BRB No. 13-0017 BLA

ARBIE L. LAYNE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NATIONAL MINES CORPORATION	)	DATE ISSUED: 09/20/2013
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
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 Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Arbie L. Layne, Dema, Kentucky, *pro se.*

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order Denying Benefits (2011-BLA-05217) of Administrative Law Judge Lystra A. Harris

[1] In a letter dated October 8, 2010, Ron Carson, a benefits counselor with Stone Mountain Health Services of St. Charles, Virginia, requested, on behalf of claimant, that

rendered on a subsequent claim[2] filed on December 8, 2009, pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). The administrative law judge first considered whether claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge found that claimant established twenty years of coal mine employment, and that at least fifteen of those years were in underground coal mine employment. However, the administrative law judge found that the evidence failed to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b) and failed, therefore, to establish invocation of the amended Section 411(c)(4) presumption. The administrative law judge also found that entitlement to benefits was not established pursuant to 20 C.F.R. Part 718, as total respiratory disability, an essential element of entitlement, was not established. Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance of the administrative law judge's denial

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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] Claimant filed his initial claim for benefits on October 4, 1988. That claim was denied by the district director on February 22, 1989, finding that claimant failed to establish either the existence of pneumoconiosis or total respiratory disability. Director's Exhibit 1. Claimant filed a second claim on July 3, 1990, which was ultimately denied by Administrative Law Judge Donald B. Jarvis in a Decision and Order issued on August 12, 1992. *Id*. A third claim was filed on April 17, 2002, and denied on October 21, 2003. The district director denied the claim because claimant did not establish any of the elements of entitlement. *Id*. Claimant filed two requests for modification of the denial of benefits. These requests were denied by the district director on July 19, 2005 and November 16, 2006, respectively. *Id*. No further action was taken until the filing of claimant's current claim for benefits.

[3] The recent amendments to the Act apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this living miner's claim, Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) of the Act, which provides, in relevant part, that if a miner had at least fifteen years of qualifying coal mine employment, and if the evidence establishes the presence of a totally disabling respiratory impairment, there is a rebuttable presumption of total disability due to pneumoconiosis. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119, 260 (2010).

of benefits, as supported by substantial evidence. Employer further argues that, if any error exists in the administrative law judge's Decision and Order, it is her finding that claimant has established at least fifteen years of qualifying coal mine employment. The Director, Office of Workers' Compensation Programs, has not filed a substantive response.

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. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176, 1-177 (1989). 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 in accordance with law.[4] 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).

After noting that this subsequent claim was filed on December 8, 2009, was pending on May 23, 2010, and that she credited claimant with at least fifteen years of qualifying coal mine employment, the administrative law judge concluded that claimant would be entitled to the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, if he established total respiratory disability pursuant to Section 718.204(b). 30 U.S.C. §921(c)(4).

Pursuant to Section 718.204(b)(2)(i), the administrative law judge considered the two pulmonary function studies admitted into the record, the January 22, 2010 pulmonary function study administered by Dr. Baker, which yielded qualifying values, and the January 17, 2011 pulmonary function study administered by Dr. Rosenberg, which yielded non-qualifying values.[5] Decision and Order at 8; Director's Exhibit 13; Employer's Exhibit 4. Weighing the conflicting pulmonary function studies, the administrative law judge properly determined that the pulmonary function study evidence was insufficient to establish total respiratory disability, as the more recent study, which yielded non-qualifying results, was more indicative of claimant's current condition.[6] *See*

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study yields values that exceed the appropriate values. *Id*.

[6] In support of his finding, the administrative law judge cited the decision of the United States Court of Appeals for the Third Circuit in *Andruscavage v. Director,*

Gray v. Director, OWCP, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1999). Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence was insufficient to establish total respiratory disability. 20 C.F.R. §718.204(b)(2)(i); *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Pursuant to Section 718.204(b)(2)(ii) and (iii), the administrative law judge properly found that total respiratory disability was not established, as the blood gas study evidence yielded non-qualifying values and the administrative law judge found that there was no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(ii), (iii); *Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12; Decision and Order at 8, 9.

With regard to the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the administrative law judge considered the opinions of Drs. Baker, Rosenberg and Jarboe.[7] Based on his January 22, 2010 physical examination and testing, Dr. Baker diagnosed clinical pneumoconiosis, as well as legal pneumoconiosis in the form of chronic obstructive pulmonary disease with a moderate defect, chronic bronchitis and mild resting arterial hypoxemia due to coal dust exposure and smoking. Director's Exhibit 13. Dr. Baker opined that claimant is totally disabled from a pulmonary standpoint from performing his last coal mine employment, finding a severe impairment with both the FEV_1 and FVC portions of the January 22, 2010 pulmonary function study yielding qualifying results. *Id*. Dr. Rosenberg, examined claimant on January 17, 2011 and, in a January 27, 2011 report, opined that claimant does not have either clinical pneumoconiosis or legal pneumoconiosis and that, from a pulmonary perspective, claimant is not disabled and is capable of performing his previous coal mine employment. Employer's Exhibit 4. In a supplemental report, based on a review of claimant's medical records, Dr. Rosenberg reiterated his opinion that claimant does not have clinical or legal pneumoconiosis and that, from a pulmonary standpoint, claimant is capable of

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OWCP, No. 93-3291, slip op at 9-10 (3d Cir. Feb. 22, 1994)(unpub.), where the court affirmed an administrative law judge's decision to credit the most recent non-qualifying pulmonary function study over earlier qualifying pulmonary function studies, as a better indicator of claimant's respiratory condition. The court affirmed the administrative law judge's reasoning that because pulmonary function testing is effort dependent, spurious low values can result, but spurious high values are not possible. Decision and Order at 8.

[7] Initially, the administrative law judge found that all three physicians are Board-certified pulmonologists and, therefore, granted their opinions equal weight based on their professional credentials. Decision and Order at 11.

performing his last coal mine employment. Employer's Exhibit 8. Dr. Jarboe, based on a review of claimant's medical records, opined that claimant does not have either medical (clinical) pneumoconiosis or legal pneumoconiosis, Employer's Exhibit 6, and that claimant "does retain the functional respiratory capacity to perform his last coal mining job or one of similar physical demand in a dust-free environment." Employer's Exhibit 6 at 6.

Considering these medical opinions, the administrative law judge found that the weight of the medical opinion evidence was insufficient to establish total respiratory disability pursuant to Section 718.204(b)(2)(iv). The administrative law judge reasonably accorded greater weight to the opinions of Drs. Rosenberg and Jarboe, than the opinion of Dr. Baker, because they considered the more recent non-qualifying pulmonary function study and also because they reviewed more of claimant's medical data. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *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 11. Consequently, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total respiratory disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Moreover, we affirm the administrative law judge's weighing of all the relevant medical evidence, like and unlike, in finding that it is insufficient to establish a totally disabling respiratory impairment. *Shedlock v. Bethlehem Mines Corp*., 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(en banc).

In conclusion, the administrative law judge rationally found that claimant was not entitled to invocation of the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis, as claimant failed to establish that he has a totally disabling respiratory impairment pursuant to Section 718.204(b).[8] Because claimant failed to establish this requisite element of entitlement pursuant to amended Section 411(c)(4), we need not consider employer's challenge to the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Further, because claimant has failed to establish a totally disabling respiratory impairment, a necessary element of entitlement, claimant is not entitled to benefits pursuant to 20 C.F.R. Part 718. *See Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

[8] A review of the record shows that it is devoid of evidence of complicated pneumoconiosis, or progressive massive fibrosis pursuant to 20 C.F.R. §718.304, and, therefore, that it is insufficient to establish invocation of irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3).

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