BRB No. 98-0777 BLA

MARGARET I. ENDRES (Widow of JOSEPH J. ENDRES) Claimant-Petitioner v. CONSOLIDATION COAL COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of George P. Morin, Administrative Law Judge, United States Department of Labor.

C. Patrick Carrick, Morgantown, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Decision and Order (96-BLA-0930) of Administrative

[1] Claimant is Margaret I. Endres, widow of Joseph J. Endres, the miner. Mr. Endres filed his claim on May 11, 1979 and was receiving benefits at the time of his death on June 7, 1993. Director's Exhibits 1, 82. Section 422(l) of the Act, 30 U.S.C. §932(l), relieves survivors of the burden of filing a claim and proving their own

Law Judge George P. Morin denying 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 case is before the Board for the third time. Initially, Administrative Law Judge Robert L. Feldman credited the miner with more than ten years of coal mine employment, found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(2), and determined that employer failed to rebut the presumption pursuant to Section 727.203(b) under the then-applicable law regarding rebuttal. Director's Exhibit 31. Accordingly, he awarded benefits.

Pursuant to employer's appeal, the Board remanded the case for the administrative law judge to reconsider Section 727.203(b)(3) rebuttal in light of intervening case law. *Endres v. Consolidation Coal Co*., BRB No. 82-2422 BLA (Jul. 29, 1985)(unpub.); Director's Exhibit 36. On remand, Judge Feldman found rebuttal established and denied benefits. Director's Exhibit 37. Thereafter, the miner timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional medical evidence. Director's Exhibit 38.

On modification, Administrative Law Judge Frederick D. Neusner credited the miner with twenty-three years of coal mine employment and found that the new evidence established a change in conditions under Section 725.310. Director's Exhibit 66 at 2-4. Considering the merits of the claim, Judge Neusner found invocation of the interim presumption established at Section 727.203(a)(1) by x-ray readings that he weighed using the true doubt rule, and at Section 727.203(a)(2) by two qualifying pulmonary function studies. Director's Exhibit 66 at 5-7. Additionally, he concluded that employer failed to establish rebuttal pursuant to Section 727.203(b)(1)-(3), and that Section 727.203(b)(4) rebuttal was unavailable to employer in light of the subsection (a)(1) invocation. Director's Exhibit 66 at 7-11. Accordingly, he awarded benefits.

Employer appealed, and in a decision issued prior to the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries* [Ondecko], 512 U.S. 67, 114 S.Ct. 2251, 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) invalidating the true doubt rule, the Board affirmed the administrative law judge's Section 727.203(a)(1) invocation finding and affirmed his finding of no rebuttal at Section 727.203(b)(3).

---

entitlement to benefits in cases involving awards to deceased miners on claims filed prior to January 1, 1982. *Smith v. Camco Mining Inc*., 13 BLR 1-17, 1-19 (1989).

Endres v. Consolidation Coal Co., BRB No. 92-1005 BLA (Mar. 30, 1994)(unpub.); Director's Exhibit 83. The Board therefore affirmed the award of benefits.

However, by the time the Board's decision was issued, the miner had died, an autopsy had been performed, and employer had begun to have the autopsy materials and other evidence reviewed by its medical experts. On April 21, 1994, employer moved to modify the award of benefits to a denial pursuant to Section 725.310, alleging that its new evidence proved the absence of pneumoconiosis. Director's Exhibits 84, 87. After the district director denied employer's motion, employer requested a hearing and the case was referred to Administrative Law Judge George P. Morin. Director's Exhibits 88-90. Subsequently, the parties agreed to submit the case for a decision on the record without a hearing, and submitted briefs. Employer's Brief at 3.

In its brief to the administrative law judge on modification, employer noted that Judge Neusner's prior finding of Section 727.203(a)(1) invocation was invalid in light of *Ondecko*, but conceded that the miner had a totally disabling respiratory or pulmonary impairment and therefore was entitled to invocation of the presumption at Section 727.203(a)(4). Employer's Brief on Modification, August 7, 1997, at 8. Employer argued, however, that its evidence proved that the miner's total disability was unrelated to coal dust exposure and that he never had pneumoconiosis. *Id*. Claimant responded that employer failed to rule out any aggravation of the miner's totally disabling pulmonary impairment by coal dust exposure. Claimant's Brief on Modification, August 22, 1997, at 1-2.

In his Decision and Order, the administrative law judge apparently overlooked employer's concession of total respiratory disability. The administrative law judge instead accepted Judge Neusner's previous (a)(1) invocation finding as valid, noted that Section 727.203(b)(3) rebuttal was available, and, 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); *Curry v. Beatrice Pocahontas Coal Co*., 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), determined that subsection (b)(4) rebuttal was available despite the subsection (a)(1) invocation because employer submitted evidence different in kind and more accurate than the x-rays used to invoke. Decision and Order at 8. Then, considering only the new evidence submitted by employer on modification plus one earlier medical report submitted by employer, the administrative law judge found rebuttal established at both Section 727.203(b)(3) and (4). Apparently concluding that the previous findings of no rebuttal were a mistake in a determination of fact, the administrative law judge modified the award to a denial of benefits.

On appeal, claimant contends that the administrative law judge failed to consider all of the relevant evidence at either Section 727.203(b)(3) or (4) in finding

a mistake in a determination of fact established pursuant to Section 725.310. Claimant further asserts that the administrative law judge erred by considering subsection (b)(4) rebuttal, and contends that even assuming that (b)(4) rebuttal was available, the administrative law judge failed to apply the proper rebuttal test. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate 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 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).

Section 725.310 provides that a party may request modification of the award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held pursuant to Section 725.310 that the administrative law judge has the authority to consider all of the evidence on modification to determine whether there has been a change in conditions or a mistake in a determination of fact, including the ultimate fact of entitlement. *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971).

As we discuss below, we must vacate the administrative law judge's findings and remand this case for him to reconsider rebuttal because he failed to consider all of the relevant evidence on modification. *See Jessee, supra*. In this context, claimant's contention that Judge Neusner's previous finding of invocation at Section 727.203(a)(1) bars any consideration of Section 727.203(b)(4) rebuttal requires us to address whether there exists a valid invocation finding in this case. Because the true doubt rule is no longer valid, *see Ondecko, supra*, and we must apply the law now in effect, *see Lynn v. Island Creek Coal Co*., 12 BLR 1-146 (1989), we must vacate the previous subsection (a)(1) invocation finding. Judge Neusner's Section 727.203(a)(2) invocation finding, which was challenged by employer but not addressed by the Board, is not affirmable because Judge Neusner failed to consider all of the relevant evidence regarding the validity of the pulmonary function studies that he relied upon to invoke the presumption. Director's Exhibits 51, 66 at 6-7. Therefore, we must also vacate the previous subsection (a)(2) invocation finding. This leaves employer's concession of invocation at Section 727.203(a)(4) before the administrative law judge on modification, a concession that the administrative law judge did not address and which employer does not repeat on appeal. Under these circumstances, we think it best to instruct the administrative law judge to reconsider

invocation on remand if employer does not concede it.

Pursuant to Section 725.310 and Section 727.203(b)(3), (4), claimant contends that the administrative law judge failed to consider all relevant evidence. Claimant's Brief at 5. This contention has merit.

To rebut the presumption under Section 727.203(b)(3), employer must rule out any causal connection between the miner's total disability and his coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-313-14 (1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72, 2-80 (4th Cir. 1984). To rebut the presumption under Section 727.203(b)(4), employer must prove that the miner does not have pneumoconiosis, in either the clinical or legal sense. *See* 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995).

Employer submitted the autopsy report, in which the prosector noted fibrosis and anthracotic pigment deposits, but did not state whether pneumoconiosis was present or absent. Director's Exhibit 84. Employer also submitted the autopsy review and general medical record review reports of Drs. Naeye, Kleinerman, Caffrey, Fino, and Bellotte. Director's Exhibit 84; Employer's Exhibits 1-4. They opined that the miner's totally disabling respiratory impairment was unrelated to his coal mine employment and was due to smoking, and that the miner did not have pneumoconiosis. Generally, these opinions discuss the absence of “coal workers' pneumoconiosis” from the lung tissue slides and x-rays, and vary in the specificity with which they address the etiology of the miner's other diagnosed pulmonary impairments, including emphysema, atelectasis, COPD, interstitial fibrosis, bronchiolitis, goblet cell hyperplasia, and chronic passive congestion. Director's Exhibit 84; Employer's Exhibits 1-4.

After summarizing the evidence submitted by employer on modification, the administrative law judge stated that employer's evidence was “uncontradicted” and “clearly establish[ed]” rebuttal at Section 727.203(b)(3), (4). Decision and Order at 9. However, the record in fact contained prior diagnoses of clinical and legal pneumoconiosis. Director's Exhibits 12, 62, 63. Claimant points us to a medical opinion by Dr. Rasmussen, who is Board-certified in Internal Medicine, stating that the miner's totally disabling respiratory impairment was caused by both coal mine employment and smoking, and that coal dust exposure aggravated any smoking-related pulmonary impairments that he had. Director's Exhibits 62, 63. Because the administrative law judge did not consider all of the relevant evidence to determine whether employer met its burden of proof on modification, *see Jessee, supra*; *Branham v. BethEnergy Mines, Inc*., 20 BLR 1-27, 1-34 (1996), we must vacate the administrative law judge's findings and remand this case for further consideration.

Therefore, on remand the administrative law judge must reconsider invocation pursuant to Section 727.203(a) if it is not conceded by employer. If the administrative law judge finds invocation established, he must determine whether all of the relevant evidence establishes rebuttal pursuant to Section 727.203(b)(3) or (b)(4) under the applicable rebuttal standards. *See Massey, supra*; *Barber, supra*. In carefully assessing the medical evidence on rebuttal, the administrative law judge must bear in mind the legal definition of pneumoconiosis, *see Roberts v. Director, OWCP*, 74 F.3d 1233, 20 BLR 2-67 (4th Cir. 1996); *Barber, supra*, and make specific factual findings.[2]

[2] If the administrative law judge finds invocation established pursuant to Section 727.203(a)(1), he need not consider rebuttal at Section 727.203(b)(4). *See 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); *Curry v. Beatrice Pocahontas Coal Co*., 18 BLR 1-59 (1994)(Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge