BRB No. 11-0299 BLA

DOUGLAS R. HALL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 11/30/2011
	)	
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 Denying Benefits of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Douglas R. Hall, Rowe, Virginia, *pro se*.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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 (2009-BLA-05649) of Administrative Law Judge Pamela J. Lakes on a subsequent claim filed on August 6, 2008, 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

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

administrative law judge found that claimant established twenty-seven years of underground coal mine employment. The administrative law judge also found that claimant established the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202, an element of entitlement previously adjudicated against him and, therefore, found that a change in an applicable condition of entitlement was established pursuant to 20 C.F.R. §725.309.[2] In addition, the administrative law judge found that the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and that claimant was not, therefore, entitled to invocation of the Section 411(c)(3) irrebuttable presumption of totally disabling pneumoconiosis. 30 U.S.C. §921(c)(3). Turning to Section 411(c)(4), 30 U.S.C. §921(c)(4), which provides a rebuttable presumption of totally disabling pneumoconiosis, the administrative law judge found that the Section 411(c)(4) presumption could not be invoked in this case, as claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b). *See* 30 U.S.C. §921(c)(4). Accordingly, the administrative law judge denied benefits.

On appeal, claimant generally challenges the denial of benefits, asserting that he has established the existence of complicated pneumoconiosis pursuant to Section 718.304 and is, therefore, entitled to the irrebuttable presumption of totally disabling pneumoconiosis pursuant to Section 411(c)(3) of the Act. Employer responds, urging affirmance of the administrative law judge's decision denying benefits.[3] The Director, Office of Workers' Compensation Programs, has not filed a substantive brief in response to claimant's 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). 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).

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[2] Claimant's first claim, filed on June 4, 2001, was denied by the district director on September 6, 2002, because claimant failed to establish any element of entitlement. Director's Exhibit 1.

[3] Employer also filed a cross-appeal, BRB No. 11-0299 BLA-A, in this case. The Board granted employer's motion to withdraw its cross-appeal and dismissed the cross-appeal by Order dated May 20, 2011.

[4] The record reflects that claimant was employed in coal mining employment in Virginia. Director's Exhibit 7. Accordingly, this case arises within the jurisdiction of the

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 properly found that a change in an applicable condition of entitlement was established, because claimant established the existence of simple pneumoconiosis, an element of entitlement previously adjudicated against him. 20 C.F.R. §725.309(d)(2).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides, in pertinent part, an irrebuttable presumption of totally disabling pneumoconiosis:

> If a miner is suffering or suffered from *a chronic dust disease of the lung* which (A) when diagnosed by chest roentgenogram, yields one or more large opacities (greater than one centimeter in diameter) and would be classified in category A, B, or C in the International Classification of Radiographs of the Pneumoconioses by the International Labor Organization, (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung, or (C) when diagnosis is made by other means, would be a condition which could reasonably be expected to yield results described in clause (A) or (B) if diagnosis had been made in the manner prescribed in clause (A) or (B).

30 U.S.C. §921(c)(3) (emphasis added). The Section 411(c)(3) presumption is not invoked on the basis of a single piece of relevant evidence, however. A determination of whether complicated pneumoconiosis has been demonstrated is a finding of fact, and the administrative law judge must consider and weigh all relevant evidence before making a finding on the issue. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143,

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United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*).

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 if 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 pursuant to 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4).

Complicated Pneumoconiosis

Considering first whether the existence of complicated pneumoconiosis was established pursuant to Section 718.304(a) on the basis of the x-ray evidence, the administrative law judge properly found that complicated pneumoconiosis was not established because the x-ray evidence was in equipoise. Specifically, the administrative law judge found that, "[a]ll of the radiologists who performed x-ray interpretations noted the presence of a mass or nodule in [c]laimant's right upper lung zone, and a majority of the radiologists concluded that the mass measured over one centimeter in diameter." Decision and Order at 17. The administrative law judge, however, properly found that these x-ray readings did not establish the existence of complicated pneumoconiosis at Section 718.304(a) because, "although Drs. Scott, Wheeler, and Scatarige found a mass or nodule greater than one centimeter in diameter, each specifically stated that he did not diagnose pneumoconiosis and considered instead the mass or nodule to be scar tissue, a granuloma, or possibly cancerous tissue." *See Lester*, 993 F.2d at 1145, 17 BLR at 2-117; Decision and Order at 17. Further, on weighing these readings against the readings that were positive for complicated pneumoconiosis, and considering the qualifications of all the readers, the administrative law judge properly determined that the x-ray evidence on this issue was in "equipoise" and could not, therefore, establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a). *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). Accordingly, we affirm the administrative law judge's finding that the existence of complicated pneumoconiosis was not established at Section 718.304(a).[5]

