BRB No. 12-0316 BLA

JAMES BLANKENSHIP	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY/PITTSTON COMPANY	)	
	)	DATE ISSUED: 02/27/2013
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 on Remand of Pamela J. Lakes, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (08-BLA-5065) of Administrative Law Judge Pamela J. Lakes, awarding benefits 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, involving a subsequent claim filed on November 8, 2006,[1] is before the Board for the second time.

[1] Claimant's first two claims, filed in 2002 and 2004, were denied by the district director for failure to establish any of the elements of entitlement. Director's Exhibits 1,

In the initial decision, the administrative law judge credited claimant with at least thirty-six years of coal mine employment, and found that the new evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that claimant established that an applicable condition of entitlement had changed since the date upon which the denial of his prior claim became final. *See* 20 C.F.R. §725.309(d). In considering the merits of the claim, the administrative law judge found that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a).[2] The administrative law judge also found that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b). *Blankenship v. Clinchfield Coal Co.*, BRB No. 10-0235 BLA, slip op. at 4-5 (Feb. 15, 2011) (unpub.). The Board, therefore, affirmed the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). *Id.* However, the Board vacated the administrative law judge's findings that the evidence established the existence of clinical and legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Id.* The Board also vacated the administrative law judge's finding that the evidence established that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.* The Board, therefore, vacated the administrative law judge's award of benefits. *Id.*

The Board further noted that Congress had enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this living miner's claim, Section 1556 of Public Law Number 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and that he or she has a totally disabling respiratory impairment, there

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[2] "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). Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

will be a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556(a), 124 Stat. 119 (2010) (codified at 30 U.S.C. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). In light of the potential applicability of the Section 411(c)(4) presumption, the Board instructed the administrative law judge, on remand, to determine whether claimant was entitled to invocation of the Section 411(c)(4) presumption and, if so, whether employer rebutted the presumption.

Applying Section 411(c)(4) on remand, the administrative law judge found that, because claimant established at least fifteen years of qualifying coal mine employment,[3] and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), he invoked the rebuttable presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge found that claimant was entitled to benefits pursuant to Section 411(c)(4). 30 U.S.C. §921(c)(4).

On appeal, employer contends that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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).

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

[3] The record indicates that claimant's coal mine employment was in Virginia. Director's Exhibits 1, 2, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[4] Because it is unchallenged on appeal, we affirm the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). The administrative law judge found that employer failed to establish either method of rebuttal. Decision and Order on Remand at 8-15. Specifically, the administrative law judge found that employer failed to disprove the existence of clinical pneumoconiosis. *Id*. at 8-12. The administrative law judge also found that employer failed to disprove a causal relationship between claimant's disability and his pneumoconiosis. *Id*. at 12-15.

Employer argues that the administrative law judge erred in finding that the x-ray evidence submitted in connection with his 2006 claim did not disprove the existence of clinical pneumoconiosis. The record contains ten interpretations of four new x-rays taken on March 29, 2007, May 30, 2007, May 2, 2008, and May 17, 2008. Dr. Rasmussen, a B reader, and Dr. DePonte, a B reader and Board-certified radiologist, interpreted the March 29, 2007 x-ray as positive for pneumoconiosis.[5] Director's Exhibit 14; Claimant's Exhibit 6. Drs. Scott and Wheeler, both of whom are B readers and Board-certified radiologists, interpreted the same x-ray as negative for the disease. Director's Exhibit 17; Employer's Exhibit 6. Dr. DePonte interpreted the May 30, 2007 x-ray as positive for pneumoconiosis, Claimant's Exhibit 5, while an equally qualified physician, Dr. Wheeler, interpreted the x-ray as negative for the disease. Director's Exhibit 17. While Dr. Baker, a B reader, interpreted the May 2, 2008 x-ray as positive for pneumoconiosis, Claimant's Exhibit 1, an equally qualified physician, Dr. Hippensteel, interpreted the x-ray as negative for the disease. Employer's Exhibit 9. Finally, although Dr. DePonte interpreted the May 17, 2008 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, Dr. Scott, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 10.

Because each of claimant's new x-rays was interpreted as both positive and negative for pneumoconiosis by the best qualified physicians interpreting the respective films, the administrative law judge permissibly found that the x-ray evidence was "in equipoise" and, therefore, insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis.[6] *See Adkins v. Director, OWCP*, 958 F.2d 49, 16

[5] Dr. Navani, a B reader and Board-certified radiologist, interpreted the March 29, 2007 x-ray for film quality only. Director's Exhibit 16.

[6] Employer contends that the administrative law judge erred in not according greater weight to the interpretations of Drs. Scott and Wheeler, based upon their status as professors of radiology at Johns Hopkins University. *See* Employer's Brief at 9. An administrative law judge, in evaluating the relative weight of the x-ray readings, is not limited to considering the B reader and Board-certified radiologist status of the various physicians. However, while the administrative law judge could have accorded greater

BLR 2-61 (4th Cir. 1992); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984); Decision and Order on Remand at 9-10. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the new x-ray evidence did not assist employer in disproving the existence of clinical pneumoconiosis.[7]

Employer also contends that the administrative law judge erred in finding that the medical opinions of Drs. Hippensteel and Castle failed to disprove the existence of pneumoconiosis. We disagree. Although Drs. Hippensteel and Castle opined that claimant does not suffer from clinical pneumoconiosis, the administrative law judge accurately noted that their opinions were based, in part, upon negative x-ray interpretations. Because the administrative law judge found that the x-ray evidence was in equipoise on the issue of clinical pneumoconiosis, the administrative law judge permissibly questioned the documentation underlying the opinions of Drs. Hippensteel and Castle. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Arnoni v. Director, OWCP*, 6 BLR 1-423 (1983); Decision and Order on Remand at 11; Claimant's Exhibits 2, 4. Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the medical opinion evidence did not assist employer in disproving the existence of clinical pneumoconiosis.

We also reject employer's contention that the administrative law judge erred in finding that Dr. Castle's negative interpretation of a May 7, 2008 digital x-ray failed to

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weight to the interpretations of Drs. Scott and Wheeler based upon their status as professors, he was not required to do so. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting). In this case, the administrative law judge acted within her discretion in declining to accord additional weight to the x-ray interpretations of Drs. Scott and Wheeler based upon their status as professors. Decision and Order at 9. We also reject employer's contention that the administrative law judge should have accorded greater weight to Dr. Hippensteel's opinion based upon his Board-certification in Internal Medicine and Pulmonary Disease. Employer's Brief at 9. Board-certification in Internal Medicine and Pulmonary Disease are not radiological qualifications, and, therefore, are not relevant to the weighing of x-ray evidence. *See* 20 C.F.R. §718.202; *Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991).

[7] The administrative law judge also found that the x-ray evidence submitted in connection with claimant's 2002 and 2004 claims did not assist employer in disproving the existence of clinical pneumoconiosis. Decision and Order on Remand at 10. Because employer does not challenge the administrative law judge's finding regarding the significance of the previously submitted x-ray evidence, this finding is affirmed. *Skrack*, 6 BLR at 1-711.

disprove the existence of clinical pneumoconiosis. Although Dr. Castle, a B reader, interpreted the digital x-ray as negative for pneumoconiosis, Employer's Exhibit 3, Dr. DePonte, a B reader and Board-certified radiologist, interpreted the x-ray as positive for pneumoconiosis. Claimant's Exhibit 7. The administrative law judge permissibly credited Dr. DePonte's positive interpretation of the May 7, 2008 digital x-ray over Dr. Castle's negative interpretation, based upon his superior qualifications. *See Adkins*, 958 F.2d at 52, 16 BLR at 2-65; *Sheckler*, 7 BLR at 1-131; Decision and Order on Remand at 11. We, therefore, affirm the administrative law judge's finding that the digital x-ray evidence did not assist employer in disproving the existence of clinical pneumoconiosis.

Employer next argues that the administrative law judge erred in finding that Dr. Castle's negative interpretation of an August 16, 2007 CT scan failed to disprove the existence of clinical pneumoconiosis. Dr. Castle, a B reader, opined that the August 16, 2007 CT scan did not indicate the existence of clinical pneumoconiosis. Employer's Exhibit 3. Dr. Knapp, a Board-certified radiologist, opined that this CT scan revealed lung lesions. Claimant's Exhibit 3. Although the administrative law judge recognized that Dr. Knapp provided differential diagnoses for the lesions, the administrative law judge permissibly found that Dr. Knapp's interpretation supported a diagnosis of clinical pneumoconiosis in light of the doctor's opinion that the lesions were "most likely" due to coal workers' pneumoconiosis. *See Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501, 1-503-04 (1984); Decision and Order on Remand at 4; Claimant's Exhibit 3. Moreover, the administrative law judge permissibly found that Dr. Knapp's positive interpretation was entitled to more weight than Dr. Castle's negative interpretation based upon Dr. Knapp's superior qualifications, explaining that while Board-certified radiologists are specifically trained to interpret radiological evidence (including CT scans), B readers are only trained in the interpretation of analog x-rays. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 893-94, 22 BLR 2-409, 2-422-24 (7th Cir. 2002); Decision and Order on Remand at 4. We, therefore, affirm the administrative law judge's finding that the CT scan evidence did not disprove the existence of clinical pneumoconiosis. 20 C.F.R. §718.107.

Because it is based upon substantial evidence, we affirm the administrative law judge's determination that employer failed to disprove the existence of clinical pneumoconiosis. Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). The administrative law judge, therefore, found it unnecessary to determine whether employer could disprove the existence of legal pneumoconiosis. Decision and Order on Remand at 12.

Employer also asserts that the administrative law judge erred in failing to find that employer rebutted the Section 411(c)(4) presumption, by establishing that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4). Employer specifically contends that the opinions of Drs. Hippensteel and Castle are sufficient to establish this second method of rebuttal. Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Hippensteel and Castle, that claimant's pulmonary impairment did not arise out of his coal mine employment, because neither physician diagnosed claimant with clinical pneumoconiosis. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-383-84 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986); Decision and Order on Remand at 15. We, therefore, affirm the administrative law judge's finding that employer failed to meet its burden to establish the second method of rebuttal.

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

Accordingly, the administrative law judge's Decision and Order on Remand 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