BRB No. 13-0316 BLA

GERALD W. MABE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	DATE ISSUED: 04/30/2014
	)	
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 Awarding Benefits of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Paul E. Frampton and Thomas M. Hancock (Bowles Rice LLP), Charleston, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2011-BLA-05913) of Administrative Law Judge Daniel F. Solomon, rendered on a claim filed on July 8, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).[1] The administrative law judge determined that the claim

[1] Claimant filed a prior claim on August 14, 2009, but withdrew his claim by letter dated January 4, 2010. Director's Exhibit 1.

was timely filed[2] and accepted the parties' stipulation that claimant worked nineteen years and three months in underground coal mine employment. Based on the filing date of the claim, the administrative law judge considered claimant's entitlement under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] Because the administrative law judge found that claimant established at least fifteen years of underground coal mine employment and a totally disabling respiratory or pulmonary impairment, the administrative law judge concluded that claimant was entitled to invoke the amended Section 411(c)(4) presumption. The administrative law judge further found that employer failed to rebut that presumption. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in finding that the claim was timely filed. Alternatively, employer asserts that if the claim is not time barred, the administrative law judge's decision on the merits must be vacated, as the administrative law judge erred in failing to find that employer rebutted the amended Section 411(c)(4) presumption.[4] Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief, addressing the issue of the timeliness of the claim.

[2] At a hearing held on October 16, 2012, employer argued that the claim was not timely filed. The administrative law judge left the record open for the submission of post-hearing briefs on the timeliness issue. On January 30, 2013, the administrative law judge issued an Interim Order, determining that the claim was timely filed. The administrative law judge erroneously stated in the March 14, 2013 Decision and Order that "[t]imeliness of the claim is no longer being contested." Decision and Order at 2. There is no indication in the record that employer withdrew the issue after the Interim Order and employer was not required to file an interlocutory appeal of the administrative law judge's Interim Order with the Board.

[3] Under amended Section 411(c)(4), claimant may invoke a rebuttable presumption of total disability due to pneumoconiosis if he establishes at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine, and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2012), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

[4] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the presumption at amended Section 411(c)(4). Decision and Order at 3; s*ee Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (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 supported by substantial evidence, is rational, and is in accordance with applicable law.[5] 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).

Timeliness of Claim

Employer initially challenges the administrative law judge's determination that claimant timely filed his claim. Section 422 of the Act provides that "[a]ny claim for benefits by a miner . . . shall be filed within three years of "a medical determination of total disability due to pneumoconiosis . . . ." 30 U.S.C. §932(f). In addition, the implementing regulation requires that the medical determination have "been communicated to the miner or a person responsible for the care of the miner," and further provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §725.308(a), (c). To rebut the timeliness presumption, employer must show that the claim was filed more than three years after a "medical determination of total disability due to pneumoconiosis" was communicated to the miner. 30 U.S.C. §932(f); 20 C.F.R. §725.308(a).

Employer argues that claimant's testimony, considered in conjunction with the medical report of Dr. Fleenor, establishes that claimant received a medical determination of total disability sometime in 1993-1994, more than three years prior to filing his claim in July 2010. During the hearing held on October 16, 2012, claimant testified as follows:

> Q. Who was the first doctor who treated you for breathing problems?
> A. Best I can remember, it might have been Dr. Paranthaman in Appalachia, Big Stone.
> Q. Okay. Now, did that doctor tell you that you had black lung?
> A. No, he didn't tell me that. He said I had breathing problems.
> Q. Okay. Was there any doctor that told you that you had black lung?
> A. Oh, yeah, Dr. Fleenor, Dr. Smiddy.
> Q. Who was the first doctor to tell you that you had black lung?
> A. Dr. Fleenor, I guess.
> Q. Okay.

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc); Director's Exhibits 3, 5; Hearing Transcript at 29.

A. I've been going to Dr. Fleenor for a long time. He told me that. He said, "Your lungs are getting worse and worse."
Q. Did - - -
A. Dr. Smiddy told me I was disabled and I would never be able to go back to work.
Q. Did Dr. Fleenor tell you that you were disabled from going back to work from your black lung?
A. Yeah.
Q. And I was just looking at Dr. Fleenor's report. It looks to me like he says he's been your doctor since 1993. Is that correct?
A. Yeah. I know it was a long time. I don't know exactly how long.
Q. Okay and do you recall when it was that he told you that you had black lung and that you were totally disabled from going back to work because of your black lung?
A. I couldn't tell you the exact date, no, I couldn't.
Q. Okay. Was it back in the 1990's when you first started seeing him?
A. No, I don't think it was then. I had a stroke and my wife was up here in Virginia and come back and had a stroke. I passed out or whatever you called it and I stayed in a coma for about four days and after that, well, they said when I had the stroke, my lungs were full of carbon monoxide. That's what caused me to have the stroke and after I got out of the hospital and had therapy and stuff, I went back to Dr. Fleenor and that's when he started telling me. He said, "Your lungs are getting worse and worse," which I already knew it, but that's the first time he ever told me that I had black lung and stuff.
Q. And when did you have your stroke?
A. I don't remember to tell you the truth.
Q. Was it ten years ago?
A. Probably.
Q. Okay and ten years ago was when Dr. Fleenor told you that you had black lung?
A. It probably was.
Q. And was that also when he told you that you were totally disabled from going back to work because of your breathing?
A. Yeah.
Q. And did he tell you that your breathing problems were from your black lung?
A. Yeah.
Q. And to the best of your recollection, that was about ten years ago?
A. Yeah, something like that. I can't tell you the exact date or nothing.

Hearing Transcript at 25-27.

In a November 15, 2010 report, Dr. Fleenor, claimant's treating physician, stated:

> The first diagnosis in my record of chronic obstructive lung disease was in June 1994. [Claimant] has carried the diagnosis of Black Lung since then.

Director's Exhibit 13.

In his Interim Order issued on January 30, 2013, the administrative law judge noted the Director's position in this case that claimant's testimony is vague and does not establish the date upon which claimant was told he was totally disabled. Interim Order at 2. The administrative law judge observed that while Dr. Fleenor stated that claimant "has had 'black lung' since 1994, he did not attach reports from that time period." *Id*. The administrative law judge also observed that the Board has held that "a miner's mere statement that he was told by a physician that he was totally disabled by black lung" was insufficient to trigger the running of the statute of limitations." *Id., quoting Brigance v. Peabody Coal Co.*, 23 BLR 1-170, 1-175 (2006) (en banc); *see Tennessee Consol. Coal Co. v. Kirk*, 264 F.3d 602, 607, 22 BLR 2-288, 2-296 (6th Cir. 2001). The administrative law judge concluded that there was insufficient evidence from which to determine if Dr. Fleenor provided a reasoned diagnosis of total disability due to pneumoconiosis. Interim Order at 2. Thus, the administrative law judge concluded that employer did not rebut the presumption that the claim was timely filed pursuant to 20 C.F.R. §725.308(a).

Employer argues that the administrative law judge erred in finding that the claim was timely filed because the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has not specifically required a *reasoned* medical opinion in order to trigger the statute of limitations. Employer argues that because *Brigance* involved a claim arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, it is not applicable to this claim. Employer's argument has merit.

Subsequent to the issuance of the administrative law judge's Interim Order and his Decision and Order, the Sixth Circuit reversed the Board's decision in *Brigance*, holding that the Board erred by imposing requirements for triggering the statute of limitations that are not prescribed by the text of the statute, 30 U.S.C. §932(f), or its implementing regulation at 20 C.F.R. §725.308(a). *Peabody Coal Co. v. Director, OWCP* [*Brigance*], 718 F.3d. 590, 594 (6th Cir. 2013). The court stated:

> Construing the text of the statute as written, we hold that when a diagnosis of total disability due to pneumoconiosis by a physician trained in internal and pulmonary medicine is communicated to the miner, a "medical determination" sufficient to trigger the running of the limitations period has

> been made. No more is required. Additional findings regarding whether the medical determination is well-reasoned and well-documented are unnecessary.

Id. To the extent that the administrative law judge relied on the Board's holding in *Brigance*, we are unable to affirm his determination that the claim was timely filed.

