BRB No. 11-0265 BLA

CHESTER C. ADAMS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HARLAN CUMBERLAND COAL COMPANY	)	
	)	
and	)	
	)	
EMPLOYERS INSURANCE OF WAUSAU	)	DATE ISSUED: 11/30/2011
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

William A. Lyons and W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2007-BLA-05270) of Administrative Law Judge Theresa C. Timlin on a subsequent claim[1] filed on February 17, 2006, 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). The administrative law judge found that, "[t]he parties have stipulated that employer is the properly identified responsible operator and that claimant established at least twenty-one years of qualified coal mine employment." Decision and Order at 2. The administrative law judge further found that the x-ray evidence developed since the denial of claimant's prior claim established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)[2] and, therefore, established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Turning to the merits of entitlement, the administrative law judge found that claimant was entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis,[3] 30 U.S.C. §921(c)(4), because claimant established at least twenty-one years of qualifying coal mine employment and a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b).[4] The administrative law judge

[1] Claimant's previous claim for benefits, filed on June 23, 1994, Director's Exhibit 1, was finally denied in 2003 because claimant failed to establish the existence of pneumoconiosis. Decision and Order at 2.

[2] The administrative law judge found that claimant failed to establish the existence of legal pneumoconiosis. Decision and Order at 11.

[3] Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), provides a rebuttable presumption of totally disabling pneumoconiosis, if a claim was filed after January 1, 2005, was pending on or after March 23, 2010, and claimant establishes at least fifteen years of employment in an underground coal mine employment, or at a mine with conditions substantially similar to those of an underground mine, and a totally disabling respiratory impairment. Once the presumption is invoked, the burden rests on the party opposing entitlement to disprove either the existence of pneumoconiosis or that the miner's respiratory or pulmonary impairment arose out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

[4] The administrative law judge's findings regarding length of coal mine employment and total disability are affirmed, as they are unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Although employer argues that the administrative law judge's "analysis of the evidence under the provisions for establishment of total disability under Section 718.204(b)(2)(1), [sic]" was flawed, Employer's Brief at 10, it does not point to any specific errors made by the administrative law judge in her analysis of the pulmonary

found that employer failed to rebut the presumption by showing that claimant did not have pneumoconiosis or that claimant's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that the new x-ray evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1) and erred, therefore, in finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). Employer further asserts that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption by showing that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. Claimant has not responded. The Director, Office of Workers' Compensation Programs (the Director), does not address the administrative law judge's weighing of the relevant evidence and substantive findings, but, instead, contends that the administrative law judge properly found that the Section 411(c)(4) presumption is applicable to this case. The Director further contends that employer fails to understand that invocation of the presumption alters the parties' traditional burdens of proof.

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.[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).

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function study evidence pursuant to 20 C.F.R. §718.204(b)(2)(i). Because employer has not challenged the administrative law judge's Section 718.204(b)(2)(i) finding with any specificity, it is affirmed. *See Sarf v. Director, OWCP*, 19 BLR 1-119 (1987).

Further, employer does not challenge the administrative law judge's finding that the medical opinion evidence establishes total disability at 20 C.F.R. §718.204(b)(2)(iv), and that the pulmonary function study evidence and medical opinion evidence when weighed with all the relevant evidence establishes total disability at 20 C.F.R. §718.204(b), overall. The administrative law judge's finding that claimant established total disability at Section 718.204(b) is, therefore, affirmed, as unchallenged on appeal. *See Skrack*, 6 BLR at 1-711.

[5] As claimant's last coal mine employment was in Kentucky, Director's Exhibit 3, we will apply the law 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*).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, the administrative law judge noted that claimant's prior claim was denied for failure to establish the existence of pneumoconiosis. Consequently, in order to obtain review of the merits of the current claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3).

20 C.F.R. §718.202/20 C.F.R. §725.309

Employer first contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), based on the new x-ray evidence, and, therefore, erred in finding that a change in an applicable condition of entitlement was established pursuant to Section 725.309(d). Specifically, employer contends that the administrative law judge should have found that a preponderance of the x-ray evidence, read by the better qualified radiologists, was negative for the existence of pneumoconiosis.

The administrative law judge found the existence of pneumoconiosis established by the new x-ray evidence pursuant to Section 718.202(a)(1), based on the fact that dually-qualified radiologists read both the oldest of the new x-rays, taken on February 11, 2004, and the most recent of the new x-rays, taken on July 29, 2008, as positive for the existence of pneumoconiosis, and also read the March 20, 2006 and December 18, 2006 x-rays as positive for the existence of pneumoconiosis. The administrative law judge found that, with the exception of a negative reading of the March 20, 2006 x-ray by Dr. Wheeler, a dually-qualified radiologist, the x-ray readings by the dually-qualified radiologists were positive for the existence of pneumoconiosis.[6] Based on this analysis of

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[6] The February 11, 2004 x-ray was read as positive for pneumoconiosis, by Dr. Alexander, a Board-certified radiologist and B reader. Director's Exhibit 21. The March 20, 2006 x-ray was read as positive by Dr. Miller, a Board-certified radiologist and B reader, and as negative by Dr. Wheeler, a Board-certified radiologist and B reader and by

the x-ray evidence, the administrative law judge found that the new x-ray evidence, as a whole, established the existence of pneumoconiosis at Section 718.202(a)(1) and, consequently, that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d).

Contrary to employer's argument, we conclude that the administrative law judge properly analyzed the new x-ray evidence and, therefore, properly found that it established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), because a greater number of dually-qualified radiologists interpreted the x-rays as positive for pneumoconiosis and because both the oldest and most recent new x-rays were read as positive. *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); *see also Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge's finding that the existence of pneumoconiosis was established by the new x-ray evidence pursuant to Section 718.202(a)(1) is, therefore, affirmed, as is her finding that a change in an applicable condition of entitlement was established at Section 725.309(d).

Section 411(c)(4)

After finding that claimant established invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis, the administrative law judge found that the presumption was not rebutted because employer failed to show that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).[7] Employer contends, however, that the administrative law judge erred in finding that employer did not rebut the presumption by showing that claimant's

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Dr. Patel, a Board-certified radiologist. Claimant's Exhibit 8; Employer's Exhibit 4; Director's Exhibit 15. The December 18, 2006 x-ray was read as positive by Dr. Miller, a Board-certified radiologist and B reader and as negative by Dr. Dahhan, a B reader. Claimant's Exhibit 9; Employer's Exhibit 1. The December 13, 2007 x-ray was read as negative by Dr. Fino, a B reader. Employer's Exhibit 2. The July 29, 2008 x-ray was read as positive by Dr. Miller, a Board-certified radiologist and B reader. Claimant's Exhibit 1.

[7] Employer's argument that the administrative law judge improperly "placed the burden on the employer to disprove the existence of pneumoconiosis" and, therefore, erred in his consideration of the evidence is rejected. Contrary to employer's argument, once claimant establishes invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis, the burden shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Specifically, employer contends that the administrative law judge erred in relying on the opinions of Drs. Koura and Alam, who attributed claimant's respiratory impairment to coal mine employment, in addition to other causes, over the opinions of Drs. Dahhan and Tuteur, who found that claimant's respiratory impairment was due solely to smoking. Employer contends that the administrative law judge erred in finding that the opinions of Drs. Koura and Alam were credible because they did not have an accurate understanding of claimant's smoking history. The administrative law judge did not, however, rely on the opinions of Drs. Koura and Alam to find that employer failed to rebut the presumption. Rather, the administrative law judge found that the opinions of employer's physicians, Drs Dahhan and Tuteur, failed to rebut the presumption because they were not credible. Decision and Order at 15. Specifically, the administrative law judge properly found that Dr. Dahhan's opinion was insufficient to show that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment because Dr. Dahhan relied on the fact that "claimant had not worked in the mines since 1994." Decision and Order at 15. Because pneumoconiosis is a latent and progressive disease, the administrative law judge properly rejected Dr. Dahhan's opinion. *See* 20 C.F.R. §718.201(c). Regarding Dr. Tuteur's opinion, the administrative law judge rejected it because Dr. Tuteur "did not explain why he felt that cigarette smoking was the sole cause [of claimant's respiratory impairment] and [that] coal dust could not have contributed in any way." *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *see also Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); Decision and Order at 16. Accordingly, we affirm the administrative law judge's finding that employer failed to rebut the presumption by showing that claimant's respiratory impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).[8]

In conclusion, we affirm the administrative law judge's finding that the new x-ray evidence established the existence of pneumoconiosis pursuant to Section 718.202(a)(1), and her consequent finding that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d). We also affirm the administrative law judge's findings that claimant was entitled to invocation of the Section 411(c)(4)

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[8] The Section 411(c)(4) presumption could not be rebutted by a finding that claimant did not have pneumoconiosis because the administrative law judge found that the existence of clinical pneumoconiosis was established. The administrative law judge properly rejected the opinions of Drs. Dahhan and Tuteur, that claimant did not have clinical pneumoconiosis, because those opinions were contrary to her finding that claimant had clinical pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Assoc. Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995).

presumption on the merits, and that employer failed to rebut the presumption by showing that claimant did not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge