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: 09/27/2011 DECISION and ORDER

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, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order Awarding Benefits (09-BLA-5184) of Administrative Law Judge Thomas M. Burke, rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act). The administrative law judge credited the miner with twenty-four years of coal mine employment,[2] and found that the medical evidence developed since the denial of the miner's last claim established that he was totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d).

Turning to the merits of the claim, the administrative law judge noted that Congress recently 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) (to be codified at 30 U.SC. §921(c)(4)). If the presumption is invoked, the burden of proof shifts to employer to disprove the existence of pneumoconiosis, or to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[3] 30 U.S.C. §921(c)(4).

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[1] The miner's first claim for benefits, filed on March 31, 2000, was denied by the district director on August 1, 2000, because the miner did not establish any element of entitlement. Director's Exhibit 1. His second claim, filed on June 11, 2003, was denied by the district director on March 19, 2004, because the miner did not establish that he was totally disabled. Director's Exhibit 2. The miner filed this claim on December 7, 2007. Director's Exhibit 4. The miner died on November 19, 2008, and claimant, his widow, is pursuing his claim. Decision and Order at 2.

[2] 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*).

[3] In a March 30, 2010 Order, the administrative law judge provided the parties with notice of amended Section 411(c)(4), and directed them to submit position

Applying amended Section 411(c)(4), the administrative law judge found that, although the majority of the miner's coal mine employment was aboveground, his aboveground employment took place in conditions that were substantially similar to conditions in an underground mine. Since the evidence also established that the miner had a totally disabling respiratory impairment, the administrative law judge found invocation of the rebuttable presumption established. The administrative law judge also found that employer failed to establish either that the miner did not have pneumoconiosis, or that his pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's application of amended Section 411(c)(4) to this case. Employer further contends that the administrative law judge erred in finding that the miner's aboveground work was substantially similar to underground coal mine employment, and therefore erred in finding that claimant established the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption. Employer also argues that the administrative law judge erred in weighing the x-ray and medical opinion evidence, and that he did not consider all of the relevant evidence, in finding that employer failed to rebut the presumption. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), declined to submit a response brief, but in a footnote to his letter, urges the Board to reject employer's argument that the administrative law judge erred in applying amended Section 411(c)(4) to this case. In a reply brief, employer reiterates its allegations of error.[4]

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statements on its applicability to this case. Claimant, employer, and the Director, Office of Workers' Compensation Programs, each submitted position statements. By Order dated May 4, 2010, the administrative law judge denied employer's request to hold the case in abeyance, but granted its motion to reopen the record for the submission of additional evidence in response to the change in law. The administrative law judge gave employer forty-five days either to submit supplemental reports from the physicians who provided medical reports in its affirmative case, or to submit their depositions. Employer did not submit any additional evidence. Decision and Order at 2.

[4] Employer does not challenge the administrative law judge's findings that the new evidence established twenty-four years of coal mine employment, total disability, and a change in the applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d). We therefore affirm those findings. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Initially, we reject employer's assertion that the administrative law judge erred in applying the Section 411(c)(4) presumption without interpretive regulations promulgated by the Department of Labor. The mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing and, therefore, that there was no need for the administrative law judge to hold this case in abeyance pending the promulgation of new regulations. *See Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010), *recon. denied*, BRB No. 09-0666 BLA (Apr. 14, 2011) (Order) (unpub.), *appeal docketed*, No. 11-1620 (4th Cir. June 13, 2011).

Coal Mine Employment

The record reflects that the miner worked aboveground, from 1965 to 1981, in various jobs; he worked underground from 1982 to 1986; he was laid off from 1986 to 1995, and he again worked underground from 1995 to 1998. Director's Exhibits 1, 2; Employer's Brief at 19. Although, as employer states, the administrative law judge did not separately calculate the miner's underground and aboveground coal mine employment, employer does not dispute that the miner worked underground from 1982 to 1986, and from 1995 to 1998, a period of approximately seven to eight years. The miner rated his dust exposure in those underground jobs as "10" on a scale of "1 to 10." Director's Exhibits 1, 2.

