BRB No. 00-0324 BLA

MARY F. RIFFLE (Widow of HERBERT E. RIFFLE) Claimant- Respondent v. CARBON FUEL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order-On Remand of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Gregory W. Evers (Franklin W. Kern, L.C.), Charleston, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order-On Remand (89-BLA-1959) of Administrative Law Judge John C. Holmes with respect to a miner's claim and 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] In the Board's most recent Decision and Order, issued on May 11, 1999, the Board affirmed the administrative law judge's determination that the record be reopened for the submission of one medical opinion from each party and one joint opinion. The Board also affirmed the administrative law judge's decision to accord little weight to Dr. Zaldivar's opinion under 20 C.F.R. §727.203(b)(3). The Board vacated the administrative law judge's ultimate finding that rebuttal was not established under Section 727.203(b)(3), however, as the administrative law judge did not address the opinions of Drs. Fino and Kory and did not provide a sufficient rationale for his discrediting of the opinions of Drs. Kleinerman and Naeye. The Board instructed the administrative law judge "to consider whether a physician's finding of no pneumoconiosis undermines the probative value of this opinion relevant to the issue of whether pneumoconiosis contributed to the miner's impairment." *Riffle v. Carbon Fuel Co.*, BRB No. 98-1103 BLA (May 11, 1999)(unpub.), slip op. at 6.

[1]The miner, Herbert E. Riffle, filed an application for benefits on November 17, 1979. Director's Exhibit 1. Mr. Riffle died on October 20, 1988, prior to the full adjudication of his claim. Director's Exhibit 72. His widowed spouse, Mary F. Riffle (claimant), filed an application for survivor's benefits on November 23, 1988. Director's Exhibit 71. The claims were joined for adjudication purposes.

The administrative law judge found on remand that the opinions of Drs. Fino, Kory, Naeye, and Kleinerman do not meet the Section 727.203(b)(3) rebuttal standard set forth in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), which requires the party opposing entitlement to rule out the causal relationship between coal mine employment and the miner's total disability, and *Grigg v. Director, OWCP*, 28 F. 3d 416, 18 BLR 2-299 (4th Cir. 1994).[2] Accordingly, benefits were awarded in the miner's claim and the survivor's claim. Employer's present appeal followed. Employer asserts that the administrative law judge erred in failing to reopen the record following the second remand from the Board for the submission of additional medical reports concerning the source of the miner's disabling respiratory impairment. Employer also argues that the administrative law judge did not properly apply the relevant rebuttal standard and did not provide a sufficient rationale for discrediting the opinions of Drs. Kory, Fino, Kleinerman, Naeye, and Crisalli. Claimant has responded and urges affirmance of the award of benefits regarding both claims. 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As an initial matter, we reject employer's argument pertaining to the administrative law judge's decision to limit the reopening of the record. Employer raised this issue in its most recent prior appeal before the Board which held that the administrative law judge acted within his discretion in allowing the parties to submit one separate opinion and one joint opinion relevant to the Section 727.203(b)(3) rebuttal standard set forth in *Grigg*. *Riffle v. Carbon Fuel Co.*, BRB No. 98-1103 BLA (May 11, 1999)(unpub.), slip op. at 3-4. Inasmuch as the Board previously addressed and rejected employer's contention and no intervening case law has been issued which mandates a different result, the Board's prior holding constitutes the law of the case and need not be disturbed. *See Cochran*

[2]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last year of coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

v. Consolidation Coal Co., 12 BLR 1-136 (1989); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Citing decisions of the United States Court of Appeals for the Seventh Circuit in this case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, employer contends that the finding of invocation at 20 C.F.R. §727.203(a)(1), which was made by Administrative Law Judge G. Marvin Bober in the initial Decision and Order in this case, should be revisited, as Judge Bober erred in mechanically according greatest weight to the autopsy prosector's opinion. Judge Bober, in his Decision and Order on Reconsideration stated that Dr. Klapproth, the prosector, was:

> [A]ble to analyze the [miner's] lungs in their entirety, and concluded that [the miner] had anthracosis, dense fibrosis with coal dust trapped in the dense collagen rear (sic) lung tissue and coal dust pigmentation of the hilar lymph nodes. None of the other physicians [was] able to make such a thorough and complete diagnosis of the [miner's] lungs after simply reviewing sections of the lungs under slides.

1992 Decision and Order on Reconsideration at 2; Director's Exhibit 58; Claimant's Exhibit 12. The Board previously affirmed Judge Bober's finding. *Riffle v. Carbon Fuel Co.*, BRB No. 92-2212 BLA-A (July 28, 1994)(unpub.), slip op. at 3. Subsequent to the Board's affirmance of Judge Bober's determination and subsequent to the filing of employer's brief in this appeal, however, the United States Court of Appeals for the Fourth Circuit issued *Bill Branch Coal Corp. v. Sparks,* 213 F.3d 186, BLR (4th Cir. 2000). In *Sparks*, the court held that an administrative law judge must refrain from giving determinative weight to the opinion of an autopsy prosector solely because the autopsy prosector was the only physician with an opportunity to conduct a gross examination near the time of death. *Sparks*, *supra*. In light of the Fourth Circuit's recent decision and in light of the fact that the descriptions upon which Judge Bober relied to give greater weight to Dr. Klapproth's opinion actually appear in the section of the autopsy report containing Dr. Klapproth's microscopic findings, we now vacate the finding of invocation under Section 727.203(a)(1). On remand, the administrative law judge must reconsider whether the medical evidence of record supports a finding of invocation pursuant to Section 727.203(a)(1) in light of the holding in *Sparks*.[3] If he determines that invocation

[3]On remand, the administrative law judge should address Dr. Kleinerman's statement that having the autopsy report to review, in addition to the slides, put

has not been established under Section 727.203(a)(1), he should consider whether invocation has been established under Section 727.203(a)(2)-(a)(4).

Turning to Section 727.203(b)(3), the administrative law judge stated that he was required to discredit the opinions of Drs. Kory, Fino, Kleinerman, and Naeye on the ground that they did not diagnose pneumoconiosis and, therefore, could not rule out pneumoconiosis as a contributing cause of the miner's presumed total disability. Decision and Order-On Remand at 3-4, citing *Massey*, *supra*; *Grigg*, *supra*. Inasmuch as the finding of pneumoconiosis may have been erroneous, however, we must vacate the administrative law judge's finding that employer failed to establish rebuttal under Section 727.203(b)(3). Moreover, if the administrative law judge again determines that the existence of pneumoconiosis has been proven pursuant to Section 727.203(a)(1), he must reconsider his findings under Section 727.203(b)(3) in light of a consideration of all relevant evidence.[4]

In so doing, the administrative law judge should be aware that, contrary to his analysis, the Fourth Circuit has recognized that a physician's report is probative of the issue of causation, even if the physician determines, in contrast to the administrative law judge's finding, that the miner did not have pneumoconiosis, provided that the physician did not *actually premise* his opinion upon a conclusion that pneumoconiosis was absent. If the physician acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the disability, the Fourth Circuit has held that such an opinion is not premised upon the flawed

---

him and any other reviewing physician on equal footing with Dr. Klapproth. Employer's Exhibit 2 at 9-10.

[4]The administrative law judge did not explicitly weigh Dr. Crisalli's opinion in his most recent Decision and Order-On Remand. The administrative law judge's discrediting of Dr. Zaldivar's opinion under 20 C.F.R. §727.203(b)(3) constitutes the law of the case. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

assumption and is probative evidence under Section 727.203(b)(3). *See LeMaster v. Imperial Colliery Co.*, 73 F.3d 358, 20 BLR 2-20 (4th Cir. 1995); *Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g*, 18 BLR 1-59 (1994)(*en banc*); *see also Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). With respect to the opinion of Dr. Naeye, however, we affirm the administrative law judge's discrediting of this opinion, as the administrative law judge acted rationally in determining that Dr. Naeye did, in fact, base his conclusions regarding the cause of the miner's presumed total disability upon the belief that the miner did not have pneumoconiosis. Director's Exhibit 59; *see Lemaster*, *supra*; *Curry*, *supra*. Thus, if the administrative law judge finds the existence of pneumoconiosis established on remand, he need not reconsider Dr. Naeye's opinion under Section 727.203(b)(3).

If the administrative law judge determines that entitlement has not been established under Part 727 in the miner's claim, he must consider entitlement in the miner's claim under 20 C.F.R. Part 410, Subpart D and entitlement in the survivor's claim under 20 C.F.R. Part 727.[5] *See* 20 C.F.R. §§725.201, 725.212; *Smith v. Camco Mining, Inc.*, 13 BLR 1-17 (1989); *Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

Finally, employer asks that the case be remanded to a different administrative law judge. We deny this request, as employer has not proven any bias or recalcitrance on the part of the administrative law judge. *See Cochran*, *supra*; *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568 (1984); *cf. Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

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

---

[5]Employer's contention that the administrative law judge must resolve the issue of the presence of complicated pneumoconiosis is correct, provided that the administrative law judge reaches consideration of entitlement under 20 C.F.R. Part 410, Subpart D. *See* 20 C.F.R. §410.418.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge