BRB No. 11-0863 BLA

MILDRED A. PURDY (Widow of HERSHEL T. PURDY)	)	
Claimant-Petitioner	)	
v.	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 09/21/2012
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (09-BLA-5244) of Administrative Law Judge John P. Sellers, III, 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 survivor's claim filed on March 17, 2008.

[1] Claimant is the widow of the miner, who died on January 10, 2008. Director's Exhibit 11.

Considering this claim, 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 survivor'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 survivor establishes that the miner had at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he had a totally disabling respiratory impairment, there will be a rebuttable presumption that his death was due to pneumoconiosis.[2] 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).

Applying amended Section 411(c)(4), the administrative law judge found that the miner worked for thirty years in underground coal mine employment.[3] However, the administrative law judge found that the evidence did not establish that the miner had a totally disabling respiratory impairment. Consequently, the administrative law judge found that claimant failed to invoke the Section 411(c)(4) presumption that the miner's death was due to pneumoconiosis. The administrative law judge also found that the evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), or that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, found that claimant was not entitled to benefits under 20 C.F.R. Part 718.

On appeal, claimant argues that the administrative law judge erred in finding that the evidence did not establish that the miner had a totally disabling respiratory impairment, and, therefore, erred in finding that she did not invoke the Section 411(c)(4) presumption. Claimant further contends that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Claimant also argues that the administrative law

[2] Section 1556 of Public Law No. 111-148 also revived Section 422(*l*) of the Act, 30 U.S.C. §932(*l*), providing that a survivor is automatically entitled to benefits if the miner filed a successful claim and was receiving benefits at the time of his death. However, claimant cannot benefit from this provision, as the miner's claim for benefits was denied. Unmarked Exhibit.

[3] The miner's coal mine employment was in Kentucky. Director's Exhibit 3. 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).

judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Claimant finally argues that the administrative law judge erred in finding that the evidence did not establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief. In a reply brief, claimant reiterates her previous contentions.

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).

Claimant initially contends that the administrative law judge erred in finding that the medical evidence did not establish the existence of total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[4] Claimant specifically contends that the administrative law judge erred in determining that Dr. Hack's opinion did not support a finding that the miner suffered from a totally disabling respiratory or pulmonary impairment. We disagree. The administrative law judge accurately noted that Dr. Hack did not address whether the miner was totally disabled from a respiratory standpoint during his lifetime. Decision and Order at 15; Director's Exhibit 14; Employer's Exhibit 1. The administrative law judge, therefore, permissibly found that Dr. Hack's opinion did not support a finding that the miner was totally disabled[5] pursuant to 20 C.F.R.

[4] Because claimant does not challenge the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The administrative law judge permissibly found that Dr. Hack's statement in his report, that he had prescribed home oxygen for the miner, was insufficient to permit an inference that the miner was totally disabled during his lifetime. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (en banc); Decision and Order at 15. Moreover, contrary to claimant's contention, the fact that Dr. Hack diagnosed hypoxia, anemia, and chronic obstructive pulmonary disease is insufficient to support a finding of a totally disabling respiratory or pulmonary impairment. *See Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Heaton v. Director, OWCP*, 6 BLR 1-1222 (1984) (holding that, without further evidence, a diagnosis of carcinoma of the larynx will not establish the existence of a totally disabling respiratory impairment). Similarly, Dr. Hack's notation in his treatment records, that the miner reported shortness of breath, does not support a finding of a totally disabling respiratory or pulmonary impairment. *See Gee*

§718.204(b)(2)(iv). *Id*. at 5-6; *see Cornett v. Benham Coal Co.*, 277 F.3d 569, 22 BLR 2-107 (6th Cir. 2000).

Because claimant raises no other contentions of error regarding the medical opinion evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). In light of our affirmance of the administrative law judge's findings that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), we affirm his finding that claimant did not invoke the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, where the amended Section 411(c)(4) presumption is not applicable, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

Claimant argues that the administrative law judge erred in finding that the x-ray evidence did not establish the existence of clinical pneumoconiosis[6] pursuant to 20 C.F.R. §718.202(a)(1). We disagree. The administrative law judge considered interpretations of x-rays taken on January 8, 2007, January 7, 2008, and January 10, 2008. The administrative law judge accurately noted that the only interpretation of the January 8, 2007 x-ray was negative for pneumoconiosis. Decision and Order at 17; Director's Exhibit 22. Because the January 7, 2008 and January 10, 2008 x-rays were

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v. W.G. Moore & Sons, 9 BLR 1-4, 1-6 (1986); *Wright v. Director, OWCP*, 8 BLR 1-245, 1-247 (1985); Claimant's Exhibit 6.

[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).

each interpreted by equally qualified physicians as both positive and negative for pneumoconiosis, the administrative law judge permissibly found that these x-rays did not support a finding of clinical pneumoconiosis.[7] *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); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 17-18; Claimant's Exhibits 1, 3; Employer's Exhibits 2, 6. 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 clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[8]

Claimant next contends that the administrative law judge erred in finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis[9] pursuant to 20 C.F.R. §718.202(a)(4). Claimant specifically argues that the administrative law judge erred in finding that Dr. Hack's opinion did not support a finding of legal pneumoconiosis. We disagree. In his medical report, Dr. Hack indicated that his "guess" would be that the miner's chronic obstructive pulmonary disease (COPD) was seventy-five percent due to coal dust exposure and twenty-five percent due to cigarette smoking. Director's Exhibit 14. However, during a subsequent deposition, Dr. Hack testified that he was unable to determine whether the miner's COPD was caused by coal dust exposure or smoking, and indicated that he would defer to a Board-certified pulmonologist in regard to the etiology of the disease. Employer's Exhibit 1 at 7-8. The administrative law judge permissibly found that Dr. Hack's opinion regarding the cause of the miner's COPD was "extremely equivocal and uncertain," and, therefore, insufficient to constitute a diagnosis of legal pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Justice v. Island Creek*

[7] The administrative also considered two interpretations of a January 8, 2008 digital x-ray pursuant to 20 C.F.R. §718.107. Because this x-ray was interpreted as both positive and negative by equally qualified physicians, the administrative law judge permissibly found that the x-ray was inconclusive for the existence of pneumoconiosis, and therefore, insufficient to support a finding of clinical pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order at 19-20; Claimant's Exhibit 2; Employer's Exhibit 7.

[8] Because claimant does not challenge 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)(2), (3), these findings are affirmed. *Skrack*, 6 BLR at 1-711.

[9] 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).

Coal Co., 11 BLR 1-91, 1-94 (1988); Decision and Order at 20, 22. Because claimant raises no other contentions of error regarding the medical opinion evidence under 20 C.F.R. §718.202(a)(4), we affirm the administrative law judge's finding that the medical opinion evidence did not establish the existence of legal pneumoconiosis.

In light of our affirmance of the administrative law judge's finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4), an essential element of entitlement in a survivor's claim, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718. *See Trumbo*, 17 BLR at 1-87-88.

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