BRB No. 00-0910 BLA

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| EVALENE GULLEY (Widow of DENZLE GULLEY) | ) | |
| Claimant-Respondent | ) | |
| v. | ) | |
| SAHARA COAL COMPANY | ) | |
| Employer-Petitioner | ) | DATE ISSUED: |
| 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 of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Frederick Turner, Jr. (Law Office of Frederick Turner, Jr.), Golconda, Illinois, for claimant.

John G. Paleudis (Hanlon, Duff, Paleudis & Estadt Co., LPA), St. Clairsville, Ohio, for employer.

Michelle S. Gerdano (Howard M. Radzely, Acting 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (82-BLA-4450) of

Administrative Law Judge Ellin M. O'Shea 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] This case has been before the Board previously.[2] In the most recent prior appeal, the Board noted that the administrative law judge found, and employer stipulated to, eighteen years of qualifying coal mine employment. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 727, the administrative law judge concluded that claimant[3] established a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(3) (2000). The administrative law judge further found that employer failed to establish rebuttal of the interim presumption by any method available pursuant to 20 C.F.R. §727.203(b) (2000). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's findings pursuant to 20 C.F.R. §§725.310, 727.203(a)(3) and

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The procedural history of this case has previously been set forth in detail in the Board's prior decision in *Gulley v. Sahara Coal Co.*, BRB No. 98-0665 BLA (February 10, 1999)(unpublished), which is incorporated herein by reference.

[3]Claimant is Evalene Gulley, the miner's widow. The miner, Denzle Gulley, filed his claim for benefits on May 2, 1977. Director's Exhibit 1. The miner died on April 7, 1990 after filing a modification request, and claimant is pursuing the claim on his behalf. Director's Exhibits 35, 40, 41, 46; Employer's Exhibit 6.

727.203(b)(4) (2000). The Board vacated, however, the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3) (2000) and remanded the case for further consideration of the medical opinion evidence pursuant to the appropriate standards. *Gulley v. Sahara Coal Co.*, BRB No. 98-0665 BLA (February 10, 1999)(unpublished).

On remand, the administrative law judge concluded that the medical opinion evidence of record was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3) (2000). Decision and Order on Remand at 5-9. Accordingly, benefits were awarded. In the instant appeal, employer contends that the administrative law judge erred in finding modification established, in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1) (2000), in failing to allow employer to submit additional evidence and in failing to find rebuttal of the interim presumption established pursuant to Sections 727.203(b)(2), (b)(3) and (b)(4) (2000). Claimant responds that substantial evidence supports the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter responding to employer's contentions concerning invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000) and indicating that he will not further respond in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 16, 2001, to which the parties have responded asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if the findings of fact and the conclusions of law are rational, supported by substantial evidence, and in accordance with the 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).

Initially, we reject employer's contention that the administrative law judge erred in not reopening the record to admit employer's proffered evidence on remand. Employer's Brief at 12-13. The administrative law judge, who has broad discretion in addressing procedural matters, acted within her discretion, in the instant case, in declining to reopen the record for

the submission of evidence on remand as employer failed to show good cause for reopening the record. *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated Coal Co.*, 12 BLR 1-49 (1989); *Morgan v. Director, OWCP*, 8 BLR 1-491 (1986). Under the circumstances of this case, we discern no abuse of discretion in the administrative law judge's refusal to reopen the record, and therefore, we affirm this determination. *See Cochran, supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Morgan, supra*.

With respect to the merits, employer initially contends that the administrative law judge erred in finding modification established pursuant to 20 C.F.R. §725.310 (2000), in determining that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) (2000) and in finding the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(4) (2000). Employer's Brief at 4-12, 14-16. These contentions lack merit as the Board addressed employer's concerns with respect to these sections in its prior Decision and Order and thus we decline to review the administrative law judge's findings at Sections 725.310, 727.203(a)(1) and 727.203(b)(4) (2000) as they constitute the law of the case. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer further contends that the administrative law judge erred in failing to find rebuttal of the interim presumption established pursuant to Sections 727.203(b)(2) and (b)(3) (2000) as the administrative law judge failed to properly weigh the evidence pursuant to the relevant standards set forth by the United States Court of Appeals for the Seventh Circuit.[4] Employer's Brief at 16-22. In the instant case, the administrative law judge considered whether the relevant medical opinions of record established rebuttal of the interim presumption pursuant to Sections 727.203(b)(2) and (b)(3) (2000), as instructed by the Board, under the standards enunciated by the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995)[5] and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18

[4]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit as the miner was employed in the coal mine industry in the state of Illinois. *See* Director's Exhibits 2, 5; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5]The United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995), held that rebuttal pursuant to 20 C.F.R.§727.203(b)(2) (2000) is established if employer shows that claimant, at the time of the hearing, does not suffer from a totally disabling respiratory impairment or the source of the presumed total disability is not

BLR 2-215 (7th Cir. 1994). Decision and Order on Remand at 5-8; Director's Exhibits 14, 15, 42; Claimant's Exhibit 3; Employer's Exhibits 1, 8, 9.

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traceable to coal dust exposure.

Employer argues that the administrative law judge erred in finding the evidence of record insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) (2000). Employer contends that it is undisputed that the miner was totally disabled due to blindness, and therefore, citing *Vigna*, employer argues that that fact precludes an award of benefits. Employer's Brief at 19-22. We agree. In order to establish rebuttal pursuant to Section 727.203(b)(3) (2000), the party opposing entitlement must show, through a preponderance of the evidence, that the miner's pneumoconiosis was not a contributing cause of his total disability.[6] *See Zeigler Coal Co. v. Kelly*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Mitchell v. Director, OWCP*, 25 F.3d 500, 18 BLR 2-257 (7th Cir. 1994); *Vigna, supra*; *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). A "contributing cause" is a necessary, though not necessarily sufficient, cause of the miner's disability. *Beasley, supra*. Silence in the record as to causation will not defeat the presumption favoring the miner, *Freeman United Coal Co. v. Benefits Review Board* [*Wolfe*], 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990), and the concurrence of two sufficient disabling medical causes, one within the ambit of the Act and the other not, will not defeat entitlement. *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985). Evidence that demonstrates that an ailment other than pneumoconiosis was the sole cause of the miner's total disability can rebut the presumption. *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991).

The administrative law judge, in the instant case, erred in finding that employer failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) (2000). The relevant inquiry, based upon the circumstances of this case, is whether the miner would have been totally disabled since 1976 notwithstanding his probable pneumoconiosis. *See Vigna, supra*. The record clearly indicates that the miner's pneumoconiosis or his employment with Sahara Coal was not a necessary cause that contributed to the miner's total disability which occurred on October 22, 1976, the date the miner became blind. Decision and Order at 4, 9; Director's Exhibits 1, 14; Employer's Exhibits 1, 8; Hearing Transcript at 22-26. The record in the instant case contains no direct medical opinion or evidence

[6]Once the invocation of the interim presumption has been established, the burden shifts to the party opposing entitlement to establish rebuttal by a preponderance of the evidence. *See Peabody Coal Co. v. Director, OWCP, [Huber]*, 778 F.2d 358, 8 BLR 2-84 (7th Cir. 1985); *Amax Coal Co. v. Director, OWCP, [Chavis]*, 772 F.2d 304, 8 BLR 2-46 (7th Cir. 1985); *Lattimer v. Peabody Coal Co.*, 8 BLR 1-509 (1986).

establishing a nexus between the miner's presumed condition in 1984 based upon the arterial blood gas studies and his total disability which occurred in 1976. As the miner's total disability was caused solely by blindness in 1976, we reverse the administrative law judge's award of benefits and hold that rebuttal pursuant to Section 727.203 (b)(3) (2000) is established as a matter of law. *See Kelly*, *supra*; *Vigna, supra*; *Patrich, supra*. However, as this case arises within the jurisdiction of the Seventh Circuit, entitlement pursuant to 20 C.F.R. Part 718 must nevertheless be considered as the miner is not entitled to benefits under 20 C.F.R. Part 727. *Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987). Consequently, we remand the case for the administrative law judge to consider entitlement in the instant case pursuant to the provisions of 20 C.F.R. Part 718. *Strike, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part, reversed in part and the case is remanded to the administrative law judge for further findings consistent with this opinion..

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge