BRB No. 11-0179 BLA

DONNY NOE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/19/2011
	)	
ENERGY DEVELOPMENT CORPORATION	)	
	)	
	)	
Self-Insured 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 Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (09-BLA-5031) of Administrative Law Judge Richard A. Morgan rendered on a subsequent claim[1] filed

[1] Claimant filed three previous claims, all of which were finally denied. Director's Exhibits 1-3. His most recent prior claim, filed on March 20, 2000, was denied on May 12, 2000, because claimant failed to establish total disability. Director's Exhibit 3.

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 case involves a claim filed on November 13, 2007. Director's Exhibit 5. The administrative law judge credited claimant with at least twenty-six years of coal mine employment.[2] The administrative law judge found that the medical evidence developed since the denial of claimant's prior claim established total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2), and thus established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the claim on its merits, the administrative law judge found that claimant proved directly all of the necessary elements of entitlement under 20 C.F.R. Part 718. Specifically, he found that claimant established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a),[3] that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Additionally, the administrative law judge considered whether claimant could establish his entitlement with the aid of a rebuttable presumption of total disability due to pneumoconiosis that was reinstated by a recent amendment to the Act.[4] *See* 30 U.S.C. §921(c)(4). The

[2] The record reflects that claimant's coal mine employment was in West Virginia. Decision and Order at 2 n.1; Director's Exhibit 6; Hearing Transcript at 26. 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, 1-202 (1989)(*en banc*).

[3] Clinical pneumoconiosis is defined as "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 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).

[4] Congress recently enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. 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 amended 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.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

administrative law judge found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis under 30 U.S.C. §921(c)(4), because he established over fifteen years of qualifying coal mine employment, and that he has a totally disabling respiratory impairment. The administrative law judge further found that, in view of his finding that claimant established the existence of clinical and legal pneumoconiosis under 20 C.F.R. §718.202(a), employer did not establish rebuttal of the Section 411(c)(4) presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's findings of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). Employer also argues that the administrative law judge's application of amended Section 411(c)(4) is unconstitutional, because it denies employer due process and constitutes an unlawful taking of its private property. Employer additionally argues that the Section 411(c)(4) presumption is not applicable to employers.[5] Claimant responds in support of the administrative law judge's award, and asserts that the administrative law judge did not rely on amended Section 411(c)(4) to find claimant entitled to benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief.

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. 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 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. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989).

The administrative law judge first considered whether eighteen interpretations of eight x-rays established the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Dr. Craft, whose qualifications are not in the record, read the September 28, 1979 x-ray as positive for pneumoconiosis. Director's Exhibit 1. Dr. Al-Asbahi, a

[5] The administrative law judge's findings that claimant established at least twenty-six years of coal mine employment, a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), are unchallenged. Thus, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

Board-certified radiologist, read the June 13, 1980 x-ray as positive for pneumoconiosis, while Dr. Sargent, a B reader, interpreted this x-ray as negative for pneumoconiosis. *Id*. Dr. Al-Asbahi also read the January 31, 1985 x-ray as positive for pneumoconiosis, but Dr. Gaziano, a B reader, interpreted this x-ray as negative for pneumoconiosis. Director's Exhibit 2. Dr. Younes, a B reader, and Dr. Navani, a Board-certified radiologist and B reader, both interpreted the April 12, 2000 x-ray as positive for pneumoconiosis. Director's Exhibit 3.

Drs. Alexander and Wiot, both Board-certified radiologists and B readers, read the January 3, 2008 x-ray as positive and negative, respectively, for pneumoconiosis, Director's Exhibit 15; Claimant's Exhibit 4, while Dr. Rasmussen, a B reader, read the same x-ray as positive for pneumoconiosis.[6] Director's Exhibit 14. Drs. Alexander and DePonte, both Board-certified radiologists and B readers, interpreted the April 16, 2008 x-ray as positive for pneumoconiosis, Claimant's Exhibits 6, 8, while Dr. Zaldivar, a B reader, and Dr. Wiot, read the same x-ray as negative for pneumoconiosis. Employer's Exhibits 1, 2. Dr. Baker, a B reader, read the February 27, 2009 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, while Dr. Meyer, a Board-certified radiologist and B reader, read the x-ray as negative for pneumoconiosis. Employer's Exhibit 4. Finally, Dr. DePonte read the September 3, 2009 x-ray as positive for pneumoconiosis, Claimant's Exhibit 3, while Dr. Wiot read the same x-ray as negative for pneumoconiosis. Employer's Exhibit 5.

As summarized by the administrative law judge, the readings by Drs. Al-Asbahi, Baker, DePonte, Navani, Rasmussen, and Younes indicated that parenchymal abnormalities consistent with pneumoconiosis were present on claimant's x-rays. Decision and Order at 21. In contrast, the readings by Drs. Wiot and Meyer indicated that no parenchymal abnormalities consistent with pneumoconiosis were present, and instead identified findings consistent with usual interstitial pneumonitis (UIP) and idiopathic pulmonary fibrosis (IPF). *Id*.

Considering the x-ray readings and the readers' radiological qualifications, and according more weight to the greater number of readings by highly credentialed readers, the administrative law judge found that the weight of the x-ray evidence was positive for pneumoconiosis. Decision and Order at 21-22. The administrative law judge accurately set forth the x-ray evidence as consisting of eight positive readings, including three by dually-qualified readers, from 1979-2009, and five negative readings, including two by dually-qualified readers, from 1985-2009. The administrative law judge noted that the positive readings were "fairly consistent with one another" over a thirty-year period. *Id*.

[6] Dr. Gaziano, a B reader, reviewed the January 3, 2008 x-ray to assess its film quality only. Director's Exhibit 14.

at 21. The administrative law judge further found that the positive readings were supported by the testimony of employer's expert, Dr. Hippensteel, that there is medical literature stating that IPF can be caused by coal mine dust exposure. *Id.* In view of the consistency of the positive readings by the majority of highly credentialed readers, the administrative law judge found that the positive readings outweighed the negative readings by Drs. Wiot and Meyer.

Employer argues that the administrative law judge erred in discrediting the negative readings by Drs. Wiot, Meyer, and Zaldivar, based on an assumption that all pulmonary fibrosis is consistent with coal workers' pneumoconiosis on chest x-ray, and by doing this, improperly substituted his opinion for that of the doctors' opinions. Employer's Brief at 24-25.

Contrary to employer's contention, the administrative law judge did not assume that all pulmonary fibrosis is consistent with coal workers' pneumoconiosis on chest x-ray. Instead, the administrative law judge performed a qualitative and quantitative comparison of the x-ray readings and on that, based his determination that the positive x-ray readings by the majority of the highly credentialed readers were consistent with one another over a thirty-year span, and were more persuasive than the negative readings, when viewed in light of Dr. Hippensteel's testimony. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52-53, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-300 (2003); Decision and Order at 21-22. As employer raises no other contentions, we affirm the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis by x-ray pursuant to Section 718.202(a)(1). Because the United States Court of Appeals for the Fourth Circuit requires a weighing of all relevant evidence at 20 C.F.R. §718.202(a), *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211-12, 22 BLR 2-162, 2-175 (4th Cir. 2000), we additionally address employer's arguments regarding the administrative law judge's finding that the medical opinion evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Pursuant to Section 718.202(a)(4), the administrative law judge considered the new medical opinions from Drs. Rasmussen, Baker, Al-Khasawneh, Zaldivar, and Hippensteel.[7] Drs. Rasmussen, Baker, and Al-Khasawneh diagnosed claimant with

[7] Dr. Rasmussen diagnosed clinical pneumoconiosis, which he opined contributes materially to claimant's disabling lung disease. Director's Exhibit 14. Dr. Baker diagnosed clinical pneumoconiosis by x-ray. Claimant's Exhibit 1. Dr. Baker also diagnosed legal pneumoconiosis, in the form of hypoxemia and chronic bronchitis related to coal mine dust exposure. *Id.* Dr. Al-Khasawneh diagnosed both clinical pneumoconiosis, and legal pneumoconiosis, in the form of hypoxemia related to coal mine dust exposure, and stated that these diagnoses were the main reasons for claimant's

clinical pneumoconiosis, based on his x-ray findings. Additionally, Drs. Baker and Al-Khasawneh diagnosed claimant with legal pneumoconiosis, in the form of hypoxemia related to coal mine dust exposure; Dr. Baker also diagnosed chronic bronchitis related to coal mine dust exposure. In contrast, Drs. Zaldivar and Hippensteel opined that claimant has neither clinical nor legal pneumoconiosis, but suffers from IPF or UIP, which is unrelated to his coal mine dust exposure. The administrative law judge also considered the previously submitted opinions by Drs. Ataii, Thavaradhara, Younes, and by the West Virginia Occupational Pneumoconiosis Board.[8]

The administrative law judge found that Drs. Rasmussen, Baker, and Al-Khasawneh all recognized that coal mine dust exposure was the only known exposure to account for claimant's pulmonary problems.[9] In contrast, he found that Drs. Zaldivar and Hippensteel failed to adequately explain why claimant's twenty-six years of coal mine dust exposure were not a cause of claimant's pulmonary problems. The administrative law judge also discounted the opinions of Drs. Zaldivar and Hippensteel because they relied substantially on Dr. Wiot's x-ray and CT scan readings, which the administrative law judge had discounted. Additionally, the administrative law judge discounted Dr. Zaldivar's opinion, because the physician required that claimant have an obstructive lung disease before a diagnosis of pneumoconiosis could be made, which the administrative law judge found was "contrary to the Act." Lastly, the administrative law judge found that the diagnoses of Drs. Rasmussen, Baker, and Al-Khasawneh were not only supported by the fact that coal mine dust exposure was claimant's only known risk factor, they were also consistent with the earlier diagnoses of pneumoconiosis by Drs. Thavaradhara and Younes, and by the West Virginia Occupational Pneumoconiosis Board.

Employer argues that the administrative law judge erred in discounting the opinions of Drs. Zaldivar and Hippensteel for the reasons he provided. We disagree. Contrary to employer's contention, substantial evidence supports the administrative law

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pulmonary impairment. Claimant's Exhibit 3. In contrast, Drs. Hippensteel and Zaldivar diagnosed claimant with pulmonary fibrosis unrelated to coal mine dust exposure. Employer's Exhibits 1; 3; 6 at 26; 7 at 15.

[8] In reports dating back to 1977, Drs. Atai, Thavaradhara, and Younes, and the West Virginia Occupational Pneumoconiosis Board diagnosed pneumoconiosis related to claimant's coal mine dust exposure in their reports. Director's Exhibits 1-3.

[9] As noted by the administrative law judge, claimant testified that he never smoked cigarettes. Decision and Order at 15; Hearing Transcript at 24-25. The physicians of record noted that claimant never smoked. *See* Director's Exhibits 1-3; 14 at 2; Claimant's Exhibits 1 at 2; 3 at 2; Employer's Exhibits 1 at 5; 6 at 11; 7 at 6.

judge's permissible credibility determination, that Drs. Zaldivar and Hippensteel did not adequately explain why claimant's twenty-six years of coal mine dust exposure had no effect on claimant's pulmonary problems. *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 625, 21 BLR 2-654, 2-661 (4th Cir. 1999); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 24. Additionally, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Hippensteel, because they based their opinions on negative readings of x-rays and CT scans by Dr. Wiot, which the administrative law judge had discounted. *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175; Decision and Order at 23-24; Employer's Exhibits 6 at 15; 7 at 12, 15-16. Moreover, the administrative law judge reasonably discounted Dr. Zaldivar's opinion, that claimant does not have pneumoconiosis because he does not have an obstructive lung disease, as contrary to the medical science accepted by the Department of Labor when it amended the definition of pneumoconiosis to include both restrictive and obstructive diseases arising out of coal mine dust exposure.[10] 20 C.F.R. §718.201(a)(2); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Mountain Clay, Inc. v. Collins*, 256 F. App'x 757 (6th Cir. 2007); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125-26 (2009), *aff'd, Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011); Decision and Order at 24; Employer's Exhibit 6 at 24, 32.

The Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. As the administrative law judge permissibly discounted the opinions of Drs. Zaldivar and Hippensteel, and employer does not challenge the administrative law judge's decision to rely on the new medical opinions of Drs. Rasmussen, Baker, and Al-Khasawneh, as supported by the earlier medical opinions, we affirm the administrative law judge's findings that claimant established the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a)(4). Thus, we affirm the administrative law judge's finding that claimant established the existence of both clinical and legal pneumoconiosis pursuant to Section 718.202(a).[11] *See Compton*, 211 F.3d at 211-12, 22 BLR at 2-175; Decision and Order at 24-25.

[10] Dr. Zaldivar testified that claimant does not have pneumoconiosis because he has a restrictive lung disease, and not an obstructive lung disease, as would be seen with pneumoconiosis. Employer's Exhibit 6 at 24, 32.

[11] Based on our affirmance of the administrative law judge's finding of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a), we also affirm the administrative law judge's finding that claimant is entitled to the presumption that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), which employer did not rebut, as those findings are unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

Pursuant to Section 718.204(c), the administrative law judge considered whether claimant established that pneumoconiosis is a substantially contributing cause of his total disability. Based on the administrative law judge's decision to discredit the opinions of Drs. Zaldivar and Hippensteel at Section 718.202(a)(4), the administrative law judge discounted their opinions as to the cause of claimant's total disability at Section 718.204(c). Decision and Order at 32. Contrary to employer's contention, the administrative law judge reasonably discounted the opinions of Drs. Zaldivar and Hippensteel regarding the cause of claimant's disability, because they did not diagnose claimant with pneumoconiosis, contrary to the administrative law judge's finding. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott v. Mason Coal Co.*, 289 F.3d 263, 267, 269, 22 BLR 2-372, 2-379-80, 2-384 (4th Cir. 2002); *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); Decision and Order at 29-32; Employer's Exhibits 1, 3, 6, 7. Substantial evidence supports the administrative law judge's finding that the opinions of Drs. Rasmussen, Baker, and Al-Khasawneh establish that claimant's total disability is due to pneumoconiosis. *See Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372-73 (4th Cir. 2006); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 38, 14 BLR 2-68, 2-76-77 (4th Cir. 1990); Decision and Order at 32; Director's Exhibit 14 at 4, 8; Claimant's Exhibits 1 at 4; 3 at 4. Therefore, we affirm the administrative law judge's finding pursuant to Section 718.204(c).

Because we have affirmed the administrative law judge's findings that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a), and total disability due to pneumoconiosis pursuant to Section 718.204(b)(2), (c), we affirm the administrative law judge's award of benefits under 20 C.F.R. Part 718. Therefore, we need not address the administrative law judge's additional findings pursuant to amended Section 411(c)(4), or employer's challenges to the administrative law judge's application of amended Section 411(c)(4).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge