BRB No. 13-0292 BLA

DENVER DALE WALKER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY ALABAMA	)	DATE ISSUED: 03/31/2014
	)	
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 Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Paul E. Jones and James W. Herald (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Award of Benefits (2012-BLA-05211) of Administrative Law Judge Daniel F. Solomon, rendered on a subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge accepted the parties' stipulations

[1] Claimant's first and second claims for benefits, filed on December 14, 2000 and May 12, 2005, were denied by the district director because claimant failed to establish

that claimant worked at least thirty-three years as a coal miner and is totally disabled, and credited claimant's testimony that eighty-percent of his coal mine work occurred underground. The administrative law judge found, therefore, that the rebuttable presumption of total disability due to pneumoconiosis, set forth in amended Section 411(c)(4), 30 U.S.C. §921(c)(4), was invoked.[2] The administrative law judge further determined that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits, effective July 2010, the month in which claimant filed this subsequent claim.

On appeal, employer argues that the administrative law judge erred in shifting the burden to employer without initially addressing whether claimant established the existence of pneumoconiosis and/or that he is totally disabled due to pneumoconiosis. Employer further argues that the administrative law judge did not properly weigh the evidence on rebuttal. Claimant responds, urging affirmance of the awards of benefits. The Director, Office of Workers' Compensation Programs, advises that he will not file a substantive response unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, rational, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the

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any element of entitlement. Director's Exhibits 1, 2. Claimant filed the present subsequent claim on July 26, 2010. Director's Exhibit 4. In a Proposed Decision and Order dated September 28, 2011, the district director made an initial finding of entitlement. Director's Exhibit 21. Upon receipt of employer's request for a hearing, the district director transmitted the claim for a hearing before Administrative Law Judge Daniel F. Solomon, whose Decision and Order is the subject of this appeal. Director's Exhibits 22, 23.

[2] Under amended Section 411(c)(4), claimant is entitled to a rebuttable presumption that he is totally disabled due to pneumoconiosis if he 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 a totally disabling respiratory impairment. *See* 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(b)).

[3] The case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Decision and Order at 2; Director's Exhibit 5.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially argues that, because the administrative law judge noted in his Decision and Order that claimant "has the general burden of establishing entitlement and the initial burden of going forward with the evidence," he erred in shifting the burden of proof to employer without first determining whether claimant established the requisite elements of entitlement. Employer's Brief at 8, quoting Decision and Order at 3. This contention is without merit. Based upon the administrative law judge's findings that the relevant claim was filed after January 1, 2005, that claimant established at least fifteen years of underground coal mine employment, and that claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2), he properly determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4).[4] 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(b)); Decision and Order at 7. The administrative law judge also properly found that, once the presumption was invoked, the burden shifted to employer to establish that claimant does not have pneumoconiosis or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, his coal mine employment. 30 U.S.C. §921(c)(4); *see* 65 Fed Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(1)(i), (ii)); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); Decision and Order at 3. Thus, contrary to employer's assertion, the administrative law judge did not err in failing to initially address whether claimant established the existence of pneumoconiosis and/or total disability causation.

Regarding the administrative law judge's findings on rebuttal, with respect to the existence of clinical pneumoconiosis,[5] the administrative law judge considered the x-ray

[4] We affirm these findings, as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Decision and Order at 2-3. We further note that, based on employer's stipulation that claimant is totally disabled, claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 in this subsequent claim. *See White v. New White Coal Co., Inc.*, 23 BLR 1-1 (2004).

[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).

and medical opinion evidence together. The record of the most recent subsequent claim contains eight interpretations of four x-rays dated October 7, 2010, September 15, 2011, November 1, 2011, and August 17, 2012.[6] The October 7, 2010 x-ray was read as positive for pneumoconiosis by Dr. Majmudar, whose radiological qualifications are not of record, and Dr. DePonte, a Board-certified radiologist and B reader. Director's Exhibit 14; Claimant's Exhibit 3. Dr. Wheeler, a Board-certified radiologist and B reader, read the film as negative for pneumoconiosis.[7] Employer's Exhibit 4. The September 15, 2011 film was read as negative by Dr. Jarboe, a B reader, and the November 1, 2011 film was read as negative by Dr. Dahhan, also a B reader. Employer's Exhibits 1, 3. Dr. Wheeler also interpreted the November 1, 2011 film as negative, checking a box on the ILO form indicating that there were no parenchymal abnormalities consistent with pneumoconiosis and commenting that "underexposure blurs some fine detail [in] both bases. Repeat with good technique and obliques or get CT scan if clinically indicated or if nodules have been reported on this film." Employer's Exhibit 2. The August 17, 2012 x-ray was read as positive by Dr. DePonte, while Dr. Wheeler checked the box on the ILO form indicating that there were no parenchymal abnormalities consistent with pneumoconiosis and commented, "[r]epeat with good technique and obliques or get CT scan if clinically indicated or if nodules have been reported on this film." Claimant's Exhibit 1; Employer's Exhibit 7.

The administrative law judge stated that there were seven interpretations of the x-rays submitted with the present subsequent claim and noted generally that, when x-ray interpretations are in conflict, he was required to consider the radiological qualifications of the readers, but was not required to defer to radiological experience or status as a professor of radiology. Decision and Order at 4. The administrative law judge found that the x-ray evidence in the present case "is conflicted" and stated, "Drs. DePonte and Wheeler are both dually qualified and despite the assertion that Dr. Wheeler is better qualified, I do not attribute greater weight to his opinions." *Id*. at 5. The administrative law judge then quoted extensively from the comments that Dr. Wheeler included in his readings of the November 1, 2011 and August 17, 2012 x-rays. *Id*. The administrative law judge next noted the presence in the record of the medical opinions in which Drs. Dahhan and Jarboe, both of whom are Board-certified pulmonologists, stated that

[6] The administrative law judge erred in listing the date of the most recent x-ray as August 12, 2012. Decision and Order at 4. The record shows that the x-ray was taken on August 17, 2012. Claimant's Exhibit 1; Employer's Exhibit 7.

[7] Dr. Barrett performed a quality rereading of the October 7, 2010 x-ray and determined that the film quality was "1." Director's Exhibit 14.

claimant does not have clinical or legal pneumoconiosis.[8] Decision and Order at 5; Employer's Exhibits 1, 3. The administrative law judge then stated:

> I find that Dr. Wheeler rendered equivocal reports. His admonitions . . . to check clinically, to repeat the studies and to take CT scans, are tacit admissions that the studies were problematic.
>
> In addition, because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record, especially where a significant amount of time separates newer evidence from that evidence which is older. I accept that the Jarboe reading was not contested, but I attribute more weight to the most recent x-rays. Both Dr. Dahhan and Dr. Jarboe based their opinions on an assumption that the x-ray evidence was negative for pneumoconiosis and I find their logic is flawed and not persuasive.

Decision and Order at 5 (citations omitted). The administrative law judge concluded his consideration of whether employer affirmatively proved the absence of pneumoconiosis by stating, "I find that [e]mployer has failed to tender reasoned opinions that meet the rebuttable presumption of total disability due to pneumoconiosis. In fact, I credit Dr. DePonte's opinion as to clinical pneumoconiosis." *Id*. (citation omitted).

The administrative law judge also determined that, because Drs. Dahhan and Jarboe did not diagnose pneumoconiosis, their opinions on the issue of disability causation were entitled to little weight. Decision and Order at 6. Thus, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption by either method. *Id*.

Employer contends that the administrative law judge did not properly weigh the x-ray evidence because he did not first determine whether each individual x-ray was positive or negative for pneumoconiosis, and then consider the totality of the x-ray evidence. Employer also alleges that the administrative law judge erred in finding that Dr. Wheeler's readings were equivocal. Employer further argues that the administrative law judge failed to explain why he did not find that the readings of the October 7, 2010 and August 17, 2012 films were in equipoise. Employer also maintains that the administrative law judge's decision to discredit the opinions of Drs. Jarboe and Dahhan

[8] 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).

must be vacated, as he based his credibility determinations on his erroneous x-ray findings.

Regarding the administrative law judge's discrediting of Dr. Wheeler's x-ray readings, employer is correct in asserting that the administrative law judge did not provide an adequate rationale for his determination that Dr. Wheeler's negative readings of the November 1, 2011 and August 17, 2012 films were equivocal. As employer maintains, it is not apparent from the face of the ILO forms submitted by Dr. Wheeler that his comments regarding the possible flaws in the x-rays had any impact on his determination that they did not contain any parenchymal abnormalities consistent with pneumoconiosis. *See* Employer's Exhibits 2, 7. Dr. Walker's remarks appeared to concern the bases of the lungs and he concluded his comments on both ILO forms by stating "no CWP [coal workers' pneumoconiosis]." *Id*. Moreover, even if Dr. Wheeler specifically referred to quality issues affecting the entire x-ray, he did not classify either film as unreadable. *See Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987); *see also Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214, 1-1216 (1984) (an administrative law judge may not accord a reading, properly classified for the presence or absence of pneumoconiosis, less weight because he finds it compromised, based on its quality reading). We must vacate, therefore, the administrative law judge's discrediting of Dr. Wheeler's negative x-ray readings.

Because the administrative law judge relied on his weighing of Dr. Wheeler's x-ray interpretations to accord greater weight to Dr. DePonte's positive readings, and to discredit the medical opinions of Drs. Dahhan and Jarboe on the issues of the existence of clinical pneumoconiosis and total disability due to pneumoconiosis, we must also vacate these findings and remand this case to the administrative law judge for reconsideration of rebuttal of the amended Section 411(c)(4) presumption. On remand, the administrative law judge must first consider whether employer has affirmatively proved that claimant does not have either clinical or legal pneumoconiosis.[9] *See* 30 U.S.C. §921(c)(4); 65 Fed Reg. 59,102, 59,106 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(1)(i), (ii)); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. The administrative law judge's analysis of this method of rebuttal must begin with a weighing

[9] If the administrative law judge determines that employer cannot disprove the existence of one of the two types of pneumoconiosis, he need not address the other type of pneumoconiosis. However, the administrative law judge should make clear the type of pneumoconiosis to which his findings pertain. In addition, if the administrative law judge decides to address whether employer has affirmatively established that claimant does not have legal pneumoconiosis, he must consider the narrative x-ray interpretations of other diseases noted by Dr. Wheeler, and other doctors of record, and make findings regarding their relevancy in disproving the presumed existence of legal pneumoconiosis.

of all of the x-ray evidence, including Dr. Dahhan's negative reading of the film dated November 1, 2011, which he appeared to omit from his summary of the newly submitted x-ray readings. Decision and Order at 4; Employer's Exhibit 1. The administrative law judge is required to make a finding as to whether each x-ray is positive, negative, or inconclusive for pneumoconiosis, before determining whether the totality of the x-ray evidence is sufficient to establish the absence of pneumoconiosis. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148-149, 11 BLR 2-1, 2-8 (1987); *Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61-62 (4th Cir. 1992).

The administrative law judge must then reconsider the medical opinions of record relevant to the existence of pneumoconiosis, consisting of the reports of Drs. Dahhan, Jarboe, Majmudar, and Klayton, in light of his findings regarding the x-ray evidence. In assigning weight to the medical opinions, the administrative law judge must render a finding on each of the factors relevant to their probative value, including the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997).

The administrative law judge must set forth all of his findings on remand in detail, including the underlying rationale, as required by the Administrative Procedure Act.[10] *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If the administrative law judge finds that employer has not rebutted the presumed fact that claimant has pneumoconiosis, he must reconsider his finding that employer failed to establish rebuttal by proving that claimant's total disability did not arise out of, or in connection with, his coal mine employment, based on his reconsideration of the x-ray and medical opinion evidence on the issue of the existence of pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 65

[10] The Administrative Procedure Act requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all 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 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

Fed Reg. 59,102, 59,115 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305(d)(1)(ii)); *Barber*, 43 F.3d at 901, 19 BLR at 2-67; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44.

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