BRB No. 10-0724 BLA

LESTER GIBSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOL OF KENTUCKY, INCORPORATED	)	
	)	
	)	
and	)	DATE ISSUED: 09/29/2011
	)	
CONSOL ENERGY, 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 Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Lester Gibson, Bevinsville, Kentucky, *pro se*.

Allison B. Moreman (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2007-BLA-05561) of Administrative Law Judge Pamela Lakes Wood rendered on a miner's claim, filed on May 3, 2006, 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).[1]

On March 23, 2010, subsequent to the hearing that was held on March 26, 2009, but prior to the issuance of the administrative law judge's Decision and Order, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a presumption of total disability due to pneumoconiosis in cases where the miner has established fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment.

On April 2, 2010, the administrative law judge issued an Order in which she directed the parties to submit position statements regarding the applicability of the amendments to the claim and, in addition, offered the parties the opportunity to request reopening of the record for the submission of supplemental evidence. In response, claimant and the Director, Office of Workers' Compensation Programs (the Director), maintained that the presumption of total disability due to pneumoconiosis is applicable to this claim. In its response, employer acknowledged that the amendments may be applicable, based on the length of coal mine employment claimant alleged, but asserted that the case should be remanded for further evidentiary development. Employer also challenged the adequacy of the notice it received.

Subsequently, on May 20, 2010, the administrative law judge issued an Order in which she denied employer's request to remand the claim to the district director, but reopened the record for the parties to submit supplemental medical evidence to address the recently enacted amendments. In response, employer submitted supplemental medical reports, which the administrative law judge admitted into the record.

Thereafter, in her September 2, 2010 Decision and Order, the administrative law judge credited claimant with twenty-three years of coal mine employment, with at least fifteen years of underground coal mine employment, and adjudicated the claim pursuant to the reinstated presumption, as well as the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), based on the blood gas study evidence and the

[1] At the hearing, claimant was represented by Ron Carson, a benefits counselor with Stone Mountain Health Services. On claimant's behalf, Jerry Murphree, a benefits counselor with Stone Mountain Health Services, submitted the appeal of the administrative law judge's Decision and Order Denying Benefits, but is not representing claimant before the Board. Claimant's Notice of Appeal; *see Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

medical opinions of Drs. Baker, Potter and Jarboe. Applying amended Section 921(c)(4) to the claim, the administrative law judge found that claimant established invocation of the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge further found, however, that employer affirmatively established rebuttal of the presumption by proving that claimant did not have clinical or legal pneumoconiosis.[2] In addition, the administrative law judge found that entitlement pursuant to 20 C.F.R. Part 718 was precluded because employer affirmatively established, by a preponderance of the evidence, that claimant does not suffer from either clinical or legal pneumoconiosis. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's determination that he is not entitled to benefits. Employer responds, urging affirmance of the denial of benefits. Employer also maintains, however, that the administrative law judge erred in applying amended Section 921(c)(4) in this case, as it is unconstitutional and has no implementing regulation. Employer further argues that it was irreparably harmed by the administrative law judge's failure to issue her Decision and Order within twenty days of the close of the hearing, as required by 20 C.F.R. §725.476. The Director has declined to file a substantive response brief in this appeal.

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. *Hodges v. BethEnergy Mines, Inc.*, 18 BLR 1-84 (1994); *McFall v. Jewell Ridge Coal Co.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). 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 consistent with applicable law.[3] 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).

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[2] "Clinical pneumoconiosis'' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by the permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by coal mine dust exposure. 20 C.F.R. §718.201(a)(1). This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment. *Id.* "Legal pneumoconiosis" includes 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).

[3] The record indicates that claimant's coal mine employment was in Kentucky. *See* Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the

Initially, we affirm the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment and total disability pursuant to 20 C.F.R. §718.204(b), as they are rational and supported by substantial evidence. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order at 16. We also affirm, therefore, the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. *See Tanner v. Freeman United Coal Co.*, 10 BLR 1-85 (1987); Decision and Order at 16.

Relevant to rebuttal of the presumption, the administrative law judge considered whether the x-ray evidence was sufficient to affirmatively establish that claimant does not have pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). The administrative law judge weighed readings of x-rays dated July 18, 2006, November 30, 2006, April 11, 2008, April 18, 2008 and January 5, 2009. The administrative law judge rationally found that each of these x-rays was in equipoise, as it was read as positive for pneumoconiosis by a dually-qualified Board-certified radiologist and B reader and as negative by a physician with the same qualifications. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279-80 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); Decision and Order at 18; Director's Exhibits 9, 12; Claimant's Exhibits 1-4, 8; Employer's Exhibits 6-8, 13. The administrative law judge, therefore, properly determined that the x-ray evidence did not affirmatively establish the absence of pneumoconiosis and, thus, employer failed to rebut the 15-year presumption at 20 C.F.R. §718.202(a)(1). *See DeFore v. Alabama By-Products*, 12 BLR 1-27 (1988); Decision and Order at 18.

The administrative law judge then considered the CT scan interpretations and medical opinions of record pursuant to 20 C.F.R. §718.202(a)(4). The record contains two readings of a scan dated November 30, 2006 and two readings of a scan dated April 11, 2007. Dr. West, a dually-qualified radiologist, read the November 30, 2006 CT scan as negative for pneumoconiosis and Dr. Miller, a dually-qualified radiologist, read the same CT scan as positive for pneumoconiosis.[4] Claimant's Exhibit 9; Employer's

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United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[4] Dr. West indicated that the CT scan revealed bilateral reticular parenchymal bands, suggestive of previous infection or trauma, but was otherwise within normal limits. Employer's Exhibit 11. He determined that there were no pleural calcifications or

Exhibit 11. Dr. Poulos, a Board-certified radiologist, interpreted the April 11, 2007 scan as negative and Dr. Miller found that the same scan revealed diffuse interstitial fibrosis and bilateral, irregular opacities compatible with scarring or atelectasis.[5] Claimant's Exhibit 10; Employer's Exhibit 10.

The administrative law judge acted within her discretion in finding that the November 30, 2006 CT scan was in equipoise, as equally-qualified readers rendered conflicting opinions on the issue of the existence of pneumoconiosis. *See Staton*, 65 F.3d at 59, 19 BLR at 2-279-80; *Woodward*, 991 F.2d at 321, 17 BLR at 2-87; *White*, 23 BLR at 1-4-5; Decision and Order at 22. With respect to the April 11, 2007 scan, the administrative law judge acted within her discretion in determining that Dr. Poulos's negative reading tended to rebut the presumption, as Dr. Miller's reading was equivocal as to whether coal workers' pneumoconiosis was present. *Id*. Considering the CT scan evidence overall, the administrative law judge found that:

> Dr. Miller has indicated that his opinion based upon the first CT scan has changed, and he stated that other etiologies besides pneumoconiosis should be considered. Consequently, the CT scan readings, on the whole, tend to

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plaques and no findings suggestive of coal workers' pneumoconiosis. *Id*. Dr. Miller interpreted the CT scan as revealing the presence of diffuse interstitial lung disease, evidenced by irregular lower lung opacities in both lungs. Claimant's Exhibit 9. Dr. Miller determined that the opacities were larger than one centimeter, with a combined size of less than five centimeters, and were not indicative of lung cancer, infection, or metastatic disease. *Id*. Dr. Miller opined that the opacities were compatible with scarring and conglomerate masses due to progressive massive fibrosis (PMF) of coal workers' pneumoconiosis. *Id*.

[5] Dr. Poulos read the CT scan as revealing coarse reticular bands in claimant's upper lobes; no centrilobular or subpleural nodules or masses in either lung; and no pleural effusions or pleural plaque formations or calcification. Employer's Exhibit 10. Dr. Poulos determined that there were stable bilateral parenchymal bands or scars, but no evidence of coal workers' pneumoconiosis. *Id*. Dr. Miller read the CT scan as revealing the presence of diffuse interstitial lung disease and multiple, bilateral, irregular lower lung opacities compatible with scarring or atelectasis, which did not have the typical appearance of cancer or metastatic disease. Claimant's Exhibit 10. Dr. Miller noted that the scarring was nonspecific, but appeared to have improved in comparison to the earlier CT scan. *Id*. Dr. Miller noted, "[t]his improvement was not typical of PMF, which is progressive and does not improve," and that "[e]tiologies other than coal workers' pneumoconiosis should be considered." *Id*.

> establish that the Claimant suffers from fibrosis that was not indicative of pneumoconiosis and therefore the CT scans tend to rebut the presumption of pneumoconiosis.

Decision and Order at 22-23. We affirm the administrative law judge's finding, as it is rational and supported by substantial evidence. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002); *Clark*, 12 BLR at 1-153.

The administrative law judge then weighed the medical opinions of Drs. Baker, Potter and Jarboe under 20 C.F.R. §718.202(a)(4).[6] Dr. Baker examined claimant at the request of the Department of Labor on July 18, 2006 and diagnosed coal workers' pneumoconiosis, hypoxemia and bronchitis. Director's Exhibit 9. Dr. Baker attributed claimant's coal workers' pneumoconiosis to coal dust exposure and identified smoking and coal dust exposure as the causes of claimant's bronchitis. *Id*. Dr. Baker further opined that the restrictive impairment revealed on claimant's pulmonary function study was primarily caused by coal dust exposure. *Id*.

Dr. Potter, claimant's treating physician, submitted a medical report dated October 27, 2008. Claimant's Exhibit 7. Dr. Potter diagnosed both clinical and legal pneumoconiosis. *Id*. Dr. Potter also determined that claimant has restrictive lung disease, caused by coal dust inhalation. *Id*. Dr. Potter was deposed on March 10, 2009. Employer's Exhibit 15. Dr. Potter testified that he had a copy of a positive x-ray interpretation of the x-ray dated July 18, 2006, when he wrote his report, but he relied on his own readings of several x-rays to diagnose coal workers' pneumoconiosis. *Id*. at 11-14. Dr. Potter acknowledged that the rapid development of claimant's restrictive impairment was inconsistent with a diagnosis of coal workers' pneumoconiosis. *Id*. at 25.

Dr. Jarboe, examined claimant on November 13, 2006. Employer's Exhibit 1. Dr. Jarboe opined that claimant does not have clinical or legal pneumoconiosis. *Id*. Based on an x-ray and CT scan reading, Dr. Jarboe determined that claimant had prominent, extensive linear scars in both lungs that appear to be parenchymal scars that are unrelated to pneumoconiosis. *Id*. According to Dr. Jarboe, the absence of an obstructive

[6] The administrative law judge also considered the opinion of Dr. Repsher, who stated that claimant does not have clinical or legal pneumoconiosis and is not totally disabled. Decision and Order at 11, 20; Employer's Exhibits 2, 4, 9, 17. The administrative law judge found that Dr. Repsher's opinion was not persuasive, as he did not address the CT scan evidence and he did not explain his determination that claimant's post-exercise blood gas study results were entirely attributable to congestive heart failure. Decision and Order at 20.

impairment on claimant's pulmonary function studies indicated that he does not have legal pneumoconiosis. *Id*. At his deposition, Dr. Jarboe testified that "[i]t was difficult to be sure as to the exact cause of [claimant's linear scarring] – they were rather nondescript in terms of their appearance – but they could have been from old infection . . . [or] remote pulmonary infarctions." Employer's Exhibit 5 at 15. Dr. Jarboe further stated that the location of the scarring was not consistent with coal workers' pneumoconiosis and the radiological evidence did not show the background small opacities typical of progressive massive fibrosis related to coal dust exposure. *Id*. at 16-17. In a supplemental report, dated February 26, 2009, Dr. Jarboe reiterated his conclusion that claimant did not have clinical or legal pneumoconiosis. Employer's Exhibit 12. Dr. Jarboe submitted an additional report, after the adoption of the 2010 amendments to the Act, in which he stated that he could "rule out coal dust exposure as playing a role" in claimant's impairment. Employer's Exhibit 17. Dr. Jarboe further opined that claimant's exercise blood gas studies produced reduced values due to the dense linear scars in claimant's lungs, which were not caused by the inhalation of coal mine dust. *Id*.

The administrative law judge found that Dr. Potter's diagnosis of clinical pneumoconiosis was based "primarily upon his x-ray findings and the presence of a restrictive[,] as opposed to an obstructive[,] disorder." Decision and Order at 21. The administrative law judge rationally determined that Dr. Potter's opinion was not sufficiently reasoned and entitled to less weight, despite his status as a treating physician, as Dr. Potter did not explain his diagnosis of clinical pneumoconiosis, in light of his concession that "the rapid development of [claimant's] restriction was atypical for coal workers' pneumoconiosis." Decision and Order at 21; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553. The administrative law judge also reasonably found that Dr. Potter did not discuss all possible etiologies for claimant's lung disease, other than excluding smoking as a cause, based on the absence of a severe obstructive respiratory impairment. *See Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Clark*, 12 BLR at 1-153; Decision and Order at 21; Claimant's Exhibit 7; Employer's Exhibit 15. The administrative law judge also acted within her discretion in finding Dr. Potter's opinion on the issue of legal pneumoconiosis to be contradictory and entitled to little weight, as he attributed claimant's obstructive impairment, in part, to coal dust in his report, but later testified that smoking was the sole cause of the obstruction during his deposition. *Id*.

Regarding Dr. Baker's opinion, the administrative law judge found that his "consideration of only his own test results put him at a disadvantage," because he could not comment on the variability of claimant's blood gas study values or the linear scarring revealed on claimant's CT scans. Decision and Order at 21-22. Accordingly, we affirm administrative law judge's rational conclusion that Dr. Baker's diagnoses of clinical and legal pneumoconiosis were of little probative value. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306-08, 23 BLR 2-261, 2-284-87 (6th Cir. 2005); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Tennessee*

Consol. Coal Co. v. Crisp, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); Decision and Order at 21-22; Director's Exhibit 9.

With respect to Dr. Jarboe's opinion, the administrative law judge acted within her discretion in finding that it was well-reasoned and well-documented, as Dr. Jarboe fully explained his conclusions and identified the evidence that supported his determination that claimant does not have either clinical or legal pneumoconiosis. *See Martin*, 400 F.3d at 306-308, 23 BLR at 2-284-287; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-121-122; Decision and Order at 21-22; Employer's Exhibits 1, 5, 12, 17. In addition, when resolving the conflict between the opinions of Drs. Jarboe and Potter regarding the absence of a severe obstructive impairment and the significance of the linear scarring seen radiographically, the administrative law judge rationally found that Dr. Jarboe's views were entitled to greater weight, based on his superior qualifications as a Board-certified pulmonologist. *See Williams*, 338 F.3d at 514, 22 BLR at 2-649; Decision and Order at 20; Employer's Exhibit 1. In light of these findings, the administrative law judge reasonably determined that Dr. Jarboe's opinion was entitled to greater weight than the opinions of Drs. Baker and Potter and "tends to rebut the presumption by establishing that claimant has neither clinical nor legal pneumoconiosis." Decision and Order at 22; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-495 (6th Cir. 2002).

The administrative law judge then concluded, "[e]mployer has successfully rebutted the 15-year presumption by showing, by a preponderance of the credible medical evidence, that [c]laimant does not suffer from either clinical pneumoconiosis or legal pneumoconiosis." Decision and Order at 23. We affirm the administrative law judge's rebuttal finding, as it was based upon her appropriate consideration of the x-ray, CT scan and medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(1), (4).[7] *See Shonborn v. Director, OWCP*, 8 BLR 1-434, 1-435-36 (1986).

[7] We also affirm, as rational and supported by substantial evidence, the administrative law judge's finding that, absent the application of amended 30 U.S.C. §921(c)(4), claimant's entitlement to benefits is precluded, as he can not establish that he has either clinical or legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-22 (6th Cir. 2000); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); Decision and Order at 19, 23.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.[8]

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[8] In light of our affirmance of the denial of benefits, we decline to address employer's argument that the amendments to the Act cannot be applied in this claim.