BRB No. 13-0303 BLA

DOUGLAS E. STONE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	
	)	DATE ISSUED: 03/19/2014
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 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.

Ronald E. Gilbertson (Husch Blackwell LLP), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (11-BLA-5936) of Administrative Law Judge Daniel F. Solomon awarding benefits 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 subsequent claim filed on August 24, 2010.[1]

[1] Claimant's previous claim, filed on July 29, 2008, was finally denied by the district director because claimant failed to establish any element of entitlement. Director's Exhibit 1.

Applying amended Section 411(c)(4), 30 U.S.C. §921(c)(4),[2] the administrative law judge accepted the parties' stipulation to at least twenty-eight years of surface coal mine employment.[3] The administrative law judge further found that at least fifteen years of claimant's surface coal mine employment occurred in conditions substantially similar to those in an underground coal mine. The administrative law judge, therefore, found that claimant established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. The administrative law judge further found that the new evidence established that claimant has a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2).[4] The administrative law judge, therefore, found that claimant invoked the rebuttable presumption set forth at Section 411(c)(4). Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in crediting claimant with fifteen years of qualifying coal mine employment and, therefore, erred in

[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 qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012). The Department of Labor revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. We will indicate when a regulatory citation in this decision refers to a regulation as it appears in the September 25, 2013 Federal Register. Otherwise, all regulations cited in this decision may be found in 20 C.F.R. Parts 718, 725 (2013).

[3] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6 at 4. 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 (1989) (en banc).

[4] The administrative law judge did not specify whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant did not establish total disability in his previous claim, the administrative law judge's finding that claimant established total disability with new evidence constitutes a determination of a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

determining that claimant invoked the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption.[5] 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. In a reply brief, employer reiterates its previous contentions.

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).

Invocation of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment for the purpose of invoking the Section 411(c)(4) presumption. Employer specifically argues that claimant presented no evidence "that his surface mining conditions were, in fact, substantially similar to conditions faced by miners in underground [coal mine] employment." Employer's Brief at 8.

Subsequent to the issuance of the administrative law judge's Decision and Order, the Department of Labor promulgated regulations implementing amended Section 411(c)(4). 78 Fed. Reg. 59,102 (Sept. 25, 2013). Those regulations provide that "[t]he conditions in a mine other than an underground mine will be considered 'substantially similar' to those in an underground mine if the claimant demonstrates that the miner was regularly exposed to coal-mine dust while working there."[6] 78 Fed. Reg. at 59,114 (to be

[5] Because employer does not challenge the administrative law judge's determination that the new evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2), and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, this determination is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[6] The comments accompanying the Department of Labor's regulations further clarify claimant's burden in establishing substantial similarity:

> [T]he claimant need only focus on developing evidence addressing the dust conditions prevailing at the non-underground mine or mines at which the miner worked. The objective of this evidence is to show that the miner's duties regularly exposed him to coal mine dust, and thus that the miner's work conditions approximated those at an underground mine. The term

codified at 20 C.F.R. §718.305(b)(2)); *see also Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509, 512-13 (7th Cir. 1988).

The administrative law judge initially accepted employer's stipulation that claimant worked for twenty-eight years as a surface miner, noting that claimant held the positions of coal loader, equipment operator, and bulldozer operator. Decision and Order at 2, 4. The administrative law judge then considered whether claimant established that he "was exposed to sufficient coal dust in his surface coal mine employment." *Id.* at 4. The administrative law judge noted that claimant testified that his position as a coal loader was "real dusty," exposing him "to constant dust, 11-12 hours a day." *Id.* The administrative law judge further noted that claimant's testimony that, in his earlier coal mine work, he was exposed to overburden and slate dust. *Id.* The administrative law judge also noted that claimant testified that "the cabs on [the] vehicles he operated were 'open' cabs, without air conditioning." *Id.* The administrative law judge found that claimant's testimony regarding the dusty conditions of his employment was "credible," and was corroborated by coal mine employment histories set forth in the medical reports of record. *Id*.

Employer argues that the administrative law judge erred in failing to explain "how he determined that the mere presence [of] dust exposure was equivalent to underground coal mine employment." Employer's Brief at 13. However, claimant needed only establish that his surface coal mine employment regularly exposed him to coal mine dust. 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.305(b)(2)); *Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, F.3d , 2014 WL 804008 at *11 (10th Cir. March 3, 2014); *Leachman*, 855 F.2d at 512-13. Contrary to employer's contention, therefore, the administrative law judge did not need to explain how the "constant" exposure to coal dust that claimant described was equivalent to the coal dust exposure found in underground coal mine employment. *Id.*

> "regularly" has been added to clarify that a demonstration of sporadic or incidental exposure is not sufficient to meet the claimant's burden. The fact-finder simply evaluates the evidence presented, and determines whether it credibly establishes that the miner's non-underground mine working conditions regularly exposed him to coal mine dust. If that fact is established to the fact-finder's satisfaction, the claimant has met his burden of showing substantial similarity.

78 Fed. Reg. at 59,105; *see also Antelope Coal Co./Rio Tinto Energy Am. v. Goodin*, F.3d , 2014 WL 804008 at *10 (10th Cir. March 3, 2014) (recognizing that the provision set forth at 20 C.F.R. §718.305(b)(2) did not change existing law).

In this case, the administrative law judge permissibly relied upon claimant's uncontradicted testimony, as corroborated by the histories that claimant provided to the physicians of record, in finding that, for at least fifteen of his twenty-eight years of surface coal mine employment, claimant was regularly exposed to coal mine dust. 78 Fed. Reg. at 59,114 (to be codified at 20 C.F.R. §718.305(b)(2)); *See Goodin*, 2014 WL 804008 at *11; *Leachman*, 855 F.2d at 512-13. Because it is based upon substantial evidence,[7] we affirm the administrative law judge's finding that claimant established at least fifteen years of employment in surface mining with dust conditions substantially similar to those found in underground mines. 20 C.F.R. §718.305(b)(2).

In light of our affirmance of the administrative law judge's findings that claimant established at least fifteen years of qualifying coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2), we affirm the administrative law judge's determination that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4). 30 U.S.C. §921(c)(4).

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

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)); *Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). The administrative law judge found that employer failed to establish rebuttal by either method. Specifically, the administrative law judge found that employer

[7] Employer accurately notes that claimant testified that, during his last job as a coal loader, he worked in an enclosed cab with air conditioning and heating. Director's Exhibit 6 at 6. Although Dr. Brooks, employer's physician, similarly noted that claimant worked in an enclosed cab during this time (2001-2006), the doctor noted that claimant wore no respiratory protection. Employer's Exhibit 3. Moreover, even if this five-year period of surface mining were excluded, there is no evidence calling into question the administrative law judge's determination that claimant was regularly exposed to coal-mine dust during his previous twenty-three years of surface coal mine employment. Consequently, the administrative law judge's error, if any, in not specifically addressing whether claimant was regularly exposed to coal mine dust while working in an enclosed cab for five years was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

failed to disprove the existence of clinical and legal pneumoconiosis.[8] The administrative law judge also found that employer failed to disprove a causal relationship between claimant's disability and his pneumoconiosis.

In addressing whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge considered nine interpretations of three x-rays taken on September 7, 2010, June 5, 2012, and September 23, 2012. Considering the x-ray evidence, the administrative law judge noted that each of the x-rays was interpreted as both positive and negative by dually-qualified readers, and concluded that the x-ray evidence was "at best in equipoise" and, thus, insufficient to carry employer's burden to disprove the existence of clinical pneumoconiosis. Decision and Order at 6.

Although employer does not challenge the administrative law judge's finding that the above-referenced x-ray interpretations are "in equipoise," employer contends that the administrative law judge failed to address all of the relevant x-ray evidence. Specifically, employer argues that the administrative law judge failed to consider three contemporaneous x-ray interpretations contained in claimant's treatment records (Dr. Prieto's interpretation of a January 11, 2011 x-ray, Dr. Trigg's interpretation of a January 13, 2011 x-ray, and Dr. Willard's interpretation of a March 4, 2012 x-ray). Claimant's Exhibit 7. Because the three x-ray interpretations do not mention pneumoconiosis,[9] employer asserts that they should have been considered negative for clinical pneumoconiosis.

The significance of x-ray readings that contain no mention of pneumoconiosis is a question committed to the discretion of the administrative law judge in his role as fact-finder. *Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). Although the administrative law judge noted that claimant's treatment records "contain a number of chest x-ray reports, none of which describe the process of coal workers' pneumoconiosis," Decision and Order at 5, he failed to address the significance of this x-

[8] "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). "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).

[9] The record also contains Dr. Abdalla's interpretation of a February 23, 2012 x-ray. Claimant's Exhibit 5. Like the other three x-ray interpretations, it makes no mention of pneumoconiosis.

ray evidence in regard to employer's burden to disprove the existence of clinical pneumoconiosis. Consequently, the administrative law judge's analysis does not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), which requires that every adjudicatory decision include 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). Because the administrative law judge failed to adequately address all of the relevant evidence, we must vacate his finding that employer failed to disprove the existence of clinical pneumoconiosis, and remand this case for the administrative law judge to reconsider this issue. *See Director, OWCP v. Rowe*, 710 F. 2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Employer argues further that the administrative law judge erred in his consideration of the CT scan evidence. Dr. Abdalla interpreted a March 19, 2012 CT scan as revealing chronic obstructive pulmonary disease, but did not mention clinical pneumoconiosis. Claimant's Exhibit 5. The administrative law judge found that the CT scan evidence did not rule out clinical pneumoconiosis because the follow-up x-rays were "not conclusive, and are at best in equipoise." Decision and Order at 6. In light of our decision to remand the case for the administrative law judge to reconsider the x-ray evidence, *Marra*, 7 BLR at 1-218-19, his basis for discounting the CT scan evidence cannot stand. We, therefore, vacate the administrative law judge's finding that the CT scan evidence did not assist employer in disproving the existence of clinical pneumoconiosis, and remand the case for further consideration.

Employer also submitted the medical opinions of Drs. Brooks and Jarboe in support of its burden to disprove the existence of clinical pneumoconiosis.[10] The administrative law judge discounted the opinions of Drs. Brooks and Jarboe, that claimant does not suffer from clinical pneumoconiosis, because they based their conclusions on a belief that the overall weight of the x-ray evidence is negative for

[10] Employer argues that the administrative law judge erred in not addressing medical evidence from the prior claim. Employer, however, has not explained how medical evidence from the prior claim, which predates claimant's invocation of the rebuttable presumption of total disability due to pneumoconiosis, is relevant to whether employer has rebutted the presumption. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988) (holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982). Thus, under the facts of this case, we find no error in the administrative law judge's decision not to discuss the prior claim evidence at rebuttal.

pneumoconiosis, contrary to the administrative law judge's finding that the x-ray evidence, as a whole, is in equipoise. Decision and Order at 8; Employer's Exhibits 2, 3, 13. However, in light of our decision to remand the case for reconsideration of the x-ray evidence, the basis for the administrative law judge's finding cannot stand. We, therefore, vacate the administrative law judge's finding that the medical opinion evidence does not disprove the existence of clinical pneumoconiosis, and remand the case for further consideration.

Employer also contends that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. In addressing whether employer disproved the existence of legal pneumoconiosis, the administrative law judge considered the medical opinions of Drs. Jarboe, Brooks, and Baker. Dr. Jarboe opined that claimant does not have any pulmonary disease caused by, aggravated by, or substantially contributed to by, his coal mine dust exposure, but suffers from "obesity hypoventilation syndrome" due to morbid obesity. Employer's Exhibits 2, 13. Dr. Jarboe also attributed claimant's pulmonary impairment to bronchial asthma and sleep apnea. *Id.* Dr. Brooks diagnosed claimant with chronic obstructive pulmonary disease (COPD) and asthma, but did not specifically address whether those diseases were related to coal mine dust exposure. Employer's Exhibit 3. Dr. Brooks, however, opined that claimant's respiratory impairment is "not due to coal workers' pneumoconiosis. . . ." Employer's Exhibit 3 at 6. Dr. Baker diagnosed legal pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) and chronic bronchitis, each of which he attributed to coal mine dust exposure and cigarette smoking. Director's Exhibit 12.

Employer argues that the administrative law judge failed to properly resolve the conflicting medical opinion evidence regarding the existence of legal pneumoconiosis. We agree. In finding that the medical opinion evidence did not disprove the existence of legal pneumoconiosis, the administrative law judge concluded, without explanation, that Dr. Baker's opinion was "better reasoned." Decision and Order at 6. The administrative law judge neither addressed whether Dr. Baker's diagnosis was adequately reasoned, nor weighed Dr. Baker's opinion against that of Dr. Jarboe. The administrative law judge's conclusory analysis, that the medical opinion evidence is insufficient to disprove the existence of legal pneumoconiosis,[11] does not comply with the APA. 5 U.S.C. §557(c)(3)(A); *see Wojtowicz*, 12 BLR 1-165. Consequently, we must vacate the

[11] The administrative law judge stated that he questioned Dr. Jarboe's reliance, in part, on the reversibility of claimant's pulmonary impairment after bronchodilator administration, to exclude coal mine dust exposure as a cause of that impairment. Decision and Order at 6. However, a review of Dr. Jarboe's medical reports does not reveal that the doctor used that factor as a basis to exclude coal mine dust exposure as a cause of claimant's pulmonary impairment. Employer's Exhibits 2, 13.

administrative law judge's finding that the medical opinion evidence was insufficient to disprove the existence of legal pneumoconiosis, and remand this case for the administrative law judge to address whether employer has affirmatively established that claimant does not suffer from, legal pneumoconiosis.[12] 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

Upon finding that employer failed to disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer established rebuttal by showing that claimant's disabling pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment, pursuant to 30 U.S.C. §921(c)(4). To establish rebuttal by this method, employer must establish "that no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in §718.201." 78 Fed. Reg. at 59,115 (to be codified at 20 C.F.R. §718.305(d)(1)(ii)). The administrative law judge discounted the opinions of Drs. Jarboe and Brooks, that claimant's disabling pulmonary impairment did not arise out of his coal mine employment, because the physicians, contrary to the administrative law judge's finding, did not diagnose pneumoconiosis. Decision and Order at 7. However, in light of our decision to vacate the administrative law judge's finding that employer failed to disprove the existence of clinical and legal pneumoconiosis, the administrative law judge's basis for discounting the disability causation opinions of Drs. Jarboe and Brooks cannot stand. Consequently, we vacate the administrative law judge's finding that employer failed to establish rebuttal of the Section 411(c)(4) presumption, and remand this case to the administrative law judge for him to address whether employer has affirmatively established that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[13] 30 U.S.C. §921(c)(4); *see Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

[12] On remand, the administrative law judge is instructed to address whether Dr. Brooks' opinion is sufficient to disprove the existence of legal pneumoconiosis.

[13] Employer accurately notes that Dr. Jarboe explained that his opinion, that claimant's disabling pulmonary impairment is not due to pneumoconiosis, would not change even if he assumed that claimant suffered from simple pneumoconiosis. Employer's Brief at 23; Employer's Exhibits 2, 13. On remand, should the administrative law judge find it necessary to address whether employer can prove that no part of claimant's pulmonary total disability was caused by pneumoconiosis, where the physician did not diagnose pneumoconiosis, the administrative law judge should address the entirety of Dr. Jarboe's opinion. *See Big Branch Res., Inc. v. Ogle*, 737 F.3d 1063 (6th Cir. 2013).

Accordingly, the administrative law judge's Decision and Order awarding 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.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge