BRB No. 11-0550 BLA

CLYDE D. BARTON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 05/10/2012
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Amended Order Denying Benefits of Paul C. Johnson Jr., Administrative Law Judge, United States Department of Labor.

Clyde D. Barton, Vansant, Virginia, *pro se*.

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

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Amended Order Denying Benefits (2009-BLA-05276) of Administrative Law Judge Paul C. Johnson, Jr., with

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

respect to a subsequent claim filed on April 10, 2008,[2] 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).[3] After crediting claimant with 13.77 years of coal mine employment, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant did not invoke the presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §9219c)(4), because, although claimant previously established that he had a totally disabling respiratory impairment, claimant failed to establish at least fifteen years of qualifying coal mine employment.[4] The administrative law judge then found that, because claimant did not establish, based on the newly submitted evidence, the existence of pneumoconiosis, he could not prove that his totally disabling respiratory impairment is due to pneumoconiosis or that he developed the disease from his coal mine employment. Accordingly, the administrative law judge found that claimant did not demonstrate a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 and he denied benefits.

[2] Claimant filed an initial claim for benefits on August 13, 2001, which was denied by the district director because claimant did not establish the existence of pneumoconiosis or that his totally disabling respiratory impairment was due, in part, to his coal mine employment. Director's Exhibit 1. Claimant submitted requests for modification on July 10, 2003, and again on October 6, 2004, both of which the district director ultimately denied because the evidence did not show a change in condition. *Id*. Claimant did not take any further action until he filed the present claim.

[3] On April 12, 2011, the administrative law judge issued a Decision and Order Denying Benefits, which inadvertently omitted the discussion of his findings concerning the length of claimant's coal mine employment. Therefore, the administrative law judge issued an Amended Order on April 18, 2011, including that discussion and superseding the previous decision.

[4] On March 23, 2010, amendments to the Act were enacted that affect claims filed after January 1, 2005, that were pending on or after March 23, 2010. The amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Pursuant to amended Section 411(c)(4) of the Act, a miner suffering from a totally disabling respiratory or pulmonary impairment, who has fifteen or more years of underground, or substantially similar, coal mine employment, is entitled to a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Claimant generally challenges the administrative law judge's decision denying benefits. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[5]

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue 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.[6] 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 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 entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(en banc).

In this subsequent claim, claimant must establish 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). Although claimant established a totally disabling respiratory impairment in his prior claim, he did not establish that he had pneumoconiosis arising from coal mine employment or that his disabling respiratory impairment was due to pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one of these elements of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

[5] We affirm the administrative law judge's finding that claimant established a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2), as it is unchallenged on appeal and is not adverse to claimant. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibit 4. 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).

I. Length of Coal Mine Employment

The administrative law judge noted that, at the hearing, claimant testified that he had worked in coal mines for about sixteen years. Decision and Order at 10; Hearing Transcript at 11. The administrative law judge also noted that the medical reports of record included varying accounts of claimant's coal mine employment history, which ranged from fifteen to twenty years. Decision and Order at 10; Director's Exhibits 12, 13; Employer's Exhibits 1, 4. The administrative law judge further stated that, in claimant's initial claim, he reported that he worked at Left Fork Coal Company from 1979 to 1981, at Island Creek Coal Company from 1981 to 1994, and at S&M Coal Company during 1984. Decision and Order at 10; Director's Exhibit 1. The administrative law judge noted that, in the current claim, claimant reported that he worked at Left Fork during 1980, at Island Creek from 1981 to 1994, and at S&M Coal in 1984 and 1985. Decision and Order at 3; Director's Exhibit 4. The administrative law judge then determined that claimant's Social Security earning records show dates that are consistent with those he reported in the current claim. Decision and Order at 10; Director's Exhibit 8. Therefore, the administrative law judge gave determinative weight to the earning records, as they are more specific than the general dates provided by claimant. *Id*.

Based on the earnings records, the administrative law judge credited claimant with full years of coal mine employment at Island Creek from 1983-1986 and 1988-1994, because he "earned more than the average coal-mine industry earnings for each of those years [as] determined by [the Office of Workers' Compensation Programs] in Exhibit 610."[7] Decision and Order at 10; *see* Administrative Law Judge's Appendix 1. Similarly, the administrative law judge credited claimant with a full year of employment with Left Fork in 1980. Decision and Order at 10. The administrative law judge determined that this amounted to twelve years of coal mine employment. *Id*. Additionally, the administrative law judge credited claimant with 1.77 years, using the same exhibit, for his work for various employers in 1981, 1982, 1987 and 1995, for a total of 13.77 years of coal mine employment. *Id*.

We affirm the administrative law judge's finding with regard to the length of claimant's coal mine employment, as it is rational and supported by substantial evidence. An administrative law judge may credit Social Security records over the claimant's testimony, where the testimony is unreliable. *Tackett v. Director, OWCP*, 6 BLR 1-839 (1984). In this case, because claimant's hearing testimony and reports of his coal mine employment were inconsistent, the administrative law judge properly resolved the

[7] The administrative law judge attached Exhibit 610 as Appendix 1 to his Decision and Order. The exhibit reflects the average earnings of employees in coal mining.

conflict in the evidence by concluding that claimant established 13.77 years based on claimant's earnings, found in his Social Security records, considered together with the average earnings of employees in coal mining. *See Tackett*, 6 BLR at 1-841; Decision and Order at 10. Further, the administrative law judge specifically and logically explained how he calculated claimant's coal mine employment. *See* Decision and Order at 10. Consequently, we affirm the administrative law judge's finding that claimant had 13.77 years of coal mine employment. *Tackett*, 6 BLR at 1-841.

We also affirm, therefore, the administrative law judge's determination that, because claimant did not establish fifteen years of underground, or substantially similar, coal mine employment, he did not invoke the rebuttable presumption at amended Section 411(c)(4), that his totally disabling respiratory impairment was due to pneumoconiosis. Because we have affirmed the administrative law judge's determination, that claimant did not invoke the presumption at amended Section 411(c)(4), we must now evaluate the administrative law judge's findings concerning whether claimant was able to establish the elements of entitlement independently, without the benefit of the presumption.

II. 20 C.F.R. §718.202(a)(1)-(3)

In making his findings at 20 C.F.R. §718.202(a)(1), the administrative law judge considered the newly submitted x-ray evidence, which consisted of five interpretations of two films, dated March 6, 2008 and April 22, 2008. Dr. Ahmed interpreted the March 6, 2008 x-ray as positive for coal workers' pneumoconiosis, while Dr. Spitz interpreted it as negative for the disease. Director's Exhibit 13; Employer's Exhibit 3. Dr. Alexander interpreted the April 22, 2008 x-ray as positive for coal workers' pneumoconiosis, while Drs. Forehand and Meyer interpreted it as negative.[8] Director's Exhibits 12, 15; Claimant's Exhibit 1. Dr. Forehand is a B reader. Director's Exhibit 12. Drs. Spitz, Ahmed, Alexander, and Meyer are dually-qualified as B readers and Board-certified radiologists. Director's Exhibits 12, 15; Claimant's Exhibit 1; Employer's Exhibit 3.

The administrative law judge noted that Dr. Ahmed's positive reading of the March 6, 2008 x-ray was for "shape and size s/s and profusion 1/0." Decision and Order at 11. Because the administrative law judge found that Dr. Hippensteel testified that Dr. Ahmed's findings were consistent with asthma, not pneumoconiosis, and that this testimony was uncontradicted, he determined that the x-ray is negative for pneumoconiosis. *Id.* As to the April 22, 2008 x-ray, the administrative law judge found that the x-ray is negative for pneumoconiosis "based on the credentials of the interpreting physicians." *Id.*

[8] Dr. Navani's interpretation of the x-ray was for film quality only. Director's Exhibit 12.

The administrative law judge's determination that the March 6, 2008 x-ray is negative, based on Dr. Hippensteel's testimony concerning Dr. Ahmed's positive interpretation, cannot be affirmed as he did not explain, in accordance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), why he gave more weight to Dr. Hippensteel's opinion than to the interpretation by Dr. Ahmed. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1985); Decision and Order at 11. However, this error is harmless, as both of the physicians offering contrary interpretations of the x-ray are dually-qualified such that even if Dr. Hippensteel's testimony is disregarded, the March 6, 2008 x-ray is, at best, in equipoise. *See Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); Director's Exhibit 13; Employer's Exhibit 3. Furthermore, the administrative law judge rationally determined, based on the preponderance of negative readings and the physicians' credentials, that the April 22, 2008 x-ray is negative for pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Accordingly, we affirm the administrative law judge's finding that the x-ray evidence is insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

We also affirm the administrative law judge's determination that claimant has not established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), (3), as the record does not contain any biopsy or autopsy evidence and the presumptions set forth in 20 C.F.R. §§718.304, 718.305, and 718.306 are not applicable.[9] Decision and Order at 5.

III. 20 C.F.R. §718.202(a)(4)

In evaluating whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Forehand, Roatsey, Sutherland, Killeen, and Hippensteel. Decision and Order at 12. In addition, he considered a report by Nurse Practitioner Mullins and a digital x-ray, dated September 10, 2008. *Id*. at 13.

The administrative law judge noted that, of the five medical opinions submitted, Drs. Forehand, Roatsey, and Sutherland found pneumoconiosis and chronic obstructive pulmonary disease (COPD), while Drs. Killeen and Hippensteel found that claimant does not have pneumoconiosis. Decision and Order at 12. The administrative law judge found

[9] The presumption at 20 C.F.R. §718.304 is inapplicable because there is no evidence of complicated pneumoconiosis in the record. The presumption set forth in 20 C.F.R. §718.305 is also inapplicable based on the filing date. Lastly, as this claim is not a survivor's claim filed before June 30, 1982, the presumption at 20 C.F.R. §718.306 is also inapplicable.

that Dr. Forehand's opinion was documented and reasoned, as the underlying medical evidence was sufficient to support his conclusions. *Id*. The administrative law judge also determined that Dr. Roatsey's opinion is documented and reasoned, but noted that he is not a B reader and is Board-certified in family practice. *Id*. The administrative law judge found that the opinions of Drs. Killeen and Hippensteel are documented and reasoned and noted that Drs. Killeen and Hippensteel are Board-certified in internal and pulmonary medicine and are B readers. *Id*. at 13.

In contrast, the administrative law judge found that Dr. Sutherland is not as well-qualified as several of the other physicians, noting that despite his status as a treating physician with "a more thorough knowledge of claimant's medical and social histories; he is neither Board-certified nor a B reader." Decision and Order at 12. The administrative law judge also determined that Dr. Sutherland's opinion was not supported by medical evidence but, instead, was wholly conclusory. *Id*. As a result, the administrative law judge indicated that he rejected Dr. Sutherland's opinion "as not documented or reasoned." *Id*.

Upon considering the doctors' opinions together, the administrative law judge determined that the credentials of Drs. Killeen and Hippensteel are superior to the credentials of Drs. Forehand and Roatsey. Decision and Order at 13. In addition, the administrative law judge indicated that the opinions of Drs. Forehand and Roatsey are based on one-time evaluations of claimant, which did not "take into account the extensive medical records that would allow them to review his condition over time." *Id*. In contrast, the administrative law judge found that Dr. Killeen's opinion is based on an examination of claimant and a records review and that Dr. Hippensteel's opinion is based on a review of medical records covering an extended period of time. *Id*. Therefore, the administrative law judge gave more weight to the opinions of Drs. Killeen and Hippensteel and determined that claimant did not establish the existence of pneumoconiosis based on the medical opinion evidence. *Id*.

With respect to the remaining medical evidence, the administrative law judge indicated that Nurse Practitioner Mullins, who indicated that claimant has coal workers' pneumoconiosis and COPD, did not conduct any diagnostic testing to support her opinion and that her conclusion appeared to be based on the history claimant gave her. Decision and Order at 13. Consequently, the administrative law judge determined that her opinion is unsupported by the objective medical evidence. *Id*. Concerning the digital x-ray, dated September 10, 2008, the administrative law judge found that Dr. Wiot, who interpreted the x-ray as negative for pneumoconiosis, is "particularly well-qualified," as "[h]e is by far the most experienced of all the doctors in radiological diagnosis of pneumoconiosis, and indeed helped to develop the standards for the ILO classifications." *Id*. Therefore, the administrative law judge credited Dr. Wiot's interpretation over the

positive interpretation of Dr. Ahmed to find the digital x-ray negative for pneumoconiosis. *Id*.

The administrative law judge concluded that, because claimant did not establish the existence of pneumoconiosis based on the newly submitted evidence, he could not establish that his totally disabling respiratory impairment is due to pneumoconiosis or that he developed the disease from his coal mine employment. Decision and Order at 13. Consequently, the administrative law judge determined that claimant did not establish a change in an applicable condition of entitlement and denied his subsequent claim. *Id*. at 13-14.

We hold that the administrative law judge acted within his discretion in rejecting Dr. Sutherland's diagnosis of pneumoconiosis, despite his status as claimant's treating physician, as the administrative law judge rationally determined that Dr. Sutherland's opinion was not reasoned or documented, as the tests he relied on were not in evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 536, 21 BLR 2-323, 2-341(4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993). In addition, the administrative law judge rationally gave greater weight to the opinions of Drs. Killeen and Hippensteel, than the contrary opinions of Drs. Forehand and Roatsey, as he determined that their credentials were superior and that they relied on more extensive documentation in forming their opinions. *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Sabett v. Director, OWCP*, 7 B.L.R. 1-299 (1984); *see also Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486 (7th Cir. 2004) (proper to accord greater weight to a physician who "integrated all of the objective evidence").

The administrative law judge also acted within his discretion in giving less weight to the report of Nurse Practitioner Mullins, as she did not perform any diagnostic testing in making her assessments and the objective medical evidence did not support her conclusions. *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Further, the administrative law judge rationally gave more weight to Dr. Wiot's opinion, in finding that the digital x-ray, dated September 10, 2008, was negative, as he permissibly found that Dr. Wiot was more qualified than Dr. Ahmed. *Adkins*, 958 F.2d at 52-53, 16 BLR at 2-66. We affirm, therefore, the administrative law judge's determination that claimant did not establish the existence of pneumoconiosis, based on the newly submitted evidence at 20 C.F.R. §718.202(a)(4). We also affirm the administrative law judge's finding that the newly submitted evidence, as a whole, was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a). *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000).

Based upon our affirmance of the administrative law judge's finding at 20 C.F.R. §718.202(a), we further affirm the administrative law judge's conclusion that claimant cannot establish that he has pneumoconiosis arising out of his coal mine employment at 20 C.F.R. §718.203 or that he is totally disabled due to pneumoconiosis at 20 C.F.R. §718.204(c). Thus, we affirm the administrative law judge's determination that claimant did not establish a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), and the denial of benefits. *White*, 23 BLR at 1-3.

Accordingly, the administrative law judge's Amended 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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JUDITH S. BOGGS
Administrative Appeals Judge