BRB No. 12-0668 BLA

DARRELL W. PENROD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
GREEN RIVER COAL COMPANY	)	DATE ISSUED: 09/04/2013
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Carl M. Brashear (Hoskins Law Offices, PLLC), Lexington, Kentucky, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits (2010-BLA-5046) of Administrative Law Judge Daniel F. Solomon rendered on a claim filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (Supp. 2011)(the Act).[1] By Order dated August 19, 2011, the administrative law judge granted the Motion for Partial Summary Decision filed by the Director, Office of Workers' Compensation Programs (the Director), and found that employer was the properly designated responsible operator herein. The administrative law judge credited claimant

[1] The parties agreed to cancel the hearing and requested a decision on the record. Decision and Order at 1.

with nineteen years of coal mine employment, as stipulated by the parties, and found that all of the work was performed underground. Adjucating this claim, filed on November 10, 2008, pursuant to the regulatory provisions at 20 C.F.R. Part 718, the administrative law judge denied employer's motion to strike Claimant's Exhibits 1 and 3, and found that claimant established total respiratory disability pursuant to 20 C.F.R. §718.204(b), and thus, was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[2] The administrative law judge further found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's evidentiary ruling admitting Claimant's Exhibits 1 and 3 into the record, and his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director has declined to file a substantive response.[3]

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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] Congress enacted amendments to the Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4), amended by Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010).

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that employer is the properly designated responsible operator herein; that claimant established at least fifteen years of underground coal mine employment; that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b); and that claimant invoked the presumption at amended Section 411(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 3.

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and contains no reversible error. We first address employer's argument that the administrative law judge erred in admitting Claimant's Exhibit 1, an x-ray dated July 16, 2010,[5] and Claimant's Exhibit 3, an x-ray dated December 2, 2009, into the record. Employer argues that this evidence should have been excluded because the original films were not filed with the Department of Labor (DOL), in violation of the regulatory provisions at 20 C.F.R. §718.102(d). Employer's Brief at 2-3. We disagree.

Section 718.102(d) states, in pertinent part, that:

> The original film on which the x-ray report is based shall be supplied to the Office [of Workers' Compensation Programs], unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties.

20 C.F.R. §718.102(d). The record reflects that employer first became aware of the existence of the x-rays in August 2011 and October 2011, respectively. Employer's Brief at 2. On December 22, 2011, employer requested that DOL forward the original x-rays to Dr. Meyer to have them re-read, and on January 4, 2012, DOL responded that it did not have the x-rays. Employer's Motion to Strike at 1. On August 24, 2012, claimant's exhibits were admitted into evidence without objection. Conference Transcript at 6. On August 31, 2012, employer filed a motion to strike claimant's x-rays on the ground that employer had been unable to obtain rebuttal re-readings. The administrative law judge permissibly denied the motion, finding that employer offered no proof that it had ever requested the films from claimant, and that employer had not raised the issue with the administrative law judge despite several opportunities to do so in telephone conferences held on June 25, 2012 and August 24, 2012. Decision and Order at 6; Conference Transcript at 4. As the administrative law judge has broad discretion in procedural matters, we find no abuse of discretion in his admission of the two x-rays into the record, since the original films were "otherwise available" to employer for rebuttal readings as contemplated by Section 718.102(d). *See* 20 C.F.R. §718.102; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(en banc). Accordingly, we affirm the administrative law judge's evidentiary ruling.

[5] While employer refers to the date of Claimant's Exhibit 1 as July 17, 2010, the x-ray is dated July 16, 2010. Claimant's Exhibit 1.

Turning to the merits of entitlement, employer challenges the administrative law judge's finding that it failed to rebut the amended Section 411(c)(4) presumption with proof that claimant does not have pneumoconiosis, or that his disabling impairment is not due to pneumoconiosis. Employer contends that the administrative law judge erroneously considered the July 16, 2010 and December 2, 2009 x-rays, Claimant's Exhibits 1 and 3, and further erred in discounting the opinions of Drs. Repsher and Castle on the basis that they relied, in part, on negative x-rays in finding that claimant does not have pneumoconiosis. Employer asserts that the opinions of Drs. Repsher and Castle are the only well-reasoned and documented opinions of record, and should have been credited, as these physicians fully explained why they found no basis for attributing claimant's impairment to coal mine dust exposure. Employer's Brief at 3-7. Employer essentially seeks a reweighing of the evidence, which is beyond the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

As discussed supra, the x-rays dated July 16, 2010 and December 2, 2009 were properly admitted into the record and considered by the administrative law judge. In evaluating the x-ray evidence, the administrative law judge correctly noted that the record contained seven interpretations of four x-rays dated December 1, 2008; July 7, 2009; December 2, 2009; and July 16, 2010. Decision and Order at 6. The December 1, 2008 x-ray was read as positive by Dr. Baker, a B reader, and by Dr. Alexander, who is dually qualified as a B reader and Board-certified radiologist, while Dr. Wiot, also dually qualified, read the x-ray as negative. Director's Exhibits 11, 31; Claimant's Exhibit 2. Drs. Wiot and Meyer, both dually qualified physicians, read the July 7, 2009 x-ray as negative, without contradiction. Employer's Exhibits 1, 2. The December 2, 2009 x-ray was read as positive, without contradiction, by Dr. Alexander, Claimant's Exhibit 1, and the July 16, 2010 x-ray was read as positive, without contradiction, by Dr. Ahmed, a dually qualified physician, Claimant's Exhibit 3. Considering the physicians' qualifications and according greatest weight to the most recent films, read by dually qualified physicians, the administrative law judge acted within his discretion in finding that the x-ray evidence supported a finding of clinical pneumoconiosis, and did not establish rebuttal. Decision and Order at 6-7; *see Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-65 (2004)(en banc); *White v. New White Coal Co.*, 23 BLR 1-1, 1-4-5 (2004); *see also Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986). As the administrative law judge's findings are supported by substantial evidence, they are affirmed.

Next, in reviewing the medical opinion evidence, the administrative law judge permissibly found that the opinions of Drs. Repsher[6] and Castle,[7] that claimant does not

[6] Dr. Repsher examined claimant on July 7, 2009, was deposed on October 14, 2011, and issued a supplemental report on October 18, 2011. He found no clinical or

suffer from clinical or legal pneumoconiosis, were entitled to little weight because they were based, in part, on negative x-ray readings, contrary to the administrative law judge's finding that the x-ray evidence is positive for pneumoconiosis. Decision and Order at 7; *see Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); *Abshire v. D & L Coal Co.*, 22 BLR 1-202, 1-214 (2002)(en banc). The administrative law judge further determined that the opinions of Drs. Repsher and Castle were "flawed," as they failed to explain why claimant's nineteen-year history of coal dust exposure was not a contributing cause of his total respiratory disability. Decision and Order at 7; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *Clark*, 12 BLR at 1-155. Thus, the administrative law judge concluded that the opinions of Drs. Baker, Houser,[8] and Chavda,[9] diagnosing a severe

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legal pneumoconiosis, but diagnosed severe and disabling chronic obstructive pulmonary disease (COPD) complicated by left ventricular congestive heart failure. Based, in part, on claimant's "markedly elevated carboxyhemoglobin level," Dr. Repsher opined that claimant's COPD was due to his long and heavy cigarette smoking habit, and that any loss of lung function due to coal dust exposure would not be clinically significant. Employer's Exhibits 6, 7.

[7] Dr. Castle provided consulting opinions on December 22, 2009; October 26, 2001; and January 20, 2012. He opined that claimant did not suffer from clinical or legal pneumoconiosis. Dr. Castle diagnosed a severe airway obstruction with a marked degree of bronchoreversibility due to claimant's long and extensive smoking history. Dr. Castle also noted that it is possible that claimant is permanently and totally disabled due to his other medical problems, including cardiac disease and obstructive sleep apnea syndrome. Employer's Exhibits 3, 4, 5.

[8] Drs. Baker and Houser opined that claimant has clinical and legal pneumoconiosis and is totally disabled due to his chronic obstructive pulmonary disease secondary to coal dust exposure and cigarette smoking. Director's Exhibit 11; Claimant's Exhibit 5.

[9] Dr. Chavda examined claimant on August 1, 2011, and found that he suffered a totally disabling pulmonary impairment. Dr. Chavda diagnosed severe obstructive airway disease due to legal pneumoconiosis, cigarette smoking, obesity-related obstructive sleep apnea, cardiomegaly, and heart arrhythmias. Claimant's Exhibit 4.

and disabling pulmonary disease due to both coal dust exposure and cigarette smoking, were more persuasive and entitled to greater weight.

The determination of whether a physician's report is adequately reasoned and documented is essentially a credibility matter reserved to the discretion of the fact-finder. *See Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumption under amended Section 411(c)(4) of the Act with affirmative proof that claimant does not have pneumoconiosis or that his respiratory or pulmonary impairment did not arise out of, or in connection with, employment in a coal mine. *See Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011); 30 U.S.C. §921(c)(4).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge