BRB No. 11-0712 BLA

CARL E. KANIPE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 07/31/2012
	)	
and	)	
	)	
PEABODY INVESTMENTS INCORPORATED, c/o OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 John P. Sellers, III, Administrative Law Judge, United States Department of Labor.

Brent Yonts, Greenville, Kentucky, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2009-BLA-05182) of Administrative Law Judge John P. Sellers, III, rendered on a claim filed on January 22, 2008, pursuant to 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). On March 23, 2010, amendments to the Act, contained in the Patient Protection and Affordable Care Act, were enacted, affecting claims such as this one, which were filed after January 1, 2005, and were pending on or after March 23, 2010. The amendments revive Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, 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 will be a rebuttable presumption that the miner is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

The administrative law judge accepted the parties' stipulation that claimant has thirty-four years of qualifying coal mine employment, and he determined that claimant established a totally disabling respiratory or pulmonary impairment under 20 C.F.R. §718.204(b)(2)(ii). Thus, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis, pursuant to amended Section 411(c)(4). However, the administrative law judge further found that employer successfully rebutted the presumption by proving that claimant's disability did not arise out of his coal mine employment. Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in finding the medical opinions of Drs. Repsher and Fino sufficient to establish rebuttal of the amended Section 411(c)(4) presumption. Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response to claimant's appeal, unless specifically requested to do so by the Board. Claimant has also filed a reply brief, reiterating his arguments on appeal. [1]

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.[2] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[1] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit because claimant's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3.

Rebuttal of the Amended Section 411(c)(4) Presumption

The administrative law judge explained that the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) can be rebutted "by evidence establishing that [claimant] does not have pneumoconiosis or that his total disability is not due to pneumoconiosis." Decision and Order at 14. The administrative law judge first considered the issue of disability causation, noting that "the presence of legal pneumoconiosis and the cause of any [respiratory or pulmonary] disability substantially overlap."[3] *Id*. The administrative law judge noted that employer relied on the opinions of Drs. Repsher and Fino to satisfy its burden of proof. *Id*.

Dr. Repsher examined claimant on August 13, 2008, at which time he recorded: a history of thirty-six years of coal mine employment; a history of thirteen years of smoking one pack of cigarettes a day from 1962 to 1975; symptoms of shortness of breath on exertion for twelve years; and a cough. Employer's Exhibit 1. Dr. Repsher obtained a chest x-ray, which he interpreted as negative for pneumoconiosis, and also obtained a computerized tomography (CT) scan, pulmonary function study, arterial blood gas study, and an EKG. *Id*. He indicated that both the x-ray and CT scan showed a bullet lodged in claimant's right anterior lateral chest wall and a neurostimulator. *Id*. He indicated that the pulmonary function study was "consistent with a paralyzed hemidiaphragm and marked obesity" and that the arterial blood gas study was "very abnormal, consistent with obesity, hyperventilation syndrome and a paralyzed hemidiaphragm." *Id*. Under "Impression" in his report, he diagnosed "probable right diaphragmatic hemiparesis, of unclear etiology," and "probable coronary artery disease." *Id*. He opined that there was no evidence of "medical or legal coal workers' pneumoconiosis" and no evidence of "any other pulmonary or respiratory disease or condition, either caused by or aggravated by his employment as a coal miner with exposure to coal mine dust." *Id*.

[3] Pursuant to 20 C.F.R. §718.201, 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." 20 C.F.R. §718.201(a)(1). 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. *Id*. 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).

Dr. Repsher was deposed on October 14, 1990, and testified that claimant's CT scan showed "an elevated hemidiaphram" and that his pulmonary function studies revealed an impairment of both the FEV1 and FVC. Employer's Exhibit 9. He indicated that a parallel reduction of the FEV1 and FVC is a "feature" of a paralyzed diaphragm." *Id*. at 8. Dr. Repsher stated that claimant's obesity caused "hypoventilation syndrome," which he described as "under-breathing . . . not breathing as deeply and as rapidly as you need to to keep your blood gases in a normal mode." *Id* at 7. When asked to describe the process, he stated: "What physically takes place is the fact that he only has one-half of his diaphragm that's working and with the obesity that makes that half of the diaphragm work even harder because it has to push – it has to by itself push away all the fat that is below the diaphragm in the abdomen." *Id*. at 12. According to Dr. Repsher, claimant suffers from a form of "chronic respiratory failure," that he attributed to a combination of the paralyzed hemidiaphragm and claimant's obesity. *Id*. at 11.

Dr. Fino reviewed various medical records, including the examination reports of Drs. Repsher and Simpao.[4] Employer's Exhibit 2. Dr. Fino opined that the pulmonary function tests, obtained by Dr. Simpao on Feburary 19, 2008 and Dr. Repsher on August 13, 2008, were technically invalid, but that the values show a restrictive impairment and no evidence of obstructive respiratory disease. *Id*. He agreed that unilateral paralysis of

[4] Dr. Simpao performed the Department of Labor examination of claimant on February 19, 2008, and opined that claimant suffers from chronic obstructive pulmonary disease (COPD), evidenced by hypercarbia on arterial blood gas testing, reduced vital capacity on pulmonary function testing, and claimant's subjective symptoms. Director's Exhibit 11. He concluded that claimant's thirty-six years of coal mine employment were a significant contributing factor to his COPD. *Id*. In a progress note from Muhlenberg Community Hospital dated March 2, 2010, Dr. Chavda, a Board-certified pulmonologist, stated that claimant experienced shortness of breath, that an x-ray showed "no pneumoconiosis changes," but that pulmonary function studies showed mild obstructive and mild restrictive impairment. Claimant's Exhibit 7. He wrote that claimant "could definitely qualify for legal pneumoconiosis in part that he has worked in the coal mines and in part that he has significant obstructive [and] restrictive airway disease. Also because he has significant exertional hypoxia." *Id*. In an "Annual Note" from Muhlenberg Community Hospital, Dr. Baker noted that claimant worked thirty-five years in coal mine employment, suffered a gunshot wound to the chest in the Vietnam War and had never smoked. Claimant's Exhibit 8. Dr. Baker indicated that claimant suffered from decreased oxygen saturation and diagnosed clinical pneumoconiosis, chronic bronchitis, and a mild restrictive defect. *Id*. Additionally, the record contains a letter addressed to claimant's counsel from Dr. White, claimant's treating physician, dated May 27, 2010. Claimant's Exhibit 10. Dr. White rendered an opinion as to the cause of claimant's "low oxygen levels," stating that they were "secondary to black lung." *Id*.

the hemidiaphragm, as well as obesity, could contribute to restriction. *Id*. at 10-11. He opined that claimant's arterial blood gas abnormality is due to obesity. *Id*. at 11. In a deposition conducted on November 1, 2010, Dr. Fino indicated that he considered CT scans to be more credible for determining the presence or absence of pneumoconiosis. Employer's Exhibit 5 at 7-8. He testified that the pulmonary function studies, if valid, represent a purely restrictive type of defect, and that the blood gas studies "show that there is a problem in [claimant's] ability to get oxygen in and carbon dioxide out" of the lungs. *Id*. at 18. Dr. Fino opined that none of the objective testing was consistent with either smoking or coal dust exposure. *Id*. at 19. He attributed claimant's disability to obesity and opined that claimant does not have either clinical or legal pneumoconiosis. *Id*.

In considering whether employer established rebuttal, the administrative law judge observed that Dr. Rephser's opinion, that claimant does not have clinical pneumoconiosis was consistent with the negative x-ray evidence and the one CT scan of record. The administrative law judge noted that, "[a]lthough the x-ray evidence is fairly evenly balanced, I give greater weight to the negative CT scan evidence."[5] Decision and Order at 15. The administrative law judge found "the opinions of Drs. Repsher and Fino, ruling out legal and [clinical] pneumoconiosis, and attributing [claimant's] qualifying blood gas studies to his obesity and probable right diaphragmatic hemiparesis, sufficient to satisfy [employer's] burden on rebuttal." Decision and Order at 19. He rejected the contrary opinions of Drs. Simpao, Chavda and Baker and explained the weight accorded the evidence as follows:

> Weighing all this evidence, I find that Drs. Repsher and Fino, two highly qualified pulmonologists, have expressed opinions which are entitled to substantial weight and bear directly on the issues at hand. Conversely, I find that Dr. Simpao's qualifications are not equal to those of Drs. Repsher and Fino, and that his report is not adequately explained or particularly persuasive. Although both are board-certified pulmonologists, Dr. Baker and Dr. Chavda did not submit fully explained medical reports. Rather, their opinions appear as part of the Claimant's treatment records and . . . failed to fully address the issues or counter the opinions of Drs. Repsher and Fino.

[5] Dr. Wiot interpreted a computerized tomography (CT) scan, dated August 13, 2008, as showing no evidence of coal workers' pneumoconiosis. Employer's Exhibit 4. The administrative law judge explained that he was crediting Dr. Fino's testimony as "establish[ing] that CT scans are more sensitive than normal chest x-rays." Decision and Order at 15 n.10.

Id. In addition, the administrative law judge determined that Dr. White's opinion is not well-reasoned or well-documented because he did not articulate a rationale for his opinion. *Id*. Thus, the administrative law judge determined that employer satisfied its burden to rebut the amended Section 411(c)(4) presumption.

Claimant contends that the opinions of Drs. Repsher and Fino are speculative, insofar as they diagnose "probable" right diaphragm paralysis, and are insufficient to establish rebuttal. Based on our review of the administrative law judge's credibility findings, we agree with claimant that the administrative law judge has not properly addressed whether the opinions of Drs. Repsher and Fino are sufficiently reasoned to rebut the presumption at amended Section 411(c)(4). *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-151 (1989) (en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Although the administrative law judge credited the opinions of Drs. Repsher and Fino, based on their credentials, he did not specifically consider whether their opinions constitute "affirmative" evidence that claimant does not have pneumoconiosis or a respiratory disability due to his coal dust exposure. *See Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 479-80, 25 BLR 2-1 (6th Cir. 2011). Specifically, the administrative law judge erred in failing to consider whether either Dr. Repsher or Dr. Fino explained why they believed that claimant's respiratory disability, even if due to obesity and a "probable" paralyzed hemidiaphragm, is not also due to, or aggravated by, his thirty-four years of coal dust exposure. *See Crockett Colleries, Inc., v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576-77, 22 BLR 2-107, 2-121-122 (6th Cir. 2000). Thus, we are unable to affirm the administrative law judge's finding that the opinions of Drs. Repsher and Fino are credible.

Furthermore, the administrative law judge specifically determined that Dr. Repsher's opinion was "consistent with the negative x-ray readings of record, and, more importantly, the negative CT scan evidence." Decision and Order at 15. The administrative law judge, however, erred in failing to address the fact that the negative CT scan predates most of the positive x-ray evidence in this case by two years.[6] *See*

[6] The administrative law judge noted that the record contains twelve interpretations of four x-rays dated February 19, 2008, August 13, 2008, February 20, 2009 and February 22, 2010. Decision and Order at 4-5. The February 19, 2008 x-ray was read as positive for pneumoconiosis, by Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, and as negative for pneumoconiosis, by Dr. Westerfield, also a dually qualified radiologist. Director's Exhibit 11; Claimant's Exhibit 1. The August 13, 2008 x-ray was read as positive by Dr. Alexander, but as negative by Dr. Repsher, a B reader, and by Dr. Wiot, a dually qualified radiologist. Claimant's

Woodward v. Director, OWCP, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *see also Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Moreover, to the extent that the administrative law judge found the x-ray evidence to be "fairly evenly balanced," the administrative law judge's decision to credit Dr. Repsher's opinion, because he found it to be supported by the negative x-ray evidence, is not sufficiently explained. Decision and Order at 15. If the x-ray evidence is in equipoise as to the presence or absence of clinical pneumoconiosis, employer has not satisfied its burden to disprove that claimant has pneumoconiosis, and the administrative law judge's reason for crediting Dr. Repsher's opinion is not rational.[7] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Morrison*, 644 F.3d at 479-80.

For the above-stated reasons, we conclude that the administrative law judge's credibility findings with regard to Drs. Repsher and Fino fail to satisfy the Administrative Procedure Act (APA),[8] 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), 30 U.S.C. §932(a). We therefore vacate the administrative law judge's finding that employer established rebuttal of the amended Section 411(c)(4) presumption and the denial of benefits.

On remand, the administrative law judge must specifically address whether employer has rebutted the presumption with affirmative evidence. *Morrison*, 644 F.3d at 479-80, 25 BLR at 2-9. The administrative law judge must determine whether Drs. Repsher and Fino provided reasoned and documented opinions that specifically explain

---

Exhibit 5; Employer's Exhibits 1, 2. The February 20, 2009 x-ray was read as positive by Dr. Baker, a B reader, and as negative by Dr. Shipley, a dually qualified radiologist. Claimant's Exhibit 2; Employer's Exhibit 7. The February 22, 2010 x-ray was read as positive by Dr. Alexander and as negative by Dr. Myer, a dually qualified radiologist. Claimant's Exhibit 4; Employer's Exhibit 8.

[7] The administrative law judge has also not addressed the extent, if any, to which Dr. Fino's invalidation of Dr. Repsher's pulmonary function studies bears on the credibility of Dr. Repsher's opinion.

[8] 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), 30 U.S.C. §932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

why claimant's disability is not caused or aggravated by his coal dust exposure. When weighing the conflicting medical opinions on remand, the administrative law judge must address the credentials of the physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their respective diagnoses. *Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The administrative law judge must also explain his findings in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

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.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge