BRB No. 13-0462 BLA

WILLIAM J. YOURICH	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 05/14/2014
	)	
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 Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, Pennsylvania, for claimant.

Christopher Pierson (Burns White LLC), Pittsburgh, Pennsylvania, for employer.

Rebecca J. Fiebig (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 (2012-BLA-5259) of Administrative Law Judge Thomas M. Burke (the administrative law judge) awarding benefits on a

subsequent claim[1] filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 28 years in underground coal mine employment, based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Parts 718 and 725. The administrative law judge also accepted employer's concession of total respiratory disability. Consequently, the administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Further, the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012). The administrative law judge also found that employer did not establish rebuttal of the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that it failed to establish rebuttal of the amended Section 411(c)(4) presumption by showing the absence of clinical pneumoconiosis and total disability due to pneumoconiosis. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he is not submitting a substantive response, unless specifically requested to do so by the Board. However, the Director maintains that employer "wrongly suggests" that it may rebut the presumption at amended Section 411(c)(4) solely by establishing that claimant does not have clinical pneumoconiosis.[2]

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, is rational, and is in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the

[1] Claimant filed his first claim on October 4, 1994. Director's Exhibit 1. It was finally denied by a claims examiner on February 21, 1995 because claimant failed to establish any of the elements of entitlement. *Id*. Claimant filed his second claim (a duplicate claim) on March 22, 1996. Director's Exhibit 2. It was finally denied by a claims examiner on August 6, 1996 because claimant failed to establish any of the elements of entitlement, and thus failed to establish a material change in conditions. *Id*. Claimant filed this claim (a subsequent claim) on January 12, 2011. Director's Exhibit 4.

[2] Because the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 is not challenged on appeal, we affirm this finding. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record indicates that claimant was employed in the coal mining industry in Pennsylvania. Director's Exhibits 1, 2, 5, 7. Accordingly, the law of the United States

Act 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

In 2010, Congress enacted 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 living miner's claim, 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 15 or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4) (2012).

We affirm the administrative law judge's application of amended Section 411(c)(4) to this claim, as it was filed after January 1, 2005, and was pending after March 23, 2010. 30 U.S.C. §921(c)(4) (2012). We also affirm the administrative law judge's finding that claimant is entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) because he established 15 or more years of qualifying coal mine employment and total respiratory disability, as supported by substantial evidence.[4] *Id*.

Court of Appeals for the Third Circuit is applicable. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

[4] Employer asserts that the administrative law judge erred in failing to consider whether claimant's pneumoconiosis arose out of his coal mine employment under amended Section 411(c)(4). Contrary to employer's assertion, the presumption at amended Section 411(c)(4) presumes the element of disease causation. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305). Moreover, the element of disease causation may be rebutted. 78 Fed. Reg. 59,102, 59,106, 59,115 (Sept. 25, 2013). Employer points to no evidence that could establish rebuttal by establishing that claimant's clinical pneumoconiosis did not arise out of his coal mine employment. Thus, we reject employer's assertion that the administrative law judge erred in failing to consider whether claimant's pneumoconiosis arose out of his coal mine employment under amended Section 411(c)(4), either affirmatively or on rebuttal. *Id*.

Because claimant invoked the presumption of total disability due to pneumoconiosis at amended 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) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)). The administrative law judge found that employer failed to establish rebuttal by either method.

Employer contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by showing the absence of clinical pneumoconiosis. The administrative law judge considered the x-ray and medical opinion evidence. At Section 718.202(a)(1), the administrative law judge found that the May 24, 1996, February 23, 2011, August 4, 2011, and November 18, 2011 x-rays were inconclusive for pneumoconiosis.[5] While the administrative law judge found that the October 27, 1994 x-ray was negative for pneumoconiosis,[6] he found that the June 23, 2011 and July 18, 2011 x-rays were positive.[7] The administrative law judge gave greater weight to the positive x-rays dated June 23, 2011 and July 18, 2011 than to the negative x-ray dated October 27, 1994 "as more recent x-ray evidence of [coal workers' pneumoconiosis (CWP)] is entitled to greater weight, given that CWP is a

[5] Dr. Wilson, a dually-qualified B reader and Board-certified radiologist, read the May 24, 1996 x-ray as positive for pneumoconiosis, while Dr. Franche, a dually-qualified radiologist, read this x-ray as negative. Director's Exhibit 2. Similarly, Dr. Ahmed, a dually-qualified radiologist, read the February 23, 2011 x-ray as positive for pneumoconiosis, Director's Exhibit 13, while Dr. Wolfe, a dually-qualified radiologist, read this x-ray as negative, Director's Exhibit 17. In addition, Dr. Ahmed read the August 4, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, while Dr. Wolfe read this x-ray as negative, Employer's Exhibit 3. Lastly, Dr. Ahmed read the November 18, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 6, while Dr. Wolfe read this x-ray as negative, Employer's Exhibit 4.

[6] Drs. Franche, Herbick, McMahon, Palmer and Wolfe, dually-qualified radiologists, read the October 27, 1994 x-ray as negative for pneumoconiosis. Director's Exhibit 1.

[7] Dr. Ahmed, a dually-qualified radiologist, read the June 23, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 9, while Dr. Fino, a B reader, read this x-ray as negative, Director's Exhibit 14. Similarly, Dr. Ahmed read the July 18, 2011 x-ray as positive for pneumoconiosis, Claimant's Exhibit 4, while Dr. Kaplan, a B reader, read this x-ray as negative, Director's Exhibit 15.

progressive and irreversible disease process." Decision and Order at 17. The administrative law judge then stated, "[b]ecause it is [e]mployer's burden to rebut the presumption of clinical pneumoconiosis, and the weight of the chest x-ray evidence remains inconclusive, I find that the weight of the chest x-ray evidence fails to rebut the presumption of clinical pneumoconiosis."[8] *Id*.

Regarding Section 718.202(a)(4), the administrative law judge considered the opinions of Drs. Begley, Fino, and Kaplan that claimant does not have clinical pneumoconiosis. The administrative law judge gave no weight to Dr. Begley's opinion because he found that it was "poorly" reasoned. The administrative law judge gave little weight to Dr. Fino's opinion because he found that it was based on an incomplete picture of claimant's health. Further, the administrative law judge gave no weight to Dr. Kaplan's opinion because he found that it was not reasoned, "[g]iven that the x-ray evidence as a whole does not support a finding that [c]laimant does not have clinical pneumoconiosis." Decision and Order at 17. Hence, the administrative law judge found that the medical opinion evidence did not establish that claimant does not have clinical pneumoconiosis.

Based on the x-ray and medical opinion evidence, the administrative law judge found that employer failed to rebut the presumption at amended Section 411(c)(4) by establishing that claimant does not have pneumoconiosis.

Employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Begley and Kaplan on the ground that they relied on negative x-ray readings in concluding that claimant does not have clinical pneumoconiosis because, employer alleges, "[the administrative law judge] did not find that the weight of the chest x-ray evidence established the existence of pneumoconiosis"; rather, he found the evidence inconclusive. Employer's Brief at 19. Contrary to employer's assertion, the administrative law judge permissibly accorded no weight to Dr. Begley's opinion because it was "poorly reasoned, as it is not adequately supported by the evidence of record."[9] Decision and Order at 17; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155;

[8] Because the administrative law judge's finding that the weight of the chest x-ray evidence failed to rebut the presumption of clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1) is not challenged on appeal, we affirm this finding. *See Skrack*, 6 BLR at 1-711.

[9] The administrative law judge stated that "Dr. Begley's opinion was based on his own interpretation of the November 2011 x-ray, however, which was not in evidence, and as noted just *supra*, I found that x-ray to be inconclusive for the presence of pneumoconiosis, so it should not be used to support a finding that [c]laimant does not have pneumoconiosis." Decision and Order at 17.

(1989)(en banc); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985). Further, the administrative law judge permissibly accorded no weight to Dr. Kaplan's opinion that claimant does not have clinical pneumoconiosis because, while it was based, in part, on a negative x-ray reading, the administrative law judge found that the weight of the x-ray evidence, as a whole, was inconclusive. *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Thus, we reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Begley and Kaplan on the ground that they relied on negative x-ray readings in concluding that claimant does not have clinical pneumoconiosis.

Employer also asserts that the administrative law judge erred in discrediting Dr. Fino's opinion that claimant does not have clinical pneumoconiosis "because [Dr. Fino] did not have 'any' of Dr. Ahmed's chest x-ray reinterpretations." Employer's Brief at 20. We disagree. It is within the administrative law judge's discretion, as the trier-of-fact, to determine the weight and credibility to be accorded the medical experts, *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Sisak v. Helen Mining Co.*, 7 BLR 1-178, 1-181 (1984), and to assess the evidence of record and draw his own conclusions and inferences from it. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). In this case, the administrative law judge determined that "[Dr. Fino's] opinion was based on an incomplete picture of the evidence, "as [Dr. Fino] had not seen any of Dr. Ahmed's x-ray readings,[10] and had seen only the February 2011 reading by Dr. Wolfe." Decision and Order at 17. The administrative law judge stated that "[Dr. Fino] noted that his own reading was 'consistent with four other readings and inconsistent with one,' which is very different from the evidence as it currently stands; indeed, Dr. Fino's reading of the June 2011 x-ray was discredited *supra* in favor of Dr. Ahmed's positive one."[11] *Id*. Thus, the administrative law judge permissibly gave little weight to Dr.

[10] During an October 31, 2012 deposition, Dr. Fino stated: "If I had had a 1/0 x-ray, it would not have changed my opinion. Starting at 1/1 or greater, it probably would – not probably, that's not fair. It would have changed my opinion based on the article by Dr. Leigh. So if I had read this x-ray as 1/1 or 1/2 or higher, obviously, I would – I would say that I could not rule out coal mine dust as being a significant contributing factor to his disability." Employer's Exhibit 6 (Dr. Fino's Depo. at 25-26).

[11] As discussed, *supra*, Dr. Ahmed, who is dually-qualified as a B reader and Board-certified radiologist, read x-rays dated February 23, 2011, June 23, 2011, July 18, 2011, August 4, 2011, and November 18, 2011 as positive for pneumoconiosis. Director's Exhibit 13; Claimant's Exhibits 4, 5, 6, 9. Although Dr. Fino listed Dr. Ahmed's 1/1 ILO classification of the February 23, 2011 x-ray in the chest x-ray charts of his July 18, 2011 and June 18, 2012 reports, he did not mention this x-ray reading in his October 31, 2012 deposition. In his reports and deposition, Dr. Fino indicated that he

Fino's opinion because it was based on an incomplete picture of claimant's health. *See Stark*, 9 BLR at 1-37; *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984). Consequently, we reject employer's assertion that the administrative law judge erred in discrediting Dr. Fino's opinion that claimant does not have clinical pneumoconiosis.

Because the administrative law judge permissibly discredited the only medical opinions of record that could carry employer's burden on rebuttal,[12] we affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by establishing the absence of pneumoconiosis.[13] 30 U.S.C. §921(c)(4) (2012).

Employer next contends that the administrative law judge erred in finding that it failed to establish rebuttal of the presumption at amended Section 411(c)(4) by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in

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relied on *his* negative reading of the June 23, 2011 x-ray to opine that claimant does not have clinical pneumoconiosis. Director's Exhibit 14; Employer's Exhibits 1, 6.

[12] Employer asserts that the administrative law judge erred in failing to consider Dr. Schaaf's opinion because "[he] reported and testified that [c]laimant had a negative chest x-ray taken as part of his evaluation on August 4, 2011." Employer's Brief at 20. Employer also asserts that the administrative law judge erred in failing to consider the hospital records because "[n]owhere in the reports was there a diagnosis of pneumoconiosis." *Id*. In the assessment section of an August 4, 2011 report, Dr. Schaaf noted, "abnormal chest x-ray consistent with pneumoconiosis, atypical but not inconsistent with coal mine dust exposure." Claimant's Exhibit 1. During a November 16, 2012 deposition, Dr. Schaaf stated that, even in light of a 0/1 x-ray reading, "[a miner] can still have a normal x-ray and have physiologic and functional abnormalities due to coal dust." Claimant's Exhibit 7 (Dr. Schaaf's Depo. at 16). Dr. Schaaf further stated, "I'm asked to decide whether the x-ray is consistent with pneumoconiosis. The answer to the question is yes." Claimant's Exhibit 7 (Dr. Schaaf's Depo. at 47). Regarding the hospital records, employer does not point to a physician's opinion that claimant does not have clinical pneumoconiosis. Because Dr. Schaaf's opinion and the hospital records are insufficient to carry employer's burden on rebuttal of proving the absence of clinical pneumoconiosis, 30 U.S.C. §921(c)(4) (2012), we reject employer's assertion that the administrative law judge erred in failing to consider Dr. Schaaf's opinion and the hospital records.

[13] Employer's failure to disprove the existence of clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,115 (Sept. 25, 2013)(to be codified at 20 C.F.R. §718.305(d)).

connection with," coal mine employment. Specifically, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Fino and Kaplan because they did not diagnose clinical pneumoconiosis. The administrative law judge considered the opinions of Drs. Fino and Kaplan. Drs. Fino and Kaplan opined that coal mine dust did not play any role in claimant's impairment or disability. Director's Exhibit 14; Employer's Exhibits 1, 6 (Dr. Fino's Depo. at 12-13), 7 (Dr. Kaplan's Depo. at 14). In addressing employer's burden with regard to the issue of disability causation, the administrative law judge noted that, "[w]hile Drs. Fino and Kaplan attributed [c]laimant's disability to non-coal-dust etiologies, such as his smoking history, they also opined that [c]laimant did not have clinical pneumoconiosis." Decision and Order at 18. The administrative law judge permissibly discredited the disability causation opinions of Drs. Fino and Kaplan because the doctors opined that claimant does not have clinical pneumoconiosis, contrary to the administrative law judge's finding on this issue. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, we reject employer's assertion that the administrative law judge erred in discrediting the opinions of Drs. Fino and Kaplan on this basis. We, therefore, affirm the administrative law judge's finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.

Because the administrative law judge properly found that employer failed to establish rebuttal of the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), we affirm the administrative law judge's award of benefits.

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