BRB No. 13-0194 BLA

ELDON K. NEWPORT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SAM DAUGHERTY	)	
	)	DATE ISSUED: 10/23/2013
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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Herbert B. Williams (Stokes, Williams, Sharp & Davies), Knoxville, Tennessee, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (2011-BLA-05464) of Administrative Law Judge Daniel F. Solomon, 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 involves a subsequent claim filed on July 7, 2008.[1] Director's Exhibit 2.

Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005 that were pending on or after March 23, 2010. Relevant to this living

[1] Claimant's prior claim, filed on October 12, 1990, was finally denied on May 25, 2007, because claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Director's Exhibit 1.

miner's claim, 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

The administrative law judge found that claimant established twenty-seven years of coal mine employment,[2] primarily in surface mining, and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). Decision and Order at 5, 7. After determining that claimant's twenty-seven years of surface coal mine employment were substantially similar to at least fifteen years of work in an underground mine, the administrative law judge held that claimant had invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, and had demonstrated a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding that claimant's coal mine employment at surface mines was substantially similar to underground mining. Further, employer challenges the administrative law judge's finding that employer did not rebut the Section 411(c)(4) presumption. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a brief in this appeal.[3]

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).

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[2] Since the record reflects that claimant's coal mine employment was in Tennessee, Director's Exhibit 4, this case arises within the jurisdiction 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).

[3] As employer does not challenge the administrative law judge's findings that claimant established twenty-seven years of coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

In order to establish entitlement to benefits in a miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. 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). Claimant's last claim was denied because he did not establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, to obtain review of the merits of his current claim, claimant had to submit new evidence establishing the existence of pneumoconiosis. 20 C.F.R. §725.309(d)(2), (3). The administrative law judge found that, because claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, he also demonstrated a change in the applicable condition of entitlement.

Qualifying Coal Mine Employment

In order to invoke the amended Section 411(c)(4) presumption, a miner must establish at least fifteen years of "employment in one or more underground coal mines," or of "employment in a coal mine other than an underground mine," in conditions that were "substantially similar to conditions in an underground mine." 30 U.S.C. §921(c)(4). To establish that his work was substantially similar to underground coal mine employment pursuant to Section 411(c)(4), a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 480, 22 BLR 2-265, 2-275 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512 (7th Cir. 1988). It is then up to the administrative law judge "to compare the surface mining conditions established by the evidence to conditions known to prevail in underground mines." *Leachman*, 855 F.2d at 512.

With the exception of two months that claimant spent working underground in 1967, all of claimant's coal mine employment took place aboveground, in and around surface coal mines and coal preparation facilities. Director's Exhibit 4. As a surface miner, claimant worked as a coal sampler, a coal truck driver, and a high lift operator. *Id.* Claimant worked as a coal truck driver from March 1962 to March 1966, and from 1967 to 1979. He then worked as a coal sampler from 1979 to 1982, and again worked as a coal truck driver, and as a high lift operator, from 1982-1990. *Id.* Claimant testified that, while working as a coal truck driver, he hauled some gravel, but ninety-eight percent of

the time he hauled coal. According to claimant, he picked up the coal at a mine, and drove approximately four to five miles to the coal preparation plant, or tipple, where he unloaded the coal. Hearing Tr. at 15; Director's Exhibit 6. In addition to driving, claimant made repairs to his truck, shoveled coal from the truck bed, and loaded the coal into his truck with a high lift. Hearing Tr. at 15; Director's Exhibit 19 at 9-10. Claimant stated that sometimes the high lift did not have a windshield, and mine dust blew in, so that when he went home he was "as black as your coal there, black from the coal dust." Hearing Tr. at 15; Director's Exhibit 19 at 9-10. Claimant also stated that the truck he drove was open, that there was no air conditioning, and that the road was dirt, not paved. Hearing Tr. at 16. Claimant testified that sometimes the road was not dusty, because it had been watered, or rain or snow had fallen, but generally his work as a truck driver was "a dusty job," and after work his clothes would be black. Hearing Tr. at 15-16, 19, 22. Claimant also testified that his work as a coal sampler, from August 1979 to January 1982, involved watching the belt line, where the coal trucks and railroad cars were loaded and unloaded. He described working conditions on the belt line as "so dusty you couldn't see a thing," and stated that when he came home "[he'd] be so black and dusty" that only his eyes, nose, and mouth would be visible. Director's Exhibit 19 at 6-7.

The administrative law judge found that claimant's uncontradicted testimony established that the conditions during his twenty-seven years of coal mine employment in surface mines were substantially similar to those that would be encountered in more than fifteen years of working in an underground mine:

> I accept the Claimant's allegations that, at times, the cab became extremely dusty. Although truck driving may not involve exposure similar to underground work, I find that the Claimant is credible that besides work in the truck cab, he worked at the tipple and in extremely dusty jobs for an excess of fifteen years. I find that there is no evidence otherwise. Employer presented no testimony or other evidence to undermine the allegation that Claimant's job as a truck driver exposed him to mining-type conditions . . . I find that the job was an equivalent to work in underground mining.

Decision and Order at 7.

Employer challenges the administrative law judge's finding, contending that there were no evidentiary findings concerning dust conditions underground that could be compared to the dust conditions experienced by claimant. Employer contends that, therefore, there was nothing in the record to support the administrative law judge's finding that claimant's dust exposure as a truck driver was equivalent to more than fifteen years of dust exposure underground. Employer's Brief at 10. Employer's contention lacks merit.

Based on claimant's uncontradicted testimony, the administrative law judge rationally relied upon claimant's statements[4] and his own understanding of the coal mine industry to conclude that the conditions of claimant's coal mine employment were substantially similar to those in underground coal mining. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002); *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Summers*, 272 F.3d at 480, 22 BLR at 2-276; *Leachman*, 855 F.2d at 512; *Blakley*, 54 F.3d at 1319, 19 BLR at 2-202; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). Because the administrative law judge considered the comparability of the conditions between claimant's coal mine employment and underground coal mine employment, and substantial evidence supports this finding, *see Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005), we affirm the administrative law judge's determination that claimant established that more than fifteen years of his coal mine employment at surface mines took place in conditions substantially similar to those in underground coal mine employment.

In light of our affirmance of the administrative law judge's findings that claimant established more than fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4), 30 U.S.C. §921(c)(4), and established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Decision and Order at 7, 9.

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 pneumoconiosis, or by proving that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 7-9. Specifically, the administrative law judge found that employer failed to disprove the

[4] Contrary to employer's assertion, claimant did not state that he spent ninety-eight percent of his time driving. Rather, claimant stated that ninety-eight percent of his driving time was spent hauling coal, not gravel. Employer's Brief at 8; Hearing Tr. at 15; Director's Exhibit 6.

existence of clinical pneumoconiosis.[5] Decision and Order at 8. The administrative law judge also found that employer failed to disprove a causal relationship between claimant's disability and his pneumoconiosis. Decision and Order at 9.

Employer argues that the administrative law judge erred in finding that the x-ray evidence did not disprove the existence of clinical pneumoconiosis. The administrative law judge considered eight interpretations of four x-rays taken on April 2, 2007, August 22, 2008, July 2, 2009, and March 18, 2010, and considered the physicians' radiological qualifications. Dr. Cohen, a B reader, interpreted the April 2, 2007 x-ray as positive for pneumoconiosis. Director's Exhibit 15. Dr. Wiot, a B reader and Board-certified radiologist, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 17. Dr. Miller, a B reader and Board-certified radiologist, and Dr. Baker, a B reader, interpreted the August 22, 2008 x-ray as positive for pneumoconiosis. Director's Exhibit 16. However, Dr. Wheeler, a B reader and Board-certified radiologist, interpreted the same x-ray as negative for pneumoconiosis. Director's Exhibit 17. Dr. Alexander, a B reader and Board-certified radiologist, interpreted the July 2, 2009 x-ray as positive for pneumoconiosis, Director's Exhibit 18, and Dr. Wiot interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 1. Finally, Dr. Miller interpreted the March 18, 2010 x-ray as positive for pneumoconiosis, Claimant's Exhibit 2, and Dr. Wiot interpreted the same x-ray as negative for pneumoconiosis. Employer's Exhibit 3. Considering the more recent x-rays, the administrative law judge determined that there were an equal number of positive and negative readings by dually-qualified readers, and concluded that the x-ray evidence was "at best in equipoise" and, thus, insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis. Decision and Order at 8.

Employer asserts that the administrative law judge erred in crediting Dr. Alexander's positive reading for simple pneumoconiosis of the July 2, 2009 x-ray, to find the readings of the July 2, 2009 x-ray to be in equipoise. Employer contends that, because Dr. Alexander questioned whether a large opacity he identified in the left upper lung zone was complicated pneumoconiosis or lung cancer, his positive reading for the existence of pneumoconiosis should have been discounted as equivocal. Employer's Brief at 11. Employer also asserts that, assuming the evidence is in equipoise, claimant has not met his burden to establish the existence of pneumoconiosis. Employer's Brief at 12. Employer's arguments lack merit.

[5] "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).

The administrative law judge began his analysis by correctly noting that he could accord greater weight to the x-ray interpretations rendered by physicians with the dual qualifications of B reader and Board-certified radiologist. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-279 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 319-20, 17 BLR 2-77, 2-87 (6th Cir. 1993); Decision and Order at 8. Additionally, the administrative law judge reasonably relied upon the more recent x-ray evidence of record, which he found more accurately reflected claimant's condition, in light of the progressive nature of pneumoconiosis. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Decision and Order at 8. Regarding the July 2, 2009 x-ray, as Dr. Alexander definitively diagnosed small opacities of simple pneumoconiosis in five lung zones, the administrative law judge was not required to discount Dr. Alexander's positive x-ray reading as equivocal, based on the physician's notation that complicated pneumoconiosis may also be present. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Thus, the administrative law judge permissibly relied on the equal number of conflicting readings by similarly qualified readers to find the x-ray evidence to be in equipoise. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton*, 65 F.3d at 59, 19 BLR at 2-279; *Woodward*, 991 F.2d at 319-20, 17 BLR at 2-87. Moreover, contrary to employer's assertion, having successfully invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, claimant no longer bears the burden of proof to establish the existence of pneumoconiosis; it is employer's burden to disprove the existence of pneumoconiosis. 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's finding that the x-ray evidence failed to disprove the existence of clinical pneumoconiosis. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; Decision and Order at 8.

Employer also submitted the medical opinions of Drs. Rosenberg and Fino in support of its burden to disprove the existence of pneumoconiosis. The administrative law judge permissibly discounted the opinions of Drs. Rosenberg and Fino, that claimant does not suffer from clinical pneumoconiosis, because they based their conclusions on negative x-ray evidence, contrary to the administrative law judge's finding that the x-ray evidence, as a whole, is in equipoise. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 514, 22 BLR 2-625, 2-649 (6th Cir. 2003); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); Decision and Order at 8; Employer's Exhibits 4, 5. Because employer does not challenge the administrative law judge's basis for according less weight to the opinions of Drs. Rosenberg and Fino, the administrative law judge's credibility determination is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Since employer makes no additional contentions of error

regarding the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis,[6] that finding is affirmed. *Id.*

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that the miner's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Rosenberg and Fino, that claimant's pulmonary impairment did not arise out of his coal mine employment, because neither physician diagnosed claimant with clinical pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (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, 1-473 (1986). We, therefore, affirm the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Blakley*, 54 F.3d at 1320, 19 BLR at 2-203.

Because claimant invoked the Section 411(c)(4) presumption that he is totally disabled due to pneumoconiosis, and employer did not rebut the presumption, we affirm the administrative law judge's award of benefits.

[6] The remainder of employer's arguments do not address the administrative law judge's specific rebuttal findings. Rather, employer contends that the medical evidence of record, including the opinions of claimant's medical experts, Drs. Baker and Cohen, is not sufficient to meet claimant's burden to establish the existence of pneumoconiosis. Employer's Brief at 10-17. Contrary to employer's argument, the sufficiency of claimant's evidence is not at issue on rebuttal, since employer bears the burden to affirmatively disprove the existence of pneumoconiosis. 30 U.S.C. §921(c)(4); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

Accordingly, the administrative law judge's Decision and Order awarding 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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REGINA C. McGRANERY
Administrative Appeals Judge