BRB No. 13-0019 BLA

BILLY M. WOOTEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ADENA FUELS, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY	)	DATE ISSUED: 07/30/2013
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

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

H. Brett Stonecipher (Ferreri & Fogle, PLLC), Lexington, Kentucky, for employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Benefits (2011-BLA-05272) of Administrative Law Judge Lystra A. Harris, 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 involves a claim filed on January 22, 2010. Director's Exhibit 2.

In her Decision and Order issued September 14, 2012, the administrative law judge noted the recent amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this claim, Congress reinstated the presumption of Section 411(c)(4) of the Act. Under Section 411(c)(4), if a miner establishes at least fifteen years of underground or substantially similar coal mine employment, and establishes that he or she has a totally disabling respiratory impairment, there 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, 260 (2010). If the presumption is invoked, the burden shifts to employer to rebut it by disproving the existence of pneumoconiosis or by establishing that the miner's respiratory impairment "did not arise out of, or in connection with," coal mine employment. *Id.*

The administrative law judge found that claimant had at least twenty-five years of coal mine employment, at least fifteen of which were underground coal mine employment.[1] The administrative law judge also found that the evidence established claimant's total disability pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge found that claimant invoked the Section 411(c)(4) presumption. Finally, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[2] 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.

[1] Claimant's most recent coal mine employment was in Kentucky. Director's Exhibits 16, 20. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[2] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant had at least fifteen years of underground coal mine employment, that claimant has a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), and that claimant invoked the Section 411(c)(4) presumption, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Employer's Brief at 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 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 Section 411(c)(4) presumption, the burden shifted to employer to rebut the presumption by disproving the existence of pneumoconiosis, or by proving that claimant's respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 11-17.

Existence of Pneumoconiosis

To rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis, employer must disprove the existence of both clinical and legal pneumoconiosis.[3] *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995). The administrative law judge first found, based on the x-ray evidence, that employer failed to disprove the existence of clinical pneumoconiosis. Decision and Order at 11-13. The administrative law judge considered nine interpretations of three x-rays taken on February 19, 2010, April 28, 2011, and July 16, 2011, each of which generated positive and negative interpretations for clinical pneumoconiosis.[4] Director's Exhibit 13;

[3] Clinical pneumoconiosis is defined as "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). 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). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[4] Dr. Alexander, who is dually qualified as a B reader and a Board-certified radiologist, interpreted the February 19, 2010, x-ray as positive for clinical pneumoconiosis; Drs. DePonte and Meyer, both of whom are also dually qualified, interpreted the same x-ray as negative for the disease. Claimant's Exhibit 3; Director's Exhibit 13 at 23; Employer's Exhibit 8. Dr. Alexander, and Dr. Thomas, who is also dually qualified, read the April 28, 2011, x-ray as positive for clinical pneumoconiosis;

Claimant's Exhibits 1-4; Employer's Exhibits 1, 6-8; Decision and Order at 12. After finding that the conflicting interpretations of each x-ray were in equipoise, the administrative law judge concluded that employer failed to prove that claimant does not have clinical pneumoconiosis. Decision and Order at 13.

Employer argues on appeal that the administrative law judge erred in weighing the interpretations of the February 19, 2010, x-ray.[5] The administrative law judge explained that she would give more weight to the x-ray readings of dually qualified radiologists, and that she would give equal weight to interpretations by physicians who are equally qualified "[u]nless the record indicates a specific reason to assign greater or lesser weight to an interpretation[.]" Decision and Order at 13. The administrative law judge noted that all three interpretations of the February 19, 2010, x-ray came from dually qualified radiologists, and after finding "no reason to discredit these interpretations," concluded that the evidence regarding that x-ray was in equipoise. *Id*. Employer contends that the administrative law judge erred by failing to discuss the fact that the x-ray yielded two negative interpretations and only one positive interpretation. Employer's Brief at 10. Employer also argues that the administrative law judge should have given greater weight to Dr. DePonte's negative interpretation, because Dr. DePonte is unaffiliated with either party, and that the administrative law judge should have questioned Dr. Alexander's credibility. *Id*. at 10-12. Finally, employer contends that the administrative law judge failed to discuss the fact that Dr. Alexander's ILO interpretation was "1/0," the lowest positive reading for pneumoconiosis. Employer's Brief at 10. These arguments lack merit.

Contrary to employer's suggestion, the administrative law judge was not required to find that the x-ray was negative for pneumoconiosis simply because the record contained more negative than positive interpretations. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993). Furthermore, an administrative law judge may not rely on party affiliations to give more weight to the opinion of an independent physician, or less weight to a physician retained by a party,

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Dr. Shipley, who is dually qualified, and Dr. Dahhan, who is neither a B reader nor a radiologist, read the same x-ray as negative for the disease. Claimant's Exhibits 2, 4; Employer's Exhibits 1, 6. Dr. Alexander interpreted the July 16, 2011, x-ray as positive for clinical pneumoconiosis, and Dr. Meyer interpreted it as negative for the disease. Claimant's Exhibit 1 at 9; Employer's Exhibit 7.

[5] Employer concedes that substantial evidence supports the administrative law judge's determination that the conflicting interpretations of the x-rays taken on April 28, 2011, and July 16, 2011, are in equipoise. Employer's Brief at 11.

absent some basis for finding that a physician retained by a party is biased. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-35-36 (1991) (en banc). Although employer notes that Dr. Alexander offered "1/0" interpretations of the three x-rays in the case, and points to Dr. Broudy's contention that Dr. Alexander "reads about every X-ray that comes to him as positive," employer does not identify any basis for questioning Dr. Alexander's impartiality, or for concluding that Dr. DePonte's interpretation is more reliable because she was not retained by either party. Employer's Exhibit 4 at 21. We, therefore, will not disturb the administrative law judge's credibility determinations. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Finally, because Dr. Alexander's "1/0" interpretation was sufficient evidence to establish the existence of pneumoconiosis, *see* 20 C.F.R. §§718.102(b), 718.202(a)(1), we reject employer's contention that the administrative law judge was required to discuss it further before finding that the x-ray evidence was in equipoise.

The administrative law judge properly considered the quantity of the x-ray evidence in light of the qualifications of the readers and, finding no reason to discredit any of the interpretations, reasonably concluded that the evidence was in equipoise. *See Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59-60, 19 BLR 2-271, 2-279-81 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87. Therefore, we affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis. *See* 30 U.S.C. §921(c)(4); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

In light of that affirmance, we ordinarily would not need to consider the administrative law judge's analysis of whether employer disproved the existence of legal pneumoconiosis, because rebutting the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis requires an employer to disprove the existence of both clinical and legal pneumoconiosis. *See Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66. In this case, however, employer contends that the administrative law judge erred in weighing the medical opinion evidence regarding the existence of legal pneumoconiosis, and that those errors affected her subsequent finding that employer also failed to rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of his coal mine employment. Therefore, we review the administrative law judge's finding that employer failed to disprove the existence of legal pneumoconiosis.

The administrative law judge considered the opinions of Drs. Baker, Habre, Dahhan, and Broudy, and gave greater weight to the opinions of Drs. Baker and Habre, both of whom diagnosed claimant with legal pneumoconiosis. Claimant's Exhibit 1 at 4; Director's Exhibit 14 at 1; Decision and Order at 14-16. Drs. Dahhan and Broudy both diagnosed claimant with emphysema, but opined that coal mine dust exposure did not contribute to his impairment, and therefore concluded that claimant does not have legal

pneumoconiosis. Employer's Exhibit 1 at 2-4; Employer's Exhibit 2 at 3-4. The administrative law judge discredited Drs. Dahhan and Broudy for "fail[ing] to explain how the Claimant's two-and-a-half decades of coal mine dust exposure could in no way be related to his lung disease." Decision and Order at 15. Moreover, the administrative law judge discounted Dr. Dahhan's opinion as "equivocal," and discredited Drs. Dahhan and Broudy for failing to "definitely support with objective evidence their conclusions that the Claimant's emphysema is not related to coal dust exposure." Decision and Order at 15-16. Therefore, the administrative law judge found that employer failed to establish that claimant does not have legal pneumoconiosis. *Id*. at 16.

Employer argues that, contrary to the administrative law judge's conclusions, Drs. Dahhan and Broudy were unequivocal in concluding that claimant's coal dust exposure did not contribute to his impairment, and supported their conclusions with objective evidence. Employer's Brief at 18-22. Employer's contentions have merit.

The record reflects that Drs. Dahhan and Broudy both explained why they believed, within a reasonable degree of medical certainty, that claimant's coal mine employment did not contribute to his respiratory impairment. Employer's Exhibit 3 at 10-13; Employer's Exhibit 4 at 13-16. In discrediting their opinions, the administrative law judge failed to explain what she found to be equivocal about Dr. Dahhan's opinion, and failed to address the reasons, tied to objective medical evidence, that Drs. Dahhan and Broudy offered for their conclusions. Thus, the administrative law judge's finding does not comply with the Administrative Procedure Act, which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge did not address the reasoning underlying the opinions of Drs. Dahhan and Broudy, we must vacate her determination to accord less weight to those opinions on the issue of whether employer disproved the existence of legal pneumoconiosis. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Employer next contends that, because the administrative law judge erred in her consideration of the evidence regarding the existence of legal pneumoconiosis, it follows that she also erred in weighing the evidence to find that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's impairment did not arise out of, or in connection with, his coal mine employment. Employer's Brief at 22. The administrative law judge gave no weight to the opinions of Drs. Dahhan and Broudy, both of whom opined that claimant's coal mine employment did not contribute to his respiratory impairment. Decision and Order at 16-17. Therefore, the administrative law

judge found that, even if she gave no weight to the opinions of Drs. Baker and Habre, that coal dust exposure did contribute to claimant's impairment, employer could not meet its burden to disprove any connection between claimant's impairment and his coal mine employment. *Id*. at 17.

The administrative law judge discounted the opinions of Drs. Dahhan and Broudy because they "failed to explain unequivocally" how claimant's coal mine employment did not contribute to his impairment. *Id*. at 17. As we discussed above, however, the administrative law judge did not explain what she found to be equivocal about the opinions of Drs. Dahhan and Broudy, and thus failed to comply with the APA. Therefore, the administrative law judge's credibility determination regarding those opinions cannot be affirmed.

We note further that the administrative law judge also erred in discrediting the opinions of Drs. Dahhan and Broudy for relying on pulmonary function studies to determine the cause of claimant's impairment. *Id*. Quoting *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987), the administrative law judge stated that pulmonary function studies "are not diagnostic of the etiology of the respiratory impairment, but are diagnostic only of the severity of the impairment." *Id*. The administrative law judge's reliance on *Tucker* is misplaced. In *Tucker*, which was decided under 20 C.F.R. Part 718, the Board held that a claimant who establishes the existence of pneumoconiosis, and establishes total disability based on qualifying pulmonary function or arterial blood gas study evidence, without the benefit of the Section 411(c)(4) presumption, "has not also established that the total disability is due to pneumoconiosis"; he must prove that his total disability is due to pneumoconiosis. *Tucker*, 10 BLR at 1-41-42. In that specific context, the Board held that neither pulmonary function study evidence nor blood gas study evidence, by itself, can establish disability causation.[6] The Board, however, did not hold, or suggest, that a qualified physician may not rely on such evidence, as well as other relevant evidence and his or her experience, in formulating an opinion as to the etiology of a miner's pulmonary impairment. *See Tucker*, 10 BLR at 1-41-42. In this case, the administrative law judge therefore erred in discounting the opinions of Drs. Dahhan and Broudy on the basis that they impermissibly relied on pulmonary function study evidence in determining the etiology of claimant's pulmonary impairment. Accordingly, we must

[6] Consistent with the Board's holding in *Tucker v. Director, OWCP*, 10 BLR 1-35 (1987), 20 C.F.R. §718.204(c) provides that, except in limited circumstances, "proof that the miner suffers or suffered from a totally disabling respiratory or pulmonary impairment . . . shall not, *by itself*, be sufficient to establish that the miner's impairment is or was due to pneumoconiosis," but that "the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical opinion." 20 C.F.R. 718.204(c)(2) (emphasis added).

vacate the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption by proving that claimant's impairment did not arise out of, or in connection with, his coal mine employment.

On remand, when considering whether the medical opinion evidence disproves the existence of legal pneumoconiosis or establishes that claimant's respiratory impairment was not related to his coal mine employment, the administrative law judge should address the explanations for all four physicians' conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the 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