U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0636 BLA

DAVID L. KEFFER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TEAYS INCORPORATED	)	
	)	
and	)	
	)	DATE ISSUED: 09/21/2018
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	
	)	
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 of Lystra A. Harris, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ashley M. Harman and Lucinda L. Fluharty (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order (2016-BLA-05429) of Administrative Law Judge Lystra A. Harris awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a miner's subsequent claim filed on August 5, 2014.[1]

The administrative law judge found that claimant had 20.74 years of underground coal mine employment and is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). She therefore found that claimant invoked the rebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2012),[2] and established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c).[3] The administrative law judge further found that employer did not rebut the presumption and awarded benefits accordingly.[4]

[1] This is claimant's second claim for benefits. His first claim, dated July 20, 2010, was denied on March 30, 2011 by the district director, who found that he did not establish any element of entitlement. Director's Exhibit 1. Claimant took no further action on that claim.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where the claimant 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 or pulmonary impairment. 30 U.S.C. §921(c)(4) (2012); *see* 20 C.F.R. §718.305.

[3] Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(c); *White v. New White Coal Co*., 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(c)(3).

[4] Prior to awarding benefits, the administrative law judge considered the old and new evidence together, and permissibly relied upon the evidence submitted with the current claim, which she found more accurately reflects claimant's current condition. *See Parsons*

On appeal, employer contends that the administrative law judge erred in finding that it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, did not file a response brief in this appeal. Employer filed a reply brief, reiterating its contentions.[5]

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.[6] 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).

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

Because claimant invoked the Section 411(c)(4) presumption, the burden shifted to employer to establish that claimant has neither legal nor clinical pneumoconiosis,[7] or that "no part of the miner's respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii).

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v. Wolf Creek Collieries, 23 BLR 1-29, 1-34-35 (2004) (en banc); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004) (en banc); Decision and Order at 35-36.

[5] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established 20.74 years of underground coal mine employment; the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2); invocation of the Section 411(c)(4) presumption; and a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7, 18-19, 35-36.

[6] 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 West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 5.

[7] Clinical pneumoconiosis is defined as "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).

The administrative law judge found that employer failed to establish rebuttal by either method.

We affirm the administrative law judge's finding that employer failed to disprove the existence of clinical pneumoconiosis, as it is unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Employer's failure to disprove clinical pneumoconiosis precludes a rebuttal finding that claimant does not have pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i). Nevertheless, because legal pneumoconiosis is relevant to the second method of rebuttal, we will address employer's contention that the administrative law judge erred in finding that it failed to disprove the existence of legal pneumoconiosis. *See Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 159 (2015) (Boggs, J., concurring and dissenting).

To prove that claimant does not have legal pneumoconiosis, employer must demonstrate that he does not have a chronic lung disease or impairment that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich*, 25 BLR at 1-1-55 n.8. The administrative law judge considered the opinions of Drs. Zaldivar and Castle.[8] Decision and Order at 25-33; Director's Exhibits 14, 15; Employer's Exhibits 1, 9, 10, 17, 18. Dr. Zaldivar opined that claimant does not have legal pneumoconiosis, but suffers from asthma/COPD overlap due to cigarette smoking and untreated asthma.[9] Director's Exhibits 14, 15; Employer's Exhibits 10, 17. Dr. Castle similarly opined that claimant does not have legal pneumoconiosis, but suffers from a smoking-induced airway

[8] The administrative law judge also considered the medical opinions of Drs. Rasmussen and Forehand, submitted with the current claim. Because these doctors opined that claimant suffers from legal pneumoconiosis, the administrative law judge correctly noted that their opinions do not assist employer in rebutting the presumed fact of legal pneumoconiosis. Decision and Order at 25, 27, 33; Director's Exhibits 13, 29.

[9] Based on his examination of claimant on July 1, 2015, Dr. Zaldivar initially diagnosed a partially reversible airway obstruction due to asthma and emphysema from cigarette smoking and possibly genetics. Director's Exhibit 14. Upon review of additional medical records, including a pathology report of lung biopsy and resection, Dr. Zaldivar diagnosed untreated asthma/chronic obstructive pulmonary disease (COPD) overlap with lung remodeling, and noted that claimant had developed lung cancer. Director's Exhibit 15; Employer's Exhibits 10, 17.

obstruction with pulmonary emphysema and bronchial asthma.[10] Employer's Exhibits 1 at 11; 9 at 13, 18. The administrative law judge found their opinions inadequately explained and not well-reasoned and, therefore, insufficient to satisfy employer's burden to disprove the existence of legal pneumoconiosis. Decision and Order at 30-34.

Employer contends that the administrative law judge applied an improper rebuttal standard to Dr. Castle's opinion by requiring him to "rule out" any contribution from coal dust exposure. Employer's Brief at 12, 17-18. We disagree. The administrative law judge correctly stated that employer bore the burden of establishing that claimant does not have legal pneumoconiosis, which includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 19-20, *see* 20 C.F.R. §§718.201(b), 718.305(d)(1)(i)(A). Moreover, the administrative law judge did not reject Dr. Castle's opinion because it was insufficient to meet a "rule out" standard on the existence of legal pneumoconiosis. Rather, the administrative law judge considered the explanations given by Dr. Castle for why *he* excluded coal mine dust exposure as a causative factor for claimant's impairment, and she found his opinion not credible.[11] Decision and Order at 31-33.

Specifically, the administrative law judge accurately found that, in eliminating coal dust exposure as a cause of claimant's obstructive lung disease, Dr. Castle relied in part on his view that claimant's significantly reduced FEV_1/FVC ratio is inconsistent with obstruction due to coal dust exposure. Decision and Order at 32; Employer's Exhibits 1 at 11, 18 at 28. Dr. Castle explained that smoking-related forms of obstructive lung disease are typically associated with a significant reduction in the ratio of FEV_1 to FVC, while impairments related to coal dust exposure are generally associated with a preserved ratio or minimal reduction.[12] Employer's Exhibits 1 at 11, 18 at 28. The administrative law

[10] Dr. Castle performed record reviews on August 24, 2016 and September 21, 2016. Employer's Exhibits 1, 9.

[11] Dr. Castle stated "it is my opinion that I can exclude or rule out coal dust exposure and coal workers' pneumoconiosis as playing any role in [claimant's] impairment" and that "any contribution to his impairment by the pathologic coal workers' pneumoconiosis present would have been a de minimis contribution." Employer's Exhibit 9 at 14.

[12] Dr. Castle stated that the July 1, 2015 post-bronchodilator pulmonary function study demonstrated a "significant reduction in the FEV_1/FVC ratio … of 56%," which Dr. Castle stated "is typical of tobacco smoke induced airway obstruction." Employer's Exhibit 1 at 11. Dr. Castle further stated that "coal workers' pneumoconiosis results in a minimal or no reduction in the FEV_1/FVC ratio." *Id.*

judge permissibly discredited Dr. Castle's rationale as it conflicts with the medical science credited by the Department of Labor, recognizing that coal mine dust exposure can cause clinically significant obstructive disease, which can be shown by a reduction in the FEV_1/FVC ratio.[13] *See* 65 Fed. Reg. 79,920, 79,943 (Dec. 20, 2000); *Westmoreland Coal Co. v. Stallard*, 876 F.3d 663, 671-72 (4th Cir. 2017); *Central Ohio Coal Co. v. Director, OWCP* [*Sterling*], 762 F.3d 483, 491, 25 BLR 2-633, 2-645 (6th Cir. 2014); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 314-15, 25 BLR 2-115, 2-130 (4th Cir. 2012); Decision and Order at 32. The administrative law judge further permissibly discredited Dr. Castle's opinion because he did not adequately explain why claimant's twenty years of coal mine dust exposure did not contribute, along with cigarette smoking and asthma, to his obstructive impairment. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558, 25 BLR 2-339, 2-353 (4th Cir. 2013); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 19 BLR 2-61, 2-67 (4th Cir. 1995); Decision and Order 31-32, 34.

We also reject employer's contention that the administrative law judge erred in her consideration of Dr. Zaldivar's opinion. Employer's Brief at 7-18; Reply Brief at 2-5. The administrative law judge observed that in excluding a diagnosis of legal pneumoconiosis, Dr. Zaldivar relied in part on his view that the "majority" of the x-ray readings and computed tomography (CT) scan readings are negative for the existence of pneumoconiosis.[14] Decision and Order at 31, *referencing* Employer's Exhibits 10 at 4; 17

[13] We reject employer's assertion that the administrative law judge's weighing of Dr. Castle's opinion against the medical science in the preamble accepted by the Department of Labor as credible, amounts to a presumption that a miner's obstructive lung disease is caused by exposure to coal dust. Employer's Brief at 14-15, *citing Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002), *aff'g in part and rev'g in part Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47 (D.D.C. 2001). Because claimant invoked the Section 411(c)(4) presumption, employer bore the burden to establish that claimant does not have a "chronic pulmonary disease or respiratory or pulmonary impairment" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." *Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting); 20 C.F.R. §718.201(b). Therefore, the administrative law judge looked to Dr. Castle for a sufficient explanation as to why claimant's impairment was not significantly related to, or substantially aggravated by, his coal mine dust exposure. Decision and Order at 34.

[14] In his supplemental report dated September 23, 2016, Dr. Zaldivar stated:

> It is obvious from [the negative x-ray and CT scan evidence] that there is no mineral dust within the lungs and, therefore, the expectation is that since

at 52-54. The administrative law judge permissibly concluded that Dr. Zaldivar's opinion is inconsistent with the regulations, which recognize that a physician can render a credible diagnosis of pneumoconiosis notwithstanding a negative chest x-ray reading. *See* 20 C.F.R. §718.202(a)(4); 65 Fed. Reg. 79,920, 79,971 (Dec. 20, 2000); *Looney*, 678 F.3d at 311-12, 25 BLR at 2-127; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 210, 22 BLR 2-162, 2-173 (4th Cir. 2000) (evidence that does not establish clinical pneumoconiosis, e.g., an x-ray read as negative for coal workers' pneumoconiosis, should not be treated as evidence weighing against a finding of legal pneumoconiosis); *Hobbs v. Clinchfield Coal Co*., 45 F.3d 819, 821, 19 BLR 2-86, 2-91-92 (4th Cir. 1995); *Barber*, 43 F.3d at 901, 19 BLR at 2-66; Decision and Order at 31 n.14.

The administrative law judge further found that to the extent Dr. Zaldivar concluded that claimant's impairment is not due to coal dust exposure because there is insufficient evidence of mineral dust in his lungs to cause damage, his opinion is unsupported by the evidence of record. Decision and Order at 31. Specifically, she noted that contrary to Dr. Zaldivar's view, she found that the x-ray evidence is in equipoise as to the existence of pneumoconiosis, based on the opinions of several dually-qualified readers that claimant has evidence of clinical pneumoconiosis in his lungs. Decision and Order at 31. Further, she noted that the pathologist's report indicated the presence of "multiple" anthracosilicotic nodules in the resected right upper lobe.[15] Decision and Order at 31, *referencing*

> there is no mineral dust within the lungs, it could not have caused any anatomical damage or physiological damage.

Employer's Exhibit 10 at 4. In his November 21, 2016 deposition, Dr. Zaldivar acknowledged that he reviewed some positive x-rays, but emphasized that the majority were negative and that the CT scans also did not show evidence of pneumoconiosis. Employer's Exhibit 17 at 67-68.

[15] Dr. Zaldivar initially stated that the pathologist did not see any evidence of pneumoconiosis. Employer's Exhibit 10 at 4. In his November 21, 2016 deposition, Dr. Zaldivar acknowledged that the pathologist found multiple anthracosilicotic nodules, but stated that this finding could not be taken to mean that claimant has coal workers' pneumoconiosis. Employer's Exhibit 17 at 54-55. On cross-examination, when asked whether it was his opinion that claimant has pneumoconiosis, Dr. Zaldivar qualified his response, stating:

> Well, if we accept the pathologist's report as showing pneumoconiosis, then, yes, he does, although it is not visible radiographically. But we have to accept the pathologist's report, because it's the only one, and say, okay, there

Employer's Exhibit 4 at 9; *see* 20 C.F.R. §718.201(a)(1). The administrative law judge therefore permissibly accorded Dr. Zaldivar's opinion little probative weight because she found that it is not well-reasoned or supported by the record.[16] *See 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); Decision and Order at 31; *see Cochran*, 718 F.3d at 324, 25 BLR at 2-265.

Based on the foregoing, the administrative law judge permissibly concluded that the opinions of Drs. Zaldivar and Castle are unpersuasive, as they failed to adequately explain their elimination of claimant's years of underground coal mine dust exposure as an aggravating or contributing factor in claimant's pulmonary condition. *See* 20 C.F.R. §718.201(a)(2), (b); *see Owens*, 724 F.3d at 558, 25 BLR at 2-353; *Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 34. As the administrative law judge's findings are supported by substantial evidence, we affirm her determination that the opinions of Drs. Zaldivar and Castle do not satisfy employer's burden to disprove the existence of legal pneumoconiosis, and therefore fail to rebut the

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> is something there that looks like pneumoconiosis. But how much is unknown.

Id. at 66. The administrative law judge noted that while Dr. Zaldivar concluded based on the pathology report that claimant has clinical pneumoconiosis, he indicated that he was unsure whether he believed the report. Decision and Order at 27, *referencing* Employer's Exhibit 17 at 56.

[16] We reject employer's additional argument that the administrative law judge erred in failing to recognize Dr. Zaldivar's citation to new medical literature that post-dates the preamble to the 2001 revised regulations, relevant to the issues of smoking and the development of lung disease. Employer's Brief at 10; Reply Brief at 3. When Dr. Zaldivar was asked whether the new literature he discussed enhanced or clarified what was in the preamble, he responded, "Correct. Both." Employer's Exhibit 17 at 47. Further, Dr. Zaldivar acknowledged that there is no new original research regarding the effects of coal and silica on the lungs. *Id.* at 47. Based on the foregoing, employer has not shown how the administrative law judge's failure to address whether the recent medical studies cited by Dr. Zaldivar invalidate the medical literature credited by the Department of Labor constitutes reversible error. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference."); *Westmoreland Coal Co. v. Cochran*, 718 F.3d 319, 324, 25 BLR 2-255, 2-265 (4th Cir. 2013) (observing that neither of employer's medical experts "testified as to scientific innovations that archaized or invalidated the science underlying the Preamble").

Section 411(c)(4) presumption.[17] 20 C.F.R. §718.305(d)(1)(i)(A); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137, 25 BLR 2-689, 2-699 (4th Cir. 2015); *Compton*, 211 F.3d at 207-208, 22 BLR at 2-168; Decision and Order at 34.

Upon finding that employer did not disprove the existence of pneumoconiosis, the administrative law judge addressed whether employer could establish that no part of claimant's respiratory or pulmonary disability was caused by pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 34-35. The administrative law judge rationally discounted the disability causation opinion of Dr. Zaldivar because he did not diagnose claimant with clinical or legal pneumoconiosis, contrary to the administrative law judge's finding that employer failed to disprove that claimant has both forms of the disease. *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05, 25 BLR 2-173, 2-721 (4th Cir. 2015); *see also Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order at 35. The administrative law judge acknowledged that Dr. Castle diagnosed clinical pneumoconiosis but opined that it was not totally disabling because the amount of coal mine dust in claimant's lungs was insufficient to cause any lung impairment. Decision and Order at 28-29, 35; Employer's Exhibits 9 at 13-14; 18 at 32, 34. The administrative law judge permissibly discredited Dr. Castle's opinion as unsupported by the record and inadequately explained, in light of the fact that "about half" of the dually-qualified x-ray readers found evidence of clinical pneumoconiosis and the pathologist identified "multiple" anthracosilicotic nodules in claimant's lungs.[18] *Hicks*,

[17] Because the administrative law judge provided valid bases for discrediting the opinions of Drs. Zaldivar and Castle on the issue of legal pneumoconiosis, we need not address employer's remaining arguments regarding the weight she accorded to their opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382-3 n.4 (1983).

[18] Employer additionally asserts that the administrative law judge erred in failing to discuss Dr. Castle's opinion that legal pneumoconiosis played no part in claimant's disability. Employer's Brief at 21. Dr. Castle did not diagnose legal pneumoconiosis and the administrative law judge found the existence of legal pneumoconiosis was not disproved. Decision and Order at 30-34; Employer's Exhibits 9 at 13; 18 at 32. Thus, Dr. Castle's opinion could not have been credited at all unless there were "specific and persuasive reasons" for concluding that the doctor's views on causation were independent of his mistaken belief that the miner did not have legal pneumoconiosis, in which case his opinion could be assigned, at most, "little weight." *Hobet Mining, LLC v. Epling*, 783 F.3d 498, 505 (4th Cir. Apr. 17, 2015), *quoting Scott v. Mason Coal Co.*, 289 F.3d 262, 269-70, 22 BLR 2-373, 2-384 (4th Cir. 2002); *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1070, 25 BLR 2-431, 2-446 (6th Cir. 2013); *see Toler v. E. Assoc. Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995) (recognizing that a doctor's judgment as to

138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; Decision and Order at 33, 35, *referencing* Employer's Exhibit 4 at 9. Therefore, we affirm the administrative law judge's determination that employer failed to establish that no part of claimant's respiratory or pulmonary total disability was caused by pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

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whether pneumoconiosis is a cause of a miner's disability is necessarily influenced by the accuracy of his underlying diagnosis). As employer has not identified any such specific and persuasive reasons for concluding that Dr. Castle's opinion on causation is independent of his mistaken belief that the miner did not have legal pneumoconiosis, the administrative law judge's error, if any, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).