BRB No. 10-0672 BLA

MILDRED MOSKO (o/b/o JOHN A. MOSKO) Claimant-Respondent v. EIGHTY FOUR MINING COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 11/09/2012 DECISION and ORDER on RECONSIDERATION EN BANC

Appeal of the Decision and Order Awarding Benefits of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Lynda D. Glagola (Lungs at Work), McMurray, Pennsylvania, for claimant.

William S. Mattingly (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: DOLDER, Chief Administrative Appeals Judge, SMITH, McGRANERY, HALL, and BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer has filed a timely Motion for Reconsideration and Rehearing En Banc, requesting that the Board reconsider its Decision and Order dated September 27, 2011, with respect to a miner's subsequent claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011) (the Act). In that

decision, the majority of the three-judge panel affirmed the administrative law judge's finding that, because the miner's employment aboveground from 1966 to 1976 was substantially similar to underground coal mine employment, he had the fifteen years of qualifying coal mine employment[1] necessary to invoke the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). Since employer did not dispute the administrative law judge's additional finding that the miner had a totally disabling respiratory impairment, the majority 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. *Mosko v. Eighty Four Mining Co.*, BRB No. 10-0672 BLA, slip op. at 4-8 (Sept. 27, 2011)(Dolder, C.J., concurring and dissenting)(unpub.). The majority rejected employer's allegations of error in the administrative law judge's evaluation of the medical evidence regarding rebuttal, and affirmed his finding that employer failed to rebut the presumption. *Id.* at 8-12. Accordingly, the majority affirmed the award of benefits.

Chief Judge Dolder issued a separate opinion, concurring and dissenting, agreeing with the majority's determinations that it was proper for the administrative law judge to apply amended Section 411(c)(4), and that the administrative law judge did not err in weighing the x-ray and medical opinion evidence. However, Judge Dolder opined that the administrative law judge's finding of at least fifteen years of qualifying coal mine

[1] The record indicates that the miner's coal mine employment was in Pennsylvania. Director's Exhibits 7, 8; Hearing Transcript 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] It is undisputed that the miner had seven to eight years of underground coal mine employment. The administrative law judge found, and the majority affirmed, that the miner had at least fifteen years of qualifying coal mine employment when his aboveground and underground employment were combined. As the Board summarized in its decision, Congress enacted amendments to the Act, which became effective on March 23, 2010, affecting claims filed after January 1, 2005. Relevant to this miner's claim, Section 1556 of Public Law No. 111-148 reinstated the presumption of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Under Section 411(c)(4), if a miner 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 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 (2010) (codified at 30 U.S.C. §921(c)(4)).

employment did not satisfy 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), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), because the administrative law judge did not explain how he determined that the miner's 1966 to 1976 aboveground work, where he was exposed to welding fumes and flux, was substantially similar to underground coal mine employment. Further, Judge Dolder indicated that she would hold that the administrative law judge did not explain how he determined that the miner's 1976-79 aboveground employment, which the miner indicated involved either no dust exposure, or dust exposure at a level of "1" out of "10," was substantially similar to underground mining. Therefore, Judge Dolder would have vacated the administrative law judge's finding of fifteen years of qualifying coal mine employment, and remanded the case for further consideration. Further, Judge Dolder stated that she would vacate the finding that employer did not establish rebuttal, and would instruct the administrative law judge to consider all of the CT scan evidence, as it was relevant to whether employer disproved the existence of pneumoconiosis. *Mosko*, slip op. at 13-15.

Employer seeks reconsideration of the Board's holding that substantial evidence supports the administrative law judge's finding that the miner had fifteen years of qualifying coal mine employment, and of its holding that remand is not required for the administrative law judge to consider all of the CT scan evidence regarding whether employer disproved the existence of pneumoconiosis. Neither claimant, nor the Director, Office of Workers' Compensation Programs (the Director), has responded to employer's motion.

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).

Coal Mine Employment

On reconsideration, employer contends that the Board erred in affirming the administrative law judge's finding of fifteen years of qualifying coal mine employment. Employer's contention has merit. Because the administrative law judge has not adequately explained his finding that the miner's aboveground work was substantially similar to underground mining, his finding of fifteen years of qualifying coal mine employment does not satisfy the standard of the APA. *See* 5 U.S.C. §557(c)(3)(A). Therefore, we must vacate that finding, and his finding that claimant established invocation of the presumption of total disability due to pneumoconiosis at Section 411(c)(4). We remand this case for the administrative law judge to evaluate the coal mine employment evidence, render a specific, detailed finding, and explain whether the

miner had at least fifteen years of qualifying coal mine employment. *See* 5 U.S.C. §557(c)(3)(A), *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Specifically, on remand, the administrative law judge must explain how he determined that the miner's aboveground work was "substantially similar" to underground coal mine employment pursuant to Section 411(c)(4). The administrative law judge, on remand, should assess the coal mine employment evidence in light of *Williamson Shaft Contracting Co. v. Phillips*, 794 F.2d 865 (3d Cir. 1986). *See also Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011); *Crow v. Peabody Coal Co.*, 11 BLR 1-54, 1-56 (1988); *Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100 (1987).

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

We next consider employer's challenge to the Board's holding that the administrative law judge's failure to discuss Dr. Meyer's negative CT scan reading constituted harmless error. Upon consideration of employer's argument, we also find merit in employer's assertion that the administrative law judge did not weigh all of the evidence relevant to whether employer rebutted the presumption, particularly the CT scan evidence. *See* 30 U.S.C. §923(b). Therefore, we vacate the administrative law judge's finding that employer did not rebut the presumption by establishing that the miner did not have pneumoconiosis. If, on remand, the administrative law judge finds that the Section 411(c)(4) presumption is invoked, he must consider all of the relevant evidence in determining whether employer has rebutted the presumption.

Accordingly, employer's Motion for Reconsideration and Rehearing En Banc, and the relief requested, are granted, the Board's Decision and Order of September 27, 2011, is vacated, 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

We concur.

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's decision upon reconsideration to vacate the panel's decision affirming the administrative law judge's award of benefits. The majority's determination to vacate the administrative law judge's decision and to remand the case for further discussion is both unnecessary and contrary to law. Because employer has offered no valid reason to disturb the administrative law judge's decision, I would deny employer's request for reconsideration.

First, the majority's order to remand the case for the administrative law judge to explain more fully his determination that claimant established at least fifteen years of qualifying coal mine employment pursuant to Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is unnecessary in view of employer's concession in its brief that claimant's aboveground coal mine employment from 1966 to 1981 was not at strip mines. Brief for Employer at 19.[3] That is significant because claimant must prove that his dust exposure

[3] Employer stated:

in aboveground coal mine employment is substantially similar to that in underground coal mine employment only when his aboveground employment is at a strip mine, not when he is employed aboveground at an underground mine. *Muncy v. Elkay Mining Co.*, 25 BLR 1-21 (2011).

In *Muncy*, the Board followed, at the Director's urging, its decision in *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497, 1-502 (1979)(Smith, Chairman, dissenting), holding that:

> [T]he dichotomy drawn in Section 411(c)(4) is "between types of mines (strip mines and underground mines) rather than work locations (above ground, below ground)." *Alexander*, 2 BLR at 1-503-04. The Board based that determination on both the language of Section 411(c)(4) referring to employment in an "underground mine" and in "a mine other than an underground mine," and the regulatory definitions of "coal mine" and "underground coal mine," which include the land and structures above the mine. *Alexander*, 2 BLR at 1-501-04. The Board concluded that Section 411(c)(4) distinguishes between "'an underground mine' and a 'mine other than an underground mine,'" thereby making "clear that the type of mine (underground or surface), rather than the location of the particular worker (surface or below the ground), is the element which determines whether a claimant is required to show comparability of conditions." *Alexander*, 2 BLR at 1-502.

Muncy, 25 BLR at 1-28-29 (footnotes omitted).

The Board reasoned in *Alexander* that proof of "substantially similar" conditions was not required for employment at the surface of an underground mine, because the statute provides that substantially similar conditions were to be determined when the miner worked "in a coal mine other than an underground mine." *Alexander*, 2 BLR at 1-502. The Board concluded that the statutory language "in one or more underground coal mines" included the land and buildings at an underground mine site because the regulatory definitions of "underground coal mine" and "coal mine" included all property on or above the mine site. *Id*. at 1-501-02. The Board found additional support for its

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> Mr. Mosko's coal mine employment occurred not at above ground strip mines, but at a general shop (1965 to 1966), welding locomotives (1966 to 1976), as a hydraulic repairman (1976 to 1979), and as a mechanic at a tipple.

Brief for Employer at 19. Employer stated that the miner's work at the tipple was from 1979 to 1981. Brief for Employer at 20; *see* Director's Exhibit 2.

reading of Section 411(c)(4) in the legislative history of the 1972 amendments to the Act, in which the Senate Committee on Labor and Public Welfare recommended extending the Act's coverage to strip miners, since the existing Act covered only underground miners and miners who worked aboveground at underground mines. *Id*. at 1-503-04.

The Board explained in *Muncy* that Section 1556 of Public Law No. 111-148 reinstated Section 411(c)(4) and that the amended Section 411(c)(4) contains language identical to that which the Board had construed in *Alexander*. *Muncy*, 25 BLR at 1-29. Also, the Board noted that the regulatory definitions of "coal mine" and "underground coal mine" remained the same in all relevant respects. *See* 20 C.F.R. §725.101(a)(12), (30). Since *Alexander* had not been overruled by a court or superseded by a subsequent Board decision, the Board held that *Alexander* applies to cases arising under amended Section 411(c)(4). Hence, since employer conceded that claimant's aboveground employment from 1966 to 1981 was not at a strip mine, claimant was not obliged to prove that his aboveground dust exposure was substantially similar to his underground dust exposure. *Alexander*, 2 BLR at 1-504.

When the evidence of claimant's coal mine employment from 1965 to 1981 is considered together with claimant's records reflecting underground coal mine employment from 1982 to 1986, and from 1995 to 1998, the validity of which employer has not challenged, it is clear that claimant has established more than the fifteen years of coal mine employment necessary to invoke the Section 411(c)(4) presumption of the Act, 30 U.S.C. §921(c)(4). Both employer's argument and the majority's order of remand rest on the assumption that claimant was required to prove that his dust exposure in his aboveground coal mine employment was substantially similar to the exposure underground. Since that assumption is false, there is no need for the administrative law judge to explain how he determined that claimant has established the fifteen years of qualifying coal mine employment necessary to invoke the Section 411(c)(4) presumption. As the Third Circuit observed in *Keating v. Director, OWCP*, 71 F.3d 118, 1124, 20 BLR 2-53, 2-63-64 (3d Cir. 1995), there is no need to remand the case where there is no contrary evidence and only one inference could reasonably be drawn from the record; in this case, that inference is that claimant had more than fifteen years of qualifying coal mine employment. *Accord Kowalchick v. Director, OWCP*, 893 F.2d 615, 624, 13 BLR 2-226, 2-242 (3d Cir. 1990)(holding remand unnecessary where the record supports only one conclusion).

Second, the majority's order to remand the case for the administrative law judge to discuss Dr. Meyer's negative CT scan reading is contrary to law because the majority has ignored the harmless error doctrine. The majority on reconsideration explicitly recognizes that the panel majority determined that the administrative law judge's failure to discuss Dr. Meyer's negative CT scan reading constituted harmless error. Yet without disputing that determination, the majority on reconsideration orders that the

administrative law judge's decision be vacated and the CT scan evidence reconsidered.[4] This order of the majority on reconsideration is unlawful because it contravenes the Board's statutory mandate to "determine appeals raising a substantial question of law or fact," 33 U.S.C. §921(b)(3), which requires appellant to show it was "adversely affected or aggrieved" by the administrative law judge's decision, 20 C.F.R. §802.201(a); and it contravenes the Board's obligation under the Administrative Procedure Act, 5 U.S.C. §706, to apply the rule of prejudicial error[5] as incorporated into the Act by 30 U.S.C. §932(a)[6] and 33 U.S.C. §919(d). Furthermore, the majority's order disregards long established Supreme Court teaching requiring the appellant in civil cases to demonstrate that an error is harmful. *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009). The Court has explained that "'[A litigant]…is entitled to a fair trial, but not a perfect one,' for there are no perfect trials." *Brown v. United States*, 411 U.S. 223, 231-32 (1973), *quoting Lutwak v. United States*, 344 U.S. 604, 619 (1953)(applying the harmless error rule in criminal cases).

In *Shinseki*, the Supreme Court discussed the importance of application of the harmless error rule in administrative cases. *Shinseki*, 556 U.S. at 406-10. The Court observed that failure to require proof that an error affected the judgment "encourages abuse of the judicial process and diminishes the public's confidence in the fair and effective operation of the judicial system." 556 U.S. at 409 (citation omitted). The determination of the Board majority on reconsideration to grant employer's request to vacate the administrative law judge's decision, even though employer has not attempted

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[4] The panel majority followed the example of the Third Circuit in *Morgan v. Covington Township*, 648 F.3d 172 (3d Cir. 2011), which rejected appellant's request for a new trial based on the district court's erroneous exclusion of appellant's proffered rebuttal testimony, because appellant failed to demonstrate that the court's error had affected his "substantial rights." From the Third Circuit's review of the record it was able to discern the reason appellant had failed to argue prejudicial error.

The Board's panel majority similarly reviewed the record to discern the reason employer had failed to argue prejudicial error. The administrative law judge had omitted discussion of not only Dr. Meyer's negative CT scan reading, but also of a positive reading of the same CT scan by an equally qualified reader. The conclusion is inescapable that the two readings cancel each other out.

[5] The Supreme Court has described Section 706 as an "administrative law…harmless error rule." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 659-60 (2007).

[6] The APA applies to the Black Lung Benefits Act "except as otherwise provided…by regulations of the Secretary." 30 U.S.C. §932(a).

to show it was harmed by the administrative law judge's omission, violates the Board's legal duty and invites disrespect for the system of Black Lung adjudication. *Id*.

In sum, I dissent from the order of the majority on reconsideration because both reasons which the majority has provided to vacate the administrative law judge's decision are invalid. First, as demonstrated above, it is unnecessary to remand the case for the administrative law judge to explain his determination that some of claimant's aboveground coal mine employment was in conditions substantially similar to underground coal mine employment so that he established the fifteen years of coal mine employment necessary to invoke the presumption. An analysis of the record under *Muncy* and *Alexander* could support no other conclusion. Second, the determination of the majority on reconsideration to vacate the administrative law judge's decision because he failed to discuss a CT scan reading, even though employer has not shown prejudicial error, is flatly contrary to law. 33 U.S.C. §921(b)(3), 20 C.F.R. §802.201(a); 5 U.S.C. §706; *Shinseki*, 556 U.S. at 407. Accordingly, I would deny employer's request for reconsideration.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge