BRB No. 99-0205 BLA

EMOGENE REED (on behalf of ESTELL REED) Claimant-Respondent v. SPENCER BRANCH COAL COMPANY Employer-Petitioner 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 of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

John Earl Hunt (John Earl Hunt Law Offices), Allen, Kentucky, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

Sarah M. Hurley (Henry L. Solano, Solicitor of Labor; 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, United States Department of Labor.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (84-BLA-8942) of Administrative

Law Judge Robert D. Kaplan (the administrative law judge) awarding benefits on a 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 is before the Board for the fifth time. In the original Decision and Order, Administrative Law Judge Peter McC. Giesey credited the miner with thirty-one and one-quarter years of coal mine employment and found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1) and 718.203(b). Judge Giesey also found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, Judge Giesey awarded benefits. In response to employer's appeal, the Board affirmed Judge Giesey's length of coal mine employment finding and his finding at 20 C.F.R. §718.203(b). However, the Board vacated Judge Giesey's finding at 20 C.F.R. §718.202(a)(1), and remanded the case for further consideration of the evidence at 20 C.F.R. §718.202(a)(1)-(4). The Board also vacated Judge Giesey's finding at 20 C.F.R. §718.204 and remanded the case for further consideration of the evidence. Lastly, the Board instructed Judge Giesey that, on remand, he must consider the applicability of 20 C.F.R. §718.305. *Reed v. Spencer Branch Coal Co.*, BRB No. 88-0343 BLA (Jan. 31, 1990)(unpub.).

On the first remand, Judge Giesey found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). However, Judge Giesey found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(4),[1] and thus, he found the evidence sufficient to establish invocation of the rebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.305. Accordingly, Judge Giesey again awarded benefits. In disposing of employer's second appeal, the Board affirmed Judge Giesey's findings at 20 C.F.R. §§718.202(a)(1) and 718.204(c)(1)-(3). However, the Board vacated Judge Giesey's finding at 20 C.F.R. §718.204(c) based on his weighing of the medical reports at 20 C.F.R. §718.204(c)(4), and remanded the case for a determination as to whether the contrary probative evidence of record outweighs the evidence supportive of total disability. Further, the Board instructed Judge Giesey that should he, on remand, find the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c) and find the rebuttable presumption at 20 C.F.R. §718.305 thereby invoked, he must consider whether the evidence is sufficient to establish rebuttal of the presumption. The Board noted that Judge Giesey should consider the biopsy evidence of record in

[1]Administrative Law Judge Peter McC. Giesey found the evidence insufficient to establish total disability at 20 C.F.R. §718.204(c)(1)-(3).

considering rebuttal of the presumption at 20 C.F.R. §718.305. *Reed v. Spencer Branch Coal Co.*, BRB No. 91-1141 BLA (Oct. 16, 1992)(unpub.).

On the second remand, the case was transferred to the administrative law judge, who found the evidence sufficient to establish total disability at 20 C.F.R. §718.204(c)(4), and thus, he found the evidence sufficient to establish invocation of the rebuttable presumption at 20 C.F.R. §718.305. Although the administrative law judge found the evidence insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner did not have pneumoconiosis, the administrative law judge found the evidence sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner's disability was not caused by pneumoconiosis. Accordingly, the administrative law judge denied benefits. On claimant's appeal, the Board affirmed the administrative law judge's finding at 20 C.F.R. §718.204(c). However, the Board vacated the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner's disability was not caused by pneumoconiosis, and instructed the administrative law judge that, on remand, he must reconsider the evidence with respect to this issue in conformance with the standard articulated in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). The Board also vacated the administrative law judge's determination that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner did not have pneumoconiosis, and instructed the administrative law judge that, on remand, he must reconsider the evidence relevant to this issue. *Reed v. Spencer Branch Coal Co.*, BRB No. 93-2486 BLA (Aug. 29, 1995)(unpub.).

On the third remand, although the administrative law judge found the evidence insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner did not have pneumoconiosis, the administrative law judge found the evidence sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner's disability was not caused by pneumoconiosis. Accordingly, the administrative law judge again denied benefits. On claimant's second appeal, the Board affirmed the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner did not have pneumoconiosis. However, the Board, citing *Tussey*, reversed the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner's disability was not caused by pneumoconiosis. Hence, the Board held that claimant was entitled to benefits and remanded the case to the administrative law judge to determine the date of entitlement to benefits pursuant to 20 C.F.R. §725.503. *Reed v. Spencer Branch Coal Co.*, BRB No. 96-0796 BLA (July 30, 1997)(unpub.). Subsequently, the Board

granted employer's request for reconsideration, but denied the relief requested. *Reed v. Spencer Branch Coal Co.*, BRB No. 96-0796 BLA (May 22, 1998)(unpub. Decision and Order on Recon.).

On the most recent remand, the administrative law judge ordered benefits to commence as of August 1980, the month in which the miner filed his claim for benefits. On appeal, employer challenges the Board's affirmance of the administrative law judge's previous finding that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner did not have pneumoconiosis. Employer also challenges the Board's reversal of the administrative law judge's previous finding that the evidence is sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner's disability was not caused by pneumoconiosis. Lastly, employer challenges the administrative law judge's finding that August 1980 was the date from which benefits commence. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order on Remand.[2]

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, we will address employer's contention that the Board erred in affirming the administrative law judge's previous finding that the evidence is insufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner did not have pneumoconiosis. The Board stated that "the administrative law judge again credited the opinions of Drs. Clarke, Penman, Fritzhand, Wright, Adams, Cooper and Anderson diagnosing the presence of pneumoconiosis over the contrary opinions of Drs. Tuteur and Broudy." *Reed v. Spencer Branch Coal Co.*, BRB No. 96-1096 BLA, slip op. at 4 (July 30,

[2]Employer filed a brief in reply to the response briefs of claimant and the Director, Office of Workers' Compensation Programs, reiterating its prior contentions.

1997)(unpub.). The Board held that "[t]he administrative law judge legitimately credited those medical reports which he found to be well-documented and whose reliability was substantiated by the medical and historical data compiled by the reporting physicians." *Id*. at 5. Thus, inasmuch as the Board correctly affirmed "the administrative law judge's crediting of the medical opinions of Drs. Clarke, Penman, Fritzhand, Wright, Adams, Cooper and Anderson and his finding that these opinions establish the presence of pneumoconiosis pursuant to Section 718.202(a)(4)," *id*., we are not persuaded that there is reason for us to revisit this issue.

Next, we address employer's contention that the Board erred in reversing the administrative law judge's previous finding that the evidence is sufficient to establish rebuttal of the presumption at 20 C.F.R. §718.305 based on evidence that the miner's disability was not caused by pneumoconiosis. Specifically, employer asserts that the Board erred by interpreting *Tussey* as requiring a mechanical rejection of employer's rebuttal evidence.[3] In *Tussey*, the United States Court of Appeals for the

[3]Employer, citing *Allentown Mack Sales and Service, Inc. v. N.L.R.B.*, 118 S.Ct. 818 (1998), asserts that the United States Supreme Court prohibits the Board's interpretation of *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993). Contrary to employer's assertion, the Court did not prohibit the weighing of medical evidence in accordance with *Tussey*. In *Allentown Mack Sales and Service, Inc.*, the Court held that the "reasonable doubt" test of the National Labor Relations Board (NLRB) for employer polls is facially rational and consistent with the Act. However, the Court held that the NLRB's factual finding that Allentown Mack lacked such reasonable doubt is not supported by substantial evidence in the record as a whole. Hence, although the Court concluded that the NLRB erred in its factual findings regarding the "reasonable doubt" test, the Court did not prohibit the NLRB from applying the test. Employer also asserts that the Board's interpretation of *Tussey* is inconsistent with the decision of the United States Court of Appeals for the Sixth Circuit in *Glen Coal Co. v. Director, OWCP* [*Seals*], 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998). In *Seals*, the Sixth Circuit held that although the presumption enunciated in *Doris Coal Co. v. Director, OWCP* [*Stiltner*], 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), that a miner's medical treatment expenses are related to his pneumoconiosis, is valid under the Court's decision in *Director, OWCP v. Greenwich Collieries [Ondecko],* 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), the *Stiltner* presumption is inconsistent with Sixth Circuit law because it does not advance the purposes of the Black Lung Benefits Act. However, in the instant case, the Board's interpretation of *Tussey* is not inconsistent with the Act. Therefore, we reject employer's assertion that the Board's interpretation of *Tussey* is inconsistent with *Seals*. Additionally, inasmuch as the case at bar arises within the jurisdiction of the

Sixth Circuit, within whose jurisdiction this cases arises, held that Dr. Kress' opinion, that the miner's total disability was not due to pneumoconiosis, but to cigarette smoking, was of no probative value since Dr. Kress did not find that the miner had pneumoconiosis, and the existence of pneumoconiosis was already established by the x-ray evidence. Hence, the Sixth Circuit concluded that employer "produced no evidence with respect to either rebutting condition [at 20 C.F.R. §718.305]." *Tussey*, 982 F.2d at 1043, 17 BLR at 2-25. In the case at hand, Drs. Broudy, O'Neill and Tuteur opined that the miner did not suffer from pneumoconiosis. Employer's Exhibits 1, 2; Director's Exhibit 37. The Board, in its 1997 Decision and Order, determined that "*Tussey, supra*, is directly applicable to the facts in the instant case, and when applied, negates the administrative law judge's finding that the medical evidence establishes rebuttal of the Section 718.305 presumption." *Reed v. Spencer Branch Coal Co.*, BRB No. 96-0796 BLA, slip op. at 5-6 (July 30, 1997)(unpub.). Hence, the Board held that "[i]n light of the administrative law judge's finding that the presence of pneumoconiosis was established pursuant to Section 718.202(a)(4), under the standard enunciated in *Tussey*, *supra*, the contrary opinions of Drs. Broudy, Tuteur and O'Neill have no probative value as to the issue of the cause of the miner's total disability, and as a matter of law, cannot establish rebuttal at Section 718.305." *Id*. at 6. As previously noted, the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. An inferior tribunal has no power or authority to deviate from the mandate issued by an appellate court. *See Briggs v. Pennsylvania R.R.*, 334 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). Inasmuch as the Board, in the case at hand, is bound by the case law of the Sixth Circuit, we do not have authority to consider the validity of the decision of the Sixth Circuit in *Tussey*. Therefore, inasmuch as the

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Sixth Circuit, we reject employer's assertion that the Board's interpretation of *Tussey* is incorrect because it is inconsistent with the decisions of the United States Court of Appeals for the Fourth Circuit in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), and *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. l990), and the decision of the United States Court of Appeals for the Seventh Circuit in *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992).

Board properly considered the relevant medical evidence of record in accordance with *Tussey*, we are not persuaded that there is reason for us to revisit this issue.

Further, we address employer's contention that the Board erred in refusing to reopen the record on remand in light of *Tussey*. Specifically, employer asserts that due process compels the reopening of the record to permit employer an opportunity to address the new standard enunciated by the Sixth Circuit. In its Decision and Order on Motion for Reconsideration, the Board held that "[a]ny right which employer may have had to offer evidence relevant to *Tussey* has long since been waived."[4] *Reed v. Spencer Branch Coal Co*., BRB No. 96-0796 BLA, slip op. at 2-3 (May 22, 1998)(unpub.). Hence, the Board denied employer's contention that it had a right to present new evidence applicable to the new standard. *Id*. at 2. Relevant case law supports the proposition that due process and fundamental fairness mandate a reopening of the record where a significant alteration in the type of evidence necessary to meet a party's burden of proof results from an altered legal standard. *See Peabody Coal Co. v. Ferguson,*140 F.3d 634, 21 BLR 2-344 (6th Cir. 1998); *Peabody Coal Co. v. White*, 135 F.3d 416, 21 BLR 2-247 (6th Cir. 1998); *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997); *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Bethenergy Mines, Inc. v. Director, OWCP* [*Vrobel*], 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994); *Marx v. Director, OWCP*, 870 F.2d 114, 12 BLR 2-199 (3d Cir. 1989); *cf. Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F3d 491, 22 BLR 2-1 (4th Cir. 1999); *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999).[5] However, unlike the above cited

[4]The Board observed that this case was on its second remand to the Office of Administrative Law Judges at the time the Sixth Circuit issued *Tussey* on January 13, 1993. *Reed v. Spencer Branch Coal Co*., BRB No. 96-0796 BLA, slip op. at 2-3 (May 22, 1998)(unpub.). Hence, the Board held that "[e]mployer should have requested permission of the administrative law judge to submit new evidence long before the administrative law judge issued his decision on October 12, 1993." *Id*. The Board also observed that after claimant appealed the administrative law judge's decision, the Board issued its decision on August 29, 1995, remanding the case for the administrative law judge to apply *Tussey*. *Id*. However, the Board observed that "[o]n its third remand, the case was in the Office of Administrative Law Judges for nearly six months, yet employer never requested that the record be re-opened." *Id*. Hence, the Board held that "[t]hat request, coming now, is much too late." *Id*.

[5]In *Troup v. Reading Anthracite Coal Co.*, 22 BLR 1-11 (1999), the Board rejected employer's assertion that the administrative law judge's refusal to reopen the record in order to permit it to supplement the record in light of *Labelle Processing*

cases, the regulations contained in 20 C.F.R. Part 718, rather than the regulations contained in 20 C.F.R. Part 727, apply to the case at bar. As the Director asserts, both prior to and subsequent to *Tussey*, under the Part 718 regulations, claimant must establish the existence of pneumoconiosis, that pneumoconiosis arose out of coal mine employment and that total disability is due to pneumoconiosis. Similarly, both prior to and subsequent to *Tussey*, employer could develop evidence addressing each of the elements of entitlement. Further, in the instant case, the legal standard for establishing rebuttal of the presumption at 20 C.F.R. §718.305 is not altered by *Tussey*. *Tussey* does not require anything of employer that was not required prior to its issuance with respect to employer's burden of proof under any of the elements of entitlement. *Tussey* merely advances the proposition that where an administrative law judge finds the existence of pneumoconiosis established, a physician who does not diagnose pneumoconiosis cannot provide a credible opinion with respect to the issue of whether pneumoconiosis contributes to the miner's disability. Thus, we reject employer's assertion that due process mandates a reopening of the record on remand in light of *Tussey*.

In addition, citing *Venicassa v. Consolidation Coal Co.*, 137 F.3d, 197, 21 BLR 2-277 (3d Cir. 1998) and *Lane Hollow Coal Co. v. Director, OWCP, [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer contends that liability for this claim must be transferred to the Black Lung Disability Trust Fund (Trust Fund) because the delays in processing this claim have caused the claim to become too stale to litigate. The Third Circuit in *Venicassa* and the Sixth Circuit in *Lockhart* allowed for a transfer of liability to the Trust Fund because the Department of Labor's failure to timely notify the appropriate employer of its potential liability denied it an opportunity

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Co. v. Swarrow, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995), constituted an abuse of discretion inasmuch as *Swarrow* imposes an increased burden on claimant, not employer, to prove a material change in conditions. Although the law changed with regard to 20 C.F.R. §725.309, the Board held that the change in the law did not increase employer's evidentiary burden or the type of evidence relevant to 20 C.F.R. §725.309. Hence, the Board concluded that due process and fundamental fairness did not mandate a reopening of the record.

to mount a meaningful defense. However, the facts in the instant case are distinguishable from the facts in *Venicassa* and *Lockhart*. Here, as the Board previously noted, "employer was involved from the beginning and has vigorously litigated the case." *Reed v. Spencer Branch Coal Co.*, BRB No. 96-0796 BLA (May 22, 1998)(unpub.). Thus, inasmuch as the facts of the present case, unlike those in *Venicassa* and *Lockhart*, do not provide persuasive support for employer's request to transfer liability to the Trust Fund, we conclude that there is no reason for us to revisit this issue.

Finally, we address employer's contention that the administrative law judge erred in finding August 1980 to be the date from which benefits commence. The administrative law judge considered the relevant evidence regarding the onset date of disability and found that "the evidence fails to establish that the miner was not totally disabled at any time subsequent to August 1980."[6] Decision and Order on Remand at 3. Hence, the administrative law judge found that because "the record fails to show the date of onset of total disability, benefits shall commence as of the month in which the claim was filed, August 1980." Decision and Order on Remand at 3. An administrative law judge must determine the date on which a miner became totally disabled due to pneumoconiosis, not just the date on which he becomes totally disabled by any cause. *See Carney v. Director, OWCP*, 11 BLR 1-32 (1987). However, if a date for the onset of disability is not ascertainable from the evidence of record, then benefits commence as of the month the claim was filed unless evidence, which if credited, indicates that the miner was not totally disabled due to pneumoconiosis at some point subsequent to his filing date. *See* 20 C.F.R. §725.503(b); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Employer asserts that the administrative law judge erred in failing to provide an adequate reason for finding that an onset date of disability could not be established from the medical evidence. Contrary to employer's assertion, the administrative law judge rationally found that "the record fails to show the date of onset of total disability." Decision and Order on Remand at 3.

[6]The administrative law judge stated, "one physician whom I credit stated that the miner was totally disabled prior to August 1980 when the claim was filed." Decision and Order on Remand at 3. The administrative law judge also stated, "three credited physicians stated that the miner was totally disabled within several months after August 1980." *Id*.

Employer also asserts that the administrative law judge erred in concluding that claimant did not have the burden of establishing the onset date of disability. The administrative law judge stated that "[d]espite the first sentence of §725.503(b), Employer is incorrect in stating that Claimant has the burden of establishing the date of onset of total disability." Decision and Order on Remand at 2. Nonetheless, inasmuch as the administrative law judge considered the relevant medical evidence and found that "the record fails to show the date of onset of total disability," *id*. at 3, we hold that any error by the administrative law judge in this regard is harmless, *see Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The administrative law judge considered whether the medical evidence established an onset date of disability before he determined that benefits should commence in the month in which the miner filed his claim for benefits. Thus, inasmuch as it is supported by substantial evidence, we affirm the administrative law judge's determination that benefits commence in August 1980.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge