BRB No. 99-0164 BLA

JEARLDINE WHITED on behalf of JAY L. WHITED (deceased) Claimant- Respondent v. VANDYKE & VANDYKE 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 on Remand - Awarding Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Jearldine Whited, Swords Creek, Virginia, *pro se*.

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer.

Rita Roppolo (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 on Remand - Awarding Benefits (88-BLA-0008) of Administrative Law Judge Clement J. Kichuk 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] This case is before the Board for the third time. In the original decision in this case, Administrative Law Judge Giles J. McCarthy noted the previously denied claim and determined that the instant case was a duplicate claim and, therefore, adjudicated it under 20 C.F.R. Part 718, based on the miner's January 14, 1981 filing date.[2] Weighing the relevant evidence, Judge McCarthy found the evidence insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). He further found the evidence insufficient to establish a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204. Accordingly, Judge McCarthy denied benefits. Claimant appealed the denial to the Board.

On appeal, the Board vacated Judge McCarthy's denial of benefits, holding that the second claim constituted a timely request for modification and merged into claimant's initial claim pursuant to 20 C.F.R. §725.310 and, therefore, the regulations at 20 C.F.R. Part 727 applied. The Board, accordingly, vacated Judge McCarthy's Part 718 findings and remanded the case for consideration under the appropriate regulations. *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 89-0545 BLA (Feb. 25, 1991)(unpub.).

On remand, since Judge McCarthy was no longer available, the case was reassigned to Administrative Law Judge Lawrence Brenner, who found the evidence of record sufficient to establish invocation of the interim presumption

[1] The miner, Jay L. Whited, died on January 30, 1991. The miner's surviving spouse, Jearldine Whited, is pursuing the miner's claim.

[2] The miner filed his initial application for benefits on August 4, 1976, which was denied by the district director on March 21, 1980. Director's Exhibits 1, 19. No further action was taken on this claim.

pursuant to 20 C.F.R. §727.203(a)(1). However, he further found the evidence sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). In addition, Judge Brenner found that claimant was not eligible for benefits under 20 C.F.R. Parts 410 or 718. Accordingly, Judge Brenner denied benefits. Claimant appealed this denial to the Board.

On appeal, the Board reversed Judge Brenner's determination that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). The Board held that the medical opinions of record were insufficient, as a matter of law, to "rule out" the causal relationship between claimant's total disability and coal mine employment pursuant to Section 727.203(b)(3). Consequently, affirming Judge Brenner's finding that the x-ray evidence was sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1), the Board reversed Judge Brenner's denial of benefits and remanded the case for him to determine the date of onset of benefits. *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 92-1809 BLA (Dec. 30, 1993)(unpub.). Employer timely requested reconsideration of the Board's Decision and Order.

The Board granted employer's motion for reconsideration and vacated its 1993 Decision and Order. The Board held that Judge Brenner's finding of subsection (a)(1) invocation was based, at least in part, on the "true doubt rule" which had been invalidated by the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Therefore, the Board vacated Judge Brenner's subsection (a)(1) finding and remanded the case for reconsideration of the medical evidence regarding invocation of the interim presumption at Section 727.203(a). Moreover, the Board vacated its holding that the evidence was insufficient, as a matter of law, to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and remanded the case for Judge Brenner to reconsider the relevant evidence in light of the recent holding of the United States Court of Appeals for the Fourth Circuit in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 92-1809 BLA (Dec. 17, 1997)(Order Granting Recon.)(unpub.).

On remand, the case was transferred to Administrative Law Judge Clement J. Kichuk (the administrative law judge) inasmuch as Judge Brenner was no longer available. Noting the Board's instructions on remand, the administrative law judge found the x-ray evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). In addition, the administrative law judge found the evidence of record insufficient to establish rebuttal of the interim

presumption pursuant to Section 727.203(b)(3).[3] Accordingly, the administrative law judge awarded benefits.

In challenging the administrative law judge's current Decision and Order, employer contends that the administrative law judge erred in finding the x-ray evidence of record sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1). In addition, employer contends that the administrative law judge erred in finding the medical opinion evidence insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Employer also argues that the administrative law judge erred in failing to address its contentions that Judge McCarthy erred in declining to admit relevant medical evidence at the 1988 formal hearing. Claimant, without the assistance of counsel, responds urging affirmance of the administrative law judge's award of benefits. Additionally, the Director, Office of Workers' Compensation Programs (the Director), responds urging affirmance of the administrative law judge's award of benefits, arguing that this decision is supported by substantial evidence. In addition, the Director urges the Board to reject employer's contentions that Judge McCarthy erred in not admitting the additional medical evidence at the 1988 formal hearing, arguing that employer waived this argument by not raising it in the prior appeals.

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 applicable law. 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 address the procedural issue raised by employer's assertion that during the January 28, 1988 formal hearing, Judge McCarthy erred in excluding the medical reports of Drs. Hippensteel and Endres-Bercher, as well as the accompanying documentation, and the January 4, 1988 medical report of Dr. Garzon. Specifically, employer contends that Judge McCarthy erred in finding that

[3] The Board previously held that, based on the facts of this case, rebuttal of the interim presumption was not available under 20 C.F.R. §727.203(b)(1), (b)(2) or (b)(4). *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 92-1809 BLA, slip op. at 4-5 (Dec. 30, 1993)(unpub.).

these opinions were either repetitious of the evidence previously admitted into the record or were cumulative, arguing that under Judge Kichuk's interpretation of the Part 727 regulations and the current case law of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this cases arises, this evidence is not cumulative and repetitious. Moreover, employer argues that it may raise this issue in the present appeal inasmuch as it was not required to raise this issue in the prior decisions in this claim because it was the prevailing party. In response to employer's contention, the Director argues that employer is barred from raising this issue at this point in the proceedings inasmuch as employer waived its right to argue the impropriety of the exclusions because it had not raised this issue in the previous appeals.

As employer correctly contends, it has not waived its right of raising the issue of the propriety of the exclusion of the medical reports of Drs. Hippensteel and Endres-Bercher, as well as the accompanying documentation, and the 1988 report of Dr. Garzon, by not previously raising this issue.[4] Inasmuch as employer was satisfied with the results of the previous administrative law judges' decisions in this claim, it cannot be found to have waived the issue for failure to raise its dissatisfaction regarding a non-dispositive issue in a response brief. *See Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*); *Barnes v. Director, OWCP*, 18 BLR 1-55 (1994), *modif. on recon*., 19 BLR 1-71 (1995)(Decision and Order on Recon.)(*en banc*); *see also Malcomb v. Island Creek Coal Co.*, 15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994); *Dalle Tezze v. Director, OWCP*, 814 F.2d 129, 10 BLR 2-26 (3d Cir. 1987). Thus, we reject the Director's argument that employer is barred from raising the impropriety of Judge McCarthy's exclusion of the medical reports of Drs. Garzon, Hippensteel and Endres-Bercher.

Section 725.456 requires that an administrative law judge admit, subject to objection of any party, all evidence that has been timely developed and exchanged.

[4] Employer initially raised this issue at the 1988 formal hearing before Judge McCarthy. Specifically, employer contested Judge McCarthy's decision to exclude this evidence and noted its exception to Judge McCarthy's ruling during the formal hearing. Hearing Transcript at 14; *see also* Hearing Transcript at 12-14, 38.

20 C.F.R. §725.456(a); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also United States Steel Mining Company, Inc. v. Jarrell*, 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Additionally, the administrative law judge is accorded the discretion to exclude evidence deemed irrelevant, immaterial or unduly repetitious. The Administrative Procedure Act, 5 U.S.C. §556(b), 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); *Jarrell, supra; Underwood, supra*. However, the Fourth Circuit has made clear that an administrative law judge should not exclude evidence repetitious or cumulative as long as it retains "nontrivial probative value," that is, it does not just expand the record or repeat that which is already well established in the record. *Underwood,* 105 F.3d at 950, 21 BLR at 2-31; *see also Jarrell*, 187 F.3d at 388, 21 BLR at 2-647. Therefore, when faced with repetitious or cumulative evidence, the administrative law judge should err on the side of admitting the evidence and then determine the weight it should be accorded when determining the merits of the claim. *Jarrell, supra; Underwood, supra*.

With respect to the admission of evidence during the 1988 hearing, Judge McCarthy initially admitted the medical report of Dr. Buddington and the December 1987 medical report of Dr. Garzon as well as the accompanying objective medical evidence. *See* Hearing Transcript at 6-10; Director's Exhibits 10-13, 22; Employer's Exhibit 2. However, Judge McCarthy found the 1988 medical report of Dr. Garzon repetitious of the physician's December 1987 report and, therefore, did not receive this report into evidence. Hearing Transcript at 12-13. Similarly, Judge McCarthy excluded the opinion of Dr. Hippensteel because the physician did not examine claimant and, therefore, stated that he would not consider this report.[5]

[5] The administrative law judge also noted that when the miner's wife was questioned as to whether they had received these reports, she stated that she did not remember having received them. Hearing Transcript at 12-14. However, employer states that it sent the reports of Drs. Hippensteel and Garzon under cover letter dated January 6, 1988 to Judge McCarthy for the hearing which was

Hearing Transcript at 13-14. Judge McCarthy also excluded the report of Dr. Endres-Bercher finding that while Dr. Endres-Bercher had examined the miner, the physician had not yet sent employer a copy of his report and, therefore, since employer already had claimant examined by Dr. Garzon, this report was cumulative and thus would not be admitted post-hearing. Hearing Transcript at 38.

Based on the facts of this case, we hold that Judge McCarthy's decision to exclude the medical reports, and accompanying documentation, of Drs. Garzon, Hippensteel and Endres-Bercher, is not rational. In excluding this evidence, the administrative law judge failed to determine the probative value of the evidence, but rather, mechanically excluded this evidence based on his determination that it was cumulative and repetitious because the record contained similar evidence. Hearing Transcript at 12-14, 38. However, the administrative law judge has the discretion to exclude only evidence deemed "unduly repetitious" and not merely cumulative or repetitious. *See Jarrell, supra; Underwood, supra; Cochran, supra*. Inasmuch as Judge McCarthy's findings do not show the excluded evidence to be so repetitious as to serve little useful purpose or that it repeats that which is already well established in the record, we reverse Judge McCarthy's order excluding this evidence and remand this case for the administrative law judge to admit this evidence into the formal record.

Consequently, in light of our decision vacating Judge McCarthy's exclusion of relevant medical evidence and our instruction to include this evidence in the formal record, *see* discussion, *supra*, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to consider all of the relevant evidence, including that evidence previously excluded, pursuant to Sections 727.203(a) and 727.203(b)(3).

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

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to be held on January 28, 1988, with claimant being carbon copied. Therefore, these reports were submitted, albeit marginally, within the twenty day limitation for submitting evidence prior to the hearing. 20 C.F.R. §725.456.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge