BRB No. 97-0470 BLA

EDITH BLAIR (Widow of MERIDA E. BLAIR) Claimant v. R & E COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order Upon Remand Awarding Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer/carrier.

Barry H. Joyner (Marvin Krislov, Deputy Solicitor for National Operations; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: HALL, Chief Administrative Law Judge, SMITH and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Upon Remand (85-BLA-6150) of

Administrative Law Judge Ainsworth H. Brown awarding benefits on a miner's claim and a survivor's claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This case has a lengthy procedural history. In his original Decision and Order issued on February 18, 1988, Administrative Law Judge John H. Bedford credited the miner with eighteen years of qualifying coal mine employment, and adjudicated the survivor's claim, filed on July 27, 1982, pursuant to the provisions at 20 C.F.R. Part 727, based on his finding that pursuant to 20 C.F.R. §725.310, the miner had timely petitioned for modification of his claim, which was filed on March 26, 1979 and administratively denied on June 4, 1980, and that the survivor's claim accrued as of the miner's original filing date. The administrative law judge found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (3), and that employer failed to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded in the survivor's claim.

On appeal, the Board noted that the administrative law judge did not make a specific finding of entitlement to benefits in the miner's claim, which would entitle the miner's widow to derivative survivor's benefits. The Board affirmed the administrative law judge's finding that the evidence was sufficient to establish invocation at Section 727.203(a)(1), and thus did not address employer's challenge to his finding of invocation at Section 727.203(a)(3). The Board also affirmed, as unchallenged on appeal, the administrative law judge's findings regarding the length of coal mine employment and his finding that the evidence was insufficient to establish rebuttal at Section 727.203(b)(1), (4), and affirmed his finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(2) inasmuch as the record contained no evidence sufficient to support a finding of rebuttal thereunder. The Board vacated, however, the administrative law judge's findings pursuant to Section 727.203(b)(3), and remanded this case for a complete analysis of the evidence of record relevant to rebuttal under the standard articulated by the United States Court of Appeals for the Fourth Circuit in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). The Board instructed the administrative law judge to consider the survivor's claim under 20 C.F.R. Part 718 if, on remand, he denied benefits on the miner's claim, and held that to the extent the miner's widow was found entitled to survivor's benefits on remand, she was not entitled to augmented benefits on behalf of her child adopted after the miner's death. *Blair v. R & E Coal Co.*, 16 BLR 1-113 (1992).

Upon the filing of a motion for reconsideration by the The Director, Office of Workers' Compensation Programs (the Director), the Board granted the relief requested and held that, inasmuch as claimant's adopted child satisfied both the relationship and dependency tests set out in the regulations at 20 C.F.R. §§725.208 and 725.209, to the extent that the administrative law judge found claimant entitled to survivor's benefits on remand, she was entitled to augmented benefits on behalf of her child adopted after the miner's death. *Blair v. R & E Coal Co.*, 20 BLR 1-15 (1996).

On remand, this case was assigned to Administrative Law Judge Ainsworth H. Brown, who found that the evidence was insufficient to establish rebuttal pursuant to Section 727.203(b)(3). The administrative law judge determined that the miner established

a change in conditions sufficient to support modification pursuant to 20 C.F.R. §725.310, and thus awarded benefits in both the miner's claim and the survivor's claim.

In the present appeal, employer challenges the administrative law judge's award of benefits in both claims. The Director responds, urging the Board to reject employer's arguments regarding modification at Section 725.310 and augmentation of survivor's benefits on behalf of the widow's adopted child. The Director has declined, however, to take any position regarding the administrative law judge's finding of entitlement on the merits. Claimant, the miner's widow, has not participated in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

Employer initially contends that the administrative law judge erred in granting modification pursuant to Section 725.310 in the miner's claim. Employer maintains that before considering the merits of entitlement, the administrative law judge was required to explain how the evidence established a mistake in a determination of fact or how new evidence demonstrated a change in the miner's condition since the prior denial of the claim. We disagree. The Director correctly notes that pursuant to the holding of the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), a claimant need not make any preliminary showing of a mistake in fact or a change in condition, but may simply allege that the ultimate fact of entitlement was wrongly decided. In the present case, after adjudicating the miner's claim on the merits, the administrative law judge found that it was "unrefuted that a change in conditions took place with proof of pneumoconiosis, causing presumptive total disability." Decision and Order Upon Remand at 3. While employer refutes this statement and asserts that the administrative law judge provided an inadequate analysis of the issue, substantial evidence supports the administrative law judge's conclusion that the new evidence the miner submitted in support of modification, *i.e.* the first x-ray film of record properly classified as positive for pneumoconiosis, *see* Decision and Order at 2, was sufficient to establish a change in conditions. Inasmuch as the Board previously affirmed Administrative Law Judge Bedford's finding that the weight of the x-ray and autopsy evidence of record was sufficient to establish invocation of the interim presumption at Section 727.203(a)(1), we affirm Administrative Law Judge Brown's findings pursuant to Section 725.310, as supported by substantial evidence and in accordance with law. *See Jessee, supra.*

Turning to the merits, employer contends that the administrative law judge erred in finding the opinions of Drs. O'Connor, Hansbarger, Castle and Endres-Bercher insufficient to establish rebuttal at Section 727.203(b)(3). Specifically, employer argues that the administrative law judge failed to adequately explain why he found the opinions of Drs. O'Connor and Hansbarger insufficiently reasoned, and provided invalid reasons for discounting the opinions of Drs. Endres-Bercher and Castle.

In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must rule out any causal connection between a miner's disability or death and his coal mine employment. *See Massey, supra*. In the present case, inasmuch as Administrative Law Judge Bedford found that the evidence established that the miner's death was unrelated to his pneumoconiosis, Administrative Law Judge Brown limited his inquiry at Section 727.203(b)(3) to the cause of the miner's disability. Evidence that demonstrates that an ailment other than pneumoconiosis was the sole cause of the miner's total disability, notwithstanding the existence of a respiratory or pulmonary impairment, can rebut the presumption. *See Billips v. Bishop Coal Co.*, 76 F.3d 371, 20 BLR 2-130 (4th Cir. 1996); *Massey, supra*. Likewise, a finding that a miner has no pulmonary impairment can establish rebuttal, but the relevant medical opinion must unequivocally state that the miner suffers no respiratory or pulmonary impairment of any kind. *See Curry v. Beatrice Pocahontas Coal Co.,* 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

After consideration of the administrative law judge's Decision and Order Upon Remand, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order Upon Remand is supported by substantial evidence, consistent with applicable law, and must be affirmed. The administrative law judge reviewed the medical opinions of record, and permissibly found that because the opinions of Drs. O'Connor and Hansbarger[1] were "barren of analytical content," these opinions did not constitute reasoned medical analyses sufficient to establish rebuttal at Section 727.203(b)(3). Decision and Order Upon Remand at 2; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.,* 12 BLR 1-11 (1988)(*en banc), aff'd sub nom. Director, OWCP v. Cargo Mining Co.,* Nos. 88-3531, 88-3578 (6th Cir. May 11, 1989)(unpublished)*; Oggero v. Director, OWCP*, 7 BLR 1-860 (1985) . Contrary to employer's argument, the administrative law judge was not required to provide any further explanation for discounting these opinions.

The administrative law judge also reasonably found that the opinion of Dr. Castle, that "the degree of coal workers' pneumoconiosis found at autopsy...was not a sufficient amount to cause [the miner] to be permanently and totally disabled from performing his

[1] Dr. O'Connor reviewed the autopsy protocol, death certificate and slides, which he stated showed diffuse pulmonary emphysema, terminal pneumonia, and simple coal workers' pneumoconiosis, micronodular in type, minimal in degree, and concluded that "the degree of pulmonary abnormality noted would be insignificant as to any pulmonary disability which may have been suffered by the deceased." Director's Exhibit 19. Dr. Hansbarger also found a very mild degree of pulmonary anthracosilicosis, but merely addressed the cause of the miner's death and not the cause of his presumed total disability, *see* Director's Exhibit 18, thus neither opinion is sufficient to establish rebuttal at Section 727.203(b)(3) pursuant to the applicable standard. *See Massey, supra; Badger Coal Co. v. Director, OWCP*, 83 F.3d 424, 20 BLR 2-265 (4th Cir. 1996); *Curry, supra*.

usual coal mine employment duties, or in any way impair him from performing his usual coal mine employment duties," Employer's Exhibit 3, and the opinion of Dr. Endres-Bercher, that there was no evidence for any chronically disabling respiratory impairment arising out of coal mine employment in the medical record, Employer's Exhibit 2, did not satisfy employer's burden of establishing rebuttal at Section 727.203(b)(3). Decision and Order Upon Remand at 2, 3. While employer correctly notes that in the prior appeal, the Board held that these opinions, if credited, were sufficient to establish rebuttal, subsequent case law issued by the United States Court of Appeals for the Fourth Circuit, which clarifies the *Massey* standard, persuades us otherwise, as neither physician opined that an ailment other than pneumoconiosis was the sole cause of the miner's disability, *see Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), or that the miner suffered no respiratory or pulmonary impairment of any kind, *see Curry, supra*, or addressed whether pneumoconiosis contributed to or aggravated his respiratory impairment, *see Badger Coal Co. v. Director, OWCP*, 83 F.3d 414, 20 BLR 2-265 (4th Cir. 1996). Thus, we affirm the administrative law judge's findings pursuant to Section 727.203(b)(3), as supported by substantial evidence and in accordance with law.[2]

Employer next argues that because the Board acknowledged in the prior appeal that Administrative Law Judge Bedford provided an invalid reason for finding rebuttal established at Section 727.203(b)(2), it was error for Administrative Law Judge Brown to rely on the Board's holding that there was no evidence of record sufficient to establish rebuttal thereunder as a matter of law rather than to adjudicate the issue *de novo*. We disagree. Although the Director requested reconsideration of the Board's Decision and Order on the issue of augmented benefits, and employer responded thereto, employer failed to challenge our affirmance of the administrative law judge's finding that employer failed to establish rebuttal at Section 727.203(b)(2). Consequently, we reject employer's present contention as it was not timely raised. *See generally Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991).

Lastly, we decline to revisit the issue of whether the miner's widow is entitled to

[2]We also reject, as unsupported by the record, employer's argument that the administrative law judge's "intransigence" and lack of impartiality necessitates reassignment of this case to a different administrative law judge. *See* Employer's Brief at 29, 30. Adverse rulings, by themselves, are not sufficient to show bias on the part of the administrative law judge. *See generally Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

augmented benefits on behalf of her child adopted after the miner's death. Inasmuch as no exception to the law of the case doctrine has been demonstrated, we apply the law of the case and adhere to our decision on reconsideration of this issue. *See generally Brinkley v. Peabody Coal Co.,* 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 at 237 (1989).

Accordingly, the Decision and Order Upon Remand of the administrative law judge awarding benefits on both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge