

BRB No. 00-1010 BLA

RUBY SAMMONS)
(Widow of RICHARD SAMMONS))
)
Claimant- Respondent)

v.)

DATE ISSUED: _____

WOLF CREEK COLLIERIES)
)
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 Robert L. Hillyard,
Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research & Defense Fund of Kentucky, Inc.,)
Prestonburg, Kentucky, for claimant.

Ronald E. Gilbertson, (Bell, Boyd & Lloyd PLLC), Washington, D.C., for
employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-0799) of
Administrative Law Judge Robert L. Hillyard (the administrative law judge) on 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).¹ The case

¹The Department of Labor has amended the regulations implementing the Federal
Coal Mine Health and Safety Act of 1969, as amended. These regulations became

is before the Board for the fourth time. Initially, Administrative Law Judge Lawrence E. Gray credited the miner with at least ten years of qualifying coal mine employment and adjudicated the claim pursuant to the regulations set forth in 20 C.F.R. Part 727. Judge Gray found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), but found the evidence sufficient to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1), and denied benefits. Following claimant's appeal, the Board affirmed Judge Gray's finding at 20 C.F.R. §727.203(a)(1), but reversed his finding at 20 C.F.R. §727.203(b)(1). Further, the Board held that the evidence was insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2) as a matter of law. Additionally, the Board held that rebuttal at 20 C.F.R. §727.203(b)(4) was precluded because claimant established invocation at 20 C.F.R. §727.203(a)(1). The Board then remanded the case for Judge Gray to consider whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Dec. 5, 1990)(unpub.). Subsequently, the Board granted employer's motion for reconsideration, but denied the relief requested and affirmed the Board's original Decision and Order. *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Feb. 5, 1992)(unpub.). On remand, Judge Gray found that the evidence was insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Accordingly, Judge Gray awarded benefits to commence March 1, 1976. Following employer's appeal, the Board held that its prior affirmance of Judge Gray's finding at 20 C.F.R. §727.203(b)(1) constitutes the law of the case. The Board, however, vacated Judge Gray's finding at 20 C.F.R. §727.203(b)(3),

effective on January 19, 2001, and they 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

and remanded the case with instructions for him to consider reopening the record. *Sammons v. Wolf Creek Collieries*, 19 BLR 1-24 (1994). On remand, the case was reassigned to the administrative law judge, who determined that the evidence was sufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge denied benefits. Following claimant's appeal, the Board vacated the administrative law judge's finding that the evidence was sufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3). Once again, the Board included an instruction to the administrative law judge to consider reopening the record. *Sammons v. Wolf Creek Collieries*, BRB No. 98-0119 BLA (Oct. 6, 1998)(unpub.). On remand, the administrative law judge found that Dr. Branscomb's report, submitted post-hearing following a reopening of the record on remand, was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge awarded benefits.²

On appeal, employer challenges the administrative law judge's prior determination that the evidence establishes invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), which the Board previously affirmed. *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Dec. 5, 1990)(unpub.). Employer also challenges the administrative law judge's determination not to admit post-hearing evidence relevant to this issue. Finally, employer challenges the administrative law judge's finding that the evidence fails to establish rebuttal pursuant to 20 C.F.R. §727.203 (b)(3). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The

²On June 14, 2000, the administrative law judge issued an Order Modifying Decision and Order on Remand, wherein he found that employer was liable to reimburse the Black Lung Disability Trust Fund for interim payments made by it while the case was being litigated. Employer does not raise any issue with regards to the administrative law judge's June 14, 2000 Order, and we affirm it as unchallenged on appeal. See *Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Coal Co.*, 6 BLR 1-710 (1983).

Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief in this appeal.³

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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer challenges the administrative law judge's determination to exclude from the record evidence which employer submitted post-hearing, which, if credited, could defeat invocation at 20 C.F.R. §727.203(a)(1). The Board remanded the case previously in order to allow the administrative law judge the opportunity to reopen the record to secure evidence relevant to 20 C.F.R. §727.203(b)(3) rebuttal. *Sammons v. Wolfe Creek Collieries*, BRB No. 98-0119 BLA (Oct. 6, 1998)(unpub.). The administrative law judge issued an Order dated October 20, 1999, reopening the record until December 20, 1999. By letters dated February 11, 2000, and March 27, 2000, respectively, employer attempted to introduce additional x-ray interpretation evidence into the record. Employer now asserts that it was an abuse of the administrative law judge's discretion not to admit the x-ray interpretation evidence. Employer states that it was not at fault in causing the delay in introducing the evidence. Employer argues that the administrative law judge did not allow sufficient time for the development of additional x-ray interpretation evidence when he allowed only 60 days for the record to be open. Employer further argues that the administrative law judge should accept its evidence because the new x-rays demonstrate a mistake in fact in the finding that pneumoconiosis is established, as the x-rays in question are three negative re-readings of an x-ray originally read as positive for pneumoconiosis by three readers with expert qualifications. Employer's argument ignores the fact that the record was not reopened for the submission of x-rays, but rather, pursuant to the Board's instructions, was reopened for the admission of evidence relevant to rebuttal pursuant to Section 727.203(b)(3). Moreover, we hold that the administrative law judge did not abuse his discretion in holding the record open for 60 days and we reject employer's assertion to the contrary. See *Amrose v. Director, OWCP*, 7 BLR 1- 899 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). On the facts of this case, we hold that the administrative law judge did not abuse his discretion in refusing to admit into the record newly

³The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the Black Lung regulations.

submitted x-ray interpretation evidence, which has no relevance to the issue of subsection (b)(3) rebuttal. *See Id.*

Employer also contends that the administrative law judge erred by finding that the evidence establishes invocation of the interim presumption at Section 727.203(a)(1). The Board, in a prior Decision and Order, affirmed this finding. *See Sammons v. Wolfe Creek Collieries*, BRB No. 88-4342 BLA (Dec. 5, 1990)(unpub.), slip op. at 2,n.2. Thus, this finding now constitutes the law of the case, and we reject employer's challenge on this basis. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1- 988 (1984).

Finally, employer contends that the administrative law judge erred by finding that the evidence fails to establish rebuttal at Section 727.203(b)(3). Employer contends that Dr. Branscomb's report, submitted post-hearing, is sufficient to establish subsection (b)(3) rebuttal. Employer's contention is without merit. In pertinent part, as quoted by the administrative law judge, Dr. Branscomb stated:

I can conclude with a high level of medical certainty or probability that neither pneumoconiosis nor the effects of coal mine dust nor pulmonary impairment of any etiology played any role whatsoever to produce any *significant* disability in Mr. Sammons.

Decision and Order at 4, quoting Employer's Exhibit 1(emphasis added). The administrative law judge correctly concluded that in order to establish rebuttal at subsection (b)(3) in this case arising within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the party opposing entitlement must establish that pneumoconiosis played no part in the miner's disability. *See Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). The administrative law judge concluded, within his discretion, that Dr. Branscomb's statement that pneumoconiosis did not produce any *significant* disability was insufficient to establish that pneumoconiosis played no part whatsoever in the miner's disability, as required. *Id.*⁴ We affirm, therefore, the administrative law judge's finding that the evidence fails to establish rebuttal pursuant to subsection (b)(3).

⁴Employer contends that the administrative law judge violated the Administrative Procedure Act, *see* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), and 30 U.S.C. §932(a), by failing to address all of the other medical reports of record at subsection (b)(3) rebuttal. Employer's Brief at 28. We disagree. As we have previously affirmed the administrative law judge's finding that the prior evidence failed to establish rebuttal pursuant to subsection (b)(3), this finding now

In light of the foregoing, we affirm the administrative law judge's award of benefits.

constitutes the law of the case, and we reject employer's challenge on this basis. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1- 988 (1984).

Accordingly, the administrative law judge's Decision and Order on Remand - Award of Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge