BRB No. 00-0347 BLA

BERNIE J. HENSLEY (Widow of JOHN HENSLEY) Claimant-Respondent v. EDD POTTER COAL COMPANY, INCORPORATED and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand Awarding Benefits and the Order Granting in Part Employer's Motion for Reconsideration and Denying Employer's Motion for Transfer to the Black Lung Disability Trust Fund of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Richard A. Dean (Arter & Hadden, LLP), Washington, D.C., for employer.

Jeffrey S. Goldberg (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals both the Decision and Order on Remand Awarding Benefits and the Order Granting in Part Employer's Motion for Reconsideration and Denying Employer's Motion for Transfer to the Black Lung Disability Trust Fund (93-BLA-0405) of Administrative Law Judge Joan Huddy Rosenzweig awarding medical 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). This claim is before the Board for a second time and its procedural history is as follows. Claimant initially filed a claim for benefits on January 17, 1974. The Department of Labor made an initial finding of eligibility on September 12, 1979, and notified claimant, employer and its carrier. Director's Exhibit 37. On October 18, 1979, the carrier sent a letter to employer, and a copy which the Department of Labor received on October 22, 1979, wherein the carrier noted that it had received a copy of the initial findings from the Department of Labor, but had not received copies of the evidence on file. Director's Exhibit 38. On October 22, 1979, the district director sent a letter to employer notifying it that it had waived its right to contest the claim inasmuch as it had failed to respond to the initial findings with a timely controversion, unless good cause for its failure to timely controvert was shown within ten days. Director's Exhibit 39. On October 23, 1979, the carrier sent the district director a letter in lieu of a controversion form, contesting the claim. Director's Exhibit 40. The district director entered an award of benefits on November 6, 1979, because employer failed to show good cause for its failure to submit a timely controversion. Director's Exhibit 41. On February 14, 1986, the miner died and the Department of Labor informed employer on March 14, 1986 that a derivative award of benefits was to be made to claimant. Employer controverted this award, Director's Exhibit 71, and thus, the Black Lung Trust Fund began making interim payments pending resolution of the issues of entitlement, Director's Exhibit 72. Subsequently, employer was ordered to pay benefits on the derivative entitlement. Director's Exhibits 73, 74.

Subsequently, pursuant to a request of employer, the district director reversed its previous default award of benefits in light of *Warner Coal Co. v. Director, OWCP*, 804 F.2d 346, 9 BLR 2-158 (6th Cir. 1986), in which the United States Court of Appeals for the Sixth Circuit held that a carrier cannot be held liable for benefits unless it has been given adequate notice and opportunity to defend. Director's Exhibit 79. In considering the merits of entitlement, the district director found that the evidence of record failed to establish pneumoconiosis or a totally disabling respiratory impairment, and thus claimant was unable to establish entitlement to benefits. Director's Exhibit 80. Claimant subsequently requested time to file additional evidence. Director's Exhibit 81. On July 7, 1992, an informal conference was held in Richlands, Virginia to clarify the issues in this case. Director's Exhibit 86. Pursuant to the conference, on August 14, 1992, the district director issued a Memorandum of Conference, which did not list the timeliness of employer's controversion as an issue in need of resolution. Director's Exhibit 86. On September 2, 1992, claimant wrote to the district director stating that she had "no disagreement with the memorandum as

presented," but reserved her right to a hearing before the Office of Administrative Law Judges. Director's Exhibit 87. On October 5, 1992, the district director issued another Memorandum of Informal Conference in which he again did not list the timeliness of employer's controversion as an issue in need of resolution. Director's Exhibit 90. The district director transferred the case to the Office of Administrative Law Judges on August 10, 1992, accompanied by the List of Contested Issues which omitted the timeliness of the controversion as an issue to be decided. Director's Exhibit 95. Judge Rosenzweig held a hearing on May 5, 1993, and on November 21, 1994, issued a Decision and Order, in which she did not address the merits of the claim, but instead reinstated the district director's default judgement and awarded benefits. In so doing,the administrative law judge found that employer failed to timely controvert the initial finding of entitlement and failed to demonstrate good cause for not doing so. Accordingly, the administrative law judge reinstated the award of benefits.

Subsequent to an appeal by employer, the Board vacated the award of benefits. *Hensley v. Edd Potter Coal Co.*, BRB No. 95-0759 BLA (Apr. 10, 1996)(unpub.). The Board held that pursuant to 20 C.F.R. §725.463, the issue of the timeliness of employer's controversion was not before the administrative law judge, and that the administrative law thus erred in considering the issue. Accordingly, the Board vacated the award of benefits and remanded the case to the administrative law judge for consideration of entitlement on the merits.

On remand, the administrative law judge rejected employer's motion that it be dismissed as a party to the claim inasmuch as employer failed to demonstrated any prejudice resulting from delay in this case. Decision and Order on Remand at 2-3. The administrative law judge further found that claimant established a coal mine employment history of twenty-one and one-half years, and that claimant established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1). Decision and Order on Remand at 3-7. The administrative law judge further found that employer was unable to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Decision and Order on Remand at 7-22. Accordingly, benefits were awarded. Employer filed a Motion for Reconsideration which the administrative law judge rejected, reaffirming her findings that invocation of the interim presumption was established at Section 727.203(a)(1) and that employer failed to establish rebuttal of the presumption pursuant to Section 727.203(b). Decision and Order on Reconsideration at 2-15. The administrative law judge also rejected employer's assertion that liability for benefits should be transferred to the Trust Fund, inasmuch as employer failed to establish a denial of due process, and had previously waived the transfer argument. Decision and Order on Reconsideration at 15-17. Accordingly, the administrative law judge reaffirmed the award of benefits.

On appeal, employer asserts that the administrative law judge erred in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1). Employer further asserts that the administrative law judge erred in failing to find that rebuttal

of the interim presumption was established pursuant to Section 727.203(b)(3). Lastly, employer asserts that the administrative law judge erred in failing to dismiss employer as a party to the claim inasmuch as the long delay in adjudicating the claim violated its due process rights. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief urging that the award of benefits be affirmed and further asserting that the Board reject employer's assertion that liability, if any, should be transferred to the Black Lung Disability Trust Fund. Subsequent to this response brief, employer has filed a reply brief in which it reiterates its contentions.

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

Employer contends that in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1), the administrative law judge failed to consider relevant x-ray interpretations of record, specifically the negative interpretations of Drs. Proto and Dr. Renn, Director's Exhibit 59; Employer's Exhibit 11. Employer further asserts that of the x-ray evidence actually considered, the administrative law judge erred in failing to explain how the positive interpretations outweighed the negative interpretations when, in fact, the negative interpretations constituted the majority of the readings.

In finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1), the administrative law judge found that of the most recent x-rays of record, twelve of thirty-three interpretations were positive for the existence of pneumoconoisis. The administrative law judge found that while the number of negative interpretations by the dually qualified B-readers and Board-certified radiologists was superior

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[1] The length of coal mine employment determination, as well as the administrative law judge's findings that employer failed to establish rebuttal at Section 727.203(b)(1) and (2) are unchallenged on appeal and, therefore, affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Further, inasmuch as we affirm the administrative law judge's finding at Section 727.203(a)(1), employer is precluded, as a matter of law, from establishing rebuttal pursuant to Section 727.203(b)(4). *See Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

[2] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16 , 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as

to the number of positive intepretations rendered by the physicians with these qualifications, the fact that "six different dually qualified physicians rendered these interpretations" gave corrobative effect to the positive readings and thus the administrative law judge determined that the positive interpretations supported claimant's burden at Section 727.203(a)(1). Decision and Order on Remand at 6-7.

Contrary to employer's assertion, a review of the evidence of record demonstrate that neither Dr. Renn's review of an x-ray taken October 31, 1984, Employer's Exhibit 9, nor Dr. Proto's interpretation of a February 29, 1980 x-ray, Director's Exhibit 59, was classified in a manner consistent with the requirments enunciated at Section 727.203(a)(1). *See* 20 C.F.R. §§410.428(a), 727.203(a)(1), 727.206. We therefore conclude that the administrative law judge's failure to specifically address this evidence does not constitute error, inasmuch as such evidence is not relevant to whether claimant has established invocation of the interim presumption pursuant to Section 727.203(a)(1). *See Mullins*, *supra*; *Casey v. Director, OWCP*, 7 BLR 1-873 (1984); *Parsons v. Director, OWCP*, 6 BLR 1-272 (1983). Accordingly, we reject employer's assertions in this regard.

We further reject employer's assertion that the administrative law judge erred in her analysis of the evidence she considered at Section 727.203(a)(1). Employer argues that the administrative law judge failed to provide any affirmable basis for concluding that the positive interpretations of pneumoconiosis outweighed the negative interpretations which were superior in quantity. Employer further argues that the administrative law judge failed to fully address the qualifications of the physicians in rendering her conclusions at Section 727.203(a)(1). Contrary to employer's assertions, the administrative law judge, recognized that the negative interpretations were numerically superior to the positive interpretations but found that six different dually qualified B-readers and Board-certified radiologists rendered the seven positive x-ray interpretations. Decision and Order at 7. As the trier-of-fact, the administrative law judge has broad discretion to assess the evidence of record and determine whether a party has met its burden of proof. *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). In the instant case, the administrative law judge has considered the entirety of relevant evidence and, in a proper exercise of her discretion, has concluded that the weight of such evidence has supported claimant's burden at Section 727.203(a)(1). *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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). Moreover, contrary to employer's assertion, an administrative law judge is not duty-bound to accord greatest weight to the numerical superiority of x-ray interpretations. *See Adkins v. Director, OWCP*, 958 F2d 49, 16 BLR 2-61 (4th Cir. 1992); *see also Wilt v. Wolverine Mining Company*, 14 BLR 1-70 (1990). We hold therefore that no error has been committed in the administrative law judge's analysis of the evidence pursuant to Section 727.203(a)(1), and further hold that substantial evidence supports her conclusion that claimant was entitled

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having a particular expertise in the field of radiology.

to invocation of the interim presumption at that subsection. *See Ondecko, supra*.

Employer further contends that the administrative law judge erred in concluding that the evidence of record failed to establish rebuttal pursuant to Section 727.203(b)(3). Specifically, employer asserts that the administrative law judge erred in according greatest weight to the opinion of Dr. Robinette, who concluded that claimant suffered from a totally disabling respiratory impairment arising out of pneumoconiosis and coal mine employment. Director's Exhibit 81. Employer contends that the administrative law judge failed to conduct the necessary inquiry into whether Dr. Robinette's opinion constituted a well-documented and well-reasoned medical opinion and further argues that such an inquiry would demonstrate that the physician failed to provide any support for his medical conclusions. Employer argues that because the objective tests relied upon by Dr. Robinette fail to demonstrate any respiratory impairment, the physician's opinion should actually be viewed as supporting a finding of rebuttal rather than precluding such a finding.

Employer further argues that the administrative law judge erred in according less weight to the medical opinions of Drs. Hippensteel, Renn, O'Neill and Michos, all of whom concluded that claimant either did not suffer from a totally disabling respiratory impairment, Director's Exhibits 59, 89; Employer's Exhibits 7, 9. Employer contends that the administrative law judge erred in according less weight to the opinions of Drs. Renn and Hippensteel merely because these physicians failed to diagnose pneumoconiosis, since both physicians rule out the presence of any pulmonary or respiratory impairment and that under the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), such a finding constitutes substantial evidence establishing rebuttal pursuant to Section 727.203(b)(3). Further, employer argues that the administrative law judge rejected Dr. Michos's opinion as not credible or reasoned without any explanation for such a conclusion. Finally, employer argues that the administrative law judge rejected Dr. O'Neill's opinion on the erroneous basis that the physician's conclusions were equivocal.

In order to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the United States Court of Appeals for the Fourth Circuit has held that employer must affirmatively rule out the causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), or state without equivocation that claimant suffered no respiratory or pulmonary impairment of any kind, *see Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grds.*, 18 BLR 1-59 (1984)(*en banc); Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *see generally Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995).

We hold that employer's assertions at Section 727.203(b)(3) are tantamount to requests for the Board to reweigh evidence of record, a role outside of the Board's scope of authority. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to

employer's assertion, the administrative law judge need not make a specific finding that a medical opinion is well-reasoned and well-documented inasmuch as an administrative law judge's decision to credit a medical opinion is implicitly a determination that the opinion is well-reasoned and well-documented. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-851 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984)(Smith, J. dissenting on other grounds). Accordingly, we reject employer's challenge that the administrative law judge erred in failed to make such a specific inquiry with regard to Dr. Robinette's opinion.

Further, contrary to employer's assertion, the administrative law judge, in a permissible exercise of her discretion, accorded little weight to the conclusion of Dr. O'Neill inasmuch as the physician's conclusion was not well-documented, as it failed to take into consideration the entirety of evidence of record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further still, the administrative law judge in a permissible exercise of her discretion found that Dr. Hippensteel's medical conclusions were not well-explained and thus not supportive of employer's burden at Section 727.203(b)(3). *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985); *White v. Director, OWCP*, 6 BLR 1-368, 1-371 (1983). Also, the administrative law judge reasonably concluded that Dr. Renn's opinions were not well-reasoned medical opinions as the physician's conclusions were not supported by the underlying documentation. *See Clark, supra*; *Peskie, supra*; *Lucostic, supra*. Finally, the administrative law judge properly concluded that Dr. Michos's medical opinion was not well-reasoned or well-documented as the physician failed to indicate the evidence on which his conclusions were based. *See Clark, supra*; *Peskie, supra*; *Lucostic, supra*. Inasmuch as the administrative law judge has considered the entirety of relevant evidence pursuant to Section 727.203(b)(3) and has given permissible reasons for concluding that such evidence failed to carry claimant's burden at this subsection, *see Massey, supra*, we are unable to say that the administrative law judge's findings at Section 727.203(b)(3) contain reversible error. Accordingly, we affirm the determination that employer has failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3).

Finally, we will address the procedural issue raised in employer's appeal. Employer contends that the administrative law judge erred in finding that it was the responsible operator, arguing that it was denied procedural due process due to the six year delay in notifying employer of the claim against it. Relying upon *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer contends that it was denied a fair opportunity to defend itself in light of the protracted procedural history of this case. Employer's contention lacks merit. The court in *Lockhart* held that a district director's inexcusable delay of seventeen years in providing notice of a claim to the employer did not afford the employer a reasonable time for it to appear and interpose a meaningful defense, and therefore, employer's right to due process was violated. *See Lockhart, supra*.

In the instant case, employer received timely notice of the the Department Labor's initial finding of entitlement, Director's Exhibit 37, employer had the miner examined by its physician, Director's Exhibit 50 , attended the hearings and participated in the proceedings during the course of litigation. We thus hold that, contrary to employer's contention, it was afforded a meaningful opportunity to interpose a defense in this case.

Accordingly, both the administrative law judge's Decision and Order on Remand Awarding Benefits and the Order Granting in Part Employer's Motion for Reconsideration and Denying Employer's Motion for Transfer to the Black Lung Disability Trust Fund are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3] We thus need not address the issue of whether employer has waived its right to raise the transfer of liability issue. *See Lockhart*, *supra*; *see generally Coen v. Director, OWCP*, 7 BLR 1-30 (1984).