

BRB No. 14-0073 BLA

ALVIN R. LEMMON)
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 Claimant-Respondent)
)
 v.)
)
 CARPENTERTOWN COAL & COKE) DATE ISSUED: 10/30/2014
 COMPANY)
)
 and)
)
 BIRMINGHAM FIRE)
 INSURANCE/CHARTIS)
)
 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 Granting Benefits of Drew A. Swank,
Administrative Law Judge, United States Department of Labor.

Lynda Glagola (Lungs at Work), McMurray, Pennsylvania, Lay
Representative, for claimant.

Christopher L. Wildfire (Margolis Edelstein), Pittsburgh, Pennsylvania, for
employer/carrier.

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Granting Benefits
(2012-BLA-5359) of Administrative Law Judge Drew A. Swank, rendered on a claim

filed on August 20, 2010, pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act). The administrative law judge credited claimant with 22.83 years of coal mine employment and found that he established the existence of clinical pneumoconiosis, based on the x-ray evidence at 20 C.F.R. §718.202(a)(1). The administrative law judge accepted employer's stipulation that claimant is totally disabled by a respiratory or pulmonary impairment. Based on the filing date of the claim and the administrative law judge's determination that claimant established at least fifteen years of qualifying coal mine employment, the administrative law judge found that claimant invoked the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).¹ The administrative law judge further found that employer did not rebut the amended 411(c)(4) presumption. Accordingly, benefits were awarded.

On appeal, employer asserts that the administrative law judge erred in finding that claimant established at least fifteen years of qualifying coal mine employment for invocation of the amended Section 411(c)(4) presumption. Relevant to the issue of rebuttal, employer maintains that the administrative law judge did not properly rule on its evidentiary challenges. Employer also maintains that the administrative law judge erred in finding that it failed to rebut the presumption of total disability due to clinical pneumoconiosis.² Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response, unless specifically requested to do so by the Board.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,

¹ Under amended Section 411(c)(4), a miner is presumed to be totally disabled due to pneumoconiosis if he or she establishes at least fifteen years of underground coal mine employment, or surface coal mine employment in conditions substantially similar to those of an underground mine, and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4), as implemented by 20 C.F.R. §718.305.

² The administrative law judge did not make findings with respect to the existence of legal pneumoconiosis.

³ We affirm, as unchallenged on appeal, the administrative law judge's determinations that claimant established 22.83 years of coal mine employment and total disability at 20 C.F.R. §718.204(b)(2). See *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and in accordance with applicable law.⁴ 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).

I. INVOCATION OF THE AMENDED SECTION 411(c)(4) PRESUMPTION: QUALIFYING COAL MINE EMPLOYMENT

In order to invoke the amended Section 411(c)(4) presumption, claimant must establish at least fifteen years of “employment in one or more underground coal mines,” or in surface coal mine employment, in conditions that were “substantially similar to conditions in an underground mine.” 30 U.S.C. §921(c)(4); *see Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011). The applicable regulation provides that “[t]he conditions in a mine other than an underground mine will be considered ‘substantially similar’ to those in an underground mine if [claimant] demonstrates that [he] was regularly exposed to coal-mine dust while working there.” 20 C.F.R. §718.305(b)(2); *see also Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512-13 (7th Cir. 1988); *see Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 479, 22 BLR 2-265, 2-275 (7th Cir. 2001).

In considering whether claimant established the requisite fifteen years of qualifying coal mine employment, the administrative law judge noted that claimant was “employed in one or more above-ground and below-ground coal mines for well over the statutorily-relevant fifteen years.” Decision and Order at 4. He stated that, “[b]ased on review of the record, the undersigned finds that claimant’s below-ground and equivalent above-ground mining experience is sufficient for invoking the presumption at 20 C.F.R. §718.305.” Decision and Order at 12, *citing* Director’s Exhibit 11; Hearing Transcript at 16-21. Employer argues that the administrative law judge’s summary finding does not satisfy the Administrative Procedure Act (the APA).⁵ We agree.

The Board has held that the type of mine (underground or surface), rather than the location of the particular worker (surface or below ground), is the factor that determines whether claimant’s coal mine employment is qualifying. *See Muncy v. Elkay Mining Co.*, 25 BLR 1-21, 1-29 (2011); *Alexander v. Freeman United Coal Mining Co.*, 2 BLR 1-497,

⁴ As claimant’s coal mine employment was in Pennsylvania, 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, 1-202 (1989) (en banc); Director’s Exhibit 3-5.

⁵ The Administrative Procedure Act (APA), 5 U.S.C. §500 *et seq.*, as incorporated into the Act by 30 U.S.C. §932(a), requires that an administrative law judge set forth the rationale underlying his or her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

1-503-504 (1979) (Smith, Chairman, dissenting). If claimant worked above-ground at an underground coal mine, the administrative law judge may conclude that all of his coal mine employment at the underground mine site is qualifying and claimant does not have to show that he was regularly exposed to coal dust or substantial similarity in his work conditions. *See Island Creek Kentucky Mining v. Ramage*, 737 F.3d 1050, BLR (6th Cir. 2013); *Muncy*, 25 BLR at 1-28-29. However, if his employment took place at a surface coal mine, claimant must establish that he was regularly exposed to coal dust. 20 C.F.R. §718.305; *see Director, OWCP v. Midland Coal Co. [Leachman]*, 855 F.2d 509, 512 (7th Cir. 1988).

In this case, there is testimony from claimant regarding both his underground and surface coal mine employment. We are unable to discern from the administrative law judge's cursory determination whether he has concluded that all of claimant's work with employer was at an underground mine site and is therefore qualifying. Although the administrative law judge stated that he relied on "a review of the evidence" to support his finding of fifteen years of qualifying employment, he failed to properly identify the specific evidence and explain how it supports his conclusions, as required by the APA. Thus, because there are unresolved factual determinations to be made on the record regarding the nature of claimant's coal mine work, we vacate the administrative law judge's determination that claimant established fifteen years of coal mine employment. We therefore vacate the administrative law judge's finding that claimant invoked the amended Section 411(c)(4) presumption, and that employer did not rebut the presumption. *See Leachman*, 855 F.2d at 512; *Muncy*, 25 BLR at 1-28-29; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

II. REBUTTAL OF THE AMENDED SECTION 411(C)(4) PRESUMPTION

In the interest of judicial economy, we will address employer's arguments relevant to rebuttal of the amended Section 411(c)(4) presumption. In order to rebut the presumption, employer must establish by a preponderance of the evidence that claimant does not suffer from clinical or legal pneumoconiosis, or prove that claimant's disability did not arise out of, or in connection with, coal mine employment. *See Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995).

A. Existence of Pneumoconiosis

The administrative law judge initially weighed the x-ray evidence in this case with the burden on claimant to establish the existence of clinical pneumoconiosis. The administrative law judge considered "ten readings of five analog X-rays submitted into evidence pursuant to the parties' designations on their respective Black Lung Benefits Act Evidence Summary Form[.]" Decision and Order at 9. The administrative law judge indicated that he would assign greater weight to readings by dually qualified Board-

certified radiologists and B readers. *Id.* at 8. The administrative law judge found that there were six positive readings by one dually qualified radiologist in comparison to four negative x-ray readings by two dually qualified radiologists. *Id.* at 10. The administrative law judge found the preponderance of the x-ray evidence is positive for clinical pneumoconiosis. *Id.* When considering rebuttal of the amended Section 411(c)(4) presumption, the administrative law judge focused on whether employer disproved that claimant's respiratory disability was due to clinical pneumoconiosis. The administrative law judge rejected the opinions of employer's physicians on the issue of disability causation because they did not diagnose clinical pneumoconiosis. Thus, the administrative law judge found that employer did not rebut the amended Section 411(c)(4) presumption.

Employer argues that the administrative law judge erred by failing to rule on its objection at the hearing to claimant's designated x-ray readings. The record reflects that employer challenged claimant's designation of two positive x-ray readings by Dr. Smith, a dually qualified radiologist, as part of claimant's affirmative case. Employer asserted claimant was required to submit, as one of his affirmative readings, the *negative* x-ray interpretation of Dr. Rasmussen, a B reader, obtained in conjunction with Dr. Rasmussen's examination of claimant. It is employer's position that, if claimant relies on Dr. Rasmussen's opinion as an affirmative medical report, claimant is required also to submit Dr. Rasmussen's x-ray reading as an affirmative x-ray reading.⁶ Although the administrative law judge indicated that he would "take [employer's] objection or comment under advisement," he did not further address the issue. *See* April 8, 2013 Hearing Transcript at 9.

Contrary to employer's assertion, the regulation at 20 C.F.R. §725.414 does not impose a requirement that a party designate an original x-ray interpretation obtained in

⁶ Claimant designated the following x-ray evidence: Dr. Smith's positive readings of x-rays dated May 24, 2011 and May 9, 2012, as his two affirmative x-rays, and Dr. Smith's positive readings of x-rays dated July 7, 2011 and March 13, 2012, as rebuttal to employer's two affirmative readings of those x-rays. *See* Claimant's February 18, 2013 Black Lung Evidence Summary Form. Claimant also submitted Dr. Alexander's positive reading of the Department of Labor (DOL)-sponsored x-ray, dated September 24, 2010. *Id.* Employer designated the following evidence: Dr. Fino's negative reading of a July 7, 2011 x-ray and Dr. Kaplan's negative reading of a March 13, 2012 x-ray, as its two affirmative x-rays, and Dr. Simone's negative readings of the x-rays dated September 24, 2010 and July 7, 2011, as rebuttal to claimant's affirmative x-ray evidence. *See* Employer's February 14, 2013 Black Lung Evidence Summary Form. Employer also designated Dr. Wolfe's negative reading of the DOL-sponsored x-ray, dated September 24, 2010.

conjunction with an examination. *See* 20 C.F.R. §725.414. Although Dr. Rasmussen, a B-reader, examined claimant on May 24, 2011 and read the x-ray he obtained as negative for pneumoconiosis, claimant subsequently had the x-ray re-read by Dr. Smith, a dually qualified radiologist, who opined that it was positive for pneumoconiosis. Claimant was permitted under the regulations to designate Dr. Smith's positive reading, in lieu of Dr. Rasmussen's negative reading of the May 24, 2011 x-ray. *See* 20 C.F.R. §725.414(a)(2)(i).

We agree with employer, however, that the administrative law judge erred in failing to rule on employer's evidentiary challenges, and we vacate his finding that a preponderance of the x-ray evidence is positive for pneumoconiosis. *See L.P. [Preston] v. Amherst Coal Co.*, 24 BLR 1-57, 1-63 (2008) (en banc). The record reflects that, at the hearing, employer submitted two negative readings by Dr. Wolfe, a Board-certified radiologist and B reader, of two x-rays, dated March 24, 2011 and May 9, 2012. *See* Employer's Exhibits 8, 9; Hearing Transcript at 13. Employer argued at the hearing that it should be allowed to substitute Dr. Wolfe's readings for readings by Drs. Fino and Kaplan, B readers, if claimant was not required to submit Dr. Rasmussen's negative x-ray interpretation. Hearing Transcript at 14-15. On remand, the administrative law judge should give the parties the opportunity to re-designate their evidence, as necessary, in light of our holding with regard to Dr. Rasmussen's x-ray reading. The administrative law judge must consider whether the designated evidence is consistent with the limitations set forth at 20 C.F.R. §725.414.

Employer also contends that the administrative law judge erred in excluding Dr. Simone's reading of the July 7, 2011 x-ray, on the grounds that it was not admissible as a "rebuttal" reading.⁷ We disagree. The applicable regulation states that employer may submit, in rebuttal of the case presented by claimant, "no more than one physician's interpretation of each chest X-ray . . . submitted by claimant under paragraph (a)(2)(i) of this subsection or by the Director pursuant to 20 C.F.R. 715.406." 20 C.F.R. §725.414(a)(2)(iii). The administrative law judge observed correctly that Dr. Simone's reading of the July 7, 2011 x-ray is not responsive to an x-ray submitted by claimant or to

⁷ Employer submitted two negative readings by Dr. Simone of the September 24, 2010 and July 7, 2011 x-rays, as rebuttal evidence. Claimant objected to employer's designation of these readings as rebuttal evidence, on the grounds that claimant had not submitted an affirmative reading of either the September 24, 2010 or July 7, 2011 x-rays. *See* Claimant's letter dated March 20, 2013. The administrative law judge did not address claimant's objection with regard to Dr. Simone's negative reading of the September 24, 2010 x-ray and we instruct him to do so on remand.

the DOL-sponsored x-ray. *See* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii); Decision and Order at 9 n.6. Therefore, we affirm the administrative law judge’s decision to exclude this x-ray reading, as it does not constitute rebuttal evidence, as employer alleges.

Lastly, employer contends that the administrative law judge erred in failing to weigh an x-ray reading by Dr. Blodgett of a film dated March 8, 2012. Employer’s Exhibit 12. The record reflects that employer submitted this reading subsequent to the hearing. On August 23, 2013, claimant objected to the submission of Dr. Blodgett’s x-ray reading, arguing that the record had been left open post-hearing for the limited purpose of allowing claimant to submit deposition testimony from Drs. Rasmussen and Sood, and for employer to submit evidence responsive to that testimony.¹ Hearing Transcript at 33. In a letter dated August 27, 2013, employer argued that there was good cause for the late submission of Dr. Blodgett’s x-ray reading, due to the fact that it did not become aware of the existence of the x-ray until claimant testified at the hearing regarding a recent hospitalization. The administrative law judge did not rule on the admissibility of this x-ray reading or otherwise discuss it in his Decision and Order.

The applicable regulations require that the parties exchange all documentary evidence at least twenty days before a hearing is held in connection with the claim, and if documentary evidence is not timely exchanged and “the parties do not waive the [twenty]- day requirement or good cause is not shown, the administrative law judge shall either exclude the late evidence from the record or remand the claim to the district director for consideration of such evidence.” 20 C.F.R. §725.456(b)(3); *see White v. Douglas Van Dyke Coal Co.*, 6 BLR 1-905 (1984). On remand, the administrative law judge must determine whether employer established good cause for the admission of Dr. Blodgett’s x-ray reading under 20 C.F.R. §725.456(b)(4).

B. Disability Causation

Because we vacate the administrative law judge’s determination that the preponderance of the x-ray evidence is positive for pneumoconiosis, we also vacate his finding that employer failed to disprove that claimant’s disability is due to clinical

pneumoconiosis.⁸ Decision and Order at 15-16. Thus, we remand the case for further consideration of rebuttal of the amended 411(c)(4) presumption, if invoked. In rendering his decision on remand, the administrative law judge must set forth his findings on this issue in detail, including the underlying rationale, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-162.

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

SO ORDERED.

BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

⁸ The administrative law judge rejected the opinions of employer's physicians, Drs. Fino and Kaplan, that claimant's respiratory disability is unrelated to coal dust exposure, because they did not diagnose clinical pneumoconiosis, contrary to the administrative law judge's finding with regard to the x-ray evidence. Decision and Order at 16. The administrative law judge's credibility determinations were permissible and may be reinstated on remand, if he finds that claimant invoked the presumption and that employer is unable to disprove the existence of clinical pneumoconiosis on rebuttal. *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-85, 2-99 (3d Cir. 2004).