosis on any of the CT scans of record. Decision and Order at 19; Director's Exhibits 11, 12, 13; Claimant's Exhibit 1.[9] The administrative law judge reviewed the three new medical opinions of record, and determined that Dr. Forehand examined claimant and diagnosed coal workers' pneumoconiosis based on a positive x-ray, and an obstructive respiratory impairment due to cigarette smoking as well as coal mine dust and silica exposure, based on claimant's symptoms and occupational history of coal dust exposure, a positive x-ray, and a pulmonary function study. Director's Exhibit 10. Drs. Fino and Hippensteel both opined that claimant does not have coal workers' pneumoconiosis or any pulmonary or respiratory impairment attributable to coal dust exposure. Director's Exhibit 14; Employer's Exhibits 1, 3, 4. The administrative law judge rationally discounted Dr. Forehand's diagnosis of clinical pneumoconiosis because it was based on the doctor's positive interpretation of the February 19, 2008 x-ray, which the administrative law judge determined was outweighed by the negative interpretation of a better qualified reader, and because the administrative law judge found that the preponderance of the x-ray evidence was insufficient to establish the existence of pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order at 19; Director's Exhibit 10. The

[9] The November 20, 1992 CT scan, ordered by Dr. Wolfe, was read as showing the lung parenchyma and pleural surfaces as clear, Director's Exhibit 13. The March 14, 1995 CT scan was interpreted by Dr. Coburn as normal. *Id.* Dr. Humphreys reported that the April 29, 2001 CT scan showed mild chronic nodular interstitial disease, and old granulomatous disease; cystic emphysematous changes and mild bronchiectasis. *Id.* Dr. Humphreys read the March 27, 2005 CT scan as showing "multiple areas of discrete consolidation throughout lung fields bilaterally with question of acute pneumonitis versus areas of parenchymal scarring." *Id.* Dr. Mullins interpreted the February 14, 2011 CT scan as showing "no evidence of pulmonary embolus; mediastinal lymphadenopathy of uncertain etiology; and mild centrilobular and paraseptal emphysema." Claimant's Exhibit 1.

administrative law judge also acted within her discretion in finding that Dr. Forehand's diagnosis of legal pneumoconiosis was unreasoned and entitled to diminished weight, as he failed to explain how he was able to determine that coal dust exposure had a significant effect on claimant's respiratory impairment, even if the effects of breathing coal dust and smoking cigarettes are additive. Further, Dr. Forehand failed to explain his statement that claimant's response to bronchodilators was due to the effects of cigarette smoke and coal mine dust exposure. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987); Director's Exhibit 10; Decision and Order at 19. As the administrative law judge found that the record in claimant's earlier claim did not contain a reasoned diagnosis of pneumoconiosis, and as substantial evidence supports the administrative law judge's determination to discredit the newly submitted opinion of Dr. Forehand, the only physician to diagnose pneumoconiosis, we affirm the administrative law judge's finding that claimant has not met his burden to establish the existence of pneumoconiosis by a preponderance of the evidence at Section 718.202(a)(4).

Claimant's failure to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4), an essential element of entitlement, precludes an award of benefits under 20 C.F.R. Part 718. *See Anderson*, 12 BLR at 1-112. Consequently, we affirm the administrative law judge's denial of benefits, and need not address employer's arguments on cross-appeal.

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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BETTY JEAN HALL
Administrative Appeals Judge