

BRB No. 05-0847 BLA

RALPH HANNAH)
)
 Claimant-Petitioner)
)
 v.) DATE ISSUED: 07/27/2006
)
 EASTERN ASSOCIATED COAL)
 CORPORATION)
)
 Employer-Respondent)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Modification Denying Benefits of Jeffrey Tureck, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle, L.C.), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order on Modification Denying Benefits (04-BLA-00085) of Administrative Law Judge Jeffrey Tureck rendered 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 a long procedural history. Initially,

¹ The instant case is governed by the regulations that were in effect prior to January 19, 2001, as it involves a modification of a claim filed on January 17, 1980. Decision and Order at 1; Director's Exhibits 1, 129.

Administrative Law Judge Reno E. Bonfanti denied benefits after finding invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) (2000) and rebuttal pursuant to 20 C.F.R. §727.203(b)(2) (2000). Director's Exhibit 44. Upon claimant's appeal, the Board vacated the administrative law judge's findings pursuant to Section 727.203(b)(2) (2000) rebuttal, and remanded the case to the administrative law judge to reconsider all evidence pursuant to the standard enunciated in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990); and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990). *Hannah v. Eastern Associated Coal Corp.*, BRB No. 88-0999 BLA (May 30, 1990)(unpub.); Director's Exhibit 52. The Board further instructed the administrative law judge to consider entitlement pursuant to 20 C.F.R. §410.490 and 20 C.F.R. Part 410, Subpart D, if he found rebuttal on remand. *Id.*

On remand, Judge Bonfanti again denied benefits, finding that rebuttal under 20 C.F.R. §727.203(b)(2) and (b)(3) (2000) was established, and that entitlement was precluded under Section 410.490 and Part 410, Subpart D. Director's Exhibit 61. Upon claimant's second appeal, the Board affirmed Judge Bonfanti's findings pursuant to Section 727.203(b)(3) (2000) and held that its affirmance at Section 727.203(b)(3) (2000) precluded entitlement pursuant to Section 410.490 and Part 410, Subpart D. *Hannah v. Eastern Associated Coal Corp.*, BRB No. 91-1978 BLA (June 20, 1994)(unpub.); Director's Exhibit 75. Claimant appealed to the United States Court of Appeals for the Fourth Circuit. The court reversed the Board's affirmance of Section 727.203(b)(3) (2000) rebuttal and remanded the case for reconsideration of Section 727.203(b)(2) (2000) rebuttal. *Hannah v. Eastern Associated Coal Corp.*, No. 94-2017 (4th Cir. Apr. 11, 1997)(unpub.); Director's Exhibit 78. The Board, in its third Decision and Order in this case, vacated the administrative law judge's finding pursuant to Section 727.203(b)(2) (2000), reversed the denial of benefits, and denied employer's request to develop additional evidence in light of the decision of the United States Court of Appeals for the Fourth Circuit in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). *Hanna v. Eastern Associated Coal Corp.*, BRB No. 91-1978 BLA (Aug. 5, 1998)(unpub.); Director's Exhibit 87. The Board subsequently denied employer's motion for reconsideration. *Hanna v. Eastern Associated Coal Corp.*, BRB No. 91-1978 BLA (Oct. 27, 1998)(unpub.); Director's Exhibit 91. In its second opinion on this claim, the Fourth Circuit affirmed the Board's reversal of the administrative law judge's Section 727.203(b)(2) (2000) rebuttal finding and rejected employer's arguments that the record must be reopened or liability transferred to the Black Lung Disability Trust Fund because *Sykes* and *Grigg* altered the legal standards under Section 727.203(b)(2) and (b)(3) (2000) rebuttal. *Eastern Associated Coal Corp. v. Director, OWCP [Hannah]*, No. 98-2812 (4th Cir. Sep. 27, 1999)(unpub.); Director's Exhibit 95.

On May 18, 2000, employer requested modification of claimant's commencement of

benefits date, since employer disagreed with the district director's finding that benefits should commence as of October 1981. Director's Exhibit 101. On May 22, 2002, employer additionally requested modification of claimant's entitlement to benefits Director's Exhibits 121, 122, and both of employer's modification requests were consolidated upon employer's motion, in which claimant joined. Director's Exhibits 123-125. On September 29, 2003, the district director denied employer's request for modification, Director's Exhibit 126, and employer requested a hearing on October 28, 2003. Director's Exhibit 127. The case was referred to the Office of Administrative Law Judges on February 23, 2004. Director's Exhibit 128.

In addressing employer's request for modification, Administrative Law Judge Jeffrey Tureck (the administrative law judge) initially denied employer's request for modification of Judge Bonfanti's finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) (2000). However, the administrative law judge found that the newly submitted opinions of Drs. Branscomb, Fino, and Zaldivar were sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) (2000), and thus the administrative law judge concluded that a mistake in a determination of fact in the prior finding of rebuttal at Section 727.203(b)(3) (2000) was established pursuant to 20 C.F.R. §725.310 (2000). Accordingly, the administrative law judge granted employer's request for modification, which resulted in a denial of benefits for claimant.² On appeal, claimant contends that the administrative law judge erred in finding that the newly submitted evidence established a mistake in a determination of fact pursuant to Section 725.310 (2000), and thus that the administrative law judge erred in finding rebuttal under Section 727.203(b)(3) (2000). Employer responds in support of the administrative law judge's denial of benefits.³ The Director, Office of Workers' Compensation Programs, has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman &*

² In light of his disposition of the case, the administrative law judge found moot employer's modification request as to the date for the commencement of benefits. Decision and Order at 6 n. 10.

³ In a footnote in its response brief employer notes its objection to the administrative law judge's denial of its request for modification of Judge Bonfanti's finding that invocation was established pursuant to Section 727.203(a)(1) (2000); employer makes no request for relief in the event that the decision denying benefits is not affirmed, *see* Employer's Brief at 3 n. 1. Unlike our dissenting colleague, we decline to address the issue as it is inadequately briefed. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Consequently, we affirm the administrative law judge's denial of employer's request for modification at Section 727.203(a)(1) (2000).

Grylls Associates, Inc., 380 U.S. 359 (1965).

Claimant contends that the administrative law judge erred in finding that the newly submitted opinions of Drs. Branscomb, Fino, and Zaldivar establish a mistake in a determination of fact pursuant to Section 725.310 (2000), and thus that the administrative law judge erred in finding rebuttal pursuant to Section 727.203(b)(3) (2000). Claimant asserts that these medical opinions are, in fact, insufficient to establish Section 727.203(b)(3) (2000) rebuttal as a matter of law. In its request for modification of the finding of entitlement to benefits, employer submitted two reports from Drs. Branscomb and Fino, as well as their subsequent depositions, and the deposition of Dr. Zaldivar.

In his report dated February 28, 2002, Dr. Branscomb, stated that claimant has radiographic evidence of pneumoconiosis but has no pulmonary or respiratory impairment whatever. Employer's Exhibit 1 at 5-6. Dr. Branscomb was deposed on December 2, 2004, and altered his opinion. Dr. Branscomb concluded, after reviewing an additional thirty-three negative x-ray readings, that claimant does not have radiographic evidence of pneumoconiosis, and maintained his view that claimant has no respiratory or pulmonary impairment. Employer's Exhibit 3 at 10-11, 14. Dr. Branscomb testified that he based his opinion that claimant has no respiratory or pulmonary impairment in part on a 2002 pulmonary function study which showed normal pulmonary function post-bronchodilator, although the study overall was invalid because it lacked a sufficient number of "curves." Employer's Exhibit 3 at 15-16. In his report dated March 6, 2002, Dr. Fino stated that, although claimant has x-ray evidence of coal workers' pneumoconiosis, he has no evidence of a respiratory impairment or pulmonary disability. Employer's Exhibit 2 at 12. At his deposition on December 16, 2003, Dr. Fino changed his opinion and stated that claimant does not have x-ray evidence of pneumoconiosis, after reviewing several negative readings. Dr. Fino, however, maintained that claimant still has no evidence of any respiratory impairment, and stated that there is no evidence to show that claimant is disabled from a respiratory or pulmonary standpoint, or that he has any type of impairment that would be related to coal mine dust exposure. Employer's Exhibit 5 at 16-18, 21-22. Dr. Fino testified that, even if he assumed claimant has x-ray evidence of pneumoconiosis, there is no evidence of any kind of ventilatory impairment, no evidence of an oxygen transfer impairment. Dr. Fino testified that the normal post-bronchodilator 2002 pulmonary function study is merely continued evidence of no lung problems. Employer's Exhibit 5 at 17. Dr. Zaldivar was deposed on December 8, 2004, and stated that claimant does not have any coal mine dust induced lung disease, that there is "absolutely nothing wrong with his lungs," that he is not disabled from a pulmonary standpoint at all, and that his "breathing capacity is perfectly normal." Employer's Exhibit 4 at 22-23. Dr. Zaldivar based his opinion in part on the 2002 pulmonary function study, which revealed normal results post-bronchodilator, but was invalid overall because it lacked the requisite number of tracings. Employer's Exhibit 4 at 11-20.

The administrative law judge relied on the holding in *Grigg* to find that the newly submitted opinions of Drs. Branscomb, Fino, and Zaldivar established rebuttal pursuant to Section 727.203(b)(3) (2000). The administrative law judge found that their opinions are based on evidence that is at least seventeen years more recent than any evidence considered by Dr. Cardona, the only doctor to opine that claimant is totally disabled from his pulmonary problem alone.⁴ Moreover, the administrative law judge found that the newly submitted opinions of Drs. Branscomb, Fino, and Zaldivar were supported by the normal 2002 pulmonary function study, and that these physicians were better qualified than Dr. Cardona.⁵

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that rebuttal under Section 727.203(b)(3) (2000) is established only when an employer meets its burden to “rule out” any causal relationship between claimant’s total disability and his coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Rebuttal under Section 727.203(b)(3) (2000) “is not easy.” *Lane Hollow Coal Co. v. Director, OWCP [Lane Hollow]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-313 (4th Cir. 1998). In 1987, the Board held that one way of meeting this burden is to show that claimant has no respiratory or pulmonary impairment. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). In *Grigg*, the Fourth Circuit endorsed the holding in *Marcum*, and stated that the “no respiratory or pulmonary impairment” approach was simply a means of meeting the *Massey* burden of showing that there was no causal relationship between claimant’s coal mine employment and his disability. The “catch” to the *Grigg* standard is that an opinion of “no respiratory or pulmonary impairment” cannot satisfy the *Massey* standard, and rebut Section 727.203(a)(1) (2000) invocation, when the physician rendering the opinion has premised it on an erroneous finding that claimant does not suffer from pneumoconiosis. *Grigg*, 28 F.3d at 419-420, 18 BLR at 2-306, 2-307.

⁴ The previously submitted evidence consists of the opinions of Drs. Zaldivar (1987, Director’s Exhibit 40), Cardona (1987, Director’s Exhibits 36, 74), Daniel (1982, Director’s Exhibit 31), and Craft (1980, Director’s Exhibit 13). The administrative law judge correctly stated that only Dr. Cardona previously found claimant to be totally disabled [as a direct result of his pulmonary problem alone]. Decision and Order at 6; Director’s Exhibits 36, 74.

⁵ Drs. Fino and Zaldivar are Board-certified in internal medicine and pulmonary disease, while Dr. Cardona is Board-eligible in internal medicine. Director’s Exhibits 36, 74; Employer’s Exhibits 2 at 15; 4 at 27. The administrative law judge referred to Dr. Branscomb as “one of the pioneers of pulmonary medicine.” Decision and Order at 5. At deposition, Dr. Branscomb testified that he has built about six different pulmonary laboratories, and developed and published the original description of the flow volume loop. Employer’s Exhibit 3 at 6.

We agree with claimant that the newly submitted opinions of Drs. Branscomb, Fino, and Zaldivar are insufficient to establish Section 727.203(b)(3) (2000) rebuttal as a matter of law. Dr. Branscomb's opinion that claimant has "no respiratory or pulmonary impairment whatever" cannot satisfy the *Grigg* standard, as Dr. Branscomb's opinion is premised on the belief that claimant does not have x-ray evidence of pneumoconiosis, a finding that is contrary to Judge Bonfanti's finding that the x-ray evidence established the existence of pneumoconiosis at Section 727.203(a)(1) (2000).⁶ Moreover, Dr. Fino's opinion is insufficient to establish Section 727.203(b)(3) (2000) rebuttal, as it is ultimately based on a finding that claimant does not have pneumoconiosis. *Grigg*, 28 F.3d at 419-420, 18 BLR at 2-306, 2-307. Dr. Fino, like Dr. Branscomb, changed his opinion from the time he filed his report until the time he gave his deposition, ultimately opining that claimant does not have pneumoconiosis.⁷ Similarly, Dr. Zaldivar's opinion that there is "absolutely nothing wrong" with claimant's lungs, that he is not disabled from a pulmonary standpoint, and that his "breathing capacity is perfectly normal," Employer's Exhibit 4 at 22-23, is based on a finding that claimant does not have pneumoconiosis. Employer's Exhibit 4 at 23. Thus, it, too, is

⁶ Compare Employer's Exhibit 1 at 5 ("I believe the x-rays probably are consistent with an ILO positive film at the level of about Category 1.") to Employer's Exhibit 3 at 11 ("I now conclude that there is no x-ray support, there's clearly no x-ray support for a diagnosis of coal workers' pneumoconiosis.").

⁷ Compare Employer's Exhibit 2 at 12 ("The readings of [claimant's] chest x-rays clearly reveal coal workers' pneumoconiosis." and "Pneumoconiosis is present.") to Employer's Exhibit 5 at 16 ("When I initially reviewed the information, the majority of chest x-ray readings that I had were positive for pneumoconiosis. I've now got a lot of readings that are negative for pneumoconiosis so I think on the basis of the information that I've reviewed radiographically, there's no pneumoconiosis. So I would change my opinion.").

Dr. Fino's additional opinion that claimant has no evidence of a ventilatory impairment, even assuming claimant has radiographic pneumoconiosis, is also insufficient to establish rebuttal pursuant to Section 727.203(b)(3) (2000) as opinions that even if pneumoconiosis were assumed, there would be no disability related to it, fall short of the *Massey* standard at Section 727.203(b)(3) (2000) rebuttal. *Lane Hollow Coal Co. v. Director, OWCP [Lane Hollow]*, 137 F.3d 799, 805, 21 BLR 2-302, 2-315, 2-316 (4th Cir. 1998). Moreover, Dr. Fino's opinion that claimant has *no evidence* of a respiratory impairment or pulmonary disability is insufficient to establish Section 727.203(b)(3) (2000) rebuttal in light of the Fourth Circuit's holding in *Lane Hollow* that opinions of *no evidence of impairment*, as contrasted to opinions of evidence of *no impairment*, cannot meet the Section 727.203(b)(3) (2000) rebuttal standard. *Id.*

insufficient to establish Section 727.203(b)(3) (2000) rebuttal in light of *Grigg*.⁸ Consequently, we reverse the administrative law judge's finding of rebuttal at Section 727.203(b)(3) (2000), and reinstate claimant's award of benefits.

Although we reverse the administrative law judge's findings pursuant to Section 727.203(b)(3) (2000) and reinstate claimant's award of benefits, we must remand this case to the administrative law judge for consideration of employer's request for modification of the date from which claimant's benefits commence. The administrative law judge found moot employer's modification request regarding this issue, given his denial of benefits. *See* Decision and Order at 6 n. 10; *see also* n. 1, *supra*. However, in light of our disposition, the administrative law judge must now address this issue on remand.

Accordingly, the administrative law judge's Decision and Order on Modification Denying Benefits is affirmed in part and reversed in part, and claimant's award of benefits is reinstated. The case is remanded to the administrative law judge for consideration of employer's request for modification of the date from which claimant's benefits commence.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

⁸ Additionally, Dr. Zaldivar's opinion that claimant is not disabled from a pulmonary standpoint is insufficient to establish Section 727.203(b)(3) (2000) rebuttal because it does not rule out coal mine employment as a cause of, or contributor to, claimant's total disability. *See Grigg v. Director, OWCP*, 28 F.3d 416, 420 n. 6, 18 BLR 2-299, 2-307 n. 6 (4th Cir. 1994); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 719-720, 18 BLR 2-16, 2-25 (4th Cir. 1993).

Moreover, Drs. Branscomb, Fino, and Zaldivar relied in part on an invalid 2002 pulmonary function study, with normal post-bronchodilator results, to support their opinions that claimant does not have a pulmonary impairment. The Fourth Circuit court, in *Thorn*, 3 F.3d at 719, 18 BLR at 2-24, criticized as "highly speculative", medical opinions finding that claimant does not have a totally disabling pulmonary impairment, based on invalid pulmonary function studies using the highest test results. The physicians' reliance on this invalid 2002 pulmonary function study, together with the administrative law judge's reliance on this study to corroborate the opinions of Drs. Branscomb, Fino, and Zaldivar, is error.

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, Chief Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's finding of 20 C.F.R. §727.203(b)(3) (2000) rebuttal, which the administrative law judge rendered on employer's request for modification. Rather, I would remand the case to the administrative law judge to provide him with another opportunity to apply the holding in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994) at subsection 727.203(b)(3) (2000), as clarified by the Fourth Circuit's holding in *Lane Hollow Coal Co. v. Director, OWCP [Lane Hollow]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Initially, however, I would instruct the administrative law judge to reconsider employer's request for modification of the administrative law judge's finding of invocation at 20 C.F.R. §727.203(a)(1) (2000). Finally, I agree with my colleagues' decision to instruct the administrative law judge on remand to consider employer's request for modification of the date from which claimant's benefits commence.

NANCY S. DOLDER, Chief
Administrative Appeals Judge