U.S. Department of Labor

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

BRB No. 20-0118 BLA

DARRELL L. BOYD	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	
	)	DATE ISSUED: 06/29/2021
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 Jerry R. DeMaio, Administrative Law Judge, United States Department of Labor.

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

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judge.

BUZZARD, Administrative Appeals Judge:

Employer appeals Administrative Law Judge Jerry R. DeMaio's Decision and Order on Remand (2013-BLA-05537) rendered on a claim filed pursuant to the Black Lung

Benefits Act, 30 U.S.C. §§901-944 (2018) (Act). This case involves a miner's claim filed on March 19, 2012, and is before the Benefits Review Board for the second time.[1]

The Board previously affirmed, as unchallenged, Administrative Law Judge Pamela J. Lakes's determination 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) (2018).[2] However, the Board held she did not properly address Employer's challenges to the admissibility of Dr. Forehand's supplemental report. *Boyd v. Island Creek Coal Co.*, BRB No. 16-0524 BLA, slip op. at 5-8 (July 28, 2017) (unpub.). Noting that the evidentiary record was uncertain and could change on remand, the Board declined to address Employer's challenges to the administrative law judge's rebuttal findings on legal pneumoconiosis and disability causation. With regard to clinical pneumoconiosis, the Board held the administrative law judge failed to properly explain why she credited the positive analog x-rays and medical opinions diagnosing clinical pneumoconiosis over the contrary negative digital x-ray readings and negative computed tomography (CT) scan evidence. *Id*. at 7-8. Thus, the Board vacated the award of benefits and remanded the case for Judge Lakes to resolve whether Dr. Forehand's supplemental opinion was admissible and to reconsider whether Employer rebutted the presumption if the supplemental report was excluded. *Id.* at 8.

On remand, the case was reassigned to Administrative Law Judge Jerry R. DeMaio (the administrative law judge). He excluded Dr. Forehand's supplemental report and found Employer did not rebut the Section 411(c)(4) presumption.

On appeal, Employer asserts the administrative law judge erred in finding the Section 411(c)(4) presumption unrebutted. Neither Claimant nor the Director, Office of Workers' Compensation Programs (the Director), has filed a brief in this appeal.[3]

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[1] We incorporate the procedural history of this case and the Board's prior holdings, as set forth in *Boyd v. Island Creek Coal Co.*, BRB No. 16-0524 BLA (July 28, 2017) (unpub.).

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] We detect no abuse of discretion in the administrative law judge's exclusion of Dr. Forehand's supplemental report, based on his determination that the Director did not demonstrate good cause for the late submission. *See Dempsey v. Sewell Coal Corp*., 23

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, 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 Assocs., Inc.*, 380 U.S. 359 (1965).

Because Claimant invoked the Section 411(c)(4) presumption, the burden shifted to Employer to establish Claimant has neither legal nor clinical pneumoconiosis,[5] or that "no part of [Claimant'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); *see W. Va. CWP Fund v. Bender*, 782 F.3d 129, 137 (4th Cir. 2015); *Minich v. Keystone Coal Mining Co.*, 25 BLR 1-149, 1-154-56 (2015) (Boggs, J., concurring and dissenting).

Rebuttal of Clinical Pneumoconiosis

To disprove clinical pneumoconiosis, Employer must establish that Claimant does not have any of the 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).

BLR 1-47, 1-62 (2004) (en banc); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989) (en banc).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibits 3, 8.

[5] "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 definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "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).

Analog X-ray Evidence

The administrative law judge incorporated Judge Lakes's analysis and factual findings regarding four analog x-rays. Decision and Order on Remand at 4. Dr. Forehand, a B reader, and Drs. Alexander and Ahmed, dually-qualified Board-certified radiologists and B readers, interpreted the April 30, 2012 x-ray as positive for pneumoconiosis, while Drs. Tarver and Meyer, also dually qualified, interpreted it as negative. Director's Exhibit 11; Claimant's Exhibits 5, 13; Employer's Exhibits 1, 6. Relying on the preponderance of the positive readings, the administrative law judge found the April 30, 2012 x-ray positive for pneumoconiosis. Decision and Order on Remand at 4.

Dr. Miller, a dually-qualified radiologist, interpreted the December 17, 2012 x-ray as positive for pneumoconiosis, while Dr. Shipley, also dually-qualified, interpreted it as negative. Claimant's Exhibit 1; Employer's Exhibit 11. Additionally, Drs. Miller and Alexander, each dually qualified, interpreted the May 21 and September 12, 2013 x-rays as positive for pneumoconiosis, while Drs. Tarver and Shipley interpreted them as negative. Claimant's Exhibits 2, 4; Employer's Exhibits 5, 11. The administrative law judge found the readings of these three x-rays in equipoise based on the equal number of positive and negative readings by the dually-qualified radiologists. Decision and Order on Remand at 4. Because one x-ray was positive and the readings of three were in equipoise, the administrative law judge concluded Employer did not disprove clinical pneumoconiosis based on the analog x-ray evidence. *Id*.

Employer argues the negative x-ray interpretations of Drs. Meyer, Tarver, and Shipley are entitled to greater weight based on their "superior" qualifications as professors of radiology. Employer's Brief at 11-12. Contrary to Employer's contention, credibility determinations are within the discretion of the administrative law judge. He was not required to give greater weight to Employer's experts based on qualifications such as professorships and publications, but instead permissibly assigned equal weight to readings by physicians dually-qualified as radiologists and B readers. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-114 (2006) (en banc) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon*., 24 BLR 1-13 (2007) (en banc) (McGranery and Hall, JJ., concurring and dissenting); *Worach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993). We thus affirm his finding that the readings of the December 17, 2012, May 31, 2013, and September 12, 2013 x-rays are in equipoise. *See Sea "B" Mining Co. v. Addison*, 831 F.3d 244, 256-57 (4th Cir. 2016); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992).

Employer also contends the administrative law judge erred in crediting Dr. Forehand's positive reading of the April 30, 2012 x-ray because he is a B reader but not a Board-certified radiologist. Employer's Brief at 11. Employer contends the readings of this x-ray must be considered in equipoise. *Id*. However, any error in this regard is

harmless. Even assuming the readings of the April 30, 2012 x-ray are in equipoise as Employer alleges, it does not alter the administrative law judge's overall finding that Employer failed to satisfy its burden of proof by establishing the absence of clinical pneumoconiosis. *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"); *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730 (3d Cir. 1993). We therefore affirm the administrative law judge's finding that Employer did not disprove clinical pneumoconiosis based on the analog x-ray evidence. Decision and Order on Remand at 4.

Digital X-rays, CT scans and Medical Opinions

The administrative law judge also incorporated Judge Lakes's analysis and findings that the digital x-ray and CT scan evidence is negative for clinical pneumoconiosis.[6] Employer again asserts the administrative law judge should have considered Dr. Tarver's additional qualifications to find the readings of the February 28, 2013 digital x-ray negative for clinical pneumoconiosis and not in equipoise. We reject Employer's contention for the reasons previously stated. *See Harris*, 23 BLR at 1-114; *Worach*, 17 BLR at 1-108. Moreover, Employer fails to explain how it was prejudiced given the administrative law

[6] The administrative law judge summarized the digital x-ray and CT scan evidence as follows:

> As regards other evidence, under 20 C.F.R. § 718.202(a)(4), there are two digital x-rays in the record and a CT scan. Of the two digital x-rays, the first, dated February 28, 2013, is in equipoise . . . . The second digital x-ray, from April 14, 2015, was found to be negative for pneumoconiosis by Dr. Ramakrishnan, an expert with unknown qualifications. The same x-ray was interpreted by Dr. Tarver, a dual-qualified reader, and he found the x-ray negative for pneumoconiosis . . . . As Tarver's credentials are superior, his opinion was credited over that of Ramakrishnan.
>
> There is also a CT scan in evidence from July 16, 2015. This CT scan was read by the same two doctors: Drs. Ramakrishnan and Tarver. Again, Tarver's opinion that the CT scan did not show the presence of pneumoconiosis was credited over the opinion of Ramakrishnan, who found the presence of pneumoconiosis on the CT scan . . . .

Decision and Order on Remand at 4 (internal citations omitted).

judge's overall finding that the preponderance of the digital x-ray and CT scan evidence is negative. *See Shinseki*, 556 U.S. at 413.

Regarding the medical opinion evidence, Dr. Forehand[7] diagnosed clinical pneumoconiosis while Drs. Fino[8] and Dahhan[9] did not. Decision and Order on Remand at 4. The administrative law judge observed that Dr. Forehand was the Department of Labor's examining physician and his opinion was supported by the positive analog x-ray evidence. Decision and Order on Remand at 4. He accorded Dr. Forehand's opinion "the most weight because [it] was based on his positive x-ray reading, other objective testing, [Claimant's] coal mine employment history and [Claimant's] documented history of pulmonary illness." *Id.*; *see* Director's Exhibit 11. In contrast, he found Dr. Fino expressed views on the radiographic appearance of clinical pneumoconiosis that are inconsistent with the regulations. Decision and Order on Remand at 4. He also found Dr. Dahhan's opinion "problematic" because he did not address Dr. Forehand's positive reading of the April 30, 2012 analog x-ray. *Id*. The administrative law judge concluded that Dr. Forehand's opinion is "more persuasive than the two experts who merely reviewed his digital x-rays and CT scans for the purposes of this case." *Id*. at 5.

[7] Dr. Forehand performed the Department of Labor-sponsored examination of Claimant on April 30, 2012. Director's Exhibit 11. He diagnosed clinical coal workers' pneumoconiosis based on Claimant's respiratory symptoms, the positive chest x-ray he interpreted, and the results of pulmonary function testing. *Id*.

[8] Dr. Fino examined Claimant on February 28, 2013, and conducted a medical records review, which included Dr. Forehand's positive reading of the April 30, 2012 analog x-ray, and the negative readings of the December 17, 2012 and September 12, 2013 analog x-rays, both digital x-rays, and the CT scan evidence. Employer's Exhibit 2 at 8-10; Employer's Exhibit 8 at 9-10; Employer's Exhibit 14 at 1-3. He opined Claimant has asthma unrelated to coal dust exposure and that there is insufficient evidence to justify a diagnosis of clinical coal workers' pneumoconiosis. Employer's Exhibit 2 at 10.

[9] Dr. Dahhan examined Claimant on May 31, 2013, and conducted a medical records review, which included Dr. Forehand's positive reading and Dr. Tarver's negative reading of the April 30, 2012 analog x-ray, the negative interpretations of the December 17, 2012 and September 12, 2013 analog x-rays, both digital x-rays, and the CT scan evidence. Employer's Exhibit 4 at 2-3; Employer's Exhibit 9 at 23-24; Employer's Exhibit 13 at 1. He opined Claimant does not have clinical pneumoconiosis. *Id*. Employer's Exhibit 4 at 3; Employer's Exhibit 13 at 1.

Initially, we reject Employer's assertion that the administrative law judge erred in discrediting Dr. Fino's opinion on clinical pneumoconiosis. Dr. Fino opined the irregularly shaped opacities in Claimant's middle and lower lung zones on the April 30, 2012 x-ray are uncharacteristic of coal workers' pneumoconiosis because it typically presents as rounded opacities, first in the upper portion of the right lung and then, in descending order, the left upper zone, two middle zones, and two lower zones. *Id*. The administrative law judge permissibly found Dr. Fino's views to be inconsistent with the regulations, which do not require clinical pneumoconiosis to appear radiographically as rounded opacities or in a specific lung-zone location. *See* 20 C.F.R. §718.202(a)(1); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 439-41 (4th Cir. 1997); Decision and Order on Remand at 4.

We further reject Employer's assertion that the administrative law judge improperly "discounted Dr. Dahhan's opinion on clinical pneumoconiosis solely on the basis Dr. Dahhan did not address the positive x-ray reading from Dr. Forehand." Employer's Brief at 12-13. Although Dr. Dahhan reviewed Dr. Forehand's positive reading of the April 30, 2012 x-ray in conjunction with negative radiological evidence of record, the administrative law judge accurately observed he failed to "address" this positive interpretation in concluding there is "no evidence" of clinical pneumoconiosis.[10] Decision and Order on Remand at 4-5; Employer's Exhibits 4 at 3; 9 at 23, 29; 13 at 1. Because Dr. Dahhan did not explain why Dr. Forehand's positive x-ray interpretation was not evidence of clinical pneumoconiosis or was otherwise less credible than the negative x-ray interpretations on which he relied, we affirm the administrative law judge's permissible finding that Dr. Dahhan's opinion on clinical pneumoconiosis is not adequately reasoned.[11] *Harman*

[10] In his initial report, Dr. Dahhan summarized Dr. Forehand's findings but, in his conclusions section, stated Claimant "has no evidence of medical pneumoconiosis[.]" Employer's Exhibit 4 at 2-3. At his deposition, the physician reiterated Claimant "has no radiological evidence of coal workers' pneumoconiosis." Employer's Exhibit 9 at 23. Finally, in his supplemental report, Dr. Dahhan concluded Claimant does not have clinical pneumoconiosis because "that abnormality requires the presence of x-ray findings consistent with that disease." Employer's Exhibit 13 at 1.

[11] Our dissenting colleague's suggestion that the administrative law judge offered no reason for finding Dr. Dahhan's opinion unpersuasive is, therefore, without merit. Dr. Dahhan's assessment that there is "no evidence" of clinical pneumoconiosis is particularly significant given that the April 30, 2012 x-ray, and the x-ray evidence as a whole, was found to be positive for the disease. Decision and Order on Remand at 4; Decision and Order at 15.

Mining Co. v. Director, OWCP [*Looney*], 678 F.3d 305, 316-17 (4th Cir. 2012); *Akers*, 131 F.3d at 441.

Additionally, the administrative law judge permissibly found Dr. Forehand's opinion diagnosing clinical pneumoconiosis reasoned and documented because it is based on his positive x-ray reading, objective testing, Claimant's coal mine employment and medical histories, and is also consistent with the positive analog x-ray evidence that the administrative law judge credited.[12] *See Looney*, 678 F.3d 305, 316-17; *Akers*, 131 F.3d at 441; Decision and Order on Remand at 4-5. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that the medical opinion evidence is insufficient to disprove the existence of clinical pneumoconiosis. *Id.*; Decision and Order on Remand at 4. In addition, the Board is not empowered to reweigh the evidence or substitute its judgment for that of the administrative law judge, even if our, or our dissenting colleague's, conclusions would have been different. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764 (4th Cir. 1999); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988).

Weighing all the Evidence as Whole

Considering all evidence together, the administrative law judge found that because two distinct methods of establishing clinical pneumoconiosis, analog x-ray and medical opinion evidence, support the presence of the disease, and two alternative methods, digital x-ray and CT scan evidence, do not support the presence of the disease, Employer failed to satisfy its burden of proof. Decision and Order on Remand at 5. Simply acknowledging that certain types of evidence are positive while others are negative, however, does not satisfy the explanatory requirements of the Administrative Procedure Act (APA)[13] or follow the Board's previous remand instruction to explain how he resolves the conflict in the positive x-ray and medical opinion evidence as opposed to the negative digital x-ray and CT scan evidence. *Boyd*, BRB No. 16-0524 BLA, slip op. at 8; *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); U.S.C. §557(c)(3)(A); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 803 (4th Cir. 1998);

[12] Regardless of the weight given to his opinion, Dr. Forehand's conclusion that Claimant has clinical pneumoconiosis cannot support Employer's burden to rebut the existence of the disease.

[13] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

Gunderson v. United States Department of Labor, 601 F.3d 1013, 1024 (10th Cir. 2010) (citing *Stalcup v. Peabody Coal Co.*, 477 F.3d 482 (7th Cir. 2007)) (administrative law judge's mere statement that the evidence was "evenly balanced and should receive equal weight" failed to discharge his duty under the APA to explain, on scientific grounds, why a conclusion could not be reached as to the existence of pneumoconiosis); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989).

We thus vacate the administrative law judge's weighing of the evidence as a whole and his determination that Employer did not disprove the presence of clinical pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i).

Rebuttal of Legal Pneumoconiosis and Disability Causation

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "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 1-155 n.8. To disprove disability causation, Employer must establish "no part of [Claimant'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)(ii); *see Bender*, 782 F.3d at 143.

The administrative law judge stated that "[s]ince the Board declined to comment as to legal pneumoconiosis and disability causation in anticipation of a changing evidentiary record and because [my finding of clinical pneumoconiosis] . . . supports the original finding of clinical pneumoconiosis [by Judge Lakes] and does not change the record, there is no need to go further in the analysis." Decision and Order on Remand at 5.

Employer asserts the administrative law judge erred because he did not render new independent findings as to whether it disproved legal pneumoconiosis and disability causation. Employer's Brief at 19. We agree. Judge Lakes relied, in part, on Dr. Forehand's supplemental opinion to find Employer did not rebut the presumption.[14] The Board instructed Judge Lakes to reconsider on remand whether Employer rebutted the presumption if Dr. Forehand's opinion were excluded from the record. Because the administrative law judge excluded Dr. Forehand's supplemental report, he erred in not

[14] Judge Lakes based her finding of no rebuttal largely on a relative weighing of the medical opinions as opposed to strictly finding Employer's experts insufficient to meet its burden. Decision and Order at 20 (finding Dr. Forehand's opinion is more credible than Dr. Fino's and Dr. Dahhan's "somewhat conclusory" opinions).

following the Board's remand instruction to determine whether Employer rebutted the presumption based on the existing evidentiary record.[15]

Therefore, for all of the above-stated reasons, we vacate the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption. 20 C.F.R. §718.305(d)(1); *see Bender*, 782 F.3d at 143; *Minich*, 25 BLR at 1-155 n.8. Thus, we vacate the award of benefits and remand the case for further consideration.

Remand Instructions

The administrative law judge must reconsider whether Employer is able to rebut the Section 411(c)(4) presumption. First, the administrative law judge must resolve the conflict in the categories of clinical pneumoconiosis evidence and explain the basis for his decision to credit any one category over another in accordance with the APA. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Lockhart*, 137 F.3d at 803; *Wojtowicz*, 12 BLR at 1-165.

Regardless of whether Employer disproves clinical pneumoconiosis, the administrative law judge must also address whether Employer rebutted the presumed existence of legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii); *see Minich*, 25 BLR at 1-155 n.8. If Employer establishes Claimant has neither clinical nor legal pneumoconiosis, it will have rebutted the presumption, and the administrative law judge must deny benefits. However, if Employer does not disprove both forms of the disease, a rebuttal finding that Claimant does not have pneumoconiosis is precluded. The administrative law judge must then specifically address the second rebuttal method and render a finding as to whether Employer established no part of Claimant's respiratory disability is due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii); *see Bender*, 782 F.3d at 143. In rendering his decision on remand, the administrative law judge must explain all of his factual findings, credibility determinations, and conclusions of law as the APA requires. 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Lockhart*, 137 F.3d at 803; *Wojtowicz*, 12 BLR at 1-165.

[15] In so doing, however, we do not offer any opinion on the merits of those aspects of Judge Lakes's findings regarding the sufficiency of the opinions of Employer's experts made independent of her consideration of Dr. Forehand's opinion; the administrative law judge remains free to consider the weight of those findings on remand.

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

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

I concur.

DANIEL T. GRESH
Administrative Appeals Judge

BOGGS, Chief Administrative Appeals Judge, concurring and dissenting:

I concur with my colleagues' decision to vacate the administrative law judge's finding that Employer did not rebut the Section 411(c)(4) presumption and the award of benefits, and to remand the case for further consideration as to whether Employer rebutted the presumption by establishing the absence of both clinical and legal pneumoconiosis, or that no part of Claimant's respiratory disability was due to pneumoconiosis. 20 C.F.R. §718.305(d)(1)(i), (ii). However, I respectfully disagree with my colleagues' determination to affirm the administrative law judge's finding that the medical opinion evidence does not disprove the existence of clinical pneumoconiosis, as he selectively analyzed the conflicting opinions of Drs. Dahhan and Forehand, and did not apply the same level of scrutiny in determining the weight to accord them.

The administrative law judge noted Dr. Forehand conducted the Department of Labor's complete pulmonary evaluation. He credited Dr. Forehand's opinion that Claimant has clinical pneumoconiosis as well-reasoned and documented. Dr. Forehand's initial opinion was limited to the objective evidence obtained during his examination. His supplemental report was excluded. The administrative law judge accorded Dr. Forehand's opinion "the most weight because [it] was based on his positive x-ray reading, other

objective testing, [Claimant's] coal mine employment history and [Claimant's] documented history of pulmonary illness." Decision and Order on Remand at 4; *see* Director's Exhibit 11. He found Dr. Dahhan's opinion that Claimant does not have clinical pneumoconiosis "problematic" because Dr. Dahhan did not specifically "address" Dr. Forehand's positive reading. Decision and Order on Remand at 4. The administrative law judge also stated that Dr. Forehand's opinion was more persuasive than that of Dr. Dahhan "who merely reviewed his digital x-rays and CT scans for the purposes of this case." *Id*. at 5.

The administrative law judge's rationale for giving Dr. Forehand's opinion more weight is not adequately explained.[16] The administrative law judge's analysis ignores that Dr. Dahhan, like Dr. Forehand, examined Claimant, considered his medical and coal mining histories, reviewed the medical records, and conducted objective studies. Dr. Dahhan also reviewed Dr. Forehand's positive x-ray reading in conjunction with additional negative radiological evidence, including dually-qualified expert Dr. Tarver's negative reading of the April 30, 2012 x-ray.[17] Employer's Exhibits 2, 4, 8, 9, 13, 14. The administrative law judge fails to explain why Dr. Forehand's opinion, which is based on limited evidence, is more credible than Dr. Dahhan's opinion, which is based on more evidence. Further, he failed to justify his favoring the conclusion of Dr. Forehand, as a physician who interpreted the x-ray, over that of Dr. Dahhan, as a reviewing physician, by explaining what distinct advantage Dr. Forehand gained from interpreting the x-ray. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 52-53 (4th Cir. 1992). Thus, the administrative law judge selectively analyzed Dr. Dahhan's opinion and did not equally consider all the documentation underlying the physicians' opinions in determining whether they were adequately reasoned. Employer's Brief at 13-14; Employer's Exhibit 4; *see McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996, 1-998 (1984) (fact finder's failure to discuss relevant evidence requires remand). *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987) (a report is

[16] Dr. Forehand's supplemental report was excluded. It is unclear whether the administrative law judge relied on the excluded report in reaching this determination.

[17] Dr. Forehand is a B-reader, while Dr. Tarver is dually-qualified as a Board-certified radiologist and B reader. Based on the respective qualifications of the physicians who interpreted the April 30, 2012 x-ray, that film is, at best, either in equipoise or negative for the presence of pneumoconiosis, and thus does not contradict Dr. Dahhan's overall conclusion that Claimant does not have radiographic evidence of clinical pneumoconiosis.

"reasoned" if the underlying documentation supports the doctor's assessment of the miner's health).

I also agree with Employer that the administrative law judge erred in rejecting Dr. Dahhan's opinion as inconsistent with the positive analog x-ray evidence. In analyzing the analog x-ray evidence the administrative law judge noted but failed to consider the difference in qualifications between a dually qualified reader and a B reader. This difference was not entirely harmless as suggested by the majority, because it, along with his failure to properly evaluate radiological evidence considered by the physicians, affected his assessment of the medical opinion evidence. The administrative law judge gives no rationale for his finding that Dr. Dahhan's opinion is less persuasive based on his review of the negative digital x-rays and CT scans. The administrative law judge failed to properly consider the entirety of Drs. Forehand's and Dahhan's opinions on clinical pneumoconiosis and evaluate their reasoning based on the record as a whole. *See Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 441.

Although the Board's review authority is limited, it does not require acceptance of an ultimate finding or inference, if the decision appealed discloses that it was reached in a manner that cannot be accepted as valid. *Howell v. Einbinder*, 350 F.2d 442, 444 (D.C. Cir. 1965). The administrative law judge's analysis of the evidence in this case does not stand up to scrutiny under the Administrative Procedure Act (the APA). Given the administrative law judge's disparate treatment of Dr. Forehand's and Dahhan's opinions, I would vacate his determination that Employer did not disprove clinical pneumoconiosis based on the medical opinion evidence.

I therefore would also remand the case for the administrative law judge to adequately explain how he resolved the conflict in the medical opinion evidence on clinical pneumoconiosis in accordance with the APA.[18] *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-89 (1993) (administrative law judge must consider each report to determine if that report's underlying documentation supports the conclusion of the doctor). I would instruct him to determine the credibility of Dr. Dahhan's and Dr. Forehand's opinions based on their respective rationales and the documentation underlying their conclusions on clinical pneumoconiosis. *Hicks*, 138 F.3d at 533; *Akers*, 131 F.3d at 439-41; *Trumbo*, 17 BLR at 1-89. I would further instruct the administrative law judge to consider the specific radiological reports Dr. Dahhan reviewed and determine whether those reports were

[18] The Administrative Procedure Act provides every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

credible based on the radiological qualifications of the interpreting physicians. I would further instruct the administrative law judge to resolve the conflict in the medical opinions and explain his credibility determination in accordance with the APA. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); U.S.C. §557(c)(3)(A); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989) (factfinder is required to examine the validity of the reasoning of a medical opinion in light of the objective evidence upon which the opinion is based).

After determining the credibility of the medical opinions on clinical pneumoconiosis, I would instruct the administrative law judge to weigh together the analog and digital x-rays, CT scans, and the medical opinions and explain how he resolves the conflict in that evidence in determining whether Employer can establish the absence of clinical pneumoconiosis. The administrative law judge must specifically explain how he resolves the conflict in the radiological evidence, taking into consideration the radiological qualifications of the physician's opinions, and further explain in accordance with the APA all of his credibility determinations. *Wojtowicz*, 12 BLR at 1-165.

For these reasons, I respectfully dissent, in part, from the majority's affirmance of the administrative law judge's weighing of the medical opinions. In all other respects I concur in the decision to remand this case for further consideration of whether Employer rebutted the presumption.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge