BRB No. 11-0155 BLA

MILTON HOLLIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL COMPANY	)	DATE ISSUED: 08/25/2011
	)	
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 - Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert Bilonick (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits, (09-BLA-05271) of Administrative Law Judge Michael P. Lesniak (the administrative law judge) on a claim filed on October 23, 2007, pursuant to the provisions of Title IV 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 claimant established fourteen years of coal mine employment, and was not, therefore, entitled to the presumption of totally disabling pneumoconiosis at Section 411(c)(4) of the Act. 30 U.S.C. §921(c)(4). However, the administrative law judge found the existence of clinical pneumoconiosis pursuant to 20

C.F.R. §718.202(a),[1] that it arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), and that claimant was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that claimant established that his clinical pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b), and that he was totally disabled due to clinical pneumoconiosis pursuant to Section 718.204(c).[2] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive brief in response to employer's appeal.

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.[3] 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R.

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[1] The administrative law judge found clinical pneumoconiosis established based on his weighing of the x-ray, CT scan, and medical opinion evidence. Decision and Order at 10.

[2] The administrative law judge's findings, that claimant established fourteen years of coal mine employment and that he was not entitled to invocation of the Section 411(c)(4) presumption of totally disabling pneumoconiosis, are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Additionally, the administrative law judge's findings that claimant established the existence of clinical pneumoconiosis and a totally disabling respiratory impairment pursuant to 20 C.F.R. §§718.202(a) and 718.204(b) are affirmed, as unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

[3] The record indicates that claimant's last coal mine employment was in Pennsylvania. Director's Exhibit 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

§§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).

Section 718.203(b)

Employer, citing *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987), and *Baumgartner v. Director, OWCP*, 9 BLR 1-65 (1986), asserts that the administrative law judge erred in failing to "specifically identify competent credible medical evidence establishing the relationship between pneumoconiosis and coal mine employment[,]" when he found claimant entitled to the Section 718.203(b)[4] presumption that claimant's clinical pneumoconiosis arose out of his coal mine employment. We disagree.

In both the cited cases, claimant failed to establish ten years of coal mine employment.[5] Thus, they are inapposite to the instant case. *See* 20 C.F.R. §718.203(c). Once over ten years of coal mine employment are established, claimant is entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment. The burden is then on employer to rebut the presumption, not on claimant to affirmatively establish that his clinical pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b).

Next, employer contends that the administrative law judge erred when he "merely stated that [claimant] was entitled to the rebuttable presumption because he was

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[4] The regulation at Section 718.203(b) provides:

> [i]f a miner who is suffering or suffered from pneumoconiosis was employed for ten years or more in one or more coal mines, there shall be a rebuttable presumption that the pneumoconiosis arose out of such employment.

20 C.F.R. §718.203(b).

[5] The regulation at Section 718.203(c) provides:

> [i]f a miner who is suffering or suffered from pneumoconiosis was employed less than ten years in the nation's coal mines, it shall be determined that such pneumoconiosis arose out of that employment only if competent evidence establishes such a relationship.

20 C.F.R. §718.203(c).

employed for fourteen (14) years as a coal miner[,]" but did not discuss "whether the medical evidence rebutted this presumption." Employer's Brief at 26 (unpaginated). Employer, however, fails to identify the rebuttal evidence that the administrative law judge failed to address. Accordingly, we reject employer's general contention. *See Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

Employer also asserts that, since the administrative law judge specifically found "that the evidence failed to establish any respiratory or pulmonary impairment arising out of coal mine employment," *i.e.*, legal pneumoconiosis, Employer's Brief at 26 (unpaginated), "it was incumbent upon the [administrative law judge] to weigh the evidence and provide an adequate explanation for why he came to his conclusion" that claimant was entitled to the Section 718.203(b) presumption. *Id*. Essentially, employer appears to be arguing that the administrative law judge should not have found that the Section 718.203(b) presumption was invoked or should have found the presumption rebutted, based on evidence that claimant did not have legal pneumoconiosis. In this case, however, since the administrative law judge found that claimant did not have legal pneumoconiosis, the issue before the administrative law judge was whether claimant's clinical pneumoconiosis arose out of coal mine employment, an entirely separate issue.[6] *See Andersen v. Director, OWCP*, 455 F.3d 1102, 23 BLR 2-332 (10th Cir. 2006). The administrative law judge's finding that legal pneumoconiosis was not established, however, does not preclude the administrative law judge from finding that claimant is entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment or provide a basis for rebutting the presumption. *See* 20 C.F.R. §718.201; *Andersen*, 455 F.3d at 1106, 23 BLR at 2-343; *Kiser v. L&J Equipment Co.*, 23 BLR 1-246 (2006). Employer's argument is, therefore, rejected. Consequently, as employer has not otherwise challenged the administrative law judge's finding pursuant to Section 718.203(b), it is affirmed.

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[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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of 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. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

Section 718.204(c)

Finally, employer contends that the administrative law judge erred in weighing the medical evidence on disability causation pursuant to Section 718.204(c). Specifically, employer argues that, since Dr. Fino and Dr. Kaplan classified x-rays as positive for pneumoconiosis under the ILO classification system, the administrative law judge erred in rejecting their opinions, that claimant did not have clinical pneumoconiosis, as contrary to his finding that clinical pneumoconiosis was established. We disagree.

In finding disability causation established pursuant to Section 718.204(c), the administrative law judge credited the opinions of Drs. Begley, Schaaf and Kucera on the issue because they found the existence of clinical pneumoconiosis. The administrative law judge rejected the contrary opinions of Drs. Fino and Kaplan because they did not find, contrary to the administrative law judge's finding, the existence of clinical pneumoconiosis. Specifically, in weighing the opinions of Drs. Fino and Kaplan, the administrative law judge acknowledged that the doctors classified x-rays as positive under the ILO classification system. *See* Decision and Order at 3; Director's Exhibit 14; Employer's Exhibit 2. The administrative law judge noted, however, that Drs. Fino and Kaplan explained why they did not believe that the opacities seen on x-ray were, in fact, attributable to clinical pneumoconiosis. Decision and Order at 5-10. Further, the administrative law judge noted that the opinions of Drs. Fino and Kaplan, that claimant did not have clinical pneumoconiosis, were based on physical examination findings, symptoms, and work and medical histories. Decision and Order at 5, 7, and 12. The administrative law judge, therefore, properly concluded that Drs. Fino and Kaplan found that the miner did not have clinical pneumoconiosis based on their complete evaluations of claimant. *See Anderson*, 12 BLR at 1-113; *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Consequently, the administrative law judge properly found that their opinions were entitled to little weight on the issue of disability causation pursuant to Section 718.204(c), as the doctors did not find that the miner had clinical pneumoconiosis, contrary to the administrative law judge's finding. *See Toler v. Eastern Associated Coal Co*., 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 60 F.3d 1138, 19 BLR 2-257 (4th Cir. 1995), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*). Employer's argument is, therefore, rejected and, because employer did not challenge the administrative law judge's reliance on the opinions of Drs. Begley, Schaaf and Kucera, the administrative law judge' finding that disability causation was established pursuant to Section 718.204(c) is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge