BRB No. 13-0525 BLA

DELMUS K. MOORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY/ PITTSTON COMPANY	)	
	)	
	)	DATE ISSUED: 06/05/2014
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 Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Delmus K. Moore, Clincho, Virginia, *pro se*.

John S. Honeycutt (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

HALL, Acting Chief Administrative Appeals Judge:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (2011-BLA-6139) of Administrative Law Judge Richard T. Stansell-Gamm, denying benefits on a subsequent claim filed pursuant to the provisions of the Black Lung

[1] Sharon McDevitt, 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 Ms. McDevitt is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). Claimant filed this claim on August 16, 2010.[2] Director's Exhibit 9.

The administrative law judge initially determined that the new evidence established the existence of simple, clinical pneumoconiosis, pursuant to 20 C.F.R. §718.202(a)(1), (4). Thus, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits, the administrative law judge further found that the evidence did not establish the existence of complicated pneumoconiosis. Consequently, the administrative law judge found that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Based on the filing date of the claim, the administrative law judge next considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] After crediting claimant with more than fifteen years of qualifying coal mine employment,[4] the administrative law

[2] Claimant filed five previous claims, which were finally denied. Director's Exhibits 1-3, 5, 6. His most recent prior claim, filed on January 26, 2007, was denied by the district director on September 24, 2007, for failure to establish the existence of pneumoconiosis, or the existence of a totally disabling respiratory impairment. Decision and Order at 7; Director's Exhibit 6. Claimant filed two additional claims, which he withdrew. Director's Exhibits 4, 7. Therefore, those claims are considered not to have been filed. 20 C.F.R. §725.306(b).

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[4] The record reflects that claimant's coal mine employment was in Virginia. Director's Exhibits 10, 12. 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).

judge found that the new evidence also established that claimant is totally disabled, pursuant to 20 C.F.R. §718.204(b)(2). Thus, based on claimant's years of qualifying coal mine employment and the finding of total disability, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. However, the administrative law judge found that employer rebutted the presumption by establishing that claimant's respiratory impairment "did not arise out of, or in connection with," coal mine employment. Consequently, the administrative law judge found that claimant failed to establish entitlement pursuant to Section 411(c)(4). Finally, considering whether claimant could affirmatively establish entitlement to benefits under 20 C.F.R. Part 718, the administrative law judge found that the evidence established the existence of simple, clinical pneumoconiosis, arising out of coal mine employment, at 20 C.F.R. §§718.202(a)(1), (4), 718.203(b), and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), but failed to establish that pneumoconiosis is a substantially contributing cause of claimant's total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. 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 an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (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).

Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption that a miner is totally

disabled due to pneumoconiosis if the miner is suffering from a chronic dust disease of the lung which (A) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, would be a condition that could reasonably be expected to reveal a result equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304.

The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *E. Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (en banc).

The administrative law noted that relevant to 20 C.F.R. §718.304(a), the current claim evidence includes interpretations of analog x-rays taken on May 19, 2008, October 7, 2009, and October 28, 2010. Director's Exhibits 11A, 13. The administrative law judge accurately found that none of the physicians interpreting these x-rays indicated the presence of a large opacity consistent with pneumoconiosis. Decision and Order at 12-13; Director's Exhibits 18-20; Claimant's Exhibit 1; Employer's Exhibits 13, 14, 19. Thus, the administrative law judge correctly found that the analog x-ray evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a).

Pursuant to 20 C.F.R. §718.304(b), the administrative law judge correctly found that because there is no biopsy or autopsy evidence of record, claimant is precluded from establishing invocation pursuant to 20 C.F.R. §718.304(b). Decision and Order at 13.

The administrative law judge also considered whether complicated pneumoconiosis was established by other diagnostic methods, pursuant to 20 C.F.R. §718.304(c). As the administrative law judge accurately found, the record contains interpretations of digital x-rays taken on March 8, 2011 and June 14, 2012, but none of the physicians interpreting these x-rays indicated the presence of a large opacity

consistent with pneumoconiosis. Additionally, considering the computerized tomography (CT) scan evidence of record, the administrative law judge correctly noted that, while Dr. Rao identified a 1.3 cm mass of complicated pneumoconiosis on a CT scan dated December 14, 2011, and interpreted a follow-up CT scan dated June 18, 2012, as unchanged, he did not opine that the mass would appear as a greater-than-one-centimeter opacity if seen on a chest x-ray. Decision and Order at 15-16; Claimant's Exhibits 3, 5. In addition, Dr. Fino interpreted the December 14, 2011 CT scan as showing only a one-centimeter mass of pneumoconiosis, and specifically opined that, even if the mass were 1.3 centimeters, as identified by Dr. Rao, it would not appear on an x-ray as an opacity greater than one centimeter. Further, Dr. Wheeler interpreted the June 18, 2012 CT scan as negative for large opacities of pneumoconiosis. Decision and Order at 15-16; Employer's Exhibit 17. Thus, the administrative law judge correctly concluded that the digital x-rays were not read as positive for large opacities and, as no physician described masses of pneumoconiosis on the CT scans that would appear as greater than one centimeter if seen on an x-ray, the CT scan evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).[5] *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-100; Decision and Order at 16-17.

Substantial evidence supports the administrative law judge's finding that claimant did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a)-(c). Therefore, we affirm the administrative law judge's determination that claimant did not invoke the irrebuttable presumption of total disability due to pneumoconiosis.[6]

Rebuttal of the Section 411(c)(4) Presumption

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[7] or by

[5] The record contains no medical opinions diagnosing claimant with complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c).

[6] The administrative law judge also summarized the x-ray, computerized tomography scan and medical opinion evidence submitted with claimant's prior denied claims, and accurately found that it did not contain any diagnostic evidence of a large pulmonary opacity consistent with pneumoconiosis, pursuant to 20 C.F.R. §718.304(a)-(c). Decision and Order at 38, 42-44.

[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

proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge found that employer failed to disprove the existence of pneumoconiosis, but established that claimant's disabling respiratory impairment, manifested by a blood gas exchange impairment, "did not arise out of, or in connection with," coal mine employment. Thus, the administrative law judge found that employer rebutted the Section 411(c)(4) presumption.

In addressing whether employer could establish rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, the administrative law judge considered the opinions of Drs. Fino, Hippensteel, and Alam.[8] Drs. Fino and Hippensteel both opined that coal mine dust exposure played no role in claimant's disabling gas exchange impairment. Dr. Fino examined and tested claimant, and reviewed the medical record, including the medical opinions and test results of Drs. Alam and Hippensteel, and the pulmonary function studies, blood gas studies, medical opinions and treatment notes associated with claimant's prior denied claims. Based on his examination and his review of the record, Dr. Fino opined that claimant suffers from clinical coal workers' pneumoconiosis. Dr. Fino further opined that claimant suffers from mild resting hypoxemia with hypercarbia, that does not worsen with exercise, and which is due to obesity. Employer's Exhibits 12; 15 at 24, 28. Dr. Fino explained that, based on claimant's normal lung volumes and the lack of any significant restriction, obstruction, or diffusion abnormality, he was able to rule out coal workers' pneumoconiosis and coal mine dust exposure as a cause or contributing factor to claimant's total disability. Employer's Exhibit 15 at 19, 28-30.

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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] The administrative law judge also considered the medical opinion evidence from claimant's prior denied claims, but permissibly concluded that the more recent medical evidence was of greater probative value than that submitted with the prior claims. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29, 1-35 (2004) (en banc) (McGranery, J., concurring and dissenting); *Workman v. E. Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 36, 41.

Dr. Hippensteel also examined and tested claimant, and reviewed the medical record, including the opinions of Drs. Alam and Fino, and the objective test results, medical opinions, and medical treatment notes associated with claimant's prior denied claims. Dr. Hippensteel opined that claimant's x-ray abnormalities "could be from a pneumoconiosis," Employer's Exhibit 16 at 15, and classified the x-ray as positive, but explained that the abnormalities he observed were "not typical for coal workers' type of pneumoconiosis." Director's Exhibit 21 at 9. Rather, Dr. Hippensteel opined that the x-ray abnormalities were consistent with scarring due to claimant's history of pneumonia, endocarditis, and severe adult respiratory distress syndrome. Director's Exhibit 21 at 9; Employer's Exhibit 16 at 17. However, consistent with Dr. Fino's opinion, Dr. Hippensteel opined that claimant suffers from hypoxemia and hypercarbia due to obesity, narcotic usage, and sleep apnea, and ruled out coal mine dust exposure as a contributing cause of claimant's impairment. Director's Exhibit 21 at 10; Employer's Exhibit 16 at 25. Dr. Hippensteel noted that claimant's alveolar/arterial oxygen gradient was normal, reflecting a normal interface between the air sacs of the lungs and the capillaries. Dr. Hippensteel further noted that claimant's pulmonary function study results were variable. Employer's Exhibit 16 at 23-25. Dr. Hippensteel explained that these factors were not indicative of intrinsic pulmonary issues, such as pulmonary fibrosis or inflammation, or of the permanent effects of coal mine dust exposure, even if it were stipulated that coal workers' pneumoconiosis is present. Employer's Exhibit 16 at 23-24, 28.

In contrast, Dr. Alam examined and tested claimant on behalf of the Department of Labor, and diagnosed him with clinical and legal pneumoconiosis. Dr. Alam also diagnosed claimant with a totally disabling respiratory impairment, which he opined is due to tobacco abuse and coal mine dust exposure. Director's Exhibit 18.

The administrative law judge found that Drs. Fino, Hippensteel, and Alam "all . . . rendered documented, reasoned and probative opinions" but explained that in light of the complexities associated with claimant's pulmonary health, he found that the opinions of Drs. Fino and Hippensteel were entitled to greater weight, because those physicians "had a more comprehensive documentary foundation upon which to develop their opinions than Dr. Alam[,] who relied solely on his one pulmonary examination." Decision and Order at 36, 41. Specifically, the administrative law judge noted that, in contrast to Dr. Alam, Drs. Fino and Hippensteel based their conclusions on a series of pulmonary function and blood gas studies, performed between 2010 and 2012, and explained how the largely normal pulmonary function results, and the pattern of the blood gas study results, supported their conclusion that coal mine dust exposure did not contribute to claimant's disabling gas exchange impairment. Decision and Order at 36. Relying on the opinions of Drs. Fino and Hippensteel, the administrative law judge concluded that the weight of the medical opinion evidence established that claimant's disabling respiratory impairment, demonstrated by his abnormal exercise blood gas studies, was not due to

coal workers' pneumoconiosis and did not arise out of his coal mine employment. Decision and Order at 36, 41.

The administrative law judge permissibly credited the opinions of Drs. Fino and Hippensteel as "more probative" than the opinion of Dr. Alam because, in addition to rendering documented and reasoned opinions, they reviewed "the entire medical record and observed test results over the course of [claimant's] three most recent pulmonary evaluations." *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-276 (4th Cir. 1997); Decision and Order at 36; Director's Exhibit 21; Employer's Exhibits 12, 15, 16. Thus, the administrative law judge permissibly found that the medical opinion evidence established that claimant's disabling gas exchange impairment did not arise out of his coal mine employment. Decision and Order at 36.

Because it is supported by substantial evidence, we affirm the administrative law judge's determination that the medical opinion evidence established that claimant's disabling respiratory impairment did not arise out of, or in connection with, his coal mine employment.[9] *See Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Therefore, we also affirm the administrative law judge's determination that employer rebutted the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *see Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

20 C.F.R. Part 718

Finally, referencing his prior evaluation of the evidence, the administrative law judge determined that claimant could not affirmatively establish entitlement to benefits under 20 C.F.R. Part 718. Specifically, the administrative law judge found that, while the preponderance of the evidence establishes the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), the recent, more probative opinions of Drs. Fino and Hippensteel, that claimant's respiratory impairment is unrelated to coal mine dust exposure, outweigh the opinion of Dr. Alam, such that claimant is unable to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

[9] We note that, even if the administrative law judge had discounted the disability causation opinion of Dr. Hippensteel, because Dr. Hippensteel suggested that claimant does not have clinical pneumoconiosis, *see Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. E. Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995), Dr. Fino's opinion, which the administrative law judge permissibly credited as more comprehensive than that of Dr. Alam, would still constitute substantial evidence in support of the administrative law judge's rebuttal finding. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1278 (1986).

Decision and Order at 37, 44. Further, pursuant to 20 C.F.R. §718.204(c), the administrative law judge stated that, for the same reasons that the opinions of Drs. Fino and Hippensteel establish that claimant's impairment did not arise out of coal mine employment, claimant could not prove that clinical pneumoconiosis is a substantially contributing cause of his totally disabling impairment. Decision and Order at 45. As substantial evidence supports the administrative law judge's determinations that claimant did not establish the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), or that his disability is due to his clinical pneumoconiosis at 20 C.F.R. §718.204(c), they are affirmed.[10] *See Compton v. Island Creek Coal Co.*, 211 F.3d 203, 207-208, 22 BLR 2-162, 2-168 (4th Cir. 2000). Because claimant did not establish that his totally disabling respiratory impairment is due to pneumoconiosis, a necessary element of entitlement, we affirm the administrative law judge's finding that claimant did not affirmatively establish entitlement pursuant to 20 C.F.R. Part 718. *See Trent*, 11 BLR at 1-27.

[10] As noted earlier at n.9, even if Dr. Hippensteel's disability causation opinion were accorded little weight, as contrary to the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis, *see Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83, Dr. Fino's opinion would still constitute substantial evidence in support of the administrative law judge's finding. *See Larioni*, 6 BLR at 1278.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring in the result only:

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JUDITH S. BOGGS
Administrative Appeals Judge