Turning to Section 718.304(c), the administrative law judge properly found that the CT scan evidence was in equipoise, as it was read as both positive and negative for

[5] The administrative law judge properly found that the existence of complicated pneumoconiosis could not be established at 20 C.F.R. §718.304(b), because there was no biopsy evidence in the record. 20 C.F.R. §718.304(b); Decision and Order at 17.

the existence of complicated pneumoconiosis by dually-qualified radiologists. *See Ondecko*, 512 U.S. at 281, 18 BLR at 2A-12. Considering the medical opinion evidence pursuant to Section 718.304(c), the administrative law judge noted that Drs. Rasmussen, Robinette and Sutherland opined that claimant had complicated pneumoconiosis, while Drs. Castle and Hippensteel opined that he does not have complicated pneumoconiosis. The administrative law judge properly accorded less weight to the opinions of Drs. Rasmussen, Robinette and Sutherland because they did not consider claimant's most recent x-ray, which was determined to be negative for the existence of complicated pneumoconiosis, in formulating their opinions. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge also accorded less weight to the opinion of Dr. Castle because he did not consider all the relevant evidence available to him. *See Clark*, 12 BLR at 1-155; Decision and Order at 20-21. The administrative law judge, therefore, properly rejected the opinions of Drs. Rasmussen, Robinette, Sutherland and Castle based upon "their lack of access to critical information." *See Clark*, 12 BLR 1-149; Decision and Order at 21. Instead, the administrative law judge properly accorded greater weight to the opinion of Dr. Hippensteel, that claimant does not have complicated pneumoconiosis, because he considered "a broader range of evidence" than considered by the other physicians. *See Milburn Colliery Coal Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Clark*, 12 BLR at 1-155; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Decision and Order at 21. Accordingly, we affirm the administrative law judge's finding that the CT scan and medical opinion evidence failed to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(c).

Further, on weighing the x-ray, CT scan and medical opinion evidence together, the administrative law judge properly found that it failed to establish the existence of complicated pneumoconiosis at Section 718.304 overall. *See Melnick*, 17 BLR at 1-33. That finding is, therefore, affirmed.

Section 411(c)(4)

Next, the administrative law judge considered whether claimant was entitled to invocation of the rebuttable presumption of totally disabling pneumoconiosis at Section 411(c)(4). The administrative law judge properly found that the Section 411(c)(4) presumption was not invoked because, although claimant established at least fifteen years of underground coal mine employment, he failed to establish a totally disabling respiratory impairment at 20 C.F.R. §718.204(b). 30 U.S.C. §921(c)(4). The administrative law judge properly found that total disability was not established pursuant to Section 718.204(b)(2)(i)-(iii) because the pulmonary function study and blood gas study evidence was non-qualifying, and there was no evidence that claimant has cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(i)-(iii). Considering the medical opinion evidence pursuant to Section 718.204(b)(2)(iv), the

administrative law judge properly rejected the opinion of Dr. Sutherland, that claimant has a totally disabling respiratory impairment, because the doctor did not explain his opinion in light of claimant's non-qualifying pulmonary function and blood gas studies. *See Clark*, 12 BLR at 1-155. Concerning Dr. Robinette's opinion, the administrative law judge properly rejected it because Dr. Robinette did not explain how his diagnosis, that claimant has a "moderate obstructive lung disease," affected claimant's ability to perform his usual coal mine work. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *see also Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Instead, the administrative law judge permissibly credited the opinions of Drs. Rasmussen, Castle and Hippensteel, who found that claimant could perform his usual coal mine work from a respiratory or pulmonary standpoint, because they were based on more thorough explanations and they were supported by their underlying documentation. *See Clark*, 12 BLR at 1-155; Decision and Order at 23. Further, on reviewing all of the relevant evidence at Section 718.204(b), the administrative law judge properly found that claimant failed to establish a totally disabling respiratory impairment overall. *See Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987).

Because claimant failed to establish a totally disabling respiratory impairment pursuant to Section 718.204(b), the administrative law judge properly found that claimant failed to establish invocation of the Section 411(c)(4) presumption or entitlement pursuant to 20 C.F.R. Part 718. *See* 30 U.S.C. §921(c)(4); *Anderson*, 12 BLR at 1-112.

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