

BRB No. 01-0760 BLA

| | | |
|-------------------------------|---|--------------------|
| EDWARD GRISKELL |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | DATE ISSUED: |
| ZEIGLER COAL COMPANY |) | |
| |) | |
| Employer-Respondent |) | |
| |) | |
| 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-Denying Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Frank E. Pasquesi, Daniel T. Fahner, Brenda N. Broderick (Ungaretti & Harris), Chicago, Illinois, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand-Denying Benefits (1994-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr., rendered 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).¹ Claimant filed his application for benefits on January 19, 1976. Director's Exhibit 1. His claim is now before the Board for the fourth time. Previously, the Board discussed fully this claim's procedural history. *Griskell v. Zeigler Coal Co.*, BRB No. 99-0897 BLA at 2-3 (Sep. 7, 2000)(unpub.). We now focus only on those procedural aspects relevant to the issues raised in this appeal of the administrative law judge's decision on remand to deny benefits.

In a Decision and Order on Remand-Awarding Benefits issued on April 27, 1999, the administrative law judge found that claimant established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4) by reasoned medical opinions diagnosing claimant as totally disabled by a respiratory or pulmonary impairment. The administrative law judge further found that employer did not establish rebuttal of the presumption by any of the methods set forth at 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits as of September 1, 1993, the onset date of total disability due to pneumoconiosis that he found was established by the record.

Upon consideration of employer's appeal, the Board affirmed the administrative law judge's findings that invocation of the interim presumption was established pursuant to 20 C.F.R. §727.203(a)(4), but vacated the administrative law judge's rebuttal findings and remanded the case for him to reconsider whether employer rebutted the presumption under 20 C.F.R. §727.203(b)(2)-(4). The Board held that the administrative law judge erred in his analysis of the medical opinion evidence, and thus further consideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4) was required. Additionally, the Board instructed the administrative law judge to address employer's argument that claimant was disabled by a non-pulmonary condition, and assess whether the evidence was sufficient to establish that claimant "would have been totally disabled notwithstanding his pneumoconiosis." [2000] *Griskell*, slip op. at 6, citing *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990).

On remand, the administrative law judge found that claimant became totally disabled by a back injury in 1981, but was not totally disabled by pneumoconiosis until 1989. The administrative law judge therefore found that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2) and denied benefits under Part

¹ The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

727. In support of this finding, the administrative law judge relied on claimant's testimony that he has received Social Security disability benefits since 1981 for his back, notations to the same effect by examining physicians, and a consulting physician's opinion that claimant "may be" disabled by a back injury. Because the administrative law judge found that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2), he found that entitlement was precluded under 20 C.F.R. Part 718. Accordingly, he denied benefits.

On appeal, claimant contends that substantial evidence does not support the finding that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(2). Employer responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal. Claimant has filed a reply brief reiterating his contentions, and employer has filed a surreply.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2) because employer presented no medical evidence that claimant's total disability results from a back injury, not his pneumoconiosis.

Claimant has been presumed totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4). To rebut this presumption pursuant to 20 C.F.R. §727.203(b)(2), employer bears an affirmative burden to prove that claimant is disabled by a back injury regardless of his pneumoconiosis. *See Vigna, supra; Foster, supra; see also Mitchell v. OWCP*, 25 F.3d 500, 509, 18 BLR 2-257, 2-276 (7th Cir. 1994)(a "positive showing" must be made to establish rebuttal).

Review of the record indicates that claimant worked as a miner from 1960 to 1974. The record also reflects that, according to claimant's testimony and to notations by examining physicians, claimant injured his back in 1981 and underwent surgery for herniated discs.

However, the record contains no medical evidence affirmatively addressing whether claimant would be able to perform his previous coal mine employment as a mechanic but for the 1981 back injury. The only physician who came close to addressing that question was Dr. Michael Castle, who stated that claimant "may be" disabled by a back injury. Employer's Exhibit 1 at 9. However, it is well-established that "mere speculation may not establish rebuttal." *Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 490, 14 BLR 2-130, 2-137 (7th Cir. 1989).

Therefore, Dr. Castle's opinion is not positive evidence that claimant's disability is caused by his 1981 back injury, not pneumoconiosis.

The administrative law judge also relied on claimant's testimony that he was awarded Social Security disability benefits in 1981 for his back, and notations by examining physicians to that effect. If properly submitted, a Social Security disability determination is relevant evidence which must be considered, but is not binding on the administrative law judge. See 20 C.F.R. §718.206 ("Effect of findings by persons or agencies."); 20 C.F.R. §727.203(c)(making provisions of Part 718 applicable to the adjudication of Part 727 claims); *Wenanski v. Director, OWCP*, 8 BLR 1-487, 1-489 (1986).² Here, however, the record contains no Social Security disability determination, no indication of the medical evidence that the Social Security Administration may have relied upon, and no evidence that any disability determination is still in effect. The physicians who noted a 1981 back injury and Social Security disability award in their medical reports appear to have repeated claimant's own statements as to his medical history; their reports lack any assessment of claimant's ability to perform his coal mine employment in light of his back injury. Director's Exhibit 44 at 7, 17, 40; Claimant's Exhibit 2.

Thus, the finding that claimant became totally disabled by a back injury in 1981 rests on claimant's testimony and his own statements to examining physicians. Such evidence does not support employer's burden to prove that claimant's disability is attributable to a back injury. See *Mitchell, supra*; cf. *Peabody Coal Co. v. Director, OWCP*, 581 F.2d 121, 123 (7th Cir. 1978)(lay testimony is insufficient to invoke the presumption). Furthermore, a Social Security Administration disability determination, standing alone, is insufficient to establish that a claimant is totally disabled under the Social Security Act. See *Warmoth v. Bowen*, 798 F.2d 1109, 1111 n.3 (7th Cir. 1986). Obviously, the administrative law judge could not rely upon it to deny benefits under the Black Lung Act. By contrast, in *Vigna* medical evidence demonstrated that the miner became disabled by a stroke, and in *Foster* it was undisputed that the miner quit work because of a back injury and there was no evidence of pulmonary disability. *Vigna*, 22 F.3d at 1394, 18 BLR at 2-225-26; *Foster*, 30 F.3d at 836, 18 BLR at 2-335. Therefore, we hold that substantial evidence does not support the administrative law judge's finding that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2) under the rule of *Vigna* and *Foster*.

Consequently, we reverse the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(2) and remand the case for the administrative law judge to consider rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). [2000] *Griskell*,

² The sole exception to this rule is that a determination by the Social Security Administration that a claimant is totally disabled under Section 223 of the Social Security Act, 42 U.S.C. §423, due to pneumoconiosis, is binding in a black lung claim. 20 C.F.R. §410.470; *Tackett v. Director, OWCP*, 7 BLR 1-703, 1-705 (1985).

slip op. at 6-7. If the administrative law judge denies benefits under Part 727, he should consider whether entitlement is established under Part 718. See 20 C.F.R. §727.203(d); *Strike v. Director, OWCP*, 817 F.2d 395, 406, 10 BLR 2-45, 2-60 (7th Cir. 1987).

Accordingly, the administrative law judge's Decision and Order on Remand-Denying Benefits is reversed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge