

BRB No. 04-0348 BLA

BETTY VAUGHN)
(Executrix of the Estate of)
MARGARET TAYLOR, widow of)
HILLARD TAYLOR))

Claimant-Respondent)

v.)

DRUMMOND COMPANY,)
INCORPORATED,)
(Successor to ALABAMA)
BY-PRODUCTS CORPORATION))

DATE ISSUED: 04/22/2005

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 - Awarding Benefits and Decision and Order on Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Richard J. Ebbinghouse (Wiggins, Childs, Quinn & Pantazis, P.C.), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits and Decision and Order on Reconsideration (83-BLA-1909) of Administrative Law Judge Daniel F. Sutton (the administrative law judge) 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 sixth time.¹ Most recently, the Board, in *Vaughn v. Alabama By-Products Corp.*, BRB No. 01-0680 BLA (Mar. 19, 2002)(unpublished), reversed in part and vacated in part the administrative law judge's decision, and remanded the case. Specifically, the Board reversed the administrative law judge's finding that employer established rebuttal at 20 C.F.R. §727.203(b)(3), and vacated the administrative law judge's finding that employer established rebuttal of the presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(4).

The administrative law judge awarded benefits on remand by Decision and Order dated September 29, 2003. The administrative law judge specifically determined that the opinions of Dr. Jones were insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(4). The administrative law judge awarded benefits, pursuant to the deceased miner's claim, commencing June 1, 1980 and continuing to January 26, 1984, the date of the miner's death. The administrative law judge also awarded benefits, pursuant to the survivor's claim, commencing February 1, 1984 and continuing through the date of the miner's widow's death. The administrative law judge further instructed employer to reimburse the Black Lung Disability Trust Fund for all benefits paid on both claims, with interest.

Employer filed a Motion for Reconsideration of the administrative law judge's Decision and Order. The administrative law judge found merit in one of the grounds for reconsideration advanced by employer. Specifically, the administrative law judge held that employer correctly contended that the Board had affirmed the denial of benefits in the miner's claim and thus, the administrative law judge had erred in awarding benefits on remand pursuant to the miner's claim. The administrative law judge held that the issue of entitlement to benefits in the miner's claim was not properly before him, and modified his order to grant benefits pursuant to the survivor's claim only.² Decision and Order on

¹ The prior procedural history is set forth in *Vaughn v. Alabama By-Products Corp.*, BRB No. 01-0680 BLA (Mar. 19, 2002)(unpublished). The miner's widow is deceased, and her claim is being pursued by the executrix of her estate, Betty Vaughn.

² Administrative Law Judge Clement J. Kichuk's denial of benefits in the miner's

Reconsideration dated November 24, 2003.

On appeal, employer contends that the administrative law judge's award of survivor's benefits to the miner's widow was erroneous as a matter of law because the miner's widow never filed a survivor's claim and thus, she could be entitled to benefits only through the miner's claim, which was unsuccessful.³ Alternatively, employer argues that any claim filed by the miner's widow should not have been considered under the regulations at 20 C.F.R. Part 727, but under those at 20 C.F.R. Part 718. Employer also asserts that the administrative law judge found that, at 20 C.F.R. §727.203(b)(4), Dr. Jones's opinions do *not* satisfy the "reasoned medical judgment" standard set by the United States Court of Appeals for the Eleventh Circuit in *Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989), because Dr. Jones did not state "with certainty" that the miner's coal mine employment played no role in his pulmonary disability. Employer argues that the administrative law judge's finding is contrary to the regulations. Lastly, employer alleges that the administrative law judge, in finding that the evidence was insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(4), did not consider all the relevant evidence and misconstrued and incorrectly weighed Dr. Jones's opinion. Both claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging the Board to affirm the decision below. Employer has filed a brief in reply to the response briefs of claimant and the Director.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and in

claim, pursuant to a finding of rebuttal of the interim presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3), as affirmed by the Board in its 1998 Decision and Order, does not preclude a finding of entitlement to survivor's benefits. As the Board explained in *Taylor v. Alabama By-Products Corp.*, BRB No. 98-0268 BLA (Nov. 12, 1998)(unpublished), slip op. at 4, once the interim presumption is invoked in a survivor's claim, the survivor has the benefit of two presumed facts, namely total disability due to pneumoconiosis at the time of the miner's death and death due to pneumoconiosis. The party opposing entitlement, employer in the instant case, must rebut both presumptions in order to defeat a finding of the miner's widow's entitlement to survivor's benefits. *Id.*

³ In its 1998 decision in *Taylor*, the Board affirmed Administrative Law Judge Clement J. Kichuk's denial of benefits in the miner's claim, which was based on a finding of rebuttal of the presumption of total disability due to pneumoconiosis at 20 C.F.R. §727.203(b)(3). The Board's decision in *Taylor* also reflects that it treated notification of the miner's death, filed by the miner's widow on March 3, 1984, as a claim for benefits independent of the miner's claim.

accordance with 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).

As a preliminary matter, we first address claimant’s argument that the miner’s widow was required to file an independent claim subsequent to the miner’s death. Because this issue is jurisdictional in nature, we find no merit in claimant’s contention that employer cannot raise it for the first time on appeal to the Board. *Kubachka v. Windsor Power House Coal Co.*, 11 BLR 1-171 (1988).

Employer contends that the administrative law judge’s award of benefits to the miner’s widow was erroneous as a matter of law because the miner’s widow never filed a claim and thus, could establish her entitlement to benefits based only on the miner’s claim. Because the miner’s claim was unsuccessful, employer asserts that the miner’s widow is not entitled to benefits as a matter of law. Citing *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988) and *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), claimant argues, in response, that the miner’s widow was not required to file a claim independent of the miner’s claim, which was in payment status at the time of his death in 1984. Further, claimant notes that employer did not raise below the issue of whether the miner’s widow was required to file a claim independent of the miner’s claim. Claimant notes that when, in 1984, the Department of Labor notified the miner’s widow that since the miner was receiving benefits at the time of his death, she would not be required to file a new claim for benefits, and interim benefits would be paid to her from the Black Lung Disability Trust Fund, employer did not raise any issue of a filing requirement, but contested only the finding of death due to pneumoconiosis. Director’s Exhibits W4 - W-6. Claimant urges the Board to reject employer’s contention that any award of benefits to the miner’s widow was contingent on a finding of entitlement in the miner’s claim. In response, the Director argues, pursuant to *Pothering*, that although the miner’s claim was ultimately denied, his claim “still represents a viable assertion of entitlement by Mrs. Taylor, as his survivor, based on the miner’s presumed death due to pneumoconiosis.” Director’s Brief at 3. The Director asserts that, consequently, the miner’s widow was not required to file a separate application but could proceed with her “claim” for benefits based on the miner’s filing. *Id.*

Employer’s contention that that the administrative law judge’s award of benefits to the miner’s widow was erroneous as a matter of law because the miner’s widow never filed a claim independent of the miner’s claim, lacks merit. Contrary to employer’s argument, the miner’s widow was not precluded from obtaining benefits based on the miner’s claim on the basis that that claim was ultimately denied. An eligible survivor of a deceased miner who filed a claim during his lifetime prior to January 1, 1982, the effective date of the 1981

Amendments to the Act, need not file a new claim after the miner's death.⁴ 30 U.S.C. §932(1) (1982); *Pothering*, 861 F.2d at 1323, 12 BLR at 2-70-71; *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989).⁵ We thus reject employer's assertion that because the miner's claim was ultimately unsuccessful, the miner's widow is not entitled to benefits as a matter of law.

Employer argues, alternatively, that if there is an independent miner's widow's claim, it should not have been considered under the regulations at 20 C.F.R. Part 727 but under those at 20 C.F.R. Part 718, as the miner's widow filed a March 3, 1984 notice of the miner's death, after the effective date of the regulations at Part 718. Claimant and the Director each contend that because the miner's claim was filed in 1979, before the effective date of the regulations at Part 718, and that the claim was in payment status at the time of the miner's death in 1984, the administrative law judge properly considered claimant's entitlement to benefits under Part 727, not Part 718.

Employer's contention that the regulations at 20 C.F.R. Part 718 apply, lacks merit. As explained above, the miner's claim, filed in 1979, was in payment status at the time of his death; therefore, under *Smith*, the miner's widow was not required to file a claim after the miner's death in order to have her entitlement to benefits determined under 20 C.F.R. Part 727 in this case. 30 U.S.C. §932(1)(1982); 20 C.F.R. §727.203(a).

Employer next challenges the substance of the administrative law judge's finding that employer failed to establish rebuttal at 20 C.F.R. §727.203(b)(4). The Board instructed the administrative law judge on remand to determine whether Dr. Jones's opinions affirmatively rule out the presence of pneumoconiosis, both legal and clinical. *Vaughn*, slip op. at 9. The Board further rejected claimant's assertion that the administrative law judge erred in accordingly less weight to the opinions of Drs. Tai and Goodman. The Board also indicated that the administrative law judge "could properly conclude that Dr. Grimes's silence on the issue of legal pneumoconiosis rendered his opinion irrelevant on causation." *Id.* at 9-10. The Board noted that the administrative law judge had taken into account Dr. Felgner's status as a treating physician, and had permissibly concluded that the opinion was not entitled to

⁴ An "eligible survivor" of a deceased miner is a survivor of the miner who meets the relationship and dependency requirements set forth at 20 C.F.R. §§725.212 - 725.215. In the instant case, it is undisputed that the miner's widow is an eligible survivor of the miner.

⁵ The instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. In *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989), Board indicated that its holding therein is in accord with *Pothering v. Parkson Coal Co.*, 861 F.2d 1321, 12 BLR 2-60 (3d Cir. 1988).

determinative weight. *Id.* at 10.

On remand, the administrative law judge initially noted that when this case was first before the Eleventh Circuit in 1989, the court held that an employer may establish rebuttal at 20 C.F.R. §727.203(b)(4) by a documented medical opinion that the miner did not have pneumoconiosis by a physician exercising reasoned medical judgment. *See Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989). The administrative law judge then determined that Dr. Jones's opinion, that the miner did not have coal worker's pneumoconiosis, constituted a reasoned medical judgment. He added:

However, successful rebuttal under subsection (b)(4) requires more than excluding the presence of coal workers' pneumoconiosis which is a "medical term that comprises merely a small subset of the afflictions compensable under the Act." *Barber v. Director, OWCP*, 43 F.3d 899, 910 (4th Cir. 1995). As the BRB instructed, the ALJ on remand must determine whether Dr. Jones's opinions "affirmatively rule out the presence of pneumoconiosis, both legal and clinical." Slip op. at 9. Dr. Jones ruled out the presence of coal worker[s] pneumoconiosis by diagnosing the Miner with COPD which he attributed to cigarette smoking... Dr. Jones appropriately distinguished coal worker[s] pneumoconiosis from COPD, explaining that the former would cause an irreversible restrictive impairment that was not seen in the Miner, but he then went on to conclude that the absence of evidence of coal worker[s] pneumoconiosis suggests that the Miner's COPD was caused by cigarette smoking and not coal dust exposure.

Decision and Order on Remand at 5. The administrative law judge determined that Dr. Jones's analysis, to the effect that the absence of evidence of coal workers' pneumoconiosis suggested that the miner's chronic obstructive pulmonary disease was caused by cigarette smoking and not coal dust exposure, was flawed. Specifically, the administrative law judge stated, "... Dr. Jones's determination that the Miner did not have evidence of clinical pneumoconiosis led him to exclude coal dust exposure as a cause of the Miner's COPD and, thus, prevented him from fully addressing the impact of the Miner's lengthy coal mine employment history on his disabling pulmonary impairment." *Id.* The administrative law judge determined that this omission by Dr. Jones "weakens the credibility of his opinion and precludes it from being treated as a reasoned medical judgment that the Miner did not suffer from legal pneumoconiosis." *Id.* Accordingly, the administrative law judge concluded that Dr. Jones's opinions were insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(4).

Employer asserts that the administrative law judge found that Dr. Jones's opinions did not satisfy the "reasoned medical judgment" standard set by the Eleventh Circuit in its 1989 decision in *Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir.

1989). Employer claims that the administrative law judge so decided on the basis that Dr. Jones did not state “with certainty” that the miner’s coal mine employment played no role in his pulmonary disability. Employer argues that this finding by the administrative law judge is contrary to the regulations that do not require a physician’s “absolute certainty” in rendering a medical opinion as to whether a miner is totally disabled due to pneumoconiosis.⁶ Employer’s Brief at 15. Employer asserts that the administrative law judge misconstrued Dr. Jones’s opinion. Claimant urges affirmance of the administrative law judge’s finding that employer failed to establish rebuttal at 20 C.F.R. §727.203(b)(4). The Director asserts that the relevant evidence fails to establish rebuttal under 20 C.F.R. §727.203(b)(4), as well as under 20 C.F.R. §727.203(b)(3), and attaches a copy of his response brief filed with the Board in connection with a previous appeal. The Director thus urges the Board to affirm the administrative law judge’s award of benefits.

In order to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4), the party opposing entitlement, in this case employer, must affirmatively establish that the miner did not suffer from clinical or legal pneumoconiosis. *Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532 (11th Cir. 1985). Dr. Jones opined that “it could not be stated with certainty” that the miner’s coal mine employment did not contribute “minimally” to his pulmonary disability. Employer’s Exhibit 30. The administrative law judge on remand permissibly determined that Dr. Jones’s opinions reflect that he failed to address fully the effect of the miner’s long-term coal dust exposure on the miner’s disabling

⁶ Employer asserts that the administrative law judge erred by not considering Dr. Jones’s opinions on rebuttal under 20 C.F.R. §727.203(b)(3), as well as under 20 C.F.R. §727.203(b)(4), as instructed by the Eleventh Circuit in *Taylor v. Director, OWCP*, 16 F.3d 1164 (11th Cir. 1994). Employer recognizes that the Board, in remanding the case to the administrative law judge in 2002, held that a finding of rebuttal at 20 C.F.R. §727.203(b)(3) was precluded. Employer argues, however, both that the Board’s holding was erroneous, and that the evidence is sufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3). Employer further argues that the administrative law judge erred by not considering all the relevant evidence at 20 C.F.R. §727.203(b)(4).

Employer’s assertions lack merit. The administrative law judge properly limited his decision on remand to the issue of Dr. Jones’s opinions relevant to rebuttal at 20 C.F.R. §727.203(b)(4), pursuant to the Board’s remand instructions in *Vaughn v. Alabama By-Products Corp.*, BRB No. 01-0680 BLA (Mar. 19, 2002)(unpublished). We thus need not further address employer’s assertions with regard to the sufficiency of the evidence on rebuttal at 20 C.F.R. §727.203(b)(3). Further, employer asserts no compelling reason why the Board should revisit its affirmance of the finding of no rebuttal at 20 C.F.R. §727.203(b)(3) in *Taylor v. Alabama By-Products Corp.*, BRB No. 98-0268 BLA (Nov. 12, 1998).

respiratory impairment and did not thereby misconstrue Dr. Jones's pertinent opinion. *Jordan v. Benefits Review Board*, 876 F.2d 1455, 12 BLR 2-371 (11th Cir. 1989); *Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985).

Moreover, contrary to employer's characterization of the administrative law judge's findings on remand, the administrative law judge found that Dr. Jones did exercise reasoned medical judgment in opining that the miner did not have coal workers' pneumoconiosis, but permissibly declined to credit his opinion on rebuttal at 20 C.F.R. §727.203(b)(4) because he found that Dr. Jones' analysis was "flawed" or incomplete. Decision and Order on Remand at 5; *see* discussion *supra*. As set forth above, the administrative law judge found Dr. Jones' analysis flawed to the extent that he failed to address fully the impact of the miner's coal mine employment on his condition. *Id.* Such a deficiency has no effect, however, on the administrative law judge's determination that Dr. Jones exercised reasoned medical judgment in his overall opinion. We thus reject employer's argument that the administrative law judge's decision on remand is inconsistent with the Eleventh Circuit's holdings in this case. Employer's remaining assertions, to the effect that the evidence of record establishes rebuttal at 20 C.F.R. §727.203(b)(4), constitute requests for reweighing of the evidence and are rejected on that basis. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Based on the foregoing, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). We therefore affirm the administrative law judge's award of survivor's benefits to the miner's widow pursuant to Part 727.

Accordingly, the Decision and Order on Remand - Awarding Benefits and Decision and Order on Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

ROY P.SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge