BRB No. 13-0541 BLA

MILDRED MOSKO (o/b/o JOHN A. MOSKO)	)	
Claimant-Respondent	)	
v.	)	
EIGHTY FOUR MINING COMPANY	)	
	)	DATE ISSUED: 06/26/2014
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 Remand-Award of Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Program Director, Lungs at Work), McMurray, Pennsylvania, lay representative, for claimant.

Ashley M. Harman (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: HALL, Acting Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Award of Benefits (09-BLA-5184) of Administrative Law Judge Thomas M. Burke rendered on a claim filed

pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case involves a miner's subsequent claim filed on December 7, 2007, and is before the Board for the second time.

In his initial decision, the administrative law judge credited the miner with twenty-four years of coal mine employment,[1] and found that the medical evidence developed since the final denial of the miner's last claim established that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Considering the merits of the claim, the administrative law judge found that, because the miner had more than fifteen years of qualifying coal mine employment and was totally disabled, claimant invoked the amended Section 411(c)(4) presumption of total disability due to pneumoconiosis.[2] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Upon review of employer's appeal, a majority of the Board's three-judge panel affirmed the award of benefits. *Mosko v. Eighty Four Mining Co.*, BRB No. 10-0672 BLA (Sept. 27, 2011)(unpub.)(Dolder, C.J., concurring and dissenting)(*Mosko I*). The majority affirmed, as unchallenged, the administrative law judge's findings of twenty-four years of coal mine employment, total disability, and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309. *Mosko I*, slip op. at 3 n.4. Further, the majority affirmed the administrative law judge's finding that the miner had at least fifteen years of qualifying coal mine employment under Section 411(c)(4), when his seven to eight years of underground coal mine employment and ten years of substantially similar, aboveground coal mine employment were combined.[3]

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[1] The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibits 7, 8; Hr'g Tr. at 49. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

[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, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of underground or substantially similar coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

[3] The administrative law judge did not address, and the employment evidence of record did not indicate, whether the miner's aboveground coal mine employment took

Mosko I, slip op. at 4-8. The majority therefore affirmed the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption that the miner was totally disabled due to pneumoconiosis.

With respect to the administrative law judge's rebuttal findings, the majority held that the administrative law judge permissibly found the weight of the x-ray evidence to be positive for the existence of clinical pneumoconiosis,[4] and did not err in discounting the medical opinions of the physicians who concluded, contrary to the weight of the x-ray evidence, that the miner did not have clinical pneumoconiosis. *Mosko I*, slip op. at 9-10. Further, the majority held that the administrative law judge's failure to discuss a negative CT scan reading when weighing the evidence regarding the existence of pneumoconiosis constituted harmless error, as employer demonstrated no prejudice from the omission. *Mosko I*, slip op. at 11-12. Finally, the majority held that the administrative law judge rationally discounted the disability causation opinions of employer's physicians, because those doctors did not diagnose the miner as suffering from pneumoconiosis. *Mosko I*, slip op. at 12. The majority therefore affirmed the administrative law judge's determination that employer did not disprove the existence of pneumoconiosis, or establish that the miner's impairment did not arise out of, or in connection with, coal mine employment and thus, failed to rebut the Section 411(c)(4) presumption.[5]

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place at the site of an underground mine, or at a surface mine. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497 (1979)(holding that a surface worker at an underground coal mine is not required to prove substantial similarity to take advantage of the Section 411(c)(4) presumption).

[4] "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).

[5] Chief Administrative Appeals Judge Dolder issued a separate opinion, concurring and dissenting, agreeing with the majority's determinations that the administrative law judge did not err in his analysis of the x-ray and medical opinion evidence. *Mosko v. Eighty Four Mining Co.*, BRB No. 10-0672 BLA, slip op. at 13-15 (Sept. 27, 2011)(unpub.)(Dolder, C.J., concurring and dissenting)(*Mosko I*). However, Judge Dolder opined that, because the administrative law judge did not adequately explain his finding that the miner's ten years of aboveground coal mine employment were substantially similar to underground coal mine employment, she would vacate the finding of fifteen years of qualifying coal mine employment, and remand the case for further consideration of that issue. Further, Judge Dolder stated that she would vacate the

Employer moved for reconsideration en banc, which the Board granted. *Mosko v. Eighty Four Mining Co.*, BRB No. 10-0672 BLA (Nov. 9, 2012)(reconsideration en banc)(unpub.)(McGranery and Hall, JJ., dissenting)(*Mosko II*). Upon review of employer's motion, a majority of the Board held that the administrative law judge did not adequately explain his finding that the miner's aboveground coal mine employment was substantially similar to underground mining. Accordingly, the majority vacated the finding of fifteen years of qualifying coal mine employment, and the finding that claimant invoked the Section 411(c)(4) presumption, and remanded the case for the administrative law judge to reconsider the coal mine employment evidence and explain his findings. *Mosko II*, slip op. at 3-4. Additionally, the Board majority held that the administrative law judge did not weigh all of the evidence relevant to whether employer rebutted the Section 411(c)(4) presumption, because he did not consider the negative CT scan reading. Therefore, the majority vacated the finding that employer failed to rebut the presumption by disproving the existence of pneumoconiosis, and instructed the administrative law judge that if he found that the Section 411(c)(4) presumption was invoked, he was to consider all of the relevant evidence in determining whether employer rebutted the presumption.[6] *Mosko II*, slip op. at 4.

On remand, the administrative law judge found that claimant did not establish that the miner had at least fifteen years of qualifying coal mine employment. He therefore determined that claimant did not invoke the Section 411(c)(4) presumption. Considering whether claimant could affirmatively establish entitlement to benefits pursuant to 20 C.F.R. Part 718, the administrative law judge reiterated his previous findings that the weight of the x-ray evidence was positive for the existence of clinical pneumoconiosis, and that the better-reasoned and documented medical opinion evidence supported a finding of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1),(4). Considering the conflicting CT scan readings, the administrative law judge found that the CT scan

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finding that employer did not rebut the Section 411(c)(4) presumption, and instruct the administrative law judge to consider all of the CT scan evidence.

[6] Judges McGranery and Hall dissented, stating that it was unnecessary to remand the case for the administrative law judge to explain his finding that the miner's aboveground coal mine employment was substantially similar to underground coal mine employment, because employer conceded, in its brief on appeal, that the miner's aboveground coal mine employment was not at a strip mine, thereby obviating the need for claimant to prove substantial similarity. *Mosko v. Eighty Four Mining Co.*, BRB No. 10-0672 BLA slip op. at 5-9 (Nov. 9, 2012)(reconsideration en banc)(unpub.)(McGranery and Hall, JJ., dissenting)(*Mosko II*). Further, Judges McGranery and Hall maintained that employer did not show prejudicial error in the administrative law judge's failure to discuss the CT scan reading. *Id.*

evidence also supported the existence of clinical pneumoconiosis. The administrative law judge therefore determined that claimant established that the miner suffered from clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Noting that total disability remained undisputed, the administrative law judge found that the evidence established that pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer also contends that the administrative law judge erred in his analysis of the medical opinion evidence in finding that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).[7] Both claimant and the Director, Office of Workers' Compensation Programs, respond in support of the administrative law judge's award.

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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987).

Existence of Pneumoconiosis

Employer first argues that the administrative law judge, on remand, failed to weigh all of the evidence together to determine whether it established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Employer's Brief at 9-16. Employer contends that the administrative law judge focused unduly on the positive x-ray evidence, and did not assess the evidence in a manner that would allow the miner's "entire health

[7] Because the Board vacated its initial decision, *Mosko II*, slip op. at 5, we again affirm, as unchallenged, the administrative law judge's findings of twenty-four years of coal mine employment, total disability, and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

picture to be understood." Employer's Brief at 10. Employer asserts that, had the administrative law judge properly analyzed the evidence, he would have seen that the lung fibrosis the physicians of record agreed was present on the miner's x-rays was "not consistent with coal workers' pneumoconiosis, but rather with either idiopathic pulmonary fibrosis, or the effects of esophageal cancer, either its treatment or its spreading." *Id*.

Employer's argument lacks merit. Review of the administrative law judge's Decision and Order on Remand reflects that he considered the x-ray evidence in conjunction with the physicians' opinions and the CT scans in finding that claimant established the existence of pneumoconiosis. We therefore reject employer's argument that the administrative law judge did not consider all of the evidence together. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-112 (3d Cir. 1997).

Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge reiterated his previous analysis and weighing of eight readings of four x-rays. The readings of two of the x-rays were in conflict.[8] Dr. Smith, a Board-certified radiologist and B reader, read the August 30, 2004 and September 12, 2005 x-rays as positive for pneumoconiosis, and Dr. Fino, a B reader, read the same x-rays as negative for pneumoconiosis. Considering the readers' radiological qualifications, the administrative law judge credited Dr. Smith's positive readings. Contrary to employer's contention, and as the Board held previously, the administrative law judge permissibly relied on Dr. Smith's superior radiological qualifications, to accord greater weight to his interpretations than to those of Dr. Fino, who is qualified as a B reader only. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); Decision and Order on Remand at 5; 2010 Decision and Order at 3, 14-15. Therefore, we affirm the administrative law judge's finding that "the weight of the [x-ray] evidence is positive for the existence of clinical pneumoconiosis," pursuant to 20 C.F.R. §718.202(a)(1). Decision and Order on Remand at 5.

Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge considered the medical opinions of Drs. Celko, Farney, Fino, and Jaworski.[9] The administrative law

[8] As the Board noted previously, four interpretations of two other x-rays, dated January 31, 2008 and May 23, 2008, were all positive for the existence of pneumoconiosis. *Mosko I*, slip op. at 9 n.10; Director's Exhibits 14, 15; Employer's Exhibit 3.

[9] Dr. Celko diagnosed the miner with pneumoconiosis, and he opined that the miner's lung disease was due to smoking, coal mine dust exposure, and to the effects of treatment for esophageal cancer. Claimant's Exhibit 1; Employer's Exhibit 1. Dr. Farney opined that the miner did not have clinical or legal pneumoconiosis, and stated

judge noted that "the major point of contention" in the medical opinions regarding whether the miner had pneumoconiosis "concerned the etiology of the pulmonary fibrosis that presented on chest x-ray." Decision and Order on Remand at 5. For the same reasons he gave in his initial decision, the administrative law judge explained that he credited Dr. Celko's diagnosis of pneumoconiosis over the contrary opinions of Drs. Farney, Fino, and Jaworksi. Specifically, the administrative law judge found that the opinions of Drs. Farney, Fino, and Jaworski, that the miner's x-ray abnormalities were the wrong shape, and had developed too rapidly to be considered pneumoconiosis, were not well-supported by the x-ray readings provided by the more highly qualified physicians, who interpreted the miner's x-rays as reflecting abnormalities consistent with pneumoconiosis. Decision and Order on Remand at 5; 2010 Decision and Order at 15-16.

Employer contends that the administrative law judge "provided insufficient reasoning for crediting Dr. Celko," alleging that Dr. Celko's opinion is insufficient to carry claimant's burden "because he failed to offer a persuasive opinion" regarding the existence of pneumoconiosis. Employer's Brief at 14. Employer alleges flaws in Dr. Celko's opinion that it believes should have altered the administrative law judge's analysis. *Id*. at 14-15. Employer essentially asks the Board to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). Contrary to employer's contention, the administrative law judge acted within his discretion in concluding that the x-ray evidence better supported Dr. Celko's diagnosis of pneumoconiosis. *See Williams*, 114 F.3d at 25, 21 BLR at 2-112; *Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163, 9 BLR 2-1, 2-8 (3d Cir. 1986).

Before concluding his analysis of the medical opinion evidence, the administrative law judge considered the two conflicting CT scan readings, and determined that the CT-scan evidence also supported a finding of pneumoconiosis. Decision and Order on Remand at 5-6. Specifically, the administrative law judge noted that Dr. Meyer, a Board-certified radiologist, read a May 30, 2007 CT scan as revealing mild emphysema and multifocal opacities with irregular areas of consolidation, but no evidence of coal

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that pneumoconiosis did not cause any respiratory impairment or disability. Employer's Exhibits 5, 10. Dr. Fino stated that there was no radiographic evidence of pneumoconiosis, and opined that the miner's pulmonary fibrosis and interstitial lung disease were not related to the inhalation of coal dust. Employer's Exhibits 3, 9, 12. Dr. Jaworski opined that the miner had what was "[p]robably idiopathic pulmonary fibrosis," a type of pulmonary disease "not consistent with coal workers' pneumoconiosis." Director's Exhibit 14. Dr. Jaworksi indicated that the miner's interstitial lung disease was the "predominant" cause of his impairment. Director's Exhibit 14; Employer's Exhibit 2.

workers' pneumoconiosis. Employer's Exhibit 7. The administrative law judge also considered that Dr. Smith, a Board-certified radiologist, read the same CT scan as reflecting interstitial fibrosis of a "p/q" type, at a profusion of "2/3," in all lung zones, consistent with coal workers' pneumoconiosis. Claimant's Exhibit 4. The administrative law judge explained that he credited Dr. Smith's positive CT scan reading because it was "consistent with and supported by the x-ray readings" by "dually qualified . . . Board-certified radiologists and B-readers." Decision and Order on Remand at 6.

Employer argues that, in crediting Dr. Smith's positive CT scan reading, as supported by the x-ray evidence of record, the administrative law judge "failed to resolve the differences between the other interpretations of record and the explanations offered by [employer's] pulmonary specialists that though the chest x-rays showed changes, th[ose] changes were not indicative of or consistent with coal workers' pneumoconiosis." Employer's Brief at 14. Contrary to employer's contention, the administrative law judge acted within his discretion in according greater weight to Dr. Smith's positive CT scan reading, because he found that it was supported by the weight of the x-ray evidence. *See Williams*, 114 F.3d at 25, 21 BLR at 2-112; *Kertesz*, 788 F.2d at 163, 9 BLR at 2-8. The Board is not authorized to reweigh the evidence. *Anderson*, 12 BLR at 1-113. We therefore affirm the administrative law judge's determination that the medical opinion evidence and CT scan evidence supported a finding of the existence of pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.107.

For the foregoing reasons, we conclude that substantial evidence supports the administrative law judge's finding that the weight of the x-ray evidence, medical opinion evidence, and CT scan evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *See Williams*, 114 F.3d at 25, 21 BLR at 2-112. The administrative law judge's finding is, therefore, affirmed.

Total Disability Due to Pneumoconiosis

Employer argues that the administrative law judge erred in finding that claimant established that pneumoconiosis was a substantially contributing cause of the miner's total disability pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 16-21. We disagree. The administrative law judge reiterated his previous analysis of the medical opinion evidence regarding the cause of the miner's total disability. Dr. Celko opined that clinical pneumoconiosis arising out of coal mine employment caused the miner's disabling diffusion capacity impairment. Drs. Farney, Fino, and Jaworski opined that the miner's impairment was not related to coal mine dust exposure. The administrative law judge discounted the opinions of Drs. Farney, Fino, and Jaworski, finding that the physicians "relied heavily upon their determinations that [the miner] did not have pneumoconiosis, opinions that are contrary to the weight of the evidence." Decision and Order on Remand at 6. Relying upon Dr. Celko's opinion, the administrative law judge

found that the miner's total disability was due to pneumoconiosis arising out of coal mine employment. *Id*. at 7.

Contrary to employer's contention, the administrative law judge rationally discounted the disability causation opinions of Drs. Farney, Fino, and Jaworski, because the physicians did not diagnose pneumoconiosis, contrary to the administrative law judge's finding. *See Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); Decision and Order on Remand at 6-7; 2010 Decision and Order at 16-17. Employer argues further that Dr. Celko's disability causation opinion should not have been credited, because it was not well-reasoned. Employer's Brief at 19-21. Employer's argument provides no basis for the Board to disturb the administrative law judge's finding. *See Anderson*, 12 BLR at 1-113. Because substantial evidence supports the administrative law judge's finding, we affirm the administrative law judge's determination that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Accordingly, the administrative law judge's Decision and Order on Remand-Award of Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge