U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB Nos. 18-0260 BLA
and 18-0416 BLA

JUDY WAGNER (o/b/o and Widow of JOE H. WAGNER) Claimant-Respondent v. GUEST MOUNTAIN MINING CORPORATION and CHARTIS CASUALTY COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 10/22/2019 DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits in Miner's Claim and Decision and Order Granting Summary Decision in Survivor's Claim of Paul R. Almanza, Associate Chief Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe, Williams & Reynolds), Norton, Virginia, for claimant.

Kendra Prince (Penn, Stuart & Eskridge), Abingdon, Virginia, and Cody F. Fox (Penn, Stuart & Eskridge), Bristol, Virginia, for employer/carrier.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

BUZZARD, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits in Miner's Claim (2013-BLA-06020) and Decision and Order Granting Summary Decision in Survivor's Claim (2016-BLA-05391) of Associate Chief Administrative Law Judge Paul R. Almanza rendered on claims 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 miner's claim filed on October 4, 2012, and a survivor's claim filed on January 10, 2016.[1]

In the miner's claim, the administrative law judge accepted the parties' stipulations of at least thirty-eight years of underground coal mine employment[2] and that the miner was totally disabled. 20 C.F.R. §718.204(b)(2). He therefore found claimant invoked the presumption that the miner was totally disabled due to pneumoconiosis.[3] 30 U.S.C. §921(c)(4) (2012). He further found employer failed to rebut the presumption and awarded benefits.

[1] Claimant is the widow of the miner, who died on December 22, 2015. Claimant's Exhibit 4 (Miner's Claim). Claimant is pursuing her survivor's claim and the miner's claim on his behalf. At the parties' request, the administrative law judge consolidated the claims and granted a continuance of the hearing in the survivor's claim pending a decision in the miner's claim. Decision and Order at 1 n.1. He held a hearing on the miner's claim on March 3, 2016.

[2] The miner's coal mine employment was in Virginia. Director's Exhibits 8; 9; 31 at 12 (Miner's Claim). Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] In a miner's claim, Section 411(c)(4) of the Act provides a rebuttable presumption that the miner was totally disabled due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

In a separate decision, the administrative law judge found that claimant satisfied the eligibility criteria for automatic entitlement to survivor's benefits. 30 U.S.C. §932(*l*)(2012).[4] He therefore granted her motion for a summary decision and awarded benefits.

On appeal, employer argues the administrative law judge erred in finding it failed to rebut the Section 411(c)(4) presumption.[5] In a separate brief, it argues the administrative law judge lacked the authority to hear and decide the survivor's claim because he had not been properly appointed. Claimant responds in support of the awards of benefits in both claims. The Director, Office of Workers' Compensation Programs (the Director), responds that in light of Supreme Court precedent, the Board should vacate the award in the survivor's claim only[6] and remand the case for reassignment "to a new [administrative law judge] for a new hearing." Director's Brief at 2-3.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order 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.

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[4] Under Section 422(*l*) of the Act, a survivor of a miner who was determined to be eligible to receive benefits at the time of his death is automatically entitled to survivor's benefits without having to establish that the miner's death was due to pneumoconiosis. 30 U.S.C. §932(*l*) (2012).

[5] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[6] The Director, Office of Workers' Compensation Programs (the Director), asserts that because employer did not raise an Appointments Clause challenge in its opening brief in the miner's claim, it has forfeited any such challenge in that claim. Director's Brief at 2 n.2. *See Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018)(requiring "a timely challenge to the constitutional validity of the appointment of an officer who adjudicates [a party's] case"); *Island Creek Coal Co. v. Wilkerson*, 910 F.3d 254, 256 (6th Cir. 2018)(Appointments Clause argument not raised in opening brief is waived); *Williams v. Humphreys Enters., Inc.*, 19 BLR 1-111, 1-114 (1995)(the Board generally will not consider new issues raised by the petitioner after it has filed its brief identifying the issues to be considered on appeal). Because employer has not raised an Appointments Clause challenge in its appeal of the award in the miner's claim, it is unnecessary for us to address this question. We agree with the Director that, as a general matter, in order for the Board to consider an issue it must be raised in the opening brief and that did not occur here.

359 (1965). The Board reviews questions of law de novo. *See Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 1116 (6th Cir. 1984).

The Miner's Claim

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish the miner had neither legal nor clinical pneumoconiosis,[7] or "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The administrative law judge found employer failed to establish rebuttal by either method.

To prove that the miner did not have legal pneumoconiosis, employer must establish he did not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[8] 20 C.F.R. §§718.201(a)(2),(b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015) (Boggs, J., concurring and dissenting). The administrative law judge considered the medical opinions of Drs. Rosenberg and Sargent, both of whom opined that the miner did not have legal pneumoconiosis but had a restrictive impairment and hypoxemia due solely to usual interstitial pneumonitis and idiopathic pulmonary fibrosis unrelated to coal mine dust exposure. Director's Exhibit 19; Employer's Exhibits 1, 66.

The administrative law judge discredited both opinions because he found neither adequately addressed evidence of emphysema in the record and thus whether the emphysema was legal pneumoconiosis. He specifically noted that Dr. DePonte diagnosed emphysema in her reading of an October 18, 2012 CT scan,[9] and Drs. Alexander, DePonte,

[7] "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). "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." 20 C.F.R. §718.201(a)(1).

[8] The administrative law judge found that employer disproved clinical pneumoconiosis by establishing that fibrosis in the miner's lungs was usual interstitial pneumonitis unrelated to coal mine dust exposure. Decision and Order at 19-22.

[9] As summarized by the administrative law judge, Dr. DePonte, a Board-certified radiologist and B reader, reported that the miner's lungs "show[ed] changes of panlobular emphysema." Decision and Order at 23, *quoting* Director's Exhibit 14.

Barrett, and Ramakrishnan detected emphysema on several of the miner's x-rays.[10] Decision and Order at 23-24, Director's Exhibits 13, 14, 18, 21, 22; Claimant's Exhibits 1-3, 5. He also noted Dr. Marantz's agreement that the miner had "definite emphysema." Decision and Order at 15; Claimant's Exhibit 1. The administrative law judge thus determined, "the evidence as it stands supports a finding that [the miner's] lung apices had emphysematous changes." Decision and Order at 24.

The administrative law judge considered Dr. Rosenberg's opinion that any emphysema reported on CT scan was likely just "compensatory expansion" of a part of the miner's lungs not involved in the fibrosis. Director's Exhibit 19 at 8. The administrative law judge discredited that opinion because Dr. Rosenberg "provide[d] no source for [it]," and because Dr. Rosenberg acknowledged he had reviewed no x-rays or CT scans beyond those in his own report and was not a Board-certified radiologist. Decision and Order at 24. The administrative law judge also discredited Dr. Rosenberg's opinion that the miner's lung biopsy did not reveal emphysema because it did not sample the upper lobes of the lung and apices, where the emphysema had been identified. *Id*. The administrative law judge also found that Dr. Sargent's opinion was undermined because he did not address the miner's emphysema and thus whether it is related to coal mine dust exposure. *Id*. Because he found the miner's "lung apices had emphysematous changes," and Drs. Rosenberg and Sargent did not adequately address whether it was due to coal mine dust exposure, the administrative law judge concluded that employer failed to disprove legal pneumoconiosis.

Employer contends the administrative law judge applied an improper legal standard. Employer's Brief at 3, 6, 12. We disagree. The administrative law judge correctly noted employer had the burden to establish the miner had neither clinical nor legal pneumoconiosis. Decision and Order at 23. He correctly set forth that legal pneumoconiosis includes "any chronic pulmonary disease, respiratory impairment, or pulmonary impairment 'significantly related to[,] or substantially aggravated by[,] . . . dust

[10] The administrative law judge considered readings by Drs. DePonte, Alexander, and Barrett reporting findings of emphysema on the November 28, 2012, April 17, 2013, and January 17, 2014 x-rays submitted in connection with the claim. Decision and Order at 23-24; Director's Exhibits 18, 21, 22; Claimant's Exhibits 1-3. Drs. Alexander and Barrett are Board-certified radiologists and B readers. Decision and Order at 6. Additionally, he discussed Dr. Ramakrishnan's diagnoses of emphysema on the November 13, 2012 and February 25, 2015 x-rays contained in the miner's treatment records. Director's Exhibit 13; Claimant's Exhibit 5. Decision and Order at 24. In considering these readings, the administrative law judge noted that Dr. Alexander provided additional detail by "specifically locating the emphysema [in] the lung apices." *Id*., *discussing* Claimant's Exhibits 1-3 and Director's Exhibit 22.

exposure in coal mine employment.'" *Id*. at 19, *quoting* 20 C.F.R. §718.201(b). He also accurately stated that emphysema, if related to coal mine dust exposure, constitutes legal pneumoconiosis. Decision and Order at 23; 65. Fed. Reg. 79,920, 79,939-45 (Dec. 20, 2000).

Contrary to employer's contention, the administrative law judge did not apply a "rule out" standard by inquiring whether Drs. Rosenberg and Sargent adequately addressed findings of emphysema contained in the record. Employer's Brief at 6. Rather, he was assessing the documentation and reasoning of their opinions in his role as the fact-finder. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997). Employer's argument that it had no burden to establish that the miner's emphysema was not legal pneumoconiosis unless a physician linked the disease to coal mine dust exposure ignores the effect of the Section 411(c)(4) presumption. Employer's Brief at 7, 12-13; *see* 20 C.F.R. §718.305(d)(1)(i)(A). We therefore reject employer's argument the administrative law judge applied an improper standard in determining whether employer rebutted the presumed fact of legal pneumoconiosis.[11]

We also reject its contention the administrative law judge selectively analyzed the evidence in finding the miner had emphysema by ignoring evidence that did not mention it. Employer's Brief at 10. The administrative law judge summarized in detail all the relevant evidence of record, including that which employer labels "contradictory" because it was silent as to emphysema. Decision and Order at 6-18. Contrary to employer's contention, the administrative law judge identified ample evidence that physicians detected emphysema in the miner's lungs on a CT scan and several x-rays taken over the course of two-and-a-half years. Decision and Order at 23-24; Director's Exhibits 14, 18, 21, 22; Employer's Exhibits 7-9; Claimant's Exhibits 1-3. Moreover, he fully considered the opinion of Dr. Rosenberg, the only physician who affirmatively stated the miner did *not* have emphysema, and rejected it as inadequately explained and based on review of limited x-ray and CT scan evidence, and a biopsy that did not sample the upper lobes of the lungs

[11] The administrative law judge erred by failing to consider whether employer established that the miner's lung fibrosis, restrictive impairment, and hypoxemia were not legal pneumoconiosis. Employer could not meet its rebuttal burden by establishing only that those diseases or impairments were not clinical pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i)(A); *Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-56 (4th Cir. 2013)(affirming administrative law judge's finding that employer's experts did not adequately explain why miner's interstitial fibrosis was not legal pneumoconiosis). However, because we affirm the administrative law judge's determination that employer failed to establish that the miner's emphysema was not legal pneumoconiosis, the error was harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

where the emphysema was seen.[12] In this factual context, the administrative law judge did not need to comb through the miner's extensive medical records and explain away every piece of "silent" evidence before he could conclude that doctors had detected emphysema in the miner's lungs. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 (4th Cir. 1999)("[T]he 'substantial evidence' standard is tolerant of a wide range of findings on a given record"). The Board is not empowered to reweigh the evidence, *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989), and substantial evidence supports the administrative law judge's determination the miner had emphysema. We therefore reject employer's argument that the administrative law judge selectively analyzed the evidence.

Employer further contends the administrative law judge did not sufficiently explain his reasons for discrediting the opinions of Drs. Rosenberg and Sargent that the miner did not have legal pneumoconiosis. Employer's Brief at 4-10. We disagree. As discussed above, the administrative law judge explained that he discredited Dr. Rosenberg's opinion because the physician did not provide the basis for his statement that any emphysema seen on a CT scan was instead compensatory expansion, and because Dr. Rosenberg did not review any x-rays or CT scans beyond those in his own report. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986). Further, he explained that he discredited Dr. Rosenberg's opinion because it was based in part on a biopsy limited to the mid and lower portions of the miner's lungs. *Id.*; Decision and Order at 24. Additionally, the administrative law judge accurately stated that Dr. Sargent did not address whether the miner had emphysema and thus whether it was legal pneumoconiosis. Employer's Exhibit 1. In sum, the administrative law judge adequately explained his rationale for discrediting the opinions of Drs. Rosenberg and Sargent, because they did not adequately address whether the miner's emphysema was "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."[13] 20 C.F.R. §718.201(b); *see Mays*, 176 F.3d at 762 n.10 ("If a reviewing court can discern what the [administrative law judge] did and why he did it, the duty of explanation is satisfied.")(internal quotation marks omitted).

Because the administrative law judge permissibly rejected the opinions of Drs. Rosenberg and Sargent, we affirm his finding that employer did not rebut the presumed fact of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i)(A); *see Mingo Logan Coal Co.*

[12] Employer has not challenged these credibility determinations with respect to Dr. Rosenberg's opinion. They are therefore affirmed. *See Skrack*, 6 BLR at 1-711.