When describing his aboveground coal mine work performed from 1966 to 1976, during which he welded locomotive and "Pitt wheels," the miner rated his dust exposure as "10," the same level of exposure he said he had experienced in his underground mining work.[5] Director's Exhibit 1. The miner specified that he had a "heavy exposure of flux (ground dust-a product of welding)." Director's Exhibit 1.

[5] In contrast, the miner rated the dust exposure in his three other aboveground jobs as level "1." The miner indicated that from 1965-1966, he worked as a general shop repairman, during which time he also shoveled coal at a cleaning plant; he reported that his dust exposure was "1" on a scale of "1 to 10" in this job. Director's Exhibit 2. From 1976 to 1979, the miner reported that he repaired hydraulic pumps, jacks, and valves. In one description of this work, he did not indicate whether he had any dust exposure, and in a different description, he reported that his dust exposure in this job was level "1." Director's Exhibits 1, 2. Finally, the miner reported that, from 1979 to 1981, he was a

The administrative law judge found that the record established twenty-four years of coal mine employment, and he noted that "the majority of [the miner's] work was performed above ground." Decision and Order at 13. Further, the administrative law judge noted that, according to relevant case law, a surface miner need establish only that he was exposed to sufficient coal dust in surface coal mine employment to show that his work was substantially similar to underground coal mine work. *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001); *Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995); *Director, OWCP v. Midland Coal Co.* [*Leachman*], 855 F.2d 509 (7th Cir. 1988); Decision and Order at 13. The administrative law judge found that employment histories provided by the miner, and work descriptions provided by Drs. Celko and Basheda, indicated that the miner's "aboveground [work] expose[d] him to dusty conditions" with poor ventilation, in which he did not wear a respirator. The administrative law judge therefore concluded that the miner's aboveground work was "substantially similar to underground mining." Decision and Order at 13.

Employer contends that the administrative law judge erred in finding that some of the miner's coal mine employment aboveground was substantially similar to underground coal mine work. This was error, employer argues, first, because the aboveground jobs did not entail exposure to coal dust; and second, because the aboveground jobs entailed exposure to little or no dust. Employer's Brief at 19-20. Employer's first argument is legally erroneous; its second is both factually unfounded and erroneous.

Employer's first contention, that the miner's aboveground work cannot be deemed substantially similar to underground mining, because it did not involve the extraction of coal and the resultant coal dust exposure, is contrary to the teaching of the United States Court of Appeals for the Third Circuit in *Williamson Shaft Contracting Company v. Phillips*, 794 F.2d 865 (3d Cir. 1986). Employer's Brief at 19. The Third Circuit held that a coal mine construction worker is a miner within the meaning of the Act to the extent he is exposed to coal mine dust, regardless of whether he was exposed to the dust emanating from coal itself. The court upheld the regulation defining a coal mine construction worker as a "miner", if he was exposed to "coal mine dust", 20 C.F.R. §725.202(a), even though the 1977 Act had spoken of "coal dust." *Id*. at 869. The court quoted the Department's explanation in the comments to the regulation:

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first class mechanic, working as a machinist, welder, and hydraulic repairman, and working at the tipple washing and cleaning coal. Director's Exhibit 2. In one description of this job, the miner reported that his dust exposure was level "1." Director's Exhibit 1. In a different description, he rated the dust exposure on this job as "5 to 10," and stated that it "was very dusty working at the tipple," the ventilation was poor, and that he did not wear a respirator. Director's Exhibit 2.

> The Department accepts the comment that the term "coal dust" should be changed to "coal mine dust." The Act [of 1969] defines pneumoconiosis as a "dust disease of the lung…arising out of coal mine employment." Accordingly, exposure to any coal-mine-generated dust and ensuing disease or disability form a proper basis for entitlement.[6]
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> 43 Fed. Reg. 36778 (1978).

Id. at 869 n.4. The court went on to consider the Senate Report of the 1977 Act, stating that coal mine construction workers should be covered when they work in conditions "substantially similar to conditions in underground mines." *Id*. at 876. The court concluded that:

> the term "substantially similar" conditions refers to conditions in which a worker inhales a similar quantity of dust from the coal mine environment as do miners. Under the latter reading, coal mine construction workers labor in conditions substantially similar to those of miners when they spend extended periods of time exposed to dust in the coal mine environment.

Id. Thus, coverage under the Act depends not on the kind of dust exposure in coal mine employment, but on the extent of that exposure.

Employer's second argument, that none of the miner's aboveground coal mine employment entailed sufficient dust exposure to be substantially similar to underground mining, is both unsupported by the record and factually wrong. The miner described his exposure to ground dust as "heavy" during his aboveground coal mine work as a welder from 1966 to 1976. Director's Exhibit 1. He rated it a level 10, the same level he had rated his dust exposure in underground coal mine employment. Director's Exhibit 2. Employer offered no evidence to refute the miner's evidence. As the Seventh Circuit court stated in *Summers*, "[t]he [administrative law judge] was bound to find similarity after receiving such testimony, for one cannot rationally ignore credible, uncontested evidence." *Summers*, 272 F.3d at 480, 22 BLR at 2-276. Thus, the uncontradicted evidence that the miner's aboveground work as a welder involved heavy dust exposure

[6] Claimant made the same point in his brief on appeal in this case, quoting that part of the definition of pneumoconiosis contained in 20 C.F.R. §718.201(b): "For purposes of this section, a disease 'arising out of coal mine employment' includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Claimant's Brief at 2 (unpaginated).

supports the administrative law judge's determination that the miner's aboveground work was substantially similar to underground coal mine employment.

On appeal, employer attempts to substitute argument for evidence, asserting that the miner was exposed to "no dust but fume exposures to flux while welding locomotives (1966 to 1976)." Employer's Brief at 19. Again, in its reply brief, employer argues that welding did not expose the miner to dust but to metal fumes, which, employer concedes, pose a health hazard. Employer's Reply Brief at 3. Employer's statement rests on nothing more than an assumption that fumes and dusts are entirely different substances. They are not. The Merriam-Webster Dictionary defines "dust" as "*fine particles* of matter (as of earth)", also, "the *particles* into which something disintegrates." Dictionary and Thesaurus--Merriam-Webster Online, http://www.merriam-webster.com/dictionary/dust (emphasis added). A metal fume is defined as "an *airborne particle* formed when a metal, which is solid at room temperature is melted, vaporizes into the atmosphere, and then condenses to a solid again." http://www.mineraleducation.org (Chapter 11 Metal Fumes Welding/Cutting Page 1 of 4, Copyright © 2008 Nevada Mining Association) (emphasis added). Since a metal fume is one of many kinds of dust, employer's statement that the miner's welding employment exposed him to metal fumes, does not contradict the miner's statement that his welding work exposed him to dust.[7]

In sum, as the miner's welding employment aboveground from 1966 to 1976 entailed heavy dust exposure, comparable to that underground, substantial evidence supports the administrative law judge's determination that the miner had aboveground coal mine employment which was substantially similar to underground coal mine employment. *Phillips*, 794 F.2d at 865. Furthermore, as it is undisputed that the miner had 7-8 years of underground coal mine employment, and the record establishes that his aboveground coal mine employment from 1966-1976 was substantially similar to underground coal mine employment, substantial evidence supports the administrative law judge's determination that the miner had at least fifteen years of qualifying coal mine

[7] It is appropriate to take judicial notice of undisputed facts stated in reliable sources. *E.g., Buczek v. Cont'l Cas. Ins. Co.*, 378 F.3d 284, 291 (3d Cir 2004)(relying upon dictionary definitions to overturn a district court judgment, citing as authority Fed. R. Evid. 201(b)).

employment for purposes of the presumption of 30 U.S.C. §921(c)(4).[8] That finding is, therefore, affirmed.[9]

