BRB No. 12-0221 BLA

ROBERT D. SHORES	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 01/18/2013
	)	
DONALDSON MINING COMPANY	)	
	)	
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 on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Heath M. Long (Pawlowski, Bilonick & Long), Ebensburg, 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2008-BLA-5076) of Administrative Law Judge Thomas M. Burke awarding benefits 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). This case involves a miner's claim filed on October 27, 2006, and is before the Board for the second time.

In a Decision and Order dated March 31, 2009, the administrative law judge credited claimant with forty-three years of coal mine employment,[1] based on the parties' stipulation, and found that claimant established the existence of clinical pneumoconiosis[2] arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4), 718.203(b). Additionally, the administrative law judge found that claimant is totally disabled due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and remanded the case for him to consider claimant's treatment x-rays, and to consider whether Dr. Muchnok's x-ray reading was positive for pneumoconiosis. *Shores v. Donaldson Mining Co.*, BRB No. 09-0540 BLA, slip op. at 7-8 (July 28, 2010) (unpub.). Further, pursuant to 20 C.F.R. §718.202(a)(4), the Board held that substantial evidence did not support the administrative law judge's finding that Dr. Lenkey diagnosed clinical pneumoconiosis, and held that the administrative law judge did not indicate the weight, if any, he accorded to Dr. Lenkey's opinion regarding the existence of pneumoconiosis.[3] *Id.* Additionally, the Board instructed the administrative

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[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 4. 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 (1989) (en banc).

[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).

[3] The Board further instructed the administrative law judge, on remand, to determine whether Dr. Lenkey's opinion satisfied the Department of Labor's duty to provide claimant with a complete pulmonary evaluation, pursuant to 30 U.S.C. §923(b). *Shores v. Donaldson Mining Co.*, BRB No. 09-0540 BLA, slip op. at 10 (July 28, 2010) (unpub.). The administrative law judge, on remand, determined that Dr. Lenkey's opinion met the obligation of the Director, Office of Workers' Compensation Programs, to provide a complete pulmonary evaluation. Order on Remand at 2. That finding is not at issue in the current appeal.

law judge that he should consider the evidence regarding the cause of the opacities observed on claimant's x-rays at 20 C.F.R. §718.203(b), rather than at 20 C.F.R. §718.202(a)(1). *Id.* at 9. Because the Board vacated the administrative law judge's finding of pneumoconiosis, it also vacated his finding that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Finally, the Board instructed the administrative law judge to consider whether claimant could invoke the presumption at Section 411(c)(4) of the Act,[4] 30 U.S.C. §921(c)(4), that he is totally disabled due to pneumoconiosis.[5] *Id.* at 10-11.

Applying amended Section 411(c)(4) on remand, in a May 11, 2011 Order, the administrative law judge found that claimant worked for forty-three years in underground coal mine employment, and that he suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). Therefore, the administrative law judge determined that claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis. In the same Order, the administrative law judge provided the parties with the opportunity to submit additional evidence relevant to the issue of rebuttal of the Section 411(c)(4) presumption. Neither claimant nor employer submitted additional evidence.

In a Decision and Order on Remand issued on December 23, 2011, the administrative law judge considered whether employer rebutted the Section 411(c)(4) presumption. The administrative law judge found that employer did not disprove the existence of pneumoconiosis, or establish that claimant's pulmonary or respiratory impairment "did not arise out of, or in connection with," coal mine employment. Therefore, the administrative law judge found that employer did not rebut the presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(4). Accordingly, the administrative law judge awarded benefits.

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[4] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. The amendments, in pertinent part, reinstate Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides that, if a miner worked for at least fifteen years in qualifying coal mine employment, and suffered from a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[5] The Board affirmed, as unchallenged, the administrative law judge's findings that claimant established forty-three years of coal mine employment, and total disability pursuant to 20 C.F.R. §718.204(b)(2). *Shores*, slip op. at 2, n.1.

On appeal, employer argues that the administrative law judge erred in his analysis of the medical opinion evidence in finding that employer failed to rebut the Section 411(c)(4) presumption. Further, employer contends that the administrative law judge, in weighing the evidence on remand, violated the law of the case doctrine, and did not comply with the Board's remand instructions.[6] Claimant responds, urging the Board to affirm the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response, agreeing with the administrative law judge's determination that the Department fulfilled its duty to provide claimant with a complete pulmonary evaluation.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order on Remand 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 pursuant to Section 411(c)(4), the administrative law judge properly noted that the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by proving 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); Decision and Order on Remand at 3; *see 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 473, 480, 25 BLR 2-1, 2-9 (6th Cir. 2011).

The administrative law judge first considered whether employer disproved the existence of clinical pneumoconiosis. The administrative law judge initially found that the x-ray evidence, consisting of seven readings of three x-rays made pursuant to the ILO classification system, and numerous readings contained in claimant's treatment records, did not disprove the existence of clinical pneumoconiosis. 20 C.F.R. §718.202(a)(1); Decision and Order on Remand at 4-6; *see* n.6, *supra*. Further, the administrative law judge found that the readings of the three computerized tomography (CT) scans of record

[6] Employer does not challenge the administrative law judge's determination that claimant invoked the Section 411(c)(4) presumption. Decision and Order on Remand at 1, 3. Further, with respect to rebuttal of the presumption, employer does not challenge the administrative law judge's findings that neither the x-ray evidence nor the computerized tomography (CT) scan evidence disproved the existence of pneumoconiosis. *Id.* at 6. Therefore, those findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

did not disprove the existence of clinical pneumoconiosis. 20 C.F.R. §718.107(b); Decision and Order on Remand at 6; *see* n.6, *supra*.

In determining whether the medical opinion evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered the opinions of Drs. Lenkey, Schaaf, Wiot, and Altmeyer. Drs. Wiot and Altmeyer opined that claimant does not have clinical pneumoconiosis, but most likely suffers from idiopathic pulmonary fibrosis (IPF) or usual interstitial pneumonitis (UIP), unrelated to his coal mine dust exposure. Employer's Exhibit 4 at 4; Employer's Exhibit 17 at 12-13; Employer's Exhibit 18 at 24-25. Dr. Lenkey incorporated into his Department-sponsored complete pulmonary evaluation the x-ray reading of Dr. Muchnok, who classified a February 22, 2007 x-ray as reflecting T-type irregular densities throughout the lungs in a "3/2" profusion. Director's Exhibits 9, 12. Dr. Schaaf opined that claimant suffers from coal workers' pneumoconiosis, not IPF or UIP. Claimant's Exhibits 1, 2; Claimant's Exhibit 6 at 31.

In weighing the medical opinion evidence, the administrative law judge found the opinions of Drs. Wiot and Altmeyer, diagnosing IPF and UIP, to be unpersuasive, as compared to the opinion of Dr. Schaaf. The administrative law judge further found that Drs. Wiot and Altmeyer did not sufficiently explain why they determined that coal mine dust exposure could not have caused the opacities observed on the x-rays of record. Decision and Order on Remand at 7. Finally, the administrative law judge found Dr. Schaaf's opinion, that claimant has pneumoconiosis, to be well-reasoned and well-documented.[7] *Id.* at 5-8. As the opinions of Drs. Wiot and Altmeyer were the only opinions supportive of a finding that claimant does not have clinical pneumoconiosis, the administrative law judge determined that employer failed to disprove the existence of pneumoconiosis, pursuant to Section 411(c)(4). *Id.* at 7.

Employer contends that the administrative law judge, in finding that the medical opinion evidence failed to disprove the existence of clinical pneumoconiosis, erred in discounting the opinions of Drs. Wiot and Altmeyer, and erred in crediting the opinion of Dr. Schaaf.[8] We disagree.

[7] While the administrative law judge found that Dr. Lenkey opined that the radiographic abnormalities in claimant's lungs are pneumoconiosis, he did not specifically discuss the weight he accorded to Dr. Lenkey's opinion. Decision and Order at 6.

[8] Employer's request that this case be held in abeyance pending the United States Supreme Court's resolution of the petition for certiorari filed in *W. Va. CWP Fund v. Stacy*, 671 F.3d 378, 25 BLR 2-65 (4th Cir. 2011), *cert. denied*, 568 U.S. (2012), and of

Contrary to employer's contention, the administrative law judge permissibly questioned Dr. Altmeyer's reliance on the presence of a restrictive impairment, crackles, and clubbing to exclude a diagnosis of clinical pneumoconiosis, noting that Dr. Schaaf opined that pneumoconiosis can cause a restrictive impairment in the absence of an obstructive impairment, and that crackles and clubbing are associated with lung diseases generally, not simply IPF or UIP. *See* 20 C.F.R. §718.201; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); Decision and Order on Remand at 7; Employer's Exhibit 4 at 8; Employer's Exhibit 18 at 18-19, 27-30; Claimant's Exhibit 6 at 23-25. Furthermore, the administrative law judge reasonably questioned Dr. Wiot's reliance on the presence of honeycombing to exclude a diagnosis of clinical pneumoconiosis, noting that Dr. Wiot admitted at his deposition that honeycombing could coexist with pneumoconiosis. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 6; Employer's Exhibit 17 at 13, 22-23. The administrative law judge further found that Dr. Schaaf opined that honeycombing is associated with exposure to coal mine dust, and supported his conclusion with reference to medical literature. Decision and Order on Remand at 5; Claimant's Exhibit 6. Contrary to employer's contention, the administrative law judge permissibly found Dr. Schaaf's opinion to be well-reasoned and well-documented, and better supported by the x-ray evidence, CT scan evidence, and medical literature that Dr. Schaaf cited in support of his conclusions. *See Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989) (en banc); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); Decision and Order on Remand at 5-8. The administrative law judge also acted within his discretion in questioning the opinions of Drs. Wiot and Altmeyer, finding that each physician failed to provide sufficient support for his conclusion that clinical pneumoconiosis does not present itself as irregular opacities in the lower zones of the lungs.[9] *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); Decision and Order on Remand at 5-7. In light of the above, the administrative law judge

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the constitutional challenges to other provisions of the Patient Protection and Affordable Care Act, Public Law No. 111-148, is moot. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. , 132 S.Ct. 2566 (2012).

[9] Dr. Schaaf provided support for the administrative law judge's finding, explaining that, while clinical pneumoconiosis is "predominantly an upper lung zone disease when it presents, and that's the common presentation, . . . clearly it has occurred and does occur as a lower lung zone disease." Claimant's Exhibit 6 at 54. Dr. Schaaf further noted that there exists "abundant literature that clearly describes irregular opacities in coal workers' pneumoconiosis." *Id.* at 27.

permissibly credited Dr. Schaaf's opinion over the opinions of Drs. Wiot and Altmeyer.[10] *See Clark*, 12 BLR at 1-155; Decision and Order on Remand at 7-8.

The administrative law judge's finding that employer did not disprove the existence of pneumoconiosis, because he found that the opinions of Drs. Wiot and Altmeyer were unpersuasive, is supported by substantial evidence. As the administrative law judge permissibly discredited the opinions of Drs. Wiot and Altmeyer, the only opinions supportive of a finding that claimant does not have clinical pneumoconiosis, we affirm his determination that employer failed to disprove the existence of pneumoconiosis.[11] 30 U.S.C. §921(c)(4); *see Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995)*; Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *see also Morrison*, 644 F.3d at 480, 25 BLR at 2-9.

The administrative law judge next considered whether employer established that claimant's impairment did not arise out of, or in connection with, coal mine employment. The administrative law judge considered the opinions of Drs. Wiot and Altmeyer, that claimant is totally disabled due to a pulmonary impairment unrelated to his coal mine dust exposure. The administrative law judge discounted these opinions, finding that Drs. Wiot and Altmeyer failed to adequately explain how claimant's forty-three years of exposure to coal mine dust did not contribute to his totally disabling respiratory impairment. Decision and Order on Remand at 8.

Employer was required to "rule out a relationship" between claimant's impairment and his coal mine employment. *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *see also Morrison*, 644 F.3d at 480, 25 BLR at 2-9. In light of that standard, the administrative law judge acted within his discretion in finding that Drs. Wiot and Altmeyer did not adequately explain how they determined that claimant's forty-three years of underground coal mine employment did not contribute to his disabling impairment. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Therefore, the administrative law judge permissibly found that the opinions of Drs. Wiot and

[10] Because the administrative law judge provided valid reasons for according less weight to the opinions of Drs. Wiot and Altmeyer, we need not address employer's remaining arguments regarding the weight he accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

[11] Because we affirm the administrative law judge's determination that employer's evidence does not disprove the existence of clinical pneumoconiosis, we need not address employer's contention that the administrative law judge, on remand, again erred in finding that Dr. Lenkey diagnosed clinical pneumoconiosis, and further failed to explain the weight he accorded to Dr. Lenkey's opinion. Employer's Brief at 9-14.

Altmeyer failed to establish "that coal dust exposure played no causal role in [c]laimant's disability." Decision and Order on Remand at 8; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Rose*, 614 F.2d at 939, 2 BLR at 2-43-44; *Morrison*, 644 F.3d at 480, 25 BLR at 2-9. Because substantial evidence supports the administrative law judge's credibility determination, we affirm his finding that employer failed to rebut the Section 411(c)(4) presumption by establishing that claimant's pulmonary or respiratory impairment did not arise out of, or in connection with, coal mine employment.[12]

In light of the above, we affirm the administrative law judge's determination that employer did not meet its burden to rebut the Section 411(c)(4) presumption that claimant is totally disabled due to pneumoconiosis. Therefore, we affirm the administrative law judge's award of benefits. *See* 30 U.S.C. §921(c)(4).

[12] The administrative law judge found that, for the same reasons he determined that employer did not disprove the existence of pneumoconiosis, or establish that claimant's impairment did not arise out of, or in connection with, his coal mine employment, employer also did not rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment, pursuant to 20 C.F.R. §718.203(b). Decision and Order on Remand at 7-8. We therefore reject employer's argument that the administrative law judge did not comply with the Board's remand instruction to consider that issue, or violated the law of the case doctrine.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

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