[13] The administrative law judge noted that the "evidence in the record is legion that [the miner] was a non-smoker and . . . had no other significant pulmonary risk[s]" for emphysema apart from his thirty-eight years of coal mine dust exposure. Decision and Order at 25.

v. Owens, 724 F.3d 550, 558 (4th Cir. 2013). Employer's failure to disprove legal pneumoconiosis precludes a rebuttal finding that the miner did not have pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i). Accordingly, we affirm the administrative law judge's determination that employer failed to rebut the Section 411(c)(4) presumption by establishing that the miner did not have pneumoconiosis.

The administrative law judge next considered whether employer rebutted the Section 411(c)(4) presumption by establishing that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii). He found that Dr. Rosenberg's opinion failed to meet employer's burden because Dr. Rosenberg provided no basis for his opinion. Decision and Order at 25. Employer contends the administrative law judge erred in failing to explain why Dr. Rosenberg's opinion was insufficient to establish that no part of the miner's disability was caused by pneumoconiosis and in failing to address Dr. Sargent's opinion. Employer's Brief at 13-15. We disagree.

The administrative law judge rationally discredited Dr. Rosenberg's opinion because the doctor's "unsupported statement at deposition" lacked an adequate explanation as to why no part of the miner's disability was caused by pneumoconiosis.[14] *See Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 673 n.4 (4th Cir. 2017); *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc); Decision and Order at 25; Employer's Exhibit 66 at 20. Because Dr. Sargent failed to address whether the miner's emphysema was legal pneumoconiosis, he necessarily did not address whether "no part" of the miner's disability was caused by it. Thus, the administrative law judge did not err in declining to discuss Dr. Sargent's opinion a second time. Further, since neither Dr. Rosenberg nor Dr. Sargent diagnosed the miner with legal pneumoconiosis, their opinions "may not be credited at all" unless "specific and persuasive reasons" exist for concluding the doctors' views on disability causation are independent of their incorrect diagnosis of the absence of pneumoconiosis, in which case

[14] In response to whether he could rule out coal mine dust exposure as a contributing factor in the miner's disability, Dr. Rosenberg testified:

> Without question, [the miner] had no disorder that caused or contributed to his impairments. His radiographic picture was not consistent with a CWP disorder. He had fibrosis within his lungs pathologically unassociated with coal dust exposure. His rapidly progressive disorder over a short time frame is not a disorder that's caused, contributed, or hastened by past coal exposure.

Employer's Exhibit 66 at 20.

they are entitled to "at most, little weight."[15] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); Decision and Order at 25. Thus, we affirm the administrative law judge's determination that employer failed to establish that no part of the miner's total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii). We therefore affirm the award of benefits in the miner's claim.

The Survivor's Claim

The administrative law judge found that claimant satisfied her burden to establish each fact necessary to demonstrate entitlement under Section 422(*l*) of the Act: she filed her claim after January 1, 2005; she is an eligible survivor of the miner; her claim was pending on or after March 23, 2010; and the miner was determined to be eligible to receive benefits at the time of his death. 30 U.S.C. §932(*l*); Decision and Order Granting Summary Decision in Survivor's Claim at 3. Consequently, he granted claimant's motion for summary decision and awarded survivor's benefits. 30 U.S.C. §932(*l*).

Employer contends the administrative law judge lacked the authority to hear and decide this case, and requests that the administrative law judge's decision be vacated, and the case remanded for reassignment to a properly appointed administrative law judge. Employer's Brief at 3-5 (unpaginated). The Director responds that, in light of recent case law from the Supreme Court, the Board should vacate the administrative law judge's decision and remand the case for reassignment to a new, properly appointed administrative law judge. Director's Brief at 2-3.

The Supreme Court recently held that Securities and Exchange Commission administrative law judges were not appointed in accordance with the Appointments Clause of the Constitution. *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). The Court further held that because the petitioner timely raised his Appointments Clause challenge, he was entitled to a new hearing before a new and properly appointed administrative law judge. *Id.*

In light of *Lucia*, the Director acknowledges that "[i]n cases in which an Appointments Clause challenge has been timely raised, and in which the [administrative

[15] As noted, Dr. Sargent did not address the miner's emphysema at all. The administrative law judge considered Dr. Rosenberg's statement that even if emphysema was present, it did not contribute to the miner's disability. Decision and Order at 24; Employer's Exhibit 66 at 18. He permissibly found that opinion unpersuasive, however, on the basis that the miner's "dyspnea coincide[d] with the diagnoses of . . . UIP *and* the radiological interpretations noting emphysema." Decision and Order at 24; *see Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 310 (4th Cir. 2012)(the administrative law judge determines the weight to accord conflicting evidence).

law judge] took significant actions while not properly appointed, the challenging party is entitled to the remedy specified in *Lucia*: a new hearing before a different (and now properly appointed) DOL administrative law judge." Director's Brief at 2. As the Board recently held, "*Lucia* dictates that when a case is remanded because the administrative law judge was not constitutionally appointed, the parties are entitled to a new hearing before a new, constitutionally appointed administrative law judge."[16] *Miller v. Pine Branch Coal Sales, Inc.*, BLR , BRB No. 18-0323 BLA, slip op. at 4 (Oct. 22, 2018) (en banc).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits in Miner's Claim is affirmed. We vacate the administrative law judge's Decision and Order Granting Summary Decision in Survivor's Claim and remand that case to the Office of Administrative Law Judges for reassignment to a new administrative law judge and for further proceedings consistent with this opinion.[17]

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur:

JONATHAN ROLFE
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I agree with the majority's decision to vacate the administrative law judge's award of benefits in the survivor's claim and remand this case to the Office of Administrative Law Judges for reassignment to a different administrative law judge for a new hearing in light of *Lucia v. SEC*, 585 U.S. , 138 S.Ct. 2044, 2055 (2018). However, I respectfully disagree with the decision to affirm the award of benefits in the miner's claim.

[16] Employer asserts that the Secretary's December 21, 2017 ratification of Department of Labor administrative law judges was insufficient to cure any constitutional deficiencies in their appointment. Employer's Brief in the Survivor's Claim at 4 (unpaginated). We decline to address this contention as premature.

[17] Because we have affirmed the miner's award and employer has not argued on appeal that claimant is not an eligible survivor, the new administrative law judge will be "constrained by 30 U.S.C. §932(*l*) to again award benefits to the survivor." Director's Brief at 3 n.3.

I would hold that the administrative law judge erred in finding that employer did not rebut the Section 411(c)(4) presumption because, as employer argues, he failed to consider all relevant evidence regarding the existence of legal pneumoconiosis. The administrative law judge selectively analyzed the evidence by considering only evidence tending to establish the miner had emphysema and not the evidence tending to establish there was no emphysema. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-93 (1988) (administrative law judge may not selectively analyze the evidence).

For example, several of the x-rays the administrative law judge mentioned as supporting emphysema were also read by physicians who did not note emphysema. Dr. Seaman read the same four x-rays as Dr. Alexander and did not diagnose emphysema.[18] Employer's Exhibits 1, 7-9. And while the administrative law judge pointed to two treatment x-ray readings by Dr. Ramakrishnan mentioning emphysema and a CT-scan reading from Dr. DePonte mentioning it, he did not discuss the multiple treatment x-ray readings and nine separate CT-scan readings that made no mention of emphysema. Director's Exhibit 17; Employer's Exhibits 4, 11, 15, 18, 23, 29, 33, 45, 47-50, 52-55, 61, 62.

While the multiple x-ray readings and CT-scan readings in this record that do not mention emphysema are not directly negative for it they could support an inference it was not there. *See Marra v. Consolidation Coal Co.*, 7 BLR 1-216, 1-218-19 (1984). This inference is plausible where, as here, the miner was being monitored and treated for a lung disease and was being evaluated for the lung transplant he eventually received.

Of course, the weight to accord the evidence and whether to draw such an inference are factual determinations for the administrative law judge. But absent an appropriate analysis of the evidence and explanation of the weight accorded to it in the decision before the Board, I would vacate the administrative law judge's finding that the miner had emphysema in the apices of his lungs. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 254 (4th Cir. 2016). I would instruct the administrative law judge to first discuss and weigh all relevant evidence as to the existence of emphysema and explain his findings in compliance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A). *See Addison*, 831 F.3d at 254; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If he finds that the miner had emphysema, then he must consider whether employer can establish

[18] Dr. Seaman is a Board-certified radiologist and B reader and an assistant professor of thoracic imaging at Duke University Medical Center. Employer's Exhibit 1 at 48. In addition to reading the x-rays submitted in connection with the claim she read several of the miner's treatment x-rays and CT-scans when he was being assessed for a lung transplant at Duke. None of those readings mention emphysema. Employer's Exhibits 11, 18, 50, 52, 61, 62.

that the miner's emphysema was not significantly related to, or substantially aggravated by, dust exposure in coal mine employment. 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A). He must also consider whether employer has shown, more likely than not, that the miner's lung fibrosis, restrictive impairment, and hypoxemia, if the administrative law judge finds these established, were not legal pneumoconiosis. *Id*.; *see Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 554-56 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 900-01 (4th Cir. 1995).

JUDITH S. BOGGS, Chief
Administrative Appeals Judge