Since employer does not dispute that the miner had a totally disabling respiratory impairment, we also affirm the administrative law judge's finding that claimant established invocation of 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

The administrative law judge found that the x-ray and medical opinion evidence established the existence of pneumoconiosis. He also discredited the three medical opinions that concluded that the miner's impairment was not caused by his exposure to coal dust, finding that the physicians relied heavily on their determination that the miner did not have pneumoconiosis, which was contrary to the weight of the x-ray evidence. Therefore, the administrative law judge found that employer did not establish that the

[8] Because we affirm the administrative law judge's finding based on his inclusion of the miner's aboveground work from 1966 to 1976, the addition of which takes the miner's total employment beyond the fifteen years of qualifying coal mine employment required by 30 U.S.C. §921(c)(4), we need not discuss employer's argument that other periods of aboveground work could not support the administrative law judge's finding of substantial similarity.

[9] We note that our dissenting colleague does not dispute that the uncontradicted evidence of record establishes that the miner's aboveground welding work from 1966 to 1976 entailed heavy dust exposure and was therefore substantially similar to underground coal mine employment. Yet she asserts that the case must be remanded, because the administrative law judge did not explain his analysis when he determined that claimant had worked in substantially similar aboveground coal mine employment for a sufficient number of years to complete the total of fifteen years required to invoke the Section 411(c)(4) presumption. We believe further explanation is unnecessary and that it is our statutory duty to affirm the administrative law judge's decision in accordance with Congress's directive: "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. §921(b)(3). Our decision to affirm the administrative law judge's finding is reinforced by consideration of the Third Circuit's recent declaration in *Yusupov v. Att'y Gen. of U.S.*, F.3d , 2011 WL 2410741, at *17 (3d Cir. June 16, 2011)(Nos. 09-3032, 09-3074), "'When the outcome is clear as a matter of law . . . remand is not necessary.' *Mahmood v. Gonzales*, 427 F.3d 248, 253 (3d Cir. 2005)."

miner did not have pneumoconiosis or that his total respiratory disability was not due to pneumoconiosis. Decision and Order at 16-17.

With respect to the x-ray evidence under 20 C.F.R. §718.202(a)(1), employer contends that the administrative law judge erred by mechanically crediting Dr. Smith's positive interpretations of the August 30, 2004 and September 12, 2005 x-rays, over Dr. Fino's negative interpretations of those two x-rays.[10] Employer's Reply Brief at 4-5. We disagree. Because the x-ray interpretations were conflicting, the administrative law judge reasonably relied on Dr. Smith's superior radiological qualifications, as a Board-certified radiologist and B reader, to accord greater weight to his interpretations than to those of Dr. Fino, who is qualified as a B reader only. *See* 20 C.F.R. §718.202(a)(1); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). The administrative law judge also considered four positive readings, two by dually qualified physicians, of two subsequent x-rays, dated January 31, 2008 and May 23, 2008. The administrative law judge concluded that, "whether the films are weighed separately or collectively, the weight of the x-ray evidence is positive for the existence of clinical pneumoconiosis." Decision and Order at 15.

Employer next asserts that, in finding that the medical opinions submitted by employer did not establish the absence of pneumoconiosis, the administrative law judge focused unduly on the positive x-ray interpretations to the exclusion of the medical opinions under 20 C.F.R. §718.202(a)(4). Employer's Brief at 21, *citing Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). We disagree.

In evaluating the medical opinion evidence, the administrative law judge considered the opinions of Drs. Fino, Farney, Jaworski, and Celko.[11] The administrative

[10] Four interpretations of two other new x-rays, dated January 31, 2008 and May 23, 2008, were also submitted. Director's Exhibits 14, 15; Employer's Exhibit 3. All four interpretations were positive interpretations for the existence of pneumoconiosis.

[11] Dr. Fino stated that there was no radiographic evidence of pneumoconiosis, and opined that the miner's pulmonary fibrosis and interstitial lung disease were not related to the inhalation of coal dust. Employer's Exhibits 3, 9, 12. Dr. Farney opined that the miner did not have clinical or legal pneumoconiosis, and stated that pneumoconiosis did not cause any respiratory impairment or disability. Employer's Exhibits 5, 10. Dr. Jaworski opined that the miner had what was "[p]robably idiopathic pulmonary fibrosis," a type of pulmonary disease "not consistent with coal workers' pneumoconiosis." Director's Exhibit 14. Dr. Jaworksi indicated that the miner's interstitial lung disease was the "predominant" cause of his impairment. Director's Exhibit 14; Employer's Exhibit 2. In contrast, Dr. Celko diagnosed the miner with pneumoconiosis, and he opined that the miner's lung disease was due to smoking, coal mine dust exposure, and to

law judge found that the opinions of Drs. Fino, Farney, and Jaworski merited less weight because they were not well-supported by the evidence:

> Drs. Jaworski, Fino, and Farney all rely heavily on their unanimous conclusion that [the miner's] x-ray changes appeared too rapidly during the 3-year period between 2005 and 2008 to be pneumoconiosis. This conclusion is based on Dr. Fino's negative readings of the August 30, 2004 and September 12, 2005 films. As set forth previously, Dr. Fino's negative B-readings . . . are not accepted as these same films were read as positive (2/3) by Dr. Smith, a dually qualified physician. As this point is based on a finding that is contrary to the weight of the evidence, it is not persuasive.

Decision and Order 15. The administrative law judge also found that the opinions of Drs. Fino and Jaworski, that the miner did not have pneumoconiosis, relied on the physicians' findings that the miner's x-ray showed only irregular opacities, not rounded opacities, which they stated are typical of coal workers' pneumoconiosis. The administrative law judge determined that the weight of the x-ray evidence failed to support the findings of Drs. Fino and Jaworski that only irregular opacities were seen, as more highly qualified physicians interpreting the x-rays detected either rounded opacities, or a combination of rounded and irregular opacities. *Id*.

Contrary to employer's contention, the administrative law judge did not err in his analysis of the medical opinions. The determination of whether a medical opinion is reasoned and documented is within the discretion of the administrative law judge. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Here, the administrative law judge reasonably determined that the opinions of Drs. Fino and Farney, that the miner's x-ray abnormalities developed too quickly to be considered pneumoconiosis, were not persuasive, as they were not well supported by the objective evidence. *See Williams*, 114 F.3d at 25, 21 BLR at 2-111; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985). Further, the administrative law judge rationally found that the reasoning of Drs. Jaworski and Fino, that only irregular opacities were present on x-ray, was not supported by the weight of the x-ray evidence, as all of the other physicians who reviewed the miner's x-rays noted either a combination of rounded and irregular opacities, or only rounded opacities.[12] *See Wetzel*, 8 BLR at 1-141.

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the effects of treatment for esophageal cancer. Claimant's Exhibit 1; Employer's Exhibit 1.

[12] The administrative law judge explained that he accepted the opinions of Drs. Smith, Alexander, and Colella, all of whom are dually-qualified as Board-certified

Employer next asserts that the administrative law judge's decision cannot be affirmed because, in determining whether employer had rebutted the presumption that claimant has pneumoconiosis, the administrative law judge did not specifically identify, as relevant evidence to be weighed, a negative x-ray reading and a negative CT scan reading. Employer does not argue that it was prejudiced by either omission, but that these omissions violated the Third Circuit's teaching in *Williams*, that all relevant evidence under Section 718.202(a) must be weighed together, and, for that reason alone, the administrative law judge's decision must be vacated and the case remanded for the administrative law judge to consider this evidence. In Employer's words, "Failure to consider evidence mandates remand." Employer's Brief at 27. Of course, employer cites no authority for this preposition. The well-established law is to the contrary. The United States Supreme Court has declared that "the party that 'seeks to have a [civil] judgment set aside because of an erroneous ruling carries the burden of showing that prejudice resulted.'" *Shinseki v. Sanders*, 556 U.S. 396, , 129 S.Ct. 1696, 1705 (2009), *quoting Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *accord Morgan v. Covington Twp.*, 648 F.3d 172, 180 (3d Cir. 2011). In *Shinseki*, the Supreme Court applied the harmless error doctrine, applicable to appellate review of civil cases, to review of the administrative proceeding of veterans' claims. Accordingly, the law is clear: without a demonstration of prejudice, employer's argument must be rejected.

Review of the record suggests why employer did not attempt to claim prejudice from the administrative law judge's failure to discuss this evidence when weighing the evidence relevant to the existence of pneumoconiosis. As employer concedes, the administrative law judge had discussed both negative readings when recounting this evidence of record. Decision and Order at 4; Employer's Brief at 27. Claimant's hospital records contained a negative reading by Dr. De Riggi, a B reader of an x-ray taken on September 7, 2004. Claimant's Exhibit 1. Because the administrative law judge had properly relied upon superior radiological credentials in weighing the x-ray evidence, and concluded that all four of the x-rays in the record were positive for pneumoconiosis, consideration of this early negative reading by a B reader could not have altered the weighing of the evidence. Decision and Order at 15. Hence, the administrative law judge's failure to weigh this evidence, which had little probative value, cannot be deemed a prejudicial error.

Similarly, the administrative law judge discussed an interpretation of a May 30, 2007 CT scan by Dr. Meyer, a Board-certified radiologist. Dr. Meyer had diagnosed centrilobular emphysema but no coal workers' pneumoconiosis. The administrative law

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radiologists and B readers, that the x-rays showed either only rounded opacities or mixed rounded and irregular opacities, over the contrary opinions of Drs. Jaworski and Fino, who are B readers only. Decision and Order at 16.

judge also discussed another interpretation of this CT scan, which employer does not mention. Dr. Smith, another Board-certified radiologist, diagnosed interstitial fibrosis, 2/3, consistent with coal workers' pneumoconiosis. Decision and Order at 4. It is important to note that employer does not mention this reading, because it would cancel out the negative reading. For that reason, employer cannot allege prejudice from the administrative law judge's failure to discuss Dr. Meyer's interpretation when weighing the evidence regarding the existence of pneumoconiosis. Accordingly, we hold that the administrative law judge's omission of discussion of Dr. Riggi's x-ray reading and Dr. Meyer's CT scan interpretation is, at most, harmless error. *Shinseki*, 556 U.S. at , 129 S.Ct. at 1705.[13]

Employer also asserts that the administrative law judge erred in finding that the evidence did not establish that the miner's total disability was unrelated to coal mine employment. The administrative law judge discredited the opinions of Drs. Fino, Farney, and Jaworski, that the miner's impairment was not caused, or contributed to, by his coal mine dust exposure, as these opinions were based on the physicians' determinations that the miner did not have pneumoconiosis, contrary to the administrative law judge's finding.

Contrary to employer's contention, the administrative law judge rationally discounted the opinions of Drs. Fino, Farney, and Jaworksi, because these doctors, contrary to the administrative law judge's finding, did not diagnose the miner as suffering from pneumoconiosis. *See Soubik v. Director, OWCP*, 366 F.3d 226, 23 BLR 2-82 (3d Cir. 2004); *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). Therefore, we affirm the administrative law judge's finding that employer failed to meet its burden to establish that the miner's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4).

[13] Our dissenting colleague's assertion that the case must be remanded for the administrative law judge to weigh Dr. Meyer's CT scan interpretation, despite the absence of any showing of prejudice, is flatly contrary to law. *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943); *see also Market St. Ry. Co. v. R.R. Comm'n of Cal.*, 324 U.S. 548, 562 (1945). In *Morgan v. Covington Twp.*, 648 F.3d 172 (3d Cir. 2011), the Third Circuit recently upheld application of the harmless error doctrine, quoting Fed. R. Civ. P. 61 in support of its decision: "At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." 648 F.3d at 180.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, concurring and dissenting:

I concur in the majority's determinations that the administrative law judge did not err in applying amended Section 411(c)(4) without interpretive regulations promulgated by the Department of Labor, and that he did not err in his weighing of the x-ray and medical opinion evidence, in considering whether employer rebutted that presumption. However, I respectfully dissent from the majority's decision to affirm the administrative law judge's finding that claimant established the requisite fifteen years of qualifying coal mine employment to invoke the Section 411(c)(4) presumption, and from its holding that the administrative law judge's failure to weigh CT scan evidence relevant to employer's burden to establish the absence of pneumoconiosis does not merit a remand.

Contrary to the belief of the majority, upon review of the administrative law judge's findings and the evidence of record, the administrative law judge's finding of at least fifteen years of qualifying coal mine employment does not meet the standard of the Administrative Procedure Act to weigh the evidence of record. It is not the role of the Board to fill in missing details in an administrative law judge's analysis. *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). The courts have long recognized that "[u]nless the [administrative law judge] has sufficiently explained the weight he has given to obviously probative exhibits to say that his decision is supported by substantial evidence approaches an abdication of the court's 'duty to scrutinize the record as a whole to determine whether the conclusions reached are rational.'" *Zeigler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283, 11 BLR 2-80, 2-85 (7th Cir. 1988), *quoting Arnold v. Sec'y of HEW*, 567 F.2d 258, 259 (4th Cir. 1977); *see also*

Old Ben Coal Co. v. Battram, 7 F.3d 1273, 18 BLR 2-42 (7th Cir. 1993); *Peabody Coal Co. v. Helms*, 859 F.2d 486 (7th Cir. 1988); *Schaaf v. Mathews*, 574 F.2d 157 (3d Cir. 1978).

Employer does not dispute that the miner worked underground from 1982 to 1986, and from 1995 to 1998, a period of approximately seven or eight years. Thus, claimant must establish that at least another eight years of the miner's aboveground work was substantially similar to underground coal mine employment. As employer contends, 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. Employer's Brief at 19; Employer's Reply Brief at 3-4; *see Crow v. Peabody Coal Co.*, 11 BLR 1-54, 1-56 (1988). Further, the administrative law judge did not specify how he determined that the miner's 1976-79 aboveground employment, with either no dust exposure, or dust exposure at level "1," n.5, *supra*, was substantially similar to underground mining. *See Wagahoff v. Freeman United Coal Mining Co.*, 10 BLR 1-100 (1987). The administrative law judge's brief finding that the miner was exposed to dusty conditions in poor ventilation, without a respirator, apparently refers to the miner's description of his remaining aboveground work from 1979 to 1981, and possibly, to that of 1965-66.[14]

In sum, because the administrative law judge has not adequately explained his finding that the miner's aboveground work was substantially similar to underground mining, I would vacate this finding, and his finding that claimant established invocation of the presumption of total disability due to pneumoconiosis contained in Section 411(c)(4). I would remand this case for the administrative law judge to evaluate the miner's coal mine employment evidence and render a specific, detailed finding, and explain whether the miner had at least fifteen years of qualifying coal mine employment. *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). I would instruct the administrative law judge, on remand, to assess the coal mine employment evidence in light of *Williamson Shaft Cont'g Co. v. Phillips*, 794 F.2d 865 (3d Cir. 1986).

Additionally, there is merit in employer's assertion that the administrative law judge did not weigh all of the evidence relevant to the issue of the existence of pneumoconiosis, in particular the CT scan evidence. Decision and Order at 4, 14-16. Therefore, I would instruct the administrative law judge, on remand, that if he again finds

[14] However, although the miner indicated that "the ventilation was poor " in his 1965-66 aboveground work, he also stated that the dust exposure was only level "1" on a scale of 1 to 10. Director's Exhibit 2.

the Section 411(c)(4) presumption invoked, he must consider all of the relevant evidence in determining whether employer has rebutted that presumption by establishing that the miner did not have pneumoconiosis. *See* 30 U.S.C. §§921(c)(4), 923(b).

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NANCY S. DOLDER, Chief
Administrative Appeals Judge