

BRB No. 11-0591 BLA

GREGORY S. KENNEDY)
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 Claimant-Petitioner)
)
 v.)
)
 PARAMONT COAL COMPANY)
)
 and)
)
 BIRMINGHAM FIRE INSURANCE) DATE ISSUED: 05/18/2012
 COMPANY)
)
 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.

Gregory S. Kennedy, St. Paul, Virginia, *pro se*.

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:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2009-BLA-05051) of Administrative Law Judge Pamela J. Lakes on October 18, 2007, 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). The administrative law judge found that claimant established thirty-two years of underground coal mine employment based on the parties' stipulation, and that the claim was timely filed. However, the administrative law judge found that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and failed, therefore, to establish invocation of the Section 411(c)(4) presumption of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge also found that entitlement to benefits was not established pursuant to 20 C.F.R. Part 718, as total respiratory disability, an essential element of eligibility, was not established. In addition, the administrative law judge found that claimant failed to establish the existence of complicated pneumoconiosis and failed, therefore, to establish invocation of the Section 411(c)(3) presumption of the Act, 30 U.S.C. §921(c)(3), which provides a presumption of totally disabling pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits.¹ Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and in accordance with law.² 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).

¹ Ron Carson, 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. Carson is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

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

Section 411(c)(4)
Total Respiratory Disability - 20 C.F.R. §718.204(b)

On March 23, 2010, amendments to the Act, applicable to claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. With respect to living miners' claims and survivors' claims, Section 1556 of Public Law No. 111-148 reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner is found to have at least fifteen years of qualifying coal mine employment and a totally disabling respiratory impairment, there will be, in pertinent part, a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

After noting that this claim was filed on October 18, 2007, was pending on May 23, 2010, and that the parties stipulated that claimant had fifteen years of qualifying coal mine employment, the administrative law judge concluded that claimant would be entitled to the Section 411(c)(4) presumption of total disability due to pneumoconiosis, if he established the presence of a total respiratory disability pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4).

In finding that the pulmonary function studies did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i), the administrative law judge noted that only one of the four pulmonary function studies of record was qualifying. In addition, the administrative law judge noted that, although the most recent pulmonary function study yielded qualifying pre-bronchodilator values, it yielded non-qualifying post-bronchodilator values. After reviewing the pulmonary function study evidence, the administrative law judge found that, "[a]lthough the tests as a whole reveal respiratory decline over a year and a half, I am unable to say that the pulmonary function test evidence, taken alone and as a whole, supports a finding of total disability in view of the improvement to non-qualifying values after the application of a bronchodilator." Decision and Order at 14. The administrative law judge, therefore, properly concluded that the pulmonary function study evidence, as a whole, did not establish total respiratory disability pursuant to Section 718.204(b)(2)(i). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-26 (3d Cir. 1993). Further, pursuant to Section 718.204(b)(2)(ii) and (iii), the administrative law judge properly found that total respiratory disability was not established, as all three blood gas studies of record were non-qualifying and there was no evidence in the record showing that claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

Turning to the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge properly found that it did not establish total respiratory

disability. The administrative law judge noted that Dr. Forehand found that claimant has a totally disabling respiratory impairment, while Dr. Hippensteel found that he did not. The administrative law judge, however, properly accorded greater weight to the opinion of Dr. Hippensteel, because he considered claimant's more recent objective evidence and his report was supported by the objective evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1986)(en banc). On weighing all of the relevant evidence together, like and unlike, the administrative law judge properly found that total respiratory disability was not established pursuant to Section 718.204(b)(2) overall, *see Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987)(en banc), and that claimant was not, therefore, entitled to the Section 411(c)(4) presumption that total disability was due to pneumoconiosis. 30 U.S.C. §921(c)(4). In addition, as the administrative law judge properly found that total respiratory disability was not established pursuant to Section 718.204(b), an essential element of entitlement. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(en banc).

Section 411(c)(3)
Complicated Pneumoconiosis – 20 C.F.R. §718.304

Having found that claimant was not entitled to the Section 411(c)(4) presumption, the administrative law judge considered whether the evidence established the existence of complicated pneumoconiosis, which would entitle claimant to invoke the Section 411(c)(3) presumption of totally disabling pneumoconiosis.³ 30 U.S.C. §921(a)(3). The administrative law judge properly found that the x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), because the x-ray readings by equally-qualified readers were in equipoise. *See Ondeko*, 512 U.S. at

³ Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides, in pertinent part, an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis, if such miner is suffering or suffered from a chronic dust disease of the lung which:

- (a) When diagnosed by chest X-ray yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C; or
- (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
- (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section.

281, 18 BLR at 2A-12. Regarding 20 C.F.R. §718.304(b), the administrative law judge found that that section was inapplicable, as there was no biopsy evidence in this case.

Turning to 20 C.F.R. §718.304(c), the administrative law judge found that the relevant evidence consisted of digital x-rays, CT scans, and medical opinions. Weighing this evidence together pursuant to Section 718.304(c), the administrative law judge properly found that it did not establish the existence of complicated pneumoconiosis. The administrative law judge found that, while the digital x-rays, which were read as positive for complicated pneumoconiosis by two dually-qualified readers, “weigh[ed] in favor of a finding of complicated pneumoconiosis,” the CT scan evidence did “not favor a finding of complicated pneumoconiosis.” Decision and Order at 19. The administrative law judge found that Dr. Hippensteel read a total of six CT scans as negative for complicated pneumoconiosis and concluded that the changes seen on the CT scans “were most compatible with a finding of sarcoidosis.” Decision and Order at 19. The administrative law judge, therefore, concluded that the digital x-ray evidence and the CT scan evidence were in equipoise.

Regarding the medical opinion evidence, the administrative law judge properly found that Dr. Hippensteel’s opinion that claimant has “sarcoidosis as opposed to complicated pneumoconiosis” outweighed Dr. Forehand’s finding of complicated pneumoconiosis, as Dr. Hippensteel reviewed all of claimant’s evidence, including the most recent evidence, and Dr. Hippensteel is a Board-certified pulmonologist.⁴ See *Clark*, 12 BLR at 1-155; *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). Further, the administrative law judge properly credited Dr. Hippensteel’s opinion diagnosing sarcoidosis, instead of complicated pneumoconiosis, because it was “consistent with the evidence considered as a whole.” *Dillon*, 11 BLR at 1-114; Decision and Order at 20. Accordingly, the administrative law judge properly found that the other evidence did not establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c), and did not, therefore, establish invocation of the Section 411(c)(3) presumption. See *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12.

Conclusion

Because the administrative law judge properly found that claimant failed to establish invocation of either the Section 411(c)(3) or the Section 411(c)(4) presumption of the Act, 30 U.S.C. §§921(c)(3), (4), and failed to establish total respiratory disability

⁴ The record reflects Dr. Forehand is Board-certified in Pediatrics and Allergy and Immunology, and is Board-eligible in Pediatric Pulmonary Medicine. Director’s Exhibit 9.

pursuant to 20 C.F.R. §718.204(b), an essential element of entitlement under 20 C.F.R. Part 718, she properly found that claimant is not entitled to benefits in this case.

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