

BRB No. 12-0178 BLA

LEE ROY HAYES)
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 Claimant-Petitioner)
)
 v.)
)
 CLINCHFIELD COAL COMPANY)
)
 and)
)
 PITTSTON COMPANY c/o WELLS) DATE ISSUED: 12/21/2012
 FARGO DISABILITY MANAGEMENT)
)
 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 on Remand - Denying Benefits of Paul C. Johnson, Jr., Associate Chief Administrative Law Judge, United States Department of Labor.

Lee Roy Hayes, Lebanon, Virginia, *pro se*.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, 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 on Remand - Denying Benefits (2008-BLA-5783) of Associate Chief Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act). This case is before the Board for the second time. In his initial decision, the administrative law judge credited claimant with twenty-five and one-half years of coal mine employment and considered the claim, which was filed on June 15, 2007, pursuant to 20 C.F.R. Parts 718 and 725.² Weighing the evidence submitted since the prior denial, the administrative law judge found that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b) and, thus, found that claimant established a change in one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d). However, addressing the merits of entitlement, the administrative law judge found that the weight of the medical evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Accordingly, the administrative law judge denied benefits.

Claimant filed an appeal with the Board. While the claim was pending before the Board, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established. 30 U.S.C. §921(c)(4). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption by establishing that the miner does not have pneumoconiosis or that his or her respiratory or pulmonary impairment does not arise out of, or in connection with, employment in a coal mine. *Id.* By Decision and Order dated August 30, 2010, the Board vacated the administrative law judge's denial of benefits, and remanded the case to the administrative law judge for consideration of whether claimant was entitled to benefits pursuant to amended Section 411(c)(4). *Hayes v. Clinchfield Coal Co.*, BRB No.

¹ Jerry Murphree, 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. Murphree is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995)(Order).

² Claimant filed his first claim on August 11, 2005. That claim was denied by the district director on June 29, 2006 because claimant failed to establish the existence of pneumoconiosis, total disability, or that claimant's total disability was due to pneumoconiosis. Director's Exhibit 1. No further action was taken until claimant filed his current claim on June 15, 2007.

09-0854 BLA (Aug. 30, 2010)(unpub.).

Applying amended Section 411(c)(4),³ the administrative law judge credited the miner with twenty-five and one-half years of qualifying coal mine employment, and determined that the medical evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2).⁴ The administrative law judge, therefore, found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis. The administrative law judge, however, found that employer established that the miner did not have clinical or legal pneumoconiosis and, therefore, found that employer rebutted the Section 411(c)(4) presumption. 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. The Director, Office of Workers' Compensation Programs, has not filed a 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. *McFall v. Jewell Ridge Coal Corp.*, 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 in accordance with law.⁵ 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).

³ In light of the applicability of amended Section 411(c)(4), 30 U.S.C. §921(c)(4), the administrative law judge reopened the record on remand, and allowed the parties an opportunity to submit additional evidence. In response, employer submitted a supplemental deposition from Dr. Castle, which the administrative law judge admitted into evidence. Decision and Order on Remand at 2; Employer's Exhibit 8. Claimant and employer also submitted additional briefs on remand.

⁴ The administrative law judge further found that employer, in its closing brief before the administrative law judge, conceded that claimant has a totally disabling respiratory impairment. Decision and Order on Remand at 6.

⁵ The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant was last employed in the coal mining industry in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

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

In addressing whether employer disproved the existence of clinical pneumoconiosis,⁶ the administrative law judge considered the x-ray evidence, finding that the record contains seventeen interpretations of ten x-rays dated from May 9, 1988 through August 26, 2008. Decision and Order on Remand at 8-10; Director's Exhibits 1, 17-19; Claimant's Exhibits 1, 2; Employer's Exhibits 4, 5. Initially, the administrative law judge acted within his discretion in not crediting the x-ray films from 1988, 1998 or 2000 as either positive or negative for pneumoconiosis, because he found that these films were not taken for the purpose of determining the presence or absence of pneumoconiosis and, therefore, were not classified under the ILO classification system. Decision and Order on Remand at 9; *see Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-29 (1984).

Weighing the remainder of the x-rays, the administrative law judge properly found that the x-rays dated September 11, 2006, December 19, 2007 and August 26, 2008, were in equipoise, because they were read as both positive and as negative by equally-qualified radiologists.⁷ However, the administrative law judge properly found that the x-rays dated October 24, 2005, February 8, 2006 and August 9, 2007, were negative for pneumoconiosis, based on the negative readings of the films by physicians with superior radiological qualifications.⁸ *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302

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).

⁷ Dr. Alexander, a B reader and Board-certified radiologist, interpreted the September 11, 2006 x-ray as positive for pneumoconiosis; whereas, Dr. Hayes, also a B reader and Board-certified radiologist, interpreted the x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 5. The December 19, 2007 x-ray was read as positive for pneumoconiosis by Dr. Ahmed, a B reader and Board-certified radiologist, but Dr. Wheeler, also a dually-qualified radiologist, read this film as negative for pneumoconiosis. Director's Exhibits 18, 20. The most recent film, dated August 26, 2008, was read as positive for pneumoconiosis by Dr. Miller, a B reader and Board-certified radiologist, but as negative for pneumoconiosis by Dr. Hayes, a dually-qualified radiologist. Claimant's Exhibit 1; Employer's Exhibit 4.

⁸ Dr. Rasmussen, a B reader, interpreted the October 24, 2005 x-ray as positive for pneumoconiosis; whereas, Dr. Scatarige, a B reader and Board-certified radiologist, interpreted this x-ray film as negative for pneumoconiosis. Director's Exhibit 1. The

(2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(en banc); Decision and Order on Remand at 9.

Based on the totality of the x-ray evidence, the administrative law judge properly concluded that, “taking into account both the number of positive and negative readings and the relative qualifications of the physicians, the negative interpretations outweigh the positive interpretations.”⁹ *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order on Remand at 10. We, therefore, affirm the administrative law judge’s finding that the x-ray evidence establishes that claimant does not suffer from clinical pneumoconiosis.

We also affirm the administrative law judge’s finding that employer disproved the existence of clinical and legal pneumoconiosis¹⁰ based on the medical opinion evidence. In doing so, the administrative law judge considered the medical opinions of Drs. Augustine, Forehand, Rasmussen, Castle and Killeen.

Dr. Augustine saw claimant on August 26, 2008 and diagnosed chronic obstructive pulmonary disease (COPD), coal workers’ pneumoconiosis and chronic dyspnea. Claimant’s Exhibit 4. Dr. Rasmussen, basing his opinion on objective testing and a physical examination dated October 24, 2005, diagnosed COPD due to coal dust exposure and cigarette smoking, and coal workers’ pneumoconiosis due to coal dust exposure. Director’s Exhibit 1. Based on his August 9, 2007 physical examination and objective testing, Dr. Forehand diagnosed coal workers’ pneumoconiosis due to claimant’s twenty-six years of coal dust exposure, and “cigarette smoker’s lung disease” due to claimant’s six pack-year smoking history. Director’s Exhibit 17. Dr. Castle, based on his February 8, 2006 and December 19, 2007 physical examinations and objective testing, as well as a review of all of the available medical evidence, opined that

February 8, 2006 x-ray was read as negative for pneumoconiosis by Dr. Wheeler, a B reader and Board-certified radiologist. Director’s Exhibit 1. The August 9, 2007 x-ray was read by Dr. Forehand, a B reader, as positive for pneumoconiosis; Dr. Alexander provided an ILO classification of 0/1 p/p; and, Dr. Scatarige, read the x-ray as negative for pneumoconiosis. Director’s Exhibits 17-19.

⁹ The administrative law judge specifically noted that overall there were three positive readings by dually-qualified radiologists and seven negative readings by dually-qualified radiologists. Decision and Order on Remand at 9.

¹⁰ “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).

claimant does not have coal workers' pneumoconiosis, and that claimant's respiratory impairment is due to bronchial asthma, which is unrelated to claimant's coal dust exposure. Director's Exhibits 1, 18; Employer's Exhibits 6, 8. Dr. Killeen, based on his October 8, 2008 examination and objective testing, and review of the medical evidence of record, opined that claimant does not have coal workers' pneumoconiosis, but diagnosed an obstructive lung disease most likely related to claimant's bronchial asthma and cigarette smoke exposure. Employer's Exhibits 3, 7.

Initially, we affirm the administrative law judge's finding that Dr. Augustine's opinion was not well-reasoned or documented, as the administrative law judge reasonably exercised his discretion in finding that the doctor's conclusion, that claimant has pneumoconiosis, is not supported by any underlying documentation.¹¹ *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, 2-275-76 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 11; Claimant's Exhibit 4.

Weighing the medical opinions of Drs. Forehand, Rasmussen, Castle and Killeen on the issues of clinical and legal pneumoconiosis, the administrative law judge considered the qualifications of the physicians,¹² as well as the underlying evidence upon which their conclusions were based. Decision and Order on Remand at 10-11. The administrative law judge found that each of these physicians' opinions was well-reasoned and documented because it was based, at least in part, on occupational, social and medical histories, a physical examination and objective testing.

Nonetheless, the administrative law judge properly accorded greater weight to the opinions of Drs. Castle and Killeen on the issues of clinical and legal pneumoconiosis because these doctors had a greater understanding of claimant's respiratory impairment, by virtue of having reviewed the other medical evidence of record. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order on Remand at 11. In particular, the administrative law judge properly found that

¹¹ Specifically, the administrative law judge found that Dr. Augustine's opinion consists of a single office note. Decision and Order on Remand at 11; Claimant's Exhibit 4.

¹² Drs. Castle and Killeen are Board-certified in Internal Medicine and Pulmonary Diseases; Dr. Rasmussen is Board-certified in Internal Medicine; and, Dr. Forehand is Board-certified in Pediatrics and in Allergy and Immunology. Decision and Order on Remand at 10.

the opinions of Drs. Castle and Killeen, that claimant does not have clinical pneumoconiosis, were more consistent with the underlying objective evidence, such as the x-ray evidence, which the administrative law judge found to be negative. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Lucostic*, 8 BLR at 1-47; Decision and Order on Remand at 11. The administrative law judge's finding that the medical opinion evidence established that claimant did not have clinical pneumoconiosis is, therefore, affirmed.

Turning to the issue of legal pneumoconiosis, the administrative law judge also found that the opinions of Drs. Castle and Killeen, that claimant's respiratory impairment was due to claimant's bronchial asthma and cigarette smoking, and not coal mine dust exposure, were based on a review of more extensive documentation than those of Drs. Forehand and Rasmussen. Director's Exhibits 1, 18; Employer's Exhibits 3, 6, 8. The administrative law judge properly concluded, therefore, that Drs. Castle and Killeen offered better reasoned opinions on the issue of legal pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). We, therefore, affirm the administrative law judge's finding that employer established that claimant did not have legal pneumoconiosis.

In light of the affirmance of the administrative law judge's finding that employer disproved the existence of both clinical and legal pneumoconiosis, we affirm the administrative law judge's finding that employer rebutted the Section 411(c)(4) presumption.¹³ 30 U.S.C. §921(c)(4).

¹³ The administrative law judge's finding that employer has disproved the existence of both clinical and legal pneumoconiosis also precludes a finding of entitlement pursuant to 20 C.F.R. Part 718. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Accordingly, the administrative law judge's Decision and Order on Remand – Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge