

BRB No. 99-1065 BLA

MARGARET TAYLOR)
(Widow of HILLARD TAYLOR))
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: _____)
)
 ALABAMA BY-PRODUCTS)
 CORPORATION)
)
 Employer-)
 Respondent)
)
 DIRECTOR, OFFICE OF)
 WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT) DECISION AND ORDER
 OF LABOR)

Party-in-Interest

Appeal of the Decision and Order on Remand - Denying Benefits of
Clement J. Kichuk, Administrative Law Judge, United States
Department of Labor.

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

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

Before: HALL, Chief Administrative Appeals Judge, BROWN,
Administrative Appeals Judge, and NELSON, Acting Administrative
Appeals Judge.

PER CURIAM:

Claimant, the surviving spouse of a deceased miner, appeals the Decision and Order on Remand - Denying Benefits (83-BLA-1909) of Administrative Law Judge Clement J. Kichuk with respect to 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). The relevant procedural history of this case is as follows: The miner filed an application for benefits on November 23, 1979. Director's Exhibit 1. The district director made an initial finding of entitlement which employer contested. The miner began receiving interim benefits from the Black Lung Disability Trust Fund. The miner died on January 26, 1984, before the claim was transferred to the Office of Administrative Law Judges for a hearing.¹ Claimant filed an application for survivor's benefits on March 3, 1984. After an initial finding of entitlement was made with respect to the survivor's claim, at employer's request, both claims were transferred to the OALJ for a hearing before Administrative Law Judge Ronald T. Olson.

Judge Olson accepted the parties' stipulation to twenty-four years of coal mine employment and considered entitlement pursuant to the regulations set forth in 20 C.F.R. Part 727. Judge Olson found that the evidence of record was sufficient to establish invocation of the interim presumption under 20 C.F.R. §727.203(a)(2). Judge Olson further determined, however, that the presumption was rebutted under 20 C.F.R. §727.203(b)(3) and (b)(4). Accordingly, he denied both claims under Part 727 and 20 C.F.R. Part 410, Subpart D.

Claimant filed an appeal with the Board which, in a Decision and Order issued on March 17, 1988, held, as a matter of law, that the evidence of record was insufficient to establish rebuttal of the interim presumption. *Taylor v. Alabama By-Products Corp.*, BRB No. 86-1088 BLA (Mar. 17, 1988)(unpub.). The Board remanded the case to the district director for payment. Employer appealed the Board's Decision and Order to the United States Court of Appeals

¹Dr. Felgner, the miner's treating physician, prepared the death certificate and identified cardiorespiratory arrest, due to or as a consequence of severe congestive heart failure and severe renal and hepatic failure, as the cause of death. Director's Exhibit W3.

for the Eleventh Circuit. The court determined that the Board erred in holding that none of the medical opinions of record satisfied the Section 727.203(b)(3) rebuttal standard set forth in *Black Diamond Coal Co. v. Benefits Review Board [Raines]*, 758 F.2d 1532, 7 BLR 2-209 (11th Cir. 1985). *Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989). In particular, the court stated that the Board did not properly assess the opinion of Dr. Jones, who concluded that the miner's pulmonary disability was attributable to cigarette smoking, but could not state with certainty that coal dust exposure did not contribute minimally to the miner's impairment. The court also indicated that Judge Osborn's finding of rebuttal under Section 727.203(b)(4) was not rational. Therefore, the court vacated the Board's Decision and Order and remanded the case to the Board.

The Board issued an Order on Remand on April 21, 1989. *Taylor v. Alabama By-Products Corp.*, BRB No. 86-1088 BLA (Apr. 21, 1989)(unpub. Order). Based upon the Eleventh Circuit's holdings, the Board reinstated and affirmed Judge Osborn's determination that the interim presumption was rebutted under Section 727.203(b)(3). The Board remanded the case to Judge Osborn, however, for reconsideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(4) and consideration of entitlement under 20 C.F.R. §410.490.

Due to Judge Osborn's unavailability, the case was reassigned to Administrative Law Judge Robert L. Cox on remand. Judge Cox found that the evidence was insufficient to establish rebuttal under Section 727.203(b)(4). Judge Cox further found that entitlement was established pursuant to Section 410.490. Accordingly, he awarded benefits on both claims. Employer filed an appeal with the Board in which it contested Judge Cox's findings pursuant to Sections 727.203(b)(4) and 410.490. The Board held that in light of the recent decision of the United States Supreme Court in *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), consideration of entitlement under Section 410.490 was precluded. *Taylor v. Alabama By-Products Corp.*, BRB No. 90-1272 BLA (Oct. 14, 1992)(unpub.). The Board also held, however, that in light of its prior affirmance of Judge Osborn's Section 727.203(b)(3) rebuttal finding, entitlement was precluded with respect to both claims under both 20 C.F.R. Part 727 and 20 C.F.R. Part 718. *Id.* The Board, therefore, reversed Judge Cox's Decision and Order awarding benefits in both claims without reaching the issue of rebuttal under Section 727.203(b)(4). *Id.*

Claimant appealed to the United States Court of Appeals for the Eleventh Circuit. The court held that the Board erred in relying upon dicta in the court's prior decision to determine that Dr. Jones's opinion supported a finding of rebuttal

under Section 727.203(b)(3). *Taylor v. Alabama By-Products Corp.*, 16 F.3d 1493 (11th Cir. 1994). The court remanded the case to the Board for reconsideration of Judge Osborn's findings in light of the allegations of error that claimant raised in her first appeal to the Board. In an Order on Remand, the Board affirmed Judge Osborn's decision to credit Dr. Jones's opinion as reasoned based upon his qualifications and the documentation supporting his diagnoses. *Taylor v. Alabama By-Products Corp.*, BRB No. 90-1272 BLA (Apr. 19, 1995)(unpub. Order). The Board further held, however, that Judge Osborn did not properly weigh the contrary opinions of Drs. Tai, Goodman, Felgner, and Grimes. Accordingly, the Board remanded the case for reconsideration.

On remand, the case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge). In his Decision and Order, the administrative law judge found that Dr. Jones's opinion was entitled to the most weight. The administrative law judge concluded, therefore, that rebuttal was demonstrated under Section 727.203(b)(3) and that entitlement was precluded under Part 718. Accordingly, benefits were denied with respect to both claims. Claimant filed an appeal with the Board which, in a Decision and Order issued on November 12, 1998, affirmed the administrative law judge's finding that employer rebutted the presumption of total disability due to pneumoconiosis under Section 727.203(b)(3) and affirmed the denial of benefits with respect to the miner's claim under Part 727 and Part 718. *Taylor v. Alabama By-Products Corp.*, BRB No. 98-0268 BLA (Nov. 11, 1998)(unpub.). The Board also held, however, that the administrative law judge should have explicitly considered whether the presumptions available to claimant in the survivor's claim were rebutted. Therefore, the Board remanded the case to the administrative law judge.

On remand, the administrative law judge granted employer's Motion to Strike material attached to claimant's Brief on Remand and found that the employer established rebuttal of the presumption of death due to pneumoconiosis under Section 727.203(b)(3). The administrative law judge also determined that the evidence of record was insufficient to establish entitlement to survivor's benefits under Part 718. Accordingly, benefits were denied in the survivor's claim. Claimant argues on appeal that the administrative law judge erred in granting employer's Motion to Strike. Claimant also alleges that the administrative law judge did not properly weigh the medical opinions of record. Employer has responded and urges affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.

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

As an initial matter, we will address the administrative law judge's application of Part 727 to the survivor's claim. The miner's claim in the present case was filed on November 23, 1979. The miner died on January 26, 1984, while he was still receiving interim benefit payments. Claimant filed her claim on March 3, 1984. In the Board's prior Decision and Order, the administrative law judge was instructed to consider the survivor's claim under both Part 727 and Part 718. In its response brief, employer asserts that under §718.1, the Part 727 regulations cannot be applied to survivor's claims that are filed after January 1, 1982. 20 C.F.R. §718.1 provides in relevant part that "unless the miner was found entitled to benefits as a result of a claim filed prior to January 1, 1982, benefits are payable on survivors' claims filed on or after January 1, 1982, only when the miner's death was due to pneumoconiosis." Employer's assertion regarding the meaning of Section 718.1 is at odds with the Board's holding in *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989), that pursuant to Section 422(l) of the Act, a survivor gets the benefit of the miner's filing date if the miner's claim was in pay status at the time of his death. The holding in *Smith* and §718.1 can be viewed as complementary, rather than conflicting, if the Part 727 regulations apply only to the extent that in a survivor's claim, the claimant benefits from a presumption of *death*, not total disability, due to pneumoconiosis. In the instant case, the administrative law judge only addressed death due to pneumoconiosis in the survivor's claim. Decision and Order on Remand at 6-9. The administrative law judge, therefore, acted properly in applying Part 727 to the survivor's claim in this case. See *Smith, supra*; see also *Pothering v. Parkson Coal Co.*, 861 F.2d 321, 12 BLR 2-60 (3d Cir. 1988).

The next issue raised in claimant's appeal concerns the administrative law judge's finding that Dr. Jones's opinion is sufficient to establish rebuttal under Section 727.203(b)(3). The administrative law judge determined that Dr. Jones's opinion was entitled to the greatest weight under Section 727.203(b)(3) based upon Dr. Jones's qualifications and the fact that his opinion was detailed and well-supported by the objective evidence he obtained during his examination of the miner. Decision and Order on Remand at 7-8. We cannot affirm the administrative law judge's finding, as Dr. Jones's opinion does not satisfy the standard for rebuttal of the presumption of death due to pneumoconiosis. Under the decisions of the Eleventh Circuit in *Raines* and *Bradberry v. Director, OWCP*,

117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997), the party opposing entitlement must demonstrate that pneumoconiosis played no part in the miner's death. Dr. Jones submitted a report of an examination of the miner performed in 1981 and was deposed in 1985, one year after the miner's death. Director's Exhibit 30; Employer's Exhibit 6. The doctor stated that the miner had chronic obstructive pulmonary disease (COPD) and a pulmonary disability, noted that the miner's x-ray was negative for pneumoconiosis, and concluded that the COPD was caused by smoking. He was not asked to opine as to the cause of the miner's death. *Id.* Inasmuch as Dr. Jones did not reach a conclusion as to whether legal or clinical pneumoconiosis caused or contributed to the miner's death, it is not apparent that his opinion is relevant to Section 727.203(b)(3). Perhaps the administrative law judge reasoned that because Dr. Jones essentially found that the miner did not have pneumoconiosis, his opinion necessarily rebutted the presumption that pneumoconiosis caused the miner's death. This analysis is pertinent to rebuttal under Section 727.203(b)(4), however, which the administrative law judge did not address and which was left unresolved after the Eleventh Circuit vacated the Board's second Decision and Order. See slip opinion, *supra*, at 3-4. Thus, we vacate the administrative law judge's determination that employer established rebuttal pursuant to Section 727.203(b)(3) and remand this case to the administrative law judge for reconsideration of this issue and, if necessary, consideration of whether the evidence of record is sufficient to establish rebuttal under Section 727.203(b)(4).

Regarding the remainder of the administrative law judge's findings under Section 727.203(b)(3), claimant challenges the administrative law judge's determination that the opinions of Drs. Branscomb and Felgner weigh in favor of Section 727.203(b)(3) rebuttal.² Contrary to claimant's argument, the

²Claimant also argues that the administrative law judge erred in discrediting, in his prior Decision and Order, the opinions of Drs. Grimes, Tai, and Goodman under 20 C.F.R. §727.203(b)(3). The Board affirmed the administrative law judge's weighing of these opinions. *Taylor v. Alabama By-Products Corp.*, BRB No. 98-0268 BLA (Nov. 12, 1998)(unpub.), slip opinion at 4-5. Inasmuch as claimant has advanced no new argument in support of altering the Board's previous holding and no intervening case law has contradicted the Board's resolution of this issue, it constitutes the law of the case and will not be disturbed. See *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). In addition, in light of the fact that none of these physicians offered an opinion as to the cause of the miner's death, their reports are not relevant to the administrative law judge's consideration of the issue of death due to pneumoconiosis in the survivor's claim.

administrative law judge was not required to treat Dr. Branscomb's opinion as hostile to the Act, as Dr. Branscomb did not state that he requires a positive x-ray in order to diagnose pneumoconiosis. He indicated that because the miner's numerous nonpulmonary medical problems affected the blood gas study and pulmonary function study results, he would rely heavily upon the x-ray interpretations of record. Employer's Exhibit 4. In addition, Dr. Branscomb never actually concluded that the miner did not suffer from pneumoconiosis; in response to questions regarding whether the miner had pneumoconiosis or a coal dust related impairment, Dr. Branscomb said "probably not." *Id.* Thus, the administrative law judge acted within his discretion in crediting Dr. Branscomb's opinion under Section 727.203(b)(3). See *Jones v. Kaiser Steel Corp.*, 8 BLR 1-339 (1985).

Claimant's allegation of error regarding the administrative law judge's weighing of Dr. Felgner's opinion has merit, however. Dr. Felgner, the miner's treating physician, diagnosed COPD related, in part, to coal dust exposure in May of 1982 but did not mention COPD or pneumoconiosis on the death certificate or in his summary of the miner's last hospitalization. Director's Exhibits W3, 14; Employer's Exhibit 5. The administrative law judge treated this as evidence that pneumoconiosis did not contribute to the miner's death. Decision and Order on Remand at 7. Under *Raines* and *Bradberry*, the party opposing entitlement must affirmatively prove that pneumoconiosis played no part in the miner's death. Dr. Felgner's silence on the subject does not meet this standard. The administrative law judge must, therefore, reconsider his determination that Dr. Felgner's opinion supports employer's burden under Section 727.203(b)(3) on remand. Nevertheless, in contrast to claimant's assertion, the administrative law judge is not required to determine that the sum of Dr. Felgner's reports and treatment notes, in conjunction with the fact that the miner's was suffering from respiratory distress and was using a ventilator until shortly before his death, demonstrate that COPD caused, in part, by coal dust exposure contributed to the miner's death. Unlike the factual situation in *Bradberry*, upon which claimant relies, Dr. Felgner did not explicitly state at any juncture that COPD or pneumoconiosis played a role in the miner's demise.

Regarding the administrative law judge's consideration of the opinions relevant to Section 727.203(b)(4) rebuttal, if reached on remand, claimant contends with respect to Dr. Jones's opinion that the administrative law judge erred in refusing to consider the material from scientific journals and medical treatises which claimant appended to her Brief on Remand. The administrative law judge refused to admit the material on the grounds that that Board did not order him to reopen the record, there had been no significant change in the law,

and claimant did not establish good cause. Decision and Order on Remand at 5. Claimant asserts that these items establish that Dr. Jones was incorrect in attributing the miner's COPD solely to his cigarette smoking. Claimant also asserts that contrary to the administrative law judge's finding, there have been changes in the law concerning the circumstances under which determinative weight can be accorded to scientific testimony such as that offered by Dr. Jones and whether COPD meets the legal definition of pneumoconiosis.

These contentions are without merit. Claimant states that under the decisions of the United States Supreme Court in *Daubert v. Merrill Dow Pharmaceuticals*, 509 U.S. 579 (1993) and *Kumho Tire Co., Ltd. v. Carmichael*, 119 S.Ct. 1167 (1999), the administrative law judge erred in crediting Dr. Jones's opinion without first determining that the conclusions he expressed concerning the absence of a clear link between coal dust exposure and chronic obstructive pulmonary disease are accepted by a significant number of his peers. The decisions in *Daubert* and *Kumho* are not relevant to the cases arising under the Act, as the issue before the Supreme Court concerned the interpretation of Federal Rule of Evidence 702, which pertains to the use of expert testimony in federal district courts. In addition, the holdings in *Daubert* and *Kumho* concern the *admissibility*, rather than the probative value, of such testimony. In the present case, claimant did not object to the admission of Dr. Jones's opinion into the record at the hearing. See Hearing Transcript at 7, 15.

With respect to the issue of whether COPD satisfies the legal definition of pneumoconiosis, claimant is correct in asserting that the United States Court of Appeals for the Eleventh Circuit indicated in *Bradberry*, that COPD that arises from coal mine employment falls within the definition of pneumoconiosis set forth in 20 C.F.R. §§727.202 and 718.201. See *Bradberry, supra*. The court's statement did not represent a change in the law, however, but rather an explanation, in *dicta*, of preexisting principles regarding the diseases and conditions that are treated as pneumoconiosis for the purposes of the Act. Moreover, Dr. Jones did not state that pneumoconiosis or coal dust exposure cannot cause COPD. He indicated that severe pneumoconiosis causes a restrictive impairment and that the data in this case - a negative x-ray and a pulmonary function study showing a reversible obstructive defect - supported a diagnosis of smoking related COPD. Director's Exhibit 30; Employer's Exhibit 6. Thus, the administrative law judge is not required to discredit Dr. Jones's opinion under either the case law of the Eleventh Circuit or analogous law in the other circuits. See *Bradberry, supra*; *Stiltner v. Island Creek Coal Co.*, 86 F.3d 377, 20 BLR 2-246 (4th Cir. 1996); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). We affirm, therefore, the administrative law judge's

decision to grant employer's Motion to Strike the material appended to claimant's Brief on Remand and his decision to credit Dr. Jones's opinion regarding the existence of pneumoconiosis as defined in Sections 727.202 and 718.201.

In summary, the administrative law judge's determination that employer established rebuttal of the presumption of death due to pneumoconiosis pursuant to Section 727.203(b)(3) is vacated and the case is remanded to the administrative law judge for reconsideration of this issue. If the administrative law judge finds that Section 727.203(b)(3) rebuttal is not established, he must consider rebuttal under Section 727.203(b)(4). Should the administrative law judge determine that claimant is not entitled to benefits under Part 727, he must reconsider the denial of benefits under Part 718 in light of his weighing of the medical opinions of record on remand.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

