

BRB No. 11-0362 BLA

BARRY K. SULLIVAN)
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 Claimant-Respondent)
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 v.)
)
 ROAD FORD DEVELOPMENT)
 COMPANY) DATE ISSUED: 01/30/2012
)
 Employer-Petitioner)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (08-BLA-5795) of Administrative Law Judge Alan L. Bergstrom awarding 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 subsequent claim filed on September 20, 2007.¹ After

¹ Claimant's previous claim, filed on July 1, 1998, was finally denied because claimant failed to establish that he was totally disabled by a respiratory or pulmonary

crediting claimant with eleven years of coal mine employment,² the administrative law judge found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), thereby establishing that the applicable condition of entitlement had changed since the date upon which the denial of claimant's prior claim became final. *See* 20 C.F.R. §725.309. The administrative law judge, therefore, considered claimant's 2007 claim on the merits.

In considering the merits of the claim, the administrative law judge found that the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4), and that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), and that employer did not rebut the presumption. The administrative law judge also found that the evidence established that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). Employer also contends that the administrative law judge erred in finding that the evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.³

impairment. Director's Exhibit 1; *Sullivan v. Road Fork Dev. Co.*, BRB No. 04-0305 BLA (Dec. 28, 2004) (unpub.).

² The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibits 23, 28. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

³ We affirm, as unchallenged on appeal, the administrative law judge's finding of eleven years of coal mine employment, and his finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). We similarly affirm the administrative law judge's unchallenged findings pursuant to 20 C.F.R. §§725.309, 718.204(b)(2). *Id.*

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).

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*).

Employer contends that the administrative law judge erred in finding that the x-ray evidence established the existence of clinical pneumoconiosis. Employer's Brief at 4. However, a finding of either clinical or legal pneumoconiosis is sufficient to support a finding of pneumoconiosis,⁴ and Section 718.202(a) provides alternative methods of establishing the existence of pneumoconiosis.⁵ See 20 C.F.R. §§718.201(a), 718.202(a)(1)-(4); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226-27 (2002) (*en banc*); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). Therefore, in light of our affirmance of the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), *see* n.3, *supra*, we need not address employer's contentions of error regarding the administrative law judge's finding of clinical pneumoconiosis based on the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1). See *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

⁴ "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 tissue 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).

⁵ Although the United States Courts of Appeals for the Third and Fourth Circuits have held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the evidence is sufficient to establish the existence of pneumoconiosis, *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), the Board has declined to apply *Compton* and *Williams* beyond the boundaries of the Third and Fourth Circuits.

Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer specifically contends that the administrative law judge erred in his consideration of the opinions of Drs. Rosenberg and Hippensteel, that claimant's total disability is not due to pneumoconiosis, but is due solely to reactive airways dysfunction syndrome (Dr. Rosenberg), or asthmatic bronchitis (Dr. Hippensteel). Employer's Exhibits 6, 7. We disagree. The administrative law judge rationally discounted the opinions of Drs. Rosenberg and Hippensteel, because these doctors did not diagnose claimant with legal pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom. Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 28; Employer's Exhibits 1, 4, 7. Moreover, because the administrative law judge rationally relied on the opinions of Drs. Ammisetty, Jarboe, and Baker to find that claimant established the existence of legal pneumoconiosis, he permissibly relied on these opinions to find that claimant is totally disabled due to legal pneumoconiosis.⁶ *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); Decision and Order at 28; Director's Exhibit 16; Claimant's Exhibits 1, 2, 4, 5. We, therefore, affirm the administrative law judge's finding that the evidence established that claimant's total disability is due to legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

⁶ Dr. Ammisetty diagnosed clinical pneumoconiosis, and legal pneumoconiosis, in the form of "bronchial asthma/COPD/chronic bronchitis" due to cigarette smoking and coal mine dust exposure. Director's Exhibit 16. Dr. Ammisetty opined that claimant is totally disabled due to these conditions. *Id.* Dr. Jarboe diagnosed clinical pneumoconiosis, and legal pneumoconiosis, in the form of bronchial asthma due to both cigarette smoking and coal mine dust exposure. Claimant's Exhibit 1. Dr. Jarboe opined that claimant is totally disabled due to these conditions. *Id.* Dr. Baker diagnosed clinical pneumoconiosis, and legal pneumoconiosis, in the form of chronic obstructive pulmonary disease and chronic bronchitis, each of which he attributed to claimant's coal mine dust exposure. Claimant's Exhibits 2, 5. Dr. Baker opined that claimant is totally disabled due to these conditions. *Id.*

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge