BRB No. 14-0126 BLA

FRED C. CONNELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KEYSTONE COAL MINING CORPORATION	)	DATE ISSUED: 11/21/2014
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

Margaret M. Scully (Thompson, Calkins & Sutter, LLC), Pittsburgh, Pennsylvania, for employer.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2012-BLA-05594) of Administrative Law Judge Drew A. Swank with respect to a claim filed on August 20, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C.

§§901-944 (2012) (the Act). The administrative law judge found that claimant established 23.24 years of coal mine employment, with over fifteen years working underground. The administrative law judge also found that claimant established a totally disabling respiratory or pulmonary impairment at 20 C.F.R. §718.204(b)(2). Based on the filing date of the claim and these findings, the administrative law judge determined that claimant invoked the presumption at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[1] The administrative law judge further determined that employer did not rebut the presumption and awarded benefits accordingly.

On appeal, employer argues that the administrative law judge erred in finding that it did not rebut the amended Section 411(c)(4) presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As an initial matter, we note that the administrative law judge addressed the issue of the existence of clinical pneumoconiosis[4] before he reached the issue of whether

[1] Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she 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 or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established at least fifteen years of underground coal mine employment, and that he is totally disabled, thereby invoking the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The record reflects that claimant's coal mine employment was in Pennsylvania. Director's Exhibits 4, 6. 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 (1989)(en banc).

[4] The regulation at 20 C.F.R. §718.201(a)(1) provides:

claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth in amended Section 411(c)(4). Decision and Order at 10. Accordingly, he placed the burden on claimant to establish the existence of clinical pneumoconiosis. *Id*. Because amended Section 411(c)(4) encompasses a presumption that claimant has both clinical and legal pneumoconiosis,[5] we will review his weighing of the evidence relevant to the existence of clinical pneumoconiosis in the context of rebuttal.

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 disabling 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 20 C.F.R. §718.305(d); *see Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011); *see also Barber v. Director, OWCP*, 43 F.3d 899, 900-01, 19 BLR 2-61, 2-65-66 (4th Cir. 1995).

The record contains nine interpretations of four x-rays dated October 8, 2010, August 31, 2011, November 29, 2012, and February 21, 2013. Director's Exhibits 13, 15, 22; Claimant's Exhibits 1, 6; Employer's Exhibits 2, 3, 9, 14. The administrative law judge noted that all of the physicians interpreting the x-rays are dually qualified as B readers and Board-certified radiologists. Decision and Order at 9. The administrative law judge found that "[o]f the nine interpretations of [c]laimant's [x]-rays, five were interpreted as positive. In evaluating the [x]-ray evidence, two out of the three reviewing physicians read the [x]-rays as positive for the presence of pneumoconiosis." *Id*. at 9-10.

> "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 tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1).

[5] Legal pneumoconiosis" is defined as "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). "[T]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." *Id*.

The administrative law judge concluded that the existence of clinical pneumoconiosis was established, "[b]ased upon all of the evidence, including the qualifications of the physicians and the fact that the majority of the readings demonstrated clinical pneumoconiosis." *Id*. at 10.

Employer contends that, in considering the interpretations of the x-rays, the administrative law judge "appear[ed] to find pneumoconiosis on the basis of numerical superiority of the chest x-ray evidence solely on the basis of one additional positive reading of the October 8, 2010 x-ray taken in conjunction with the Department of Labor (DOL) examination" and did not consider that the interpretations of the three most recent x-rays are in equipoise. Employer's Brief at 18. Employer further alleges that the positive interpretation of the x-ray obtained during the DOL examination should be discredited, as claimant's counsel is the program director at the Lungs at Work Clinic, where the examination was held. Additionally, employer indicates that this reading is suspect, as Dr. Smith, who interpreted the x-ray reading, also read three other x-rays on behalf of claimant. Employer also contends that the administrative law judge erred in failing to give greatest weight to the most recent x-ray evidence. Finally, employer asserts that the administrative law judge should have considered interpretations of the March 20, 2012 digital x-ray and the CT scan evidence in determining whether claimant established the existence of pneumoconiosis, as the United States Court of Appeals for the Third Circuit has held that "all types of relevant evidence must be weighed together." *Id*. at 17, *citing Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 23, 21 BLR 2-104, 2-108 (3d Cir. 1997).

We reject employer's argument regarding the interpretation of the x-ray obtained during the DOL examination, because employer has provided no evidence to substantiate its assertion that claimant's counsel somehow influenced Dr. Smith's opinion and does not explain how Dr. Smith's interpretation of multiple x-rays diminishes the validity of his opinion or reveals any bias. *See Zamora v. C. F. & I. Steel Corp.*, 7 BLR 1-568 (1984). Employer's contention that the administrative law judge should have given greatest weight to the most recent x-ray evidence is without merit, as the administrative law judge is not required to do so. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989) (en banc); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). Further, as employer acknowledges, the more recent x-rays are in equipoise. Employer's Brief at 18. They are insufficient, therefore, to rebut the presumed existence of clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(A).

With respect to the March 20, 2012 digital x-ray, although employer is correct that the administrative law judge did not consider the positive reading by Dr. Smith, a dually qualified radiologist, or the negative reading by Dr. Meyer, also a dually qualified radiologist, we hold that this omission does not require remand. Claimant's Exhibit 5;

Employer's Exhibit 18. Employer has not explained how the administrative law judge's consideration of these readings would alter his finding that the preponderance of the x-ray evidence is positive for clinical pneumoconiosis, particularly when they are in equipoise. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (Appellant must explain how the "error to which [it] points could have made any difference."); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

We also hold that the administrative law judge's omission of the CT scan evidence from consideration on the issue of the existence of clinical pneumoconiosis constitutes harmless error. Dr. Meyer and Dr. Smith each provided readings of five CT scans dated June 2, 2009, November 24, 2010, January 2, 2011, June 30, 2011, and March 23, 2012. Director's Exhibits 14, 23, 24; Claimant's Exhibit 5; Employer's Exhibits 4-7, 15. Dr. Meyer observed that all of the CT scans are negative for coal workers' pneumoconiosis, while Dr. Smith opined that all of the CT scans had findings consistent with coal workers' pneumoconiosis. *Id*. As was the case with the digital x-ray evidence, employer has not explained how the CT scan readings, which are in equipoise, would result in a finding that the preponderance of the evidence is negative for clinical pneumoconiosis. *See Shinseki*, 556 U.S. at 413; *Larioni*, 6 BLR at 1-1278. Accordingly, we affirm the administrative law judge's finding that the preponderance of the radiological evidence is positive for clinical pneumoconiosis, thereby precluding employer from establishing the absence of clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66.

In considering whether employer rebutted the presumed fact that claimant's totally disabling respiratory impairment was due to clinical pneumoconiosis, the administrative law judge gave less weight to the opinions of Drs. Fino and Basheda because they did not diagnose claimant with clinical pneumoconiosis, which contradicted the administrative law judge's finding. Decision and Order at 19-20. The administrative law judge concluded, therefore, that employer did not establish the second method of rebuttal. *Id*.; 20 C.F.R. §718.305(d)(1)(ii).

Employer contends that the administrative law judge erred in rejecting the opinions of Drs. Fino and Basheda, that claimant is not totally disabled due to pneumoconiosis, without considering the digital x-ray, CT scan, and medical opinion evidence when determining that claimant has clinical pneumoconiosis. This allegation of error is without merit. As we indicated *supra*, employer has not established that the omission of the digital x-ray and CT scan readings requires remand of this case. In addition, the administrative law judge considered the medical opinion evidence relevant to the existence of clinical pneumoconiosis when he addressed the issue of total disability causation. Decision and Order at 19-20. In this regard, the administrative law judge permissibly discredited the opinions of Drs. Fino and Basheda, that claimant does not have clinical pneumoconiosis, as they relied on negative chest x-ray interpretations,

which conflicted with the administrative law judge's weighing of the x-ray evidence. *See Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986). Thus, the administrative law judge also acted within his discretion in discrediting the causation opinions of Drs. Fino and Basheda because they did not diagnose clinical pneumoconiosis, contrary to his finding.[6] *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004). We affirm, therefore, the administrative law judge's determination that employer has not rebutted the presumption that claimant is totally disabled by clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii); *Morrison*, 644 F.3d at 480, 25 BLR at 2-9; *Barber*, 43 F.3d at 900-01, 19 BLR at 2-65-66. We further affirm the award of benefits.[7]

[6] In light of the fact that employer bears the burden of proof on rebuttal, employer is incorrect in alleging that the administrative law judge was required to find the contrary evidence in the record more credible or persuasive in order to reject the opinions of Drs. Fino and Basheda. 20 C.F.R. §718.305(d)(1); *see Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

[7] Because we have affirmed the administrative law judge's determination that employer is unable to rebut the presumed existence of clinical pneumoconiosis and the presumed causal relationship between pneumoconiosis and claimant's totally disabling respiratory impairment, it is not necessary to address employer's arguments concerning rebuttal of the presumption that claimant has legal pneumoconiosis and is totally disabled by it. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305(d)(1)(i), (ii); *see Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

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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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge