BRB No. 12-0211 BLA

PHILLIP E. HESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DOMINION COAL CORPORATION/SUN COAL	)	DATE ISSUED: 02/05/2013
	)	
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 – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Husch Blackwell, LLP), Washington. D.C., for employer.

Rita Roppolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2010-BLA-5118) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[2] The administrative law judge credited claimant with at least twenty years of underground coal mine employment, and adjudicated the claim, filed on October 30, 2008, pursuant to 20 C.F.R. Parts 718 and 725. The administrative law judge found that new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b) and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the entire record, the administrative law judge found that claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that, although employer established that claimant does not have legal pneumoconiosis,[3] employer failed to establish rebuttal with affirmative proof that claimant does not have clinical pneumoconiosis,[4] or that his total disability does not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded.

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[1] Claimant's prior claim, filed on October 7, 1998, was denied for failure to establish the existence of pneumoconiosis and total disability. Director's Exhibit 1.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. *See* Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148 (2010). Relevant to this living miner's claim, the amendments reinstated Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides a rebuttable presumption that the miner is totally disabled due to pneumoconiosis if fifteen or more years of underground coal mine employment or comparable surface coal mine employment and a totally disabling respiratory impairment, *see* 20 C.F.R. §718.204(b), are established.

[3] "Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "[T]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*.

[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. 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).

On appeal, employer challenges the administrative law judge's weighing of the x-ray and CT scan evidence and the medical opinions of Drs. Fino[5] and Castle[6] in finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption.[7] Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's challenges to the administrative law judge's weighing of the x-ray evidence, CT scan evidence, and Dr. Fino's opinion, but to remand the case for a reassessment of Dr. Castle's opinion. Employer has filed a reply brief in support of its position.[8]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[9] 33 U.S.C. §921(b)(3), as incorporated by 30

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[5] Dr. Fino performed a pulmonary examination and opined that claimant does not have clinical or legal pneumoconiosis. Dr. Fino diagnosed severe chronic obstructive pulmonary disease/emphysema with chronic obstructive bronchitis and lower lobe interstitial pulmonary fibrosis unrelated to coal dust exposure, and attributed claimant's totally disabling respiratory impairment to smoking. Decision and Order at 26-27; Employer's Exhibits 3, 4, 11.

[6] Dr. Castle performed a pulmonary examination and diagnosed a totally disabling respiratory impairment due to tobacco smoke-induced airway obstruction and bullous emphysema, with a possible asthmatic component. He opined that claimant does not have clinical or legal pneumoconiosis, or any pulmonary impairment arising out of, or aggravated by, coal dust exposure. Decision and Order at 23-25; Director's Exhibit 17; Employer's Exhibit 8.

[7] As the United States Supreme Court has upheld the constitutionality of the PPACA, employer's additional argument, that the amendments contained in the PPACA are invalid, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012); *see also W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 1-207 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012).

[8] We affirm, as unchallenged on appeal, the administrative law judge's finding of at least twenty years of underground coal mine employment, and his findings that the evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[9] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. Director's Exhibit 1; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the weight of the evidence establishes the absence of clinical as well as legal pneumoconiosis, and that the administrative law judge's weighing of the evidence relevant to this method of rebuttal was conclusory, thus failing to comply with the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2). We disagree.

In finding that employer failed to disprove the existence of clinical pneumoconiosis, the administrative law judge reviewed the analog x-ray evidence of record, and determined that: the November 4, 1998 x-ray was positive for pneumoconiosis, based on the consensus of two readers; the July 21, 2004 and November 13, 2008 x-rays were inconclusive, as the readers did not specify whether the abnormalities they identified represented pneumoconiosis; the January 13, 2009 x-ray was positive for pneumoconiosis, based on a numerical preponderance of positive interpretations by qualified readers;[10] and the July 2, 2010 x-ray was inconclusive, with one positive reading and one negative reading by equally qualified physicians. Decision and Order at 9-11. The administrative law judge rationally concluded that the weight of the analog x-ray evidence was positive for pneumoconiosis. Decision and Order at 20; *see Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255, 1-261 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). However, the administrative law judge determined that the weight of the digital x-ray evidence was negative for pneumoconiosis, as he found that the March 25, 2009 x-ray was inconclusive, with one positive reading and one negative reading by equally qualified physicians, and the June 24, 2010 x-ray was interpreted as negative by Dr. Wheeler, a dually qualified reader.[11] Decision and Order at 12, 20.

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[10] The January 13, 2009 x-ray was interpreted as positive for pneumoconiosis by three dually qualified Board-certified radiologists and B readers, Drs. Navani, Alexander and Hayes, and was interpreted as negative for pneumoconiosis by Dr. Wheeler, a dually qualified physician. Decision and Order at 9-11, 20; Director's Exhibits 18, 19; Claimant's Exhibit 2; Employer's Exhibits 5, 6. The positive interpretation of this x-ray by Dr. Forehand, a B reader, was accorded less weight. Decision and Order at 11; Director's Exhibit 12.

[11] While employer asserts that the June 24, 2010 digital x-ray was interpreted by two dually qualified readers, Employer's Brief at 15, the record reflects that Dr. Fino's interpretation of this x-ray was not offered into evidence, and was excluded from the record. Decision and Order at 3-4; Hearing Transcript at 13, 17; Employer's Exhibit 3.

The administrative law judge then reviewed the CT scan evidence and found that the November 3, 2008 CT scan was negative for pneumoconiosis,[12] based on the interpretation of Dr. Wiot, a dually qualified physician, and that the December 2, 2008 PET/CT scan was positive for pneumoconiosis, based on the interpretation of Dr. Knapp, a Board-certified radiologist. Decision and Order at 13-14; Director's Exhibits 16, 18. The administrative law judge acted within his discretion in finding that, when weighed together, the CT scan evidence was in equipoise, despite Dr. Wiot's superior qualifications, because the physicians interpreted two different films. Thus, the interpretation of Dr. Wiot did not "directly outweigh" that of Dr. Knapp, and the administrative law judge did not "consider their professional qualification distinction significant in terms of probative value." Decision and Order at 14, 20. The administrative law judge found that, even more significantly, Dr. Knapp evaluated both a PET scan and a CT scan, which provided him with an "additional advantage" in concluding that the pattern he observed was typical of pneumoconiosis. Decision and Order at 14; Employer's Brief at 16. As an administrative law judge may, but is not required to, accord greater weight to the interpretations of dually qualified physicians, we reject employer's argument that Dr. Wiot's interpretation was entitled to greater weight. *See Webber v. Peabody Coal Co.*, 23 BLR 1-123, 1-138 (2006)(en banc)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004)(en banc). Since he found that the CT scan evidence was in equipoise and thus inconclusive for pneumoconiosis, the administrative law judge weighed the positive analog x-ray evidence with the negative digital x-ray evidence and concluded that the two types of x-rays also stood in equipoise, "such that the preponderance of the chest x-ray evidence is also inconclusive for the presence of pneumoconiosis." Decision and Order at 20. As an administrative law judge need not assign greater weight to the most recent x-ray evidence, we reject employer's argument that the June 24, 2010 digital x-ray was entitled to controlling weight. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Chaffin v. Peter Cave Coal Co*., 22 BLR 1-294, 1-302 (2003); *see also Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Because the opinions of Drs. Fino and Castle, that claimant does not have clinical pneumoconiosis, were based upon negative x-rays and CT scans, contrary to the administrative law judge's finding that the preponderance of this evidence was inconclusive, the administrative law judge permissibly discounted their opinions. As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that employer failed to meet its burden of establishing rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644

[12] The administrative law judge found that the interpretation of the November 3, 2008 CT scan by Dr. Coburn, a Board-certified radiologist, was inconclusive, as he did not address whether any of the abnormalities observed were due to coal dust exposure. Decision and Order at 13; Director's Exhibit 14.

F.3d 473, 25 BLR 2-1 (6th Cir. 2011); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 2 BLR 2-38 (4th Cir. 1980).

Employer next challenges the administrative law judge's weighing of the opinions of Drs. Fino and Castle in finding them insufficient to establish the second method of rebuttal under amended Section 411(c)(4), i.e., by proving that claimant's respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Turning first to Dr. Fino's opinion, employer maintains that the administrative law judge erred in discounting the opinion, as employer asserts that it is consistent with the regulations and that Dr. Fino fully explained how the documentation supported his conclusion that claimant's disability is due entirely to smoking. Employer's arguments lack merit. In evaluating the opinion, the administrative law judge determined that Dr. Fino acknowledged that a miner may have pneumoconiosis without x-ray evidence of the disease; that pneumoconiosis can be latent and progressive; that smoking-related and coal dust-related obstruction can be present at the same time; and that smoking does not preclude progression of a coal dust-related condition. Decision and Order at 27; Employer's Exhibits 3, 4, 11. However, the administrative law judge rationally found that Dr. Fino's opinion was undermined by his view that the amount of pulmonary obstruction due to coal dust is directly related to the amount of dust retained by the lungs as shown on x-rays, and his observation that claimant's obstructive impairment worsened after claimant left coal mine employment but continued to smoke. Decision and Order at 29-30; *see* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,937-44 (Dec. 20, 2000); *Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 25 BLR 2-135 (6th Cir. 2012); *J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117 (2009), *aff'd sub nom. Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 24 BLR 2-369 (3d Cir. 2011). Further, in stating that claimant's disabling impairment was not attributable to pneumoconiosis even if the disease were present, Dr. Fino failed to explain "how he determined the presence of pneumoconiosis would have had no significant impact on [claimant's] pulmonary health." Decision and Order at 31; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc). Lastly, as Dr. Fino favored medical studies showing that only a small percentage of miners with lengthy coal mine histories develop a clinically significant loss of FEV1, over medical studies relied upon by the Department of Labor, and further stated that claimant did not fall within that small group without explaining how he reached that conclusion, the administrative law judge permissibly discounted his opinion. Decision and Order at 30; *see Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's determination to discredit Dr. Fino's opinion, we affirm his finding that the opinion is insufficient to establish rebuttal of the amended Section 411(c)(4) presumption.

Turning to Dr. Castle's opinion, employer maintains that the administrative law judge provided no valid reason for discrediting the opinion on the issue of disability causation, when he specifically found that Dr. Castle's opinion was well-reasoned and sufficient to establish that claimant does not have legal pneumoconiosis, as follows:

> Dr. Castle reached a reasoned conclusion that the pattern of the physical examination and the demonstrated reversibility of [claimant's] pulmonary obstruction to non-disabling levels in two of the three valid pulmonary function tests was inconsistent with pneumoconiosis which causes permanent scarring to the lungs that is not reversible. Dr. Castle also reasonably determined that [claimant's] totally disabling respiratory impairment was due to cigarette smoking based on the pattern of arterial blood gas studies and reduced diffusion capacity which is consistent with a cigarette smoking, rather than coal mine dust, related pulmonary obstruction.

Decision and Order at 29. Employer asserts that if claimant does not have any impairment arising out of coal mine employment, the amended Section 411(c)(4) presumption must be rebutted as a matter of law. Employer's Brief at 11-14, 23. The Director agrees that a proper finding that coal dust exposure did not cause or contribute to claimant's disability would rebut the amended Section 411(c)(4) presumption, but contends that the administrative law judge erred in weighing Dr. Castle's opinion by failing to address its faults. Director's Response at 5. The administrative law judge found that:

> Since the Employer cannot establish that [claimant] does not have clinical pneumoconiosis and Dr. Castle concluded [that claimant] did not have clinical pneumoconiosis, his opinion is insufficient to demonstrate that [claimant's] total disability is not due to coal mine employment.

Decision and Order at 31. As employer correctly maintains that impairment does not necessarily result from the mere presence of clinical pneumoconiosis, and as we cannot discern the administrative law judge's reason for finding Dr. Castle's opinion to be insufficient to establish rebuttal under the second method, in light of his finding that Dr. Castle "reasonably determined that [claimant's] totally disabling respiratory impairment was due to smoking," Decision and Order at 29, we must vacate the award of benefits and remand the case for further consideration of Dr. Castle's opinion. On remand, the administrative law judge is directed to reassess Dr. Castle's opinion and provide a rationale for his rebuttal findings under amended Section 411(c)(4) that comports with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed in part and vacated in part, and this case is remanded for further consideration consistent with this opinion.

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