BRB Nos. 12-0121 BLA
and 12-0121 BLA-A

EARL D. FLEENOR	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 10/18/2012
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal and Cross-Appeal of the Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Earl D. Fleenor, Rogersville, Tennessee, *pro se*.[1]

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.[2]

[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] By letter dated August 3, 2012, Paul E. Frampton, of Bowles, Rice, McDavid, Graff & Love, in Charleston, West Virginia, notified the Board that he is employer's new counsel.

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

PER CURIAM:

Claimant appeals, without the assistance of counsel, and employer cross-appeals the Decision and Order (09-BLA-5441) of Administrative Law Judge Daniel F. Solomon denying benefits on a claim 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). This case involves a subsequent claim filed on February 25, 2008.[3]

The administrative law judge noted that Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this 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 Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and the evidence establishes a totally disabling respiratory impairment, there will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

Applying Section 411(c)(4), the administrative law judge found that, because claimant failed to establish fifteen years of coal mine employment,[4] claimant was not entitled to invocation of the presumption. In his further consideration of the claim, the administrative law judge found that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b), 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. However, in considering the merits of the claim, the administrative law judge found that the evidence did not establish the existence of

[3] Claimant initially filed a claim for benefits on August 23, 1994. Director's Exhibit 1. Administrative Law Judge Christine McKenna denied benefits on October 31, 1996, because the evidence did not establish the existence of pneumoconiosis or total disability. *Id.* Upon review of claimant's appeal, the Board affirmed the denial of benefits. *Fleenor v. Westmoreland Coal Co.*, BRB No. 97-0388 BLA (Oct. 23, 1997) (unpub.).

[4] Claimant's last coal mine employment was in Virginia. Director's Exhibit 5. Accordingly, the Board will apply the law 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).

pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds in support of the administrative law judge's denial of benefits. Employer has also filed a cross-appeal, challenging the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). Employer also contends that the retroactive application of amended Section 411(c)(4) is unconstitutional. The Director, Office of Workers' Compensation Programs, has not filed a response brief.

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. *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).

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. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

Section 411(c)(4)

The administrative law judge accurately noted that, at the hearing, the parties stipulated that claimant worked for less than fifteen years in coal mine employment. Decision and Order at 3; Hearing Transcript at 6-7. In light of this stipulation, which is supported by substantial evidence, the administrative law judge properly found that claimant is not entitled to invocation of the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see* 20 C.F.R. §725.463; *Richardson v. Director, OWCP*, 94 F.3d 164, 167, 21 BLR 2-373, 2-378-79 (4th Cir. 1996).

The Existence of Pneumoconiosis

Pursuant to 20 C.F.R. §718.202(a)(1), the record contains ten interpretations of three x-rays taken on April 3, 2008, July 30, 2008, and February 17, 2010. Dr. Alexander, a B reader and Board-certified radiologist, interpreted the April 3, 2008 x-ray as positive for pneumoconiosis. Director's Exhibit 16. Drs. Meyer and Miller, both of

whom are also B readers and Board-certified radiologists, interpreted the same x-ray as negative for the disease. Director's Exhibit 14; Claimant's Exhibit 6. Dr. Forehand, a B reader, also interpreted the April 3, 2005 x-ray as negative for pneumoconiosis.[5] Director's Exhibit 12. Further, Dr. Alexander interpreted the July 30, 2008 x-ray as positive for pneumoconiosis, Director's Exhibit 13, while three equally qualified physicians, Drs. Meyer, Miller, and Wiot, interpreted the same x-ray as negative for the disease. Director's Exhibit 14; Claimant's Exhibit 6; Employer's Exhibit 3. Finally, although Dr. Miller, a B reader and Board-certified radiologist, interpreted the February 27, 2010 x-ray as positive for pneumoconiosis, Director's Exhibit 13, Dr. Wiot, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 11.

Because claimant's x-rays were interpreted as both positive and negative for pneumoconiosis by the best qualified physicians, the administrative law judge permissibly found that the x-ray evidence was, at best, "in equipoise," and, therefore, insufficient to establish the existence of pneumoconiosis. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 9-10. 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, the administrative law judge properly found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Decision and Order at 10. Moreover, claimant is not entitled to the presumptions set forth at 20 C.F.R. §§718.304, 718.306.[6] Therefore, he cannot establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3).

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical reports of Drs. Smiddy, Forehand, Hippensteel, and Spagnolo regarding whether claimant suffers from either clinical or legal pneumoconiosis.[7] Although Dr. Smiddy

[5] Dr. Barrett, a B reader and Board-certified radiologist, reviewed the April 3, 2008 x-ray to assess its quality only. Director's Exhibit 12.

[6] Because there is no evidence of complicated pneumoconiosis in the record, the Section 718.304 presumption is inapplicable. *See* 20 C.F.R. §718.304. Because this claim is not a survivor's claim, the Section 718.306 presumption is also inapplicable. *See* 20 C.F.R. §718.306.

[7] "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

diagnosed clinical pneumoconiosis, the administrative law judge permissibly found that the x-ray that Dr. Smiddy relied upon as positive for pneumoconiosis was inconclusive for the existence of the disease,[8] thus calling into question the reliability of Dr. Smiddy's diagnosis of clinical pneumoconiosis. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order at 11; Claimant's Exhibits 2, 4. 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).

Dr. Forehand diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease due to cigarette smoking and coal mine dust exposure. Director's Exhibit 12. The administrative law judge, however, noted that Drs. Hippensteel and Spagnolo attributed claimant's obstructive pulmonary impairment to other conditions documented in the record, namely, obstructive sleep apnea and heart disease, as well as claimant's susceptibility to recurrent respiratory infections due to an immune suppressing drug that he takes for the treatment of rheumatoid arthritis. Decision and Order at 11; Employer's Exhibits 9 at 30, 12 at 19, 28. The administrative law judge permissibly found that Dr. Forehand's opinion was not sufficiently reasoned, in light of the doctor's failure to adequately consider and address the significance of these other possible etiologies of claimant's obstructive impairment. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order at 11. Because no other physician diagnosed 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).

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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).

[8] Dr. Smiddy based his diagnosis of coal workers' pneumoconiosis on Dr. Miller's positive interpretation of the February 17, 2010 x-ray. Claimant's Exhibits 1, 2. Although Dr. Miller is a B reader and Board-certified radiologist, Dr. Wiot, an equally qualified physician, interpreted the same x-ray as negative for the disease. Employer's Exhibit 11. Based upon the equal radiological qualifications of the doctors, the administrative law judge permissibly found that the February 17, 2010 x-ray was "in equipoise" in regard to the presence of pneumoconiosis. Decision and Order at 9-10; *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 281, 18 BLR 2A-1, 2A-12 (1994).

In light of our affirmance of the administrative law judge's findings that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27; *Perry*, 9 BLR at 1-2. Therefore, we need not address employer's contentions of error raised in its cross-appeal. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

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