BRB No. 98-1624 BLA

EDDIE HESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
ALABAMA BY-PRODUCTS CORPORATION / DRUMMOND COMPANY, INCORPORATED	)	
	)	
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 of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Nakamura & Quinn, LLP), Birmingham, Alabama, for claimant.

Carranza M. Pryor (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (97-BLA-0900) of Administrative Law Judge Gerald M. Tierney awarding benefits 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] The administrative law judge found that the newly submitted

[1]On April 11, 1986, Administrative Law Judge Ronald T. Osborn issued a Decision and Order finding the evidence sufficient to invoke the interim presumption pursuant to

evidence invokes the interim presumption under 20 C.F.R §727.203(a)(1) and (a)(4), continues to invoke the interim presumption under 20 C.F.R. §727.203(a)(2), but fails to rebut the presumption at 20 C.F.R. §727.203(b). Consequently, the administrative law judge found a change in conditions under 20 C.F.R. §725.310. The administrative law judge reviewed the entire record on the merits and concluded that the evidence invoked the interim presumption at Section 727.203(a)(1), (a)(2) and (a)(4), and that rebuttal was not established pursuant to Section 727.203(b). Accordingly, benefits were awarded. Employer appeals, challenging the administrative law judge's findings of invocation under Section 727.203(a)(1), (a)(2) and (a)(4), and the finding of no rebuttal under Section 727.203(b).[2] Claimant filed a motion to dismiss employer's appeal, which was denied by the Board, see *Hester v. Consolidation Coal Co.*, BRB No. 98-1624 BLA (Feb. 10, 1999)(Order) (unpub.), but has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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20 C.F.R. §727.203(a)(2), and that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, Judge Osborn awarded benefits. Director's Exhibit 44. Employer appealed and the Board affirmed Judge Osborn's finding of invocation, but remanded the case for reconsideration of rebuttal. *Hester v. Alabama By-Products Corp.*, BRB No. 86-1247 BLA (Feb. 23, 1988)(unpub.); Director's Exhibit 52. On remand, Administrative Law Judge James W. Kerr, Jr. , found rebuttal established pursuant to 20 C.F.R. §727.203(b)(2) and (b)(4). Accordingly, Judge Kerr denied benefits. Director's Exhibit 59. In response to an appeal from claimant, the Board affirmed Judge Kerr's finding that rebuttal was established pursuant to Section 727.203(b)(4), and held that entitlement was precluded under 20 C.F.R. Part 718. *Hester v. Alabama By-Products Corp.*, BRB No. 88-3175 BLA(June 17, 1992)(unpub.); Director's Exhibit 67. Claimant then filed a request for modification and a request for a formal hearing that was denied by Judge Kerr. Director's Exhibit 85. Claimant appealed Judge Kerr's decision. The Board vacated Judge Kerr's decision and held that Judge Kerr should issue a show cause order, determine whether a modification hearing is necessary and if the request for a hearing was again denied, to carefully explain why such a hearing is unnecessary to render justice. *Hester v. Alabama By-Products Corporation,* 95-0844 BLA (Jan. 24, 1996)(unpub.); Director's Exhibit 96. The Board also remanded the case to Judge Kerr to provide a full, detailed opinion which explains the basis for denying claimant's request for modification under 20 C.F.R. §725.310, the weight assigned to the evidence, and the relationship between the evidence and his legal and factual conclusions. *Id.* In addition, the Board instructed Judge Kerr to consider the evidence under Section 727.203, and, if necessary, under 20 C.F.R. Part 718. *Id.*

[2]We affirm the administrative law judge's findings at 20 C.F.R. §§725.310, 727.203(a)(3), 727.203(b)(1) and (b)(2) as unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates Inc.,* 380 U.S. 359 (1965).

Under Section 727.203(a)(1), employer argues that the administrative law judge erred in relying on Dr. Harron's 1998 letter reinterpreting his reading of the February 1996 x-ray as positive for pneumoconiosis. Employer argues that when Dr. Harron first read the x-ray in 1996, he made no mention of pneumoconiosis and instead diagnosed pulmonary asbestosis. Employer argues that Dr. Harron did not offer an explanation for the change in diagnosis nor does it appear that he relied on any information not available in 1996. Citing *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), employer argues that the 1998 letter diagnosing pneumoconiosis is insufficient by itself to invoke the presumption under §727.203(a)(1) because the x-ray evidence is overwhelmingly negative. Employer argues that the administrative law judge failed to consider the overwhelming number of negative x-rays of record and improperly discounted all of the other evidence "because the last reading may have diagnosed pneumoconiosis." Employer's Brief at 10.

Contrary to employer's assertion, the administrative law judge considered the number of negative x-rays of record. Decision and Order at 2, 4-6. However, the administrative law judge permissibly found that as pneumoconiosis is a progressive disease, the latest x-ray evidence is the most probative. *Wilt v. Wolverine Mining Co.* 14 BLR 1-70 (1990); *Clark v. Karst-Robbinns Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); Decision and Order at 4. The administrative law judge properly found the 1996 x-ray more probative because it was read positive by Dr. Harron, who is a Board-certified radiologist and a B reader, because this reading was not challenged and because the x-rays which were negative for pneumoconiosis were taken nearly two years prior. *Id.* The administrative law judge acknowledged that Dr. Harron indicated in 1996 that the 1/1 opacities were consistent with asbestosis and in 1998 Dr. Harron described the x-ray abnormalities as consistent with pneumoconiosis. Decision and Order at 4. The administrative law judge found, and we affirm as unchallenged on appeal, that there was no inconsistency in Dr. Harron's opinion that distracts from its credibility because the diagnosed asbestosis arose out of coal mine employment. *Pershina v. Consolidation Coal Co.,* 14 BLR 1-55 (1990)(*en banc*); *Skrack, supra;* Decision and Order at 4. Inasmuch as the administrative law judge properly relied on Dr. Harron's

positive x-ray reading to find invocation of the interim presumption under Section 727.203(a)(1), that finding is affirmed. Therefore, we need not address employer's arguments under Section 727.203(a)(2) and (a)(4).

In challenging the administrative law judge's finding that the evidence was insufficient to establish rebuttal under Section 727.203(b)(3) and (b)(4), employer reiterates his arguments under invocation. At Section 718.203(b)(3), employer argues that Dr. Harron never diagnosed a totally disabling respiratory or pulmonary impairment. Employer alleges that the administrative law judge extracted from Dr. Russakoff's opinion that claimant was totally disabled, and extracted from Dr. Harron's opinion a diagnosis of pneumoconiosis, in order to find total disability due to pneumoconiosis. We disagree. Once the interim presumption of total disability due to pneumoconiosis arising out of coal mine employment was properly invoked at Section 727.203(a)(1), it was employer's burden to rebut the presumption. *Alabama By-Products Corp. v. Killingsworth,* 733 F.2d 1511, 6 BLR 2-59 (11th Cir. 1984). The administrative law judge found that only Dr. Russakoff ruled out coal mine employment as a cause of claimant's impairment. Decision and Order a 5. The administrative law judge, considering that pneumoconiosis is a progressive disease, permissibly found the credibility of Dr. Russakoff's opinion on the issue of causation lessened because his opinion predated the 1996 chest x-ray evidence of pneumoconiosis. *Lafferty v. Connelton Industries,* Inc., 12 BLR 1-190 (1989); Stark *v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order at 5. Inasmuch as the administrative law judge properly found Dr. Russakoff's opinion less probative in considering the relevant evidence under Section 727.203(b)(3), we affirm the administrative law judge's finding that employer failed to establish rebuttal at Section 727.203(b)(3). Moreover, because we affirm the administrative law judge's finding that the interim presumption was invoked under Section 727.203(a)(1), we affirm the administrative law judge's finding that rebuttal is not available at Section 727.203(b)(4). *Buckley v. Director, OWCP,* 11 BLR 1-37 (1988); Decision and Order at 5.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge