BRB No. 14-0119 BLA

WILLIAM J. RISING	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EIGHTY-FOUR MINING COMPANY	)	
	)	
and	)	
	)	
ROCHESTER & PITTSBURGH COAL COMPANY	)	DATE ISSUED: 09/12/2014
	)	
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 of Drew A. Swank, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order of Administrative Law Judge Drew A. Swank awarding benefits on a claim 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 claim filed on September 22, 2010.

After crediting claimant with 22.52 years of coal mine employment,[1] the administrative law judge found that the analog x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). After finding that claimant was entitled to the presumption that his clinical pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b), the administrative law judge found that the arterial blood gas study evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii). Next, applying amended Section 411(c)(4),[2] the administrative law judge credited claimant with at least fifteen years of qualifying coal mine employment, and found that the evidence established that claimant suffered from a totally disabling pulmonary impairment. The administrative law judge, therefore, found that claimant invoked the rebuttable Section 411(c)(4) presumption. Moreover, the administrative law judge found that employer did not rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, arguing that the administrative law judge erred in finding that the evidence established the existence of clinical pneumoconiosis.[3]

[1] Claimant's coal mine employment was in Pennsylvania. Director's Exhibit 3. 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).

[2] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, Congress reinstated Section 411(c)(4) of the Act, which provides a rebuttable presumption of total disability due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. §921(c)(4).

[3] Because employer does not challenge the administrative law judge's finding that claimant invoked the Section 411(c)(4) presumption, this finding is affirmed. *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).

Because claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of both clinical and legal pneumoconiosis,[4] or by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1). The administrative law judge found that employer failed to establish rebuttal by either method. Decision and Order at 16-23.

Based upon his finding that the analog x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge found that employer could not establish rebuttal by disproving the existence of pneumoconiosis. Decision and Order at 9-10, 16. Employer, however, contends that the administrative law judge erred in finding that the analog x-ray evidence established the existence of clinical pneumoconiosis.

In considering whether the x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered seven interpretations of two analog x-rays taken on July 7, 2010 and September 28, 2011. Drs. Smith and Alexander, each dually qualified as a B reader and Board-certified radiologist, and Dr. Cohen, a B reader, interpreted the December 7, 2010 x-ray as positive for pneumoconiosis. Director's Exhibits 10, 11; Claimant's Exhibit 3. Drs. Meyer and Seaman, each dually qualified as a B reader and Board-certified radiologist, interpreted the x-ray as negative for the disease. Employer's Exhibits 3, 13. Although Dr. Smith, a B reader and Board-certified radiologist, interpreted the September 28, 2011 x-ray as positive for pneumoconiosis, Director's Exhibit 16, Dr. Meyer, an equally qualified physician, interpreted the x-ray as negative for the disease. Employer's Exhibit 4.

[4] "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). "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).

In weighing the conflicting x-ray evidence, the administrative law judge noted that four of the seven x-ray interpretations were positive for pneumoconiosis, and that three of the five physicians had provided positive interpretations. Decision and Order at 10. "Based upon all of the evidence, including the qualifications of the physicians and the fact that the majority of the readings demonstrated clinical pneumoconiosis," the administrative law judge found that the preponderance of the analog x-ray evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *Id.*

Employer contends that the administrative law judge erred by relying on Dr. Cohen's positive interpretation of the December 7, 2010 x-ray to find that the preponderance of the x-ray evidence supported a finding of clinical pneumoconiosis, because Dr. Cohen, unlike the other physicians, is not dually-qualified, and because Dr. Cohen did not interpret the more recent x-ray taken on September 28, 2011. We disagree. Although an administrative law judge may accord less weight to x-ray interpretations by physicians who are not dually qualified, he is not required to do so. *See Webber v. Peabody Coal Co*., 23 BLR 1-123, 1-138 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon*., 24 BLR 1-1 (2007) (en banc). Moreover, while an administrative law judge may accord more weight to the most recent x-ray evidence, he is not required to do so. *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70, 1-76 (1990). We, therefore, affirm the administrative law judge's determination that the preponderance of the analog x-ray evidence supports a finding of clinical pneumoconiosis pursuant to 20 C.F.R. §718.201(a)(1).

Although the administrative law judge found that the preponderance of the analog x-ray evidence established the existence of clinical pneumoconiosis, we agree with employer and the Director that the administrative law judge erred in not considering all of the relevant evidence regarding the existence of clinical pneumoconiosis. The United States Court of Appeals for the Third Circuit has held that an administrative law judge must weigh all of the relevant evidence together before making a determination regarding the existence of pneumoconiosis. *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104, 2-111 (3d Cir. 1997); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-11, 22 BLR 2-162, 2-169-74 (4th Cir. 2000). In addition to the analog x-ray evidence, the record in this case contains two interpretations of a digital x-ray taken on January 2, 2013; interpretations of three CT scans taken on May 8, 2008, January 12, 2009, and May 6, 2011; claimant's treatment records, including the results of a 1994 lung biopsy; and medical opinions by Drs. Fino,[5] Renn, Celko, Rasmussen, and Cohen.

[5] Dr. Fino opined that claimant does not suffer from clinical pneumoconiosis based upon his own interpretation of a September 28, 2011 ray. Employer's Exhibit 15 at 10. Dr. Fino specifically found that the x-ray revealed irregular opacities in the middle

Director's Exhibits 10, 13, 16; Claimant's Exhibits 1, 4-8; Employer's Exhibits 1A, 1B, 2, 5-8, 14, 15. Because the administrative law judge did not consider all of the relevant evidence, we must vacate his finding that claimant established the existence of clinical pneumoconiosis. *See Williams*, 114 F.3d at 25, 21 BLR at 2-111; *Compton*, 211 F.3d at 208-11, 22 BLR at 2-169-74. Consequently, we must also vacate the administrative law judge's determination, based on his affirmative finding of clinical pneumoconiosis, that employer failed to rebut the Section 411(c)(4) presumption by disproving the existence of pneumoconiosis.

On remand, the administrative law judge must weigh the digital x-ray, CT scan, biopsy, and medical opinion evidence, together with the analog x-ray evidence, and determine whether employer has met its rebuttal burden of disproving the existence of clinical pneumoconiosis. If the administrative law judge finds that employer has disproved the existence of clinical pneumoconiosis, he must determine whether employer has also disproved the existence of legal pneumoconiosis. *See* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i).

If on remand, the administrative law judge finds that employer has failed to disprove the existence of both clinical and legal pneumoconiosis, he must reconsider whether employer can establish rebuttal by proving that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment.[6] 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1).

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and lower lung zones, and classified the film "as a 2/2 s/s." *Id.* We note that the administrative law judge permissibly accorded less weight to Dr. Fino's opinion, that claimant does not suffer from clinical pneumoconiosis, because the doctor's x-ray interpretation was not admitted into the record, and because Dr. Fino failed to account for other x-rays in the record showing both regular and irregular opacities. *See Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-09 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (en banc) (McGranery & Hall, JJ., concurring and dissenting); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989); Decision and Order at 21.

[6] Regarding the second prong of rebuttal, employer argues that the administrative law judge erred in finding that Dr. Renn did not address the issue of disability causation. Decision and Order at 19, 21. We agree. Dr. Renn testified that claimant suffers from a restrictive ventilatory defect, and a reduction in diffusing capacity. Employer's Exhibit 30-31, 35. Dr. Renn further opined that claimant's coal mine dust exposure does not contribute "in any significant degree" to claimant's restrictive impairment or reduced diffusion capacity. *Id.* at 35. Consequently, Dr. Renn's opinion is relevant to the issue of disability causation.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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