The Director contends that the Board may affirm, on alternate grounds, the administrative law judge's finding that employer did not rebut the presumption of timeliness. With respect to Dr. Fleenor's report, the Director asserts:

> While this arguably proves that [c]laimant learned of the pneumoconiosis diagnosis in 1994, it does not report that [c]laimant was totally disabled by that condition or that the doctor clearly reported to [c]laimant that he was totally disabled by pneumoconiosis.

Director's Letter Brief at 2. In addition, the Director asserts that claimant's testimony is vague and fails to identify the date upon which claimant was told he was totally disabled. The Director notes the following:

> Claimant was fairly adamant that the conversation with Dr. Fleenor did not occur until after his stroke. The ten-year time frame for that stroke was suggested by counsel for [employer], presumably picked at random. Claimant's grudging agreement with that suggestion, however, is inconsistent with a medical history he reported to Dr. Baker in 2010. At that time, [c]laimant reported to Dr. Baker that his stroke occurred in 2007.

Id. at 3; *see* Director's Exhibit 9.

We agree with the Director that Dr. Fleenor's report, standing alone, does not trigger the tolling of the statute of limitations because he did not state that claimant was totally disabled. However, the weight to accord claimant's testimony is crucial to the resolution of the issue of when claimant understood that he was totally disabled due to pneumoconiosis. Determining the credibility of a witness and the reliability of the evidence is within the sound discretion of the administrative law judge. *See Underwood v. Elkay Mining, Inc*., 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-22 (1988). Thus, we conclude that it is necessary to remand this case for the administrative law judge to determine the weight to be accorded claimant's testimony and the report of Dr. Baker. *See Doss v. Itmann Coal Co.*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995); *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993).

We therefore vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.308(a), and his award of benefits, and remand the case for further consideration. We instruct the administrative law judge, on remand, to determine whether employer has satisfied its burden to rebut the presumption of timeliness by proving that a medical determination of total disability due to pneumoconiosis was communicated to claimant more than three years prior to the filing of his claim. *See Island Creek Coal Co. v. Henline*, 456 F.3d 421, 23 BLR 2-321 (4th Cir. 2006). In rendering his findings on remand, the administrative law judge is required to set forth the bases for all of his findings of fact and conclusions of law in accordance with the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989).

Rebuttal of the Amended Section 411(c)(4) Presumption

In the interest of judicial economy, we will address employer's contentions concerning the administrative law judge's finding that employer did not establish rebuttal of the amended Section 411(c)(4) presumption. In order to establish rebuttal of the presumption, employer must affirmatively establish either that claimant does not have clinical or legal pneumoconiosis,[6] or that his respiratory disability did not arise out of, or in connection with, coal mine employment. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38, 2-43-44 (4th Cir. 1980); *see also Morrison v. Tenn. Consol. Coal Co.*, 644 F.3d 478, 25 BLR 2-1 (6th Cir. 2011).

[6] The regulation at 20 C.F.R. §718.201 provides:

> "Clinical pneumoconiosis" consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). 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 considering whether employer disproved the existence of clinical pneumoconiosis, the administrative law judge noted that the parties submitted twelve interpretations of four x-rays. Decision and Order at 4. He also noted that all of the interpretations were performed by doctors who are dually qualified as Board-certified radiologists and B readers. *Id*. The administrative law judge determined that the July 8, 2009 x-ray was inconclusive because it had one positive reading for pneumoconiosis by Dr. Miller and a negative reading by Dr. Meyer. Decision and Order at 4; Director's Exhibit 13; Employer's Exhibit 3. The administrative law judge found that the August 13, 2010 x-ray was negative because it had one positive reading by Dr. Alexander and three negative readings by Drs. Wiot, Tarver, and Meyer. Decision and Order at 4; Director's Exhibits 14, 10, 11, 12. The administrative law judge considered the November 8, 2010 x-ray to be inconclusive, as there was one positive reading from Dr. Alexander and one negative reading from Dr. Meyer. Decision and Order at 4; Director's Exhibit 13; Employer's Exhibit 4. Similarly, the administrative law judge determined that the December 8, 2010 x-ray was inconclusive, as there were two positive readings from Drs. Miller and Alexander, and two negative readings from Drs. Meyer and Tarver. Decision and Order at 4; Claimant's Exhibits 1, 2; Employer's Exhibits 1, 2. Additionally, the administrative law judge noted that Dr. Wheeler read a January 5, 2010 CT scan as negative. Decision and Order at 5; Employer's Exhibit 7.

The administrative law judge concluded that the x-ray evidence, as a whole, was in equipoise. Decision and Order at 5. He gave less weight to the negative CT scan reading, based on the fact that "subsequent x-ray studies of December 8, 2010, taken eleven months later, are in equipoise." *Id*. The administrative law judge stated that the opinions of Drs. Hippensteel and Basheda, that claimant does not have clinical pneumoconiosis, were "flawed" because "they assumed the x-ray evidence was negative and rely heavily on unreliable facts." *Id*. Thus, the administrative law judge concluded that employer failed to rebut the amended Section 411(c)(4) presumption by establishing that claimant does not have clinical pneumoconiosis. *Id*.

Employer argues that the administrative law judge misapplied the later evidence rule by giving greater weight in this case to the more recent inconclusive x-ray evidence, over the negative CT scan reading. Employer asserts that the negative CT scan reading plays an integral role in determining the credibility of, and weight to accord, the conflicting x-ray readings. Contrary to employer's arguments, however, the administrative law judge permissibly concluded that three out of the four x-rays of record were inconclusive as to the presence or absence of clinical pneumoconiosis and that employer failed to disprove that claimant has pneumoconiosis by a the preponderance of that evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 52, 16 BLR 2-61, 2-66 (4th Cir. 1992); *Dempsey v. Sewell Coal Corp.*, 23 BLR 1-47, 1-65 (2004) (en banc). We see no error in the administrative law judge's determination that employer failed to rebut the presumption of clinical pneumoconiosis, based on his consideration of all of the relevant

evidence. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see generally Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 22 BLR 2-409 (7th Cir. 2002).

Additionally, contrary to employer's contention, the administrative law judge permissibly gave little weight to the opinions of Drs. Hippensteel and Basheda, that claimant does not have clinical pneumoconiosis, because they assumed that the x-ray evidence was negative, contrary to the administrative law judge's finding that the x-ray evidence is inconclusive for the presence or absence of the disease.[7] *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order at 5. Thus, we affirm the administrative law judge's determination that employer failed to rebut the amended Section 411(c)(4) presumption by affirmatively establishing that claimant does not have clinical pneumoconiosis.[8]

We also reject employer's contention that the administrative law judge erred in finding that it did not rebut the presumption by establishing that claimant's disability did not arise out of, or in connection with, his coal mine employment. The administrative law judge gave little weight to employer's experts, relevant to the cause of claimant's disability, because they did not diagnose clinical pneumoconiosis. Decision and Order at 5. Contrary to employer's contention, an administrative law judge may use the determination that employer has failed to rebut the presumption of pneumoconiosis to discredit, on the issue of disability causation, the opinions of physicians who failed to diagnose pneumoconiosis. *See Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, BLR (6th Cir. 2013); *Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002).

[7] We reject employer's contention that the administrative law judge's analysis of the opinions of Drs. Hippensteel and Basheda was too cursory to satisfy the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a). *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-164 (1989). Because the administrative law judge provided a valid reason for rejecting the opinions of employer's experts, as to whether claimant has clinical pneumoconiosis, it is not necessary that we address all of employer's arguments with regard to this rebuttal method. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[8] Because employer did not rebut the presumed fact of clinical pneumoconiosis, the administrative law judge was not required to consider whether employer disproved that claimant has legal pneumoconiosis. 30 U.S.C. §921(c)(4), as implemented by 78 Fed. Reg. 59,102, 59,114 (Sept. 25, 2013) (to be codified at 20 C.F.R. §718.305).

As the trier-of-fact, the administrative law judge has discretion to assess the credibility of the medical opinions and to assign them appropriate weight. *See Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 25 BLR 2-115 (4th Cir. 2012); *Hicks*, 138 F.3d at 528, 21 BLR at 2-326; *Akers*, 131 F.3d at 438, 21 BLR at 2-269; *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). The Board cannot reweigh the evidence or substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988. As substantial evidence supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. *See* 30 U.S.C. §921(c)(4); *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44. Consequently, on remand, if the administrative law judge determines that the claim was timely filed, he may reinstate the award of benefits.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge