BRB No. 13-0161 BLA

DANNY A. TEMPLETON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DEBRA LYNN COALS INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 11/22/2013
APPOLO FUELS INCORPORATED	)	
	)	
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 of Adele Higgins Odegard, Administrative Law Judge, United States Department of Labor.

Danny A. Templeton, Pathfork, Kentucky, *pro se*.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order (11-BLA-6036) of Administrative Law Judge Adele Higgins Odegard denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (Supp. 2011) (the Act). This case involves a subsequent claim filed on September 16, 2010.[1]

Applying amended Section 411(c)(4),[2] the administrative law judge found that claimant established that he had twenty-two years of coal mine employment in surface mining,[3] but did not establish that any of his coal mine employment took place in conditions substantially similar to those in an underground mine. The administrative law judge, therefore, found that claimant did not establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

The administrative law judge also considered whether claimant could establish entitlement to benefits, without the assistance of the Section 411(c)(4) presumption. The administrative law judge found that the new evidence established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013), thereby establishing that one of the applicable conditions of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309 (2013). The administrative law judge found,

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[1] Claimant's two prior claims, filed on August 12, 1996 and October 29, 2003, were finally denied because claimant failed to establish any element of entitlement. Director's Exhibits 1, 2.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

[3] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibits 5, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

however, that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) (2013) or that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c) (2013). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Neither employer nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

In an appeal filed by a claimant without the assistance of counsel, the Board considers 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. 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).

The administrative law judge found that claimant failed to establish that he worked for fifteen years in a surface mine with dust conditions substantially similar to those found in underground mines, and therefore found that claimant did not invoke the Section 411(c)(4) presumption of total disability due to pneumoconiosis. The administrative law judge specifically found that claimant failed to prove that, during his twenty-two years as a surface miner, he was exposed to dust conditions substantially similar to those existing underground:

> The only evidence of record is . . . [c]laimant's deposition testimony that states in summary fashion that he was generally exposed to dust on a daily basis as a high lift operator. I find this insufficient to carry . . . [c]laimant's burden.

Decision and Order at 5.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). Those regulations provide that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."[4] 20 C.F.R. §718.305(b)(2); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

[4] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

As summarized by the administrative law judge, claimant testified "that he was exposed to coal dust on a daily basis, and that he was laughed at by fellow employees because he got so dirty." Decision and Order at 5. The administrative law judge further noted that claimant testified that, when he was loading coal, the dust would "come in on him." *Id.* The administrative law judge further noted that claimant testified that he "sometimes assisted the drill operator by filling in holes with powder, rock, and dirt, at which time he was exposed to coal dust as well." *Id.* Claimant's testimony regarding his working conditions, if credited, is sufficient under *Leachman*, and the regulations, to satisfy the "substantially similar" requirement of Section 411(c)(4). We, therefore, vacate the administrative law judge's finding that claimant failed to establish the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. We instruct the administrative law judge, on remand, to reconsider whether claimant established the requisite fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption.

Because the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2) (2013), should the administrative law judge, on remand, credit claimant with fifteen years of qualifying coal mine employment, claimant would be entitled to invocation of the presumption that his total disability is due to pneumoconiosis at Section 411(c)(4). Once claimant invokes the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifts to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[5] 30 U.S.C. §921(c)(4); 20 C.F.R.

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. 59,105 (Sept. 25, 2013).

[5] In addressing whether an employer has met its burden of establishing rebuttal of the Section 411(c)(4) presumption, an administrative law judge should evaluate the

§718.305(d)(1); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011).

In the interest of judicial economy, we will address the administrative law judge's additional finding that claimant did not establish directly that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a). In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). 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).

Pursuant to 20 C.F.R. §718.202(a)(1) (2013), the administrative law judge considered four interpretations of two x-rays taken on October 22, 2010 and February 24, 2011. In his consideration of the x-ray evidence, the administrative law judge properly accorded greater weight to the interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 6.

Although Dr. Baker, a B reader, interpreted the October 22, 2010 x-ray as positive for pneumoconiosis, Director's Exhibit 14, Dr. Wiot, a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis. Director's Exhibit 16. The administrative law judge acted within his discretion in crediting Dr. Wiot's negative interpretation of the October 22, 2010 x-ray, over Dr. Baker's positive interpretation, based upon Dr. Wiot's superior qualifications. 20 C.F.R. §718.202(a)(1); *Sheckler*, 7 BLR at 1-131; Decision and Order at 7. The administrative law judge, therefore, permissibly found that the October 22, 2010 x-ray was negative for pneumoconiosis. *Id.*

Drs. Baker and Whitehead, each qualified as a B-reader and Board-certified radiologist, interpreted the February 24, 2011 x-ray as negative for pneumoconiosis. Director's Exhibit 19; Employer's Exhibit 2. Because there were no other interpretations of this x-ray in the record, the administrative law judge found that the February 24, 2011 x-ray was negative for pneumoconiosis. Decision and Order at 7.

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documentation and reasoning underlying the medical opinions of record. *A & E Coal Co. v. Adams*, 694 F.3d 798, 802, 25 BLR 2-203, 2-211 (6th Cir. 2012); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 489, 25 BLR 2-135, 2-151 (6th Cir. 2012); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the x-ray evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Because there is no biopsy evidence of record, the administrative law judge properly found that claimant is precluded from establishing the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) (2013). Decision and Order at 7. Furthermore, because there is no evidence of complicated pneumoconiosis in the record, the administrative law judge properly found that the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304 (2013). The administrative law judge also properly found that, because this claim is not a survivor's claim, the Section 718.306 presumption is inapplicable. *See* 20 C.F.R. §718.306 (2013).

Pursuant to 20 C.F.R. §718.202(a)(4) (2013), the administrative law judge considered the medical reports of Drs. Idemudia, Baker, Dahhan, and Jarboe regarding whether claimant suffers from either clinical or legal pneumoconiosis.[6] Although Dr. Idemudia wrote a letter stating that claimant suffers from coal workers' pneumoconiosis, the administrative law judge properly found that Dr. Idemudia's opinion was not sufficiently reasoned because the doctor's statement "was not backed by any medical documentation." *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155; (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 12; Director's Exhibit 17. Although Dr. Baker also diagnosed clinical pneumoconiosis, the administrative law judge permissibly found that the x-ray that Dr. Baker relied upon as positive for pneumoconiosis was interpreted as negative for pneumoconiosis by a better qualified physician, thus calling into question the reliability of Dr. Baker's diagnosis of clinical pneumoconiosis. *See Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 12. Because no other physician diagnosed clinical pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013).

[6] "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 to that deposition caused by dust exposure in 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." 20 C.F.R. §718.201(a)(2).

The administrative law judge also permissibly found that Dr. Baker's opinions, that claimant's mild obstructive defect "*can* be caused by coal dust exposure," and that claimant's obesity, congestive heart failure, and coal dust exposure "*may* cause a restrictive defect," were too vague to constitute a diagnosis of legal pneumoconiosis. *Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); Decision and Order at 12 (emphasis added); Director's Exhibit 14. Because there is no other medical opinion evidence supportive of a finding of legal pneumoconiosis, we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) (2013).

In light of the above, we affirm the administrative law judge's determination that claimant did not affirmatively establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Therefore, we affirm the administrative law judge's determination that claimant did not establish entitlement to benefits under 20 C.F.R. Part 718, without the benefit of the Section 411(c)(4) presumption. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. *Trumbo*, 17 BLR at 1-87.

In sum, on remand, the administrative law judge must specifically address whether the record from the living miner's claim is admitted into evidence and, if so, whether claimant is entitled to invoke the Section 411(c)(4) presumption of death due to pneumoconiosis. Should the administrative law judge find invocation established, he must determine whether employer has rebutted the presumption.[7] *See Copley*, 25 BLR at 1-89. If the administrative law judge finds that claimant cannot invoke the presumption, or that employer has rebutted the presumption, he must deny benefits.

[7] We note that employer cannot rely upon the administrative law judge's finding that claimant did not carry his burden to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a) to relieve it of its burden to rebut the Section 411(c)(4) presumption with affirmative evidence. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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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REGINA C. McGRANERY
Administrative Appeals Judge