BRB Nos. 13-0204 BLA
and 13-0204 BLA-A

WALLACE COFIELD	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 02/25/2014
	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

Kevin T. Gillen, Ashley M. Harman and William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, 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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order – Denying Benefits (2009-BLA-5648) of Administrative Law Judge Michael P. Lesniak, rendered on a subsequent claim filed on May 9, 2008, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] Because the administrative law judge determined that claimant established fewer than fifteen years of coal mine employment, the administrative law judge found that claimant was unable to invoke the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).[2] Considering the claim pursuant to the regulations at 20 C.F.R. Part 718, the administrative law judge accepted the parties' stipulation that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b) and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge found that claimant suffers from clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), but also found that the evidence was insufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further concluded that claimant failed to establish that he is totally disabled by clinical or legal pneumoconiosis under 20 C.F.R. §718.204(c). Accordingly, benefits were denied.

On appeal, claimant argues that the administrative law judge erred in rejecting Dr. Rasmussen's opinion that claimant suffers from legal pneumoconiosis and that his total disability is due to pneumoconiosis. Employer responds, urging affirmance of the denial of benefits. Employer has also filed a cross-appeal, alleging that the administrative law judge's decision to remand this case to the district director for remedial evidentiary development, subsequent to the formal hearing, was contrary to law, and violated employer's due process right to a full and fair hearing. Employer argues that, if the case is remanded, the administrative law judge should be instructed to consider only the evidentiary record that was developed at the hearing. Alternatively, employer maintains that if benefits are awarded, liability must transfer to the Black Lung Disability Trust

[1] Claimant's initial claim for benefits, filed on November 4, 1987, was denied by the district director on April 6, 1988, because the evidence was insufficient to establish any of the elements of entitlement. Director's Exhibit 1. Claimant took no action with regard to that denial until he filed his current subsequent claim.

[2] Amended Section 411(c)(4) provides a rebuttable presumption of total disability due to pneumoconiosis, if a miner worked fifteen or more years in underground coal mine employment, or employment in conditions substantially similar to those of an underground mine, and also suffers from a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

Fund (the Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's arguments on cross-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.[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).

I. Claimant's Appeal

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

The administrative law judge determined that a preponderance of the x-ray evidence established the existence of clinical pneumoconiosis[5] pursuant to §718.202(a)(1). Relevant to 20 C.F.R. 20 C.F.R. §718.202(a)(4), the administrative law judge weighed the medical opinions of Drs. Rasmussen and Celko, that claimant suffers from legal pneumoconiosis, against the contrary opinions of Drs. Fiehler, Fino and Basheda, that claimant does not suffer from legal pneumoconiosis.[6] The administrative law judge determined that each physician's opinion was flawed in some respect and entitled to little weight. Decision and Order at 14-15. Thus, the administrative law judge found claimant did not satisfy his burden to prove that he has legal pneumoconiosis.

Claimant asserts that the administrative law judge did not provide a valid basis for rejecting Dr. Rasmussen's opinion.[7] We agree. Dr. Rasmussen examined claimant on April 28, 2010 and reported that the pulmonary function testing showed a moderate, irreversible obstructive impairment, while the arterial blood gas testing showed marked impairment in oxygen transfer during light exercise. Director's Exhibit 14. He opined that claimant was totally disabled from a respiratory or pulmonary standpoint, and identified smoking and coal dust exposure as causal factors for claimant's disabling

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant is unable to invoke the amended Section 411(c)(4) presumption because he does not have fifteen years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

respiratory condition. *Id.* Dr. Rasmussen diagnosed legal pneumoconiosis in the form of chronic obstructive pulmonary disease (COPD)/emphysema caused, in part, by coal mine dust exposure. *Id*. Dr. Rasmussen indicated that emphysema caused by coal dust exposure is not distinguishable from emphysema that is caused by smoking. *Id*.

The administrative law judge acknowledged that Dr. Rasmussen's opinion was "generally consistent with the preamble to the amended Regulations, which finds that coal dust exposure is additive with smoking in causing clinically significant airways obstruction [and] . . . that 'dust-induced emphysema and smoke-induced emphysema occur through similar mechanisms[.]'" Decision and Order at 13, *quoting* 65 Fed. Reg. 79,940, 79,943 (Dec. 20, 2000). The administrative law judge, however, gave little weight to Dr. Rasmussen's opinion on the ground that "Dr. Rasmussen failed to explain why [claimant's] *specific* case of emphysema/COPD was significantly related to his coal dust exposure." Decision and Order at 14. The administrative law judge also found Dr. Rasmussen's opinion unpersuasive to the extent that "Dr. Rasmussen admitted he had no proof that smoking alone would not cause [claimant's] degree of impairment." *Id.*

Contrary to the administrative law judge's finding, when asked to explain why coal dust exposure had any effect on claimant's lungs when he continued to smoke after leaving the mines, Dr. Rasmussen cited to specific objective tests and stated:

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[4] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because claimant's coal mine employment was in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 1, 4.

[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).

[6] "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).

[7] We affirm, as unchallenged by claimant in this appeal, the administrative law judge's determination to assign little weight Dr. Celko's opinion that claimant has legal pneumoconiosis, and is totally disabled by it. *See Skrack*, 6 BLR at 1-711.

> *Well, I tend to think the gas exchange impairment, with his reduced diffusing capacity, that 32 percent of predicted is a bit more than I would expect for a 50-pack year smoking history and especially when he only has moderate airways obstruction*. So that would be, in my opinion, a little bit atypical for just simply cigarette smoke-induced lung disease. I'd say a little bit atypical because it just is a little more severe than you see with just smoke-induced lung disease. So, again, I can't say it's not, but it just seems that it's more than you'd expect. And, after all, 50-pack years is not extremely heavy if you come right down to it.

Employer's Exhibit 12 at 25 (emphasis added). Additionally, Dr, Rasmussen discussed the nature of claimant's coal dust exposure as support for a causal relationship between claimant's coal mine employment and his obstructive lung disease. *See* Director's Exhibit 14. Dr. Rasmussen noted that claimant had seventeen years of coal mine employment, "mostly at the face" and he started working "before there was any kind of dust control, and he . . . was a shot firer, which would put him at increased dust exposure and also cause him to be likely exposed to other toxins, such as oxides of nitrogen[.]" Employer's Exhibit 12 at 26. Dr. Rasmussen also noted that claimant "worked as a roof bolter and that could give him, certainly, some silica. So he did have a period of fairly intense dust exposure or potentially heavy dust exposure[;] so that he had enough to be significant." *Id*. Thus, in light of Dr. Rasmussen's statements, we are unable to affirm the administrative law judge's determination that Dr. Rasmussen did not explain his opinion with references to the specific facts of this case. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997).

Furthermore, we conclude that the administrative law judge erred in rejecting Dr. Rasmussen's opinion because Dr. Rasmussen was unable to apportion the degree of impairment caused by smoking versus coal dust exposure. *See* Decision and Order at 14. Contrary to the administrative law judge's analysis, claimant is not required to categorically exclude smoking as a cause for his respiratory disability. Rather, claimant must show only that he has a chronic respiratory or pulmonary impairment "significantly related to, or substantially aggravated by dust exposure in coal mine employment." 20 C.F.R. §718.201; *see also Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000).

Because the administrative law judge did not properly analyze Dr. Rasmussen's opinion, we vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(4). To the extent that the administrative law judge's weighing of the evidence on the issue of the existence of legal pneumoconiosis also affected his determination that claimant is not totally disabled due to pneumoconiosis, we further vacate the administrative law judge's findings at 20 C.F.R. §718.204(c). On remand, the

administrative law judge must reconsider Dr. Rasmussen's opinion and determine whether claimant has established the existence of legal pneumoconiosis. In so doing, the administrative law judge is advised that a physician's statement that he cannot distinguish between the effects of smoking and coal dust exposure does not, by itself, render unreasoned a physician's identification of coal dust exposure as a contributing cause of a miner's pulmonary impairment. *See* 65 Fed. Reg. 79,940, 79,946 (Dec. 20, 2000); *Williams*, 453 F.3d at 622, 23 BLR at 2-372; *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482, 22 BLR 2-265, 2-280 (7th Cir. 2001); *Cornett*, 227 F.3d at 577, 22 BLR at 2-122.

As necessary, the administrative law judge must also reconsider whether claimant is totally disabled due to clinical or legal pneumoconiosis. In rendering his findings on remand, the administrative law judge must explain the bases for all of his credibility determinations in accordance with the Administrative Procedure Act. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

II. Employer's Cross-Appeal

A hearing was conducted in this case on December 8, 2010. After the record was closed, the administrative law judge issued an Order on September 30, 2011, which remanded the case to the district director for remedial evidentiary development. Specifically, the administrative law judge found that, to the extent the Department of Labor (DOL)-sponsored examination did not include an analog x-ray,[8] the district director failed to discharge his duty to provide claimant with a complete pulmonary evaluation, pursuant to 20 C.F.R. §725.406. On remand, the district director had an analog x-ray taken on November 16, 2011, which was read as positive for pneumoconiosis. Director's Exhibits 43, 45. Claimant obtained an additional positive reading of the x-ray and employer submitted a negative reading. Claimant's Exhibit 6; Employer's Exhibit 15. Thereafter, the case was returned to the administrative law judge.[9] In his Decision and Order, the administrative law judge found that the weight of the analog x-ray evidence was positive for clinical pneumoconiosis.

[8] The administrative law judge observed that the regulations require that an x-ray be of suitable quality for the proper classification of pneumoconiosis, and that digital x-rays do not satisfy this standard. *See* 20 C.F.R. §718.102; September 30, 2011 Order Remanding to District Director at 1.

[9] By Order dated September 13, 2012, the administrative law judge admitted the parties' readings of the November 16, 2011 analog film.

Citing 20 C.F.R. §725.456(e), employer asserts that the administrative law judge abused his discretion in remanding the case after termination of the hearing.[10] Employer maintains that the remand order prejudiced employer's case because claimant was allowed to swap out a negative digital x-ray reading for a positive analog x-ray reading. Employer requests that, if the case is remanded, the Board instruct the administrative law judge to limit his consideration to the evidentiary record as it was developed at the hearing or, alternatively, that liability for benefits transfer to the Trust Fund. The Director, however, contends that employer has waived its right to challenge the administrative law judge's remand order, as employer raised no objection to the order below.[11] The Director further contends that employer has not suffered any undue prejudice.

The Act requires that "[e]ach miner who files a claim . . . be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-88 n.3 (1994). The regulation at 20 C.F.R. §725.456(e) provides:

> If the administrative law judge concludes that the complete pulmonary evaluation provided pursuant to [20 C.F.R.] §725.406, or any part thereof, fails to comply with the applicable quality standards, or fails to address the relevant conditions of entitlement (see [20 C.F.R] §725.202(d)(2)(i) through (iv)) in a manner which permits resolution of the claim, the administrative law judge shall, in his or her discretion, remand the claim to the district director with instructions to develop only such additional evidence as is required, or allow the parties a reasonable time to obtain and submit such evidence, before the termination of the hearing.

20 C.F.R. §725.456(e).

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[10] The regulation at 20 C.F.R. §725.475 provides that "[h]earings are officially terminated when all the evidence has been received, witnesses heard, pleadings and briefs submitted to the administrative law judge, and the transcript of the proceedings has been printed and delivered to the administrative law judge." 20 C.F.R. §725.475

[11] The record reflects that, at the hearing, the parties discussed the fact that the Department of Labor obtained a digital x-ray, as opposed to an analog film. *See* December 8, 2010 Hearing Transcript at 11-12. Employer did not raise an objection to the remand order before the administrative law judge.

Employer does not challenge the fact that claimant is entitled to an analog x-ray as part of the DOL-sponsored examination. Employer challenges only the timing of the remand order, after termination of the hearing. Contrary to employer's arguments, however, the regulations do not provide a time limit on the development of evidence to discharge the Director's statutory obligation to provide a complete pulmonary evaluation. *See Hodges*, 18 BLR at 1-89-90. Because either the Director or claimant may raise the issue of a complete pulmonary evaluation at any time, we consider the administrative law judge's error, if any, in exercising his remand authority under 20 C.F.R. §725.456(e), after termination of the hearing, to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Moreover, we reject employer's assertion that it was prejudiced by the fact that the remand occurred after it had developed its case and submitted a post-hearing brief. Due process requires that employer be able to mount a meaningful defense to the claim through the development of evidence to support its case. *See North Am. Coal Co. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989). Employer's submission of its own reading of the November 16, 2011 x-ray, which was admitted into the record by the administrative law judge, cures any procedural defects resulting from the timing of the remand order. *See generally* 20 C.F.R. §725.456(b)(2); *Bethlehem Mines Corp. v. Henderson*, 939 F.2d 143, 16 BLR 21 (4th Cir. 1991); *Miller*, 870 F.2d at 951-51, 12 BLR at 2-228-29. Thus, we reject employer's arguments that the evidence obtained on remand should be excluded, or in the alternative, that liability for benefits should transfer to the Trust Fund. *See Miller*, 870 F.2d at 951-51, 12 BLR at 2-228-29.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge