BRB No. 13-0120 BLA

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| NICKY J. WEAVER | ) | |
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| Claimant-Respondent | ) | |
| | ) | |
| v. | ) | DATE ISSUED: 11/27/2013 |
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| SOUTHERN OHIO COAL 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 Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Ann Marie Scarpino (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 (2010-BLA-5089) of Administrative Law Judge Michael P. Lesniak 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, involving a miner's claim filed on October 6, 2005, is before the Board for the second time.

In the initial decision, Administrative Law Judge Janice K. Bullard found that the evidence established the existence of pneumoconiosis due to coal mine dust exposure, and that claimant suffers from a totally disabling pulmonary impairment. However, Judge Bullard found that the evidence did not establish that claimant is totally disabled due to pneumoconiosis. Accordingly, Judge Bullard denied benefits.

Claimant timely requested modification on April 8, 2009. Director's Exhibit 75. In a Decision and Order dated May 25, 2011, Administrative Law Judge Michael P. Lesniak (the administrative law judge) credited claimant with over fifteen years of qualifying coal mine employment,[1] and found that the medical evidence established that claimant is totally disabled by a respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2) (2013). The administrative law judge, therefore, determined that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis set forth at amended Section 411(c)(4) of the Act.[2] 30 U.S.C. §921(c)(4). The administrative law judge also found that employer failed to rebut the presumption. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board held that the administrative law judge failed to adequately explain why he excluded Dr. Wiot's interpretations of claimant's January 5, 2006, May 2, 2006, and September 15, 2006 CT scans. *Weaver v. S. Ohio Coal Co.*, BRB No. 11-0608 BLA (May 30, 2012) (unpub.). The Board further held that

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[1] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 71 at 24. 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] 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 that a miner is totally disabled 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), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). The Department of Labor (DOL) revised the regulations at 20 C.F.R. Parts 718 and 725 to implement the amendments to the Act, eliminate unnecessary or obsolete provisions, and make technical changes to certain regulations. 78 Fed. Reg. 59,102 (Sept. 25, 2013) (to be codified at 20 C.F.R. Parts 718 and 725). The revised regulations became effective on October 25, 2013. *Id.* Unless otherwise identified, a regulatory citation in this decision refers to the regulation as it appears in the September 25, 2013 Federal Register. Citations to the April 1, 2013 version of the Code of Federal Regulations will be followed by "(2013)."

the administrative law judge failed to consider all of the x-ray evidence, and erred in his consideration of the medical opinion evidence. *Id.* The Board, therefore, vacated the administrative law judge's finding that employer failed to rebut the Section 411(c)(4) presumption. *Id.* In light of this holding, the Board also vacated the administrative law judge's finding that claimant established a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2013), and remanded the case for further consideration. *Id.*

In a Decision and Order on Remand dated December 4, 2012, the administrative law judge again excluded Dr. Wiot's CT scan interpretations, finding that they were in excess of the evidentiary limitations on modification. Moreover, the administrative law judge again found that claimant invoked the Section 411(c)(4) presumption, and that employer failed to establish rebuttal. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in excluding Dr. Wiot's CT scan interpretations. Employer also challenges the administrative law judge's application of Section 411(c)(4) to this case. Employer also argues that the administrative law judge erred in finding that it failed to rebut the Section 411(c)(4) presumption. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to affirm the administrative law judge's decision to exclude Dr. Wiot's CT scan readings. The Director also contends that the administrative law judge properly applied Section 411(c)(4) to this case, and applied the correct rebuttal standard. Claimant has not filed a response brief.[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. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204 (2013). Failure to

[3] Employer does not challenge the administrative law judge's findings that claimant worked for at least fifteen years in qualifying coal mine employment, that he is totally disabled under 20 C.F.R. §718.204(b)(2) (2013), and that he, therefore, invoked the Section 411(c)(4) presumption. Those findings are, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (en banc).

An administrative law judge may grant modification based on a change in conditions or because of a mistake in a determination of fact. 20 C.F.R. §725.310(a) (2013). When a request for modification is filed, "any mistake of fact may be corrected [by the administrative law judge], including the ultimate issue of benefits eligibility." *Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993).

**Evidentiary Ruling**

Employer initially argues that the administrative law judge erred in excluding Dr. Wiot's interpretations of claimant's January 5, 2006, May 2, 2006, and September 15, 2006 CT scans. We disagree. The administrative law judge accurately found that the admission of Dr. Wiot's CT scan interpretations would exceed the evidentiary limitations, as employer had already submitted interpretations of each of these CT scans in the underlying claim. 20 C.F.R. §§725.414, 725.310(b) (2013); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (en banc) (Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007) (en banc); Decision and Order on Remand at 6-8. Furthermore, the administrative law judge permissibly found that employer did not establish good cause for the admission of these CT scan interpretations. 20 C.F.R. §725.456(b)(1) (2013); *Rose v. Buffalo Mining Co.*, 23 BLR 1-221, 1-227 (2007); Decision and Order on Remand at 8. We, therefore, affirm the administrative law judge's ruling that Dr. Wiot's interpretations of the January 5, 2006, May 2, 2006, and September 15, 2006 CT scans are not admissible.

**Application of Amended Section 411(c)(4)**

Employer contends that the rebuttal provisions of amended Section 411(c)(4) do not apply to claims brought against responsible operators. Employer's Brief at 17-28. This argument is virtually identical to the one the Board rejected in *Owens v. Mingo Logan Coal Co.*, 25 BLR 1-1, 1-4 (2011), *aff'd on other grounds*, 724 F.3d 550 (4th Cir. 2013) (Niemeyer, J., concurring). We, therefore, reject it here for the reasons set forth in that decision. *Owens*, 25 BLR at 1-4; *see also Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 37-38, 3 BLR 2-36, 2-58-59 (1976); *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 938-40, 2 BLR 2-38, 2-43-44 (4th Cir. 1980). Moreover, as discussed *supra* n.2, the Department of Labor (DOL) subsequently promulgated regulations implementing amended Section 411(c)(4) that make clear that the rebuttal provisions apply to responsible operators. 78 Fed. Reg. 59,115 (Sept. 25, 2013).

Employer contends that the administrative law judge's application of amended Section 411(c)(4) to this case was premature, because the DOL has yet to promulgate implementing regulations. We reject employer's assertion, as the mandatory language of the amended portions of the Act supports the conclusion that the provisions are self-executing. *Mathews v. United Pocahontas Coal Co.*, 24 BLR 1-193, 1-201 (2010). Moreover, the DOL has issued a regulation implementing amended Section 411(c)(4), 30 U.S.C. §921(c)(4), which became effective on October 25, 2013. 20 C.F.R. §718.305. Therefore, the administrative law judge did not err in considering this claim pursuant to amended Section 411(c)(4).

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

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 pneumoconiosis, 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.

Employer argues that the administrative law judge erred in finding that it did not disprove the existence of clinical pneumoconiosis.[4] Employer initially challenges the administrative law judge's consideration of the x-ray evidence. In determining whether the x-ray evidence disproved the existence of clinical pneumoconiosis, the administrative law judge considered interpretations of three x-rays taken on January 18, 2006, April 20, 2006, and December 6, 2006. Decision and Order on Remand at 3, 5-6. Although the administrative law judge found that the December 6, 2006 x-ray was negative for the existence of pneumoconiosis,[5] he found that the January 18, 2006 and April 20, 2006 x-rays were positive for the disease.[6] *Id.* at 5-6. The administrative law judge, therefore,

[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) (2013).

[5] Dr. Zaldivar, a B reader, and Drs. Meyer and Wiot, both of whom are B readers and Board-certified radiologists, interpreted the December 6, 2006 x-ray as negative for pneumoconiosis. Director's Exhibit 55; Employer's Exhibits 1, 4. In contrast, Dr. Ahmed, who is also dually qualified, interpreted this x-ray as positive for the disease. Director's Exhibit 67.

[6] Dr. Ahmed, who is dually qualified, and Dr. Casanova, who is a Board-certified

found that the x-ray evidence, as a whole, was positive for the existence of clinical pneumoconiosis, and that employer did not prove, through the x-ray evidence, that claimant does not suffer from the disease. *Id.* at 6.

Employer contends that the administrative law judge improperly relied on a "head count" to weigh the conflicting x-ray evidence. Employer's Brief at 11. We disagree. In this case, the administrative law judge properly considered the number of x-ray interpretations, along with the readers' qualifications, the dates of the x-rays, and the actual readings. *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985). We, therefore, affirm the administrative law judge's finding that the x-ray evidence is positive for pneumoconiosis, and does not disprove the existence of clinical pneumoconiosis.

Employer, however, contends that the administrative law judge erred in failing to adequately explain his basis for crediting the positive x-ray evidence over the negative CT scan evidence. Employer's Brief at 9-10. Pursuant to 20 C.F.R. §718.107 (2013), the administrative law judge noted that Dr. Meyer read the three CT scans of record, dated January 5, 2006, May 2, 2006, and September 15, 2006, as negative for clinical pneumoconiosis.[7] 20 C.F.R. §718.107(b) (2013); Decision and Order on Remand at 8-9; Director's Exhibit 57. Dr. Mavi also interpreted the CT scans, interpreting the January 5, 2006 CT scan as showing an "indeterminate" nodule. Director's Exhibit 59. Weighing these interpretations together, the administrative law judge found that the CT scan evidence is negative for clinical pneumoconiosis. Decision and Order on Remand at 9-10. Because the administrative law judge's finding, that the CT scan evidence is negative for clinical pneumoconiosis, is supported by substantial evidence, this finding is affirmed. *Id.*

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radiologist, interpreted the January 18, 2006 x-ray as positive for pneumoconiosis. Director's Exhibits 17, 66. Dr. Meyer, who is dually qualified, interpreted this x-ray as negative for the disease, while Dr. Gaziano, a B reader, interpreted this x-ray for quality purposes only. Director's Exhibits 18, 25. While the April 20, 2006 x-ray was interpreted as negative by Dr. Meyer, Director's Exhibit 53, Dr. Ahmed and Dr. Alexander, who is also dually qualified, interpreted the x-ray as positive for pneumoconiosis. Director's Exhibit 68; Claimant's Exhibit 2.

[7] The record reflects that Dr. Meyer opined that a "CT scan is more sensitive than [a] chest x[-]ray for detection and characterization for pulmonary parenchymal abnormalities." Director's Exhibit 57 at 3. Dr. Meyer further noted that "CT [scans] may be useful in confirming or refuting the presence of simple coal worker's pneumoconiosis . . . when not well demonstrated on routine chest x[-]rays." *Id.*; *see* 20 C.F.R. §718.107(b) (2013).

In this case, the administrative law judge also considered the medical opinions of Drs. Mavi, Altmeyer, Zaldivar, and Basheda regarding the existence of clinical pneumoconiosis. Dr. Mavi, who conducted claimant's DOL-sponsored complete pulmonary evaluation, diagnosed clinical pneumoconiosis. Director's Exhibits 12, 49, 60. In contrast, Drs. Altmeyer, Zaldivar, and Basheda opined that claimant does not have clinical pneumoconiosis. Director's Exhibits 50, 55, 58, 64; Employer's Exhibit 2. In weighing the medical opinion evidence, the administrative law judge gave "some weight" to Dr. Mavi's opinion that claimant has clinical pneumoconiosis, as "the x-ray evidence is overall positive for clinical pneumoconiosis." Decision and Order on Remand at 9. The administrative law judge accorded "little weight" to the opinions of Drs. Altmeyer, Zaldivar, and Basheda, "because they based their opinions, at least in part, on a finding that the x-ray evidence was negative for clinical pneumoconiosis, contrary to my findings." *Id.*

Considering the evidence as whole, the administrative law judge stated, "I find the x-ray evidence to be positive for pneumoconiosis, a finding that the opinion evidence supports, even though the CT scan evidence is negative." *Id.* The administrative law judge therefore concluded that "[e]mployer cannot affirmatively establish that [c]laimant does *not* suffer from clinical pneumoconiosis." *Id.* (emphasis in original).

We agree with employer that the administrative law judge erred in failing to adequately explain his basis for crediting the positive x-ray evidence over the negative CT scan evidence. As employer correctly notes, the administrative law judge did not explain why he accorded the x-ray evidence more weight than the CT scan evidence, especially in light of Dr. Meyer's statement that CT scans are a more effective tool in detecting and characterizing pulmonary abnormalities. Employer's Brief at 10; *see* 20 C.F.R. §718.107(b) (2013); Director's Exhibit 57. We also agree with employer that the administrative law judge failed to explain his weighing and crediting of all of the evidence, particularly the CT scan evidence. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-236 (4th Cir. 1998). While the administrative law judge found that Dr. Mavi's opinion was entitled to "some weight" because it was supported by the positive x-ray evidence, he did not weigh or consider employer's physicians' opinions in light of the negative CT scan evidence.[8] Decision and Order on Remand at 9. Because

[8] We note that, in support of their opinions that claimant does not have clinical pneumoconiosis, Dr. Altmeyer reviewed Dr. Mavi's interpretation of the January 5, 2006 CT scan, Dr. Zaldivar reviewed each of Dr. Mavi's three CT scan interpretations, and Dr. Basheda reviewed the interpretations of Drs. Mavi and Meyer. Director's Exhibits 55, 64; Employer's Exhibit 2. The administrative law judge did not address these physicians' reliance on the CT scan evidence in his Decision and Order on Remand.

the administrative law judge did not weigh all of the relevant evidence together in determining whether employer disproved the existence of clinical pneumoconiosis, *see Perry,* 9 BLR at 1-2, we vacate the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, and remand the case for further consideration.[9]

Regarding the other method of establishing rebuttal, the administrative law judge discounted the opinions of Dr. Altmeyer, Zaldivar, and Basheda, that claimant's pulmonary disability did not arise out of his coal mine employment, because these doctors, contrary to the administrative law judge's finding, did not diagnose pneumoconiosis. *See Toler v. E. Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 9. However, in light of our decision to vacate the administrative law judge's finding that employer failed to disprove the existence of pneumoconiosis, the administrative law judge's basis for discrediting their opinions cannot stand. We, therefore, vacate the administrative law judge's finding that employer failed to establish the second method of rebuttal. On remand, the administrative law judge should reconsider, if necessary, whether employer can establish that no part of claimant's respiratory or pulmonary impairment was caused by pneumoconiosis as defined in 20 C.F.R. §718.201 (2013).[10] 20 C.F.R. §718.305(d)(1)(ii).

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[9] On remand, should the administrative law judge find that employer has disproved the existence of clinical pneumoconiosis, he must address whether employer has also disproved the existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(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) (2013).

[10] Employer asserts that the administrative law judge applied an improper rebuttal standard under amended Section 411(c)(4), by requiring employer to rule out coal mine dust exposure as a cause of claimant's disabling respiratory impairment. Employer's Brief at 17-23. Contrary to employer's argument, the administrative law judge properly explained that, because claimant invoked the presumption that his total disability is due to pneumoconiosis at Section 411(c)(4), the burden of proof shifted to employer to establish rebuttal by disproving the existence of pneumoconiosis, or by establishing that claimant's totally disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Decision and Order on Remand at 4, 9; *see* 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995). Furthermore, the United States Court of Appeals for the Fourth Circuit has held that an employer must "effectively . . . rule out" any contribution to a miner's pulmonary impairment by coal mine dust exposure in order to meet its rebuttal burden. *Rose v. Clinchfield Coal Co.*, 614 F.2d 936, 939, 2 BLR 2-38,

## Attorney Fee

On January 9, 2013, claimant's counsel filed an attorney fee application, requesting a fee for services performed during employer's previous appeal to the Board pursuant to 20 C.F.R. §802.203. We decline to consider claimant's counsel's request for attorney fees at this time. Claimant's counsel is entitled to fees for services rendered while the case was pending before the Board only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). In light of our decision to vacate the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. If, on remand, the administrative law judge again awards benefits, claimant may submit a revised fee petition for attorney's fees for work performed before the Board in both appeals. 20 C.F.R. §802.203(c).

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2-43-44 (4th Cir. 1980). Moreover, the DOL has expressed its acceptance of the "rule out" standard on rebuttal. 78 Fed. Reg. 59,102, 59,106 (Sept. 25, 2013). Therefore, we conclude that the administrative law judge applied the correct rebuttal standard in this case.

Accordingly, the administrative law judge's Decision and Order on Remand 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge