BRB No. 13-0226 BLA

JOHN DOUGLAS WEST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 01/06/2014
	)	
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 Second Remand - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Second Remand - Award of Benefits (2007-BLA-5747) 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, involving a subsequent claim[1] filed on July 10, 2006, is before the Board for the third time. In the last appeal, the Board held that the administrative law judge erred in finding that claimant did not provide evidence sufficient to establish that he had at least fifteen years of surface coal mine employment in conditions substantially similar to those in an underground mine, because claimant's testimony that he was exposed to coal mine dust on a daily basis, if credited, was sufficient to establish comparability of conditions under *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988). The Board vacated the denial of benefits, and remanded the case for the administrative law judge to reconsider claimant's testimony and make a specific finding as to whether claimant worked in surface conditions substantially similar to those in an underground mine, for at least fifteen years. The Board had previously affirmed the administrative law judge's findings that claimant established at least twenty-four years of coal mine employment and that new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b). Thus, the Board instructed the administrative law judge that if, on remand, he determined that claimant's coal mine employment occurred in conditions substantially similar to those in an underground mine, claimant would have established both invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4),[2] and a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d),[3] the administrative law judge must then determine whether employer has rebutted the presumption. *West v. Peabody Coal Co.*, BRB No. 11-0786 BLA (Aug. 8, 2012)(unpub.).

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[1] Claimant's initial claim, filed on November 25, 2002, was finally denied on June 8, 2004, because claimant failed to establish the existence of pneumoconiosis or disability causation. Director's Exhibit 1.

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that the claimant's total disability was due to pneumoconiosis if the claimant establishes that he or she suffers from a totally disabling respiratory or pulmonary impairment and worked at least fifteen years in underground coal mine employment, or surface coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010).

[3] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth in 20 C.F.R. §725.309(d) (2013) is now set forth in 20 C.F.R. §725.309(c). 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

Pursuant to the Board's remand instructions, the administrative law judge reconsidered claimant's formal hearing testimony, and found that claimant established that his twenty-four years of coal mine employment as a welder at the tipple and in a shop was the equivalent to at least fifteen years of underground coal mine employment. Consequently, the administrative law judge determined that the evidence established invocation of the amended Section 411(c)(4) presumption, and a change in an applicable condition of entitlement at 20 C.F.R. §725.309. The administrative law judge further found that employer failed to establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's determinations that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground mine, and that invocation of the amended Section 411(c)(4) presumption affirmatively establishes a change in an applicable condition of entitlement pursuant to Section 725.309. Employer also maintains that the administrative law judge applied an incorrect standard for determining whether employer established rebuttal of the presumption under amended Section 411(c)(4), and erred in his weighing of the evidence relevant to rebuttal. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation (the Director) has filed a limited response, arguing that the Board's prior holding, that claimant may establish a change in an applicable condition of entitlement through invocation of the amended Section 411(c)(4) presumption, constitutes the law of the case and, as such, is binding in subsequent proceedings. In addition, the Director maintains that the administrative law judge properly found that the conditions in claimant's surface mine employment were substantially similar to those in an underground mine, and that he applied the appropriate standard on rebuttal.

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).

Employer initially challenges the administrative law judge's determination that the conditions in claimant's surface coal mine employment were substantially similar to those in an underground coal mine. While employer concedes that claimant's testimony established that the "extremely dusty conditions for five years" in his welding job at the

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

tipple were comparable to conditions in an underground coal mine, employer maintains that claimant failed to describe the conditions in his later work as a welder in the pit or shop with sufficient specificity to establish comparability of conditions. Employer's Brief at 17. Employer's arguments lack merit.

The administrative law judge noted the Board's remand instructions, and reviewed claimant's uncontradicted testimony that the work conditions during his first five and one-half years as a welder at the tipple were "extremely dusty." Claimant further testified that, during his remaining eighteen and one-half years as a shop welder, he performed "most of the repairs … 'on site' either in the mine pit or wherever the equipment was located," requiring him to remove dust from the equipment, which he inevitably inhaled before he could make the necessary repairs. Decision and Order on Second Remand at 2; Hearing Transcript at 10-11. While claimant acknowledged that "welding in the shop was not as dusty as welding at the tipple," the administrative law judge noted claimant's testimony, that he returned home "extremely dusty" throughout his coal mine employment, and was exposed to coal mine dust "pretty much continuous[ly], because [he] worked seven days a week most of the time." Decision and Order on Second Remand at 2; Hearing Transcript at 14-15. The administrative law judge acted within his discretion in finding that claimant's uncontradicted testimony was credible, and was corroborated by his wife's testimony at the hearing. Decision and Order on Second Remand at 2; Hearing Transcript at 49-50; *see Bizarri v. Consolidation Coal Co.*, 7 BLR 1-343, 1-344-345 (1984). As substantial evidence supports the administrative law judge's findings, we affirm his determination that claimant established an equivalency to at least fifteen years of underground coal mine employment. *See Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-274 (7th Cir. 2001); *Leachman*, 855 F.2d at 512; *see also Blakely v. Amax Coal Co.*, 54 F.3d 1313, 1319, 19 BLR 2-192, 2-202 (7th Cir. 1995); Decision and Order on Second Remand at 3. Consequently, we affirm the administrative law judge's finding that claimant established invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4).

Employer next maintains that, because the Board previously affirmed the administrative law judge's finding that new evidence failed to establish the existence of pneumoconiosis or disability causation, the elements of entitlement previously adjudicated against claimant, the application of amended Section 411(c)(4) cannot satisfy the threshold requirement of establishing a change in an applicable condition of entitlement under Section 725.309. We disagree. The administrative law judge properly found that the Board had previously rejected employer's arguments on this issue, and thus found that invocation of the amended Section 411(c)(4) presumption also established a change in an applicable condition of entitlement pursuant to Section 725.309. Decision and Order on Second Remand at 3; *see Consolidation Coal Co. v. Director, OWCP* [*Bailey*], 721 F.3d 789, 794-795, BLR (7th Cir. 2013). As no exception to the law of

the case doctrine has been demonstrated, we affirm the administrative law judge's determination that claimant established a change in an applicable condition of entitlement under Section 725.309. *See Bailey*, 721 F.3d at 794, BLR at ; *Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991).

Employer next contends that the administrative law judge applied an incorrect rebuttal standard, and erred in his evaluation of the evidence relevant to rebuttal of the presumption at amended Section 411(c)(4). Employer maintains that the administrative law judge's weighing of the x-ray evidence was inconsistent and incomplete, and that he failed to provide valid reasons for finding that the opinions of Drs. Repsher and Fino were insufficient to establish rebuttal. Employer's arguments lack merit.

Following the Board's remand instructions, the administrative law judge properly relied on the rebuttal standard articulated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Morrison v. Tenn. Consol. Coal Co.*, 644 F.2d 478, 25 BLR 2-1 (6th Cir. 2011). The court held that "rebuttal requires an affirmative showing … that the claimant does *not* suffer from pneumoconiosis, or that the disease is not related to coal mine work." *Morrison*, 644 F.2d at 480, 25 BLR at 2-9 [emphasis in original]; Decision and Order on Second Remand at 3.

In weighing each individual x-ray, the administrative law judge followed the admonition of 20 C.F.R. §718.202(a)(1) to consider the radiological credentials of each physician interpreting the x-ray. The regulations specifically discuss Board-certification and B reader certification at 20 C.F.R. §718.202(a)(1)(ii)(C) and (E), and the administrative law judge acknowledged the superior credentials of the dually qualified physicians. Decision and Order on Second Remand at 4. Although not discussed in the regulations, the administrative law judge considered that both certification as a C reader and a professorship in radiology are relevant to a physician's competence, and he therefore found that Drs. Wiot and Spitz were the best qualified of the dually qualified radiologists and B readers. Decision and Order on Second Remand at 4-5.

The administrative law judge determined that the newly submitted x-ray evidence of record consisted of five negative interpretations and four positive interpretations of three x-rays dated July 24, 2006, January 23, 2007, and June 26, 2008. Decision and Order on Second Remand at 4. The July 24, 2006 x-ray was interpreted as positive for pneumoconiosis by Dr. Alexander, a dually qualified radiologist, and as negative by dually qualified Dr. Spitz, and B reader Dr. Westerfield. Claimant's Exhibit 8; Employer's Exhibits 6, 13. The January 23, 2007 x-ray was interpreted as positive by dually qualified Drs. Ahmed and Alexander, and as negative by dually qualified Dr. Wiot, and B reader Dr. Repsher. Claimant's Exhibits 1, 7; Employer's Exhibits 1, 4. The

June 26, 2008 x-ray was interpreted as positive by B reader Dr. Baker, and as negative by dually qualified Dr. Wiot. Claimant's Exhibit 2; Employer's Exhibit 5.

The administrative law judge determined that the "x-ray evidence is at best in equipoise, and most likely favors a negative finding," apparently because each of the three x-rays had a negative reading by a physician with one or both of the additional credentials. Decision and Order on Second Remand at 5; *see Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'd sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Essentially, the administrative law judge refused to attach to these additional credentials determinative significance. That decision, as he correctly observed, was well within his discretion. Decision and Order on Second Remand at 4; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). The administrative law judge reasonably concluded that employer failed to meet its burden of affirmatively proving that claimant does not suffer from clinical pneumoconiosis. *See Morrison*, 644 F.2d at 480, 25 BLR at 2-9. Although employer correctly notes that the administrative law judge did not address the April 21, 2003 x-ray contained in the record of claimant's original claim, the administrative law judge acted within his discretion in relying on the significantly more recent x-ray evidence, since pneumoconiosis is a progressive disease. *See Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990); Director's Exhibit 1.

The administrative law judge then reviewed Dr. Elrod's pathological examination of the lung tissue from claimant's left pneumonectomy on May 10, 1997, and found that Dr. Elrod's identification of "black anthracotic stipling" in the lung and "peribronchial lymph nodes which are anthracotic, pigmented and enlarged" did not constitute a finding of pneumoconiosis under 20 C.F.R. §718.201. Claimant's Exhibit 4; Decision and Order on Second Remand at 5. However, the administrative law judge rationally concluded that this biopsy evidence did not satisfy employer's burden of affirmatively disproving the existence of clinical pneumoconiosis. Decision and Order on Second Remand at 5; *see Ondecko*, 512 U.S. at 267, 18 BLR at 2A-1. Further, because he found that Drs. Repsher and Fino relied heavily on the incorrect assumption that the x-ray evidence establishes that claimant does not suffer from pneumoconiosis to support their opinions that claimant does not suffer from clinical pneumoconiosis or any other coal dust related disease, the administrative law judge permissibly discounted their opinions. Decision and Order on Second Remand at 5; *see Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Thus, the administrative law judge properly concluded that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have pneumoconiosis.

Lastly, because Drs. Repsher and Fino did not diagnose pneumoconiosis, the administrative law judge acted within his discretion in finding that their opinions were entitled to little weight on the issue of disability causation. Decision and Order on Second Remand at 6; *see Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 2-306 (4th Cir. 1994). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his findings that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption, and that claimant is entitled to benefits. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Accordingly, the Decision and Order on Second Remand of the administrative law judge awarding benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to affirm the administrative law judge's findings that claimant established at least fifteen years of coal mine employment in conditions that were substantially similar to those in an underground mine; that claimant established invocation of the presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4); and that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. I also agree that the administrative law judge applied the appropriate standard on rebuttal of the presumption. However, I respectfully dissent from my colleagues' decision to affirm the administrative

law judge's finding that employer failed to rebut the amended Section 411(c)(4) presumption. The administrative law judge's analysis of the conflicting x-ray evidence was confusing and contradictory, as he initially found that the negative x-ray interpretations rendered by Drs. Wiot and Spitz were entitled to greater weight, based on their superior radiological expertise, and stated that "all three x-rays favor a negative interpretation," but he then concluded that the x-ray evidence was "in equipoise." Decision and Order on Second Remand at 5. As the administrative law judge's weighing of the x-ray evidence affected the weight he accorded to the medical opinions of Drs. Repsher and Fino, I believe employer's argument has merit, and I would vacate the administrative law judge's rebuttal findings, and remand for further consideration.

NANCY S. DOLDER, Chief
Administrative Appeals Judge