BRB No. 99-0897 BLA

EDWARD GRISKELL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ZEIGLER COAL COMPANY,	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
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 - Awarding Benefits of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Frank E. Pasquesi and Daryl M. Schumacher (Ungaretti & Harris), Chicago, Illinois, for claimant.

W. William Prochot (Arter & Hadden), Washington, D.C., for employer.

Jennifer U. Toth (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: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (94-BLA-1326) of Administrative Law Judge Thomas F. Phalen, Jr., 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). This case is on appeal before the Board for a third time. In a Decision and Order issued on April 13, 1990, Administrative Law Judge Daniel Lee Stewart credited claimant with fourteen years and eight months of qualifying coal mine employment, and determined that claimant's second claim, filed on March 26, 1982, was subject to the duplicate claim provisions at 20 C.F.R. §725.309. Judge Stewart found that new evidence submitted subsequent to the district director's denial of claimant's original claim, filed on January 19, 1976, was insufficient to establish either the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(4) or total respiratory disability pursuant to 20 C.F.R. §718.204(c)(1)-(4), thus claimant failed to establish a material change in conditions at Section 725.309. Accordingly, benefits were denied.

On appeal, the Board affirmed Judge Stewart's findings regarding the length of claimant's coal mine employment, but found that claimant's original claim was still viable because claimant's request for reconsideration within one year of the district director's denial of that claim constituted a request for modification pursuant to 20 C.F.R. §725.310. Consequently, the Board vacated Judge Stewart's findings pursuant to 20 C.F.R. Part 718, and remanded the case for a determination of whether the evidence was sufficient to establish a mistake in fact or a change in conditions pursuant to Section 725.310; if so, to adjudicate the claim pursuant to 20 C.F.R. Part 727; and if entitlement was not established thereunder, to consider entitlement pursuant to Part 718. *Griskell v. Zeigler Coal Co.*, BRB No. 90-1463 BLA (Jan. 28, 1993)(unpub.).

Judge Stewart remanded this case to the district director to gather and investigate additional evidence submitted by the parties. Director's Exhibit 42. Following the district director's denial of benefits, Director's Exhibit 47, this case was assigned to Administrative Law Judge Thomas F. Phalen, Jr. In a Decision and Order issued on October 31, 1997, the administrative law judge found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4), that employer failed to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4), and that claimant established a mistake of fact pursuant to Section 725.310 from Judge Stewart's prior determination that claimant was not entitled to benefits under Part 718. Accordingly, benefits were awarded.

On appeal, the Board vacated the administrative law judge's findings at Section 725.310, and remanded the case for him to consider the evidence submitted subsequent to the district director's denial of benefits on February 27, 1981, in conjunction with the previously submitted evidence, and determine whether claimant established a change in conditions or a mistake in a determination of fact pursuant to the standard enunciated in *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), by the United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises. The Board also vacated the administrative law judge's findings pursuant to Sections 727.203(a)(4) and

727.203(b)(2)-(4), and instructed the administrative law judge on remand to reweigh the evidence pursuant to the appropriate standards as articulated by the Seventh Circuit. Lastly, the Board vacated the administrative law judge's onset determination pursuant to 20 C.F.R. 725.503(b) for findings on remand consistent with *Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991). *Griskell v. Zeigler Coal Co.*, BRB Nos. 98-0351 BLA and 98-0351 BLA-A (Jan. 7, 1999)(unpub.)

In his Decision and Order on Remand issued on April 27, 1999, the administrative law judge awarded benefits, finding that claimant established a change in conditions pursuant to Section 725.310, that the weight of the evidence established invocation pursuant to Section 727.203(a)(4), and that employer failed to establish rebuttal pursuant to Section 727.203(b)(2)-(4).

In the present appeal, employer challenges the administrative law judge's finding that the evidence of record was sufficient to establish invocation at Section 727.203(a)(4) and insufficient to establish rebuttal at Section 727.203(b)(2)-(4). Employer additionally contends that due process requires its dismissal as the responsible operator herein. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's due process arguments, and has declined to take a position regarding the administrative law judge's findings on the merits.

The Board's scope of review is defined by statute. The administrative law judge's Decisoin 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to the procedural issue, employer maintains that claimant's failure to timely prosecute his 1976 claim, and the district director's mishandling of the claim, prejudiced employer's ability to present a meaningful defense at a meaningful time. Specifically, employer asserts that the delay in notifying employer of the claim, as well as the failure to process claimant's modification request and schedule a hearing in a timely manner, deprived employer of a defense under Section 727.203(b)(1). Employer argues that the facts of this case are similar to those in *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), and contends that due process requires that employer be dismissed as the responsible operator herein and that liability transfer to the Black Lung Disability Trust Fund (Trust Fund). Employer's reliance on *Borda* is misplaced.

Unlike *Borda*, where the miner worked as a federal mine inspector until 1987, and the putative operator was not notified of the miner's 1978 claim or his 1981 request for modification until the day before the hearing in 1994, in the present case employer was

notified of claimant's 1976 claim in 1980. Director's Exhibit 18. Employer submitted evidence in defense of the claim, which the district director relied upon in part to support his denial of benefits on February 27, 1981, Director's Exhibit 24, thus employer suffered no prejudice from any delay in its notification of the claim. Further, by the time claimant sought modification on December 2, 1981, claimant had ceased all employment, thus a defense under Section 727.203(b)(1) was not available to employer. Inasmuch as the delays in processing and adjudicating this claim have not deprived employer of a fair opportunity to mount a meaningful defense, *see generally Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Borda, supra*, we reject employer's request for its dismissal and a transfer of liability to the Trust Fund.

Turning to the merits, employer contends that the administrative law judge erred in finding invocation established at Section 727.203(a)(4), and argues that the administrative law judge gave invalid reasons for crediting the opinions of Drs. Hessl and Barnett over the contrary opinions of Drs. Castle and Cugell. We disagree. The administrative law judge accurately summarized the conflicting medical opinions and their underlying documentation, and reasonably determined that Dr. Cugell's conclusion, that claimant's obstructive lung disease was "not of sufficient severity to render him eligible for social security benefits," Employer's Exhibit 3, was not tantamount to a finding that claimant had the respiratory capacity to perform his usual coal mine employment or similar work because the physician did not evaluate claimant's impairment under the Department of Labor's criteria or in terms of claimant's physical capabilities, and the opinion was undermined by claimant's pulmonary function tests which were interpreted as showing a significant expiratory airflow limitation. Decision and Order on Remand at 9-10. The administrative law judge permissibly assigned great weight to Dr. Hessl's opinion that claimant's obstructive respiratory impairment was totally disabling, as he determined that Dr. Hessl's medical examinations performed over an extended period of time and accompanied by multiple diagnostic tests measuring the nature and severity of impairment, were fundamental in his determination of claimant's respiratory or pulmonary condition, and that Dr. Hessl, being certified in internal medicine and a B-reader, was qualified to medically assess that condition. Decision and Order on Remand at 9; *see Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992). The administrative law judge additionally found that Dr. Barnett's diagnosis of total respiratory disability was supported by its underlying documentation, *i.e.*, pulmonary function study results interpreted as showing a mild to moderate obstruction, an exercise study which revealed an abnormally low work capacity, and abnormal findings on physical examination. Decision and Order on Remand at 7-9 ; Director's Exhibit 44. While Dr. Castle opined, based on a review of the medical records, that claimant's mild obstructive impairment would not prevent him from performing his usual coal mine employment, the administrative law judge acted within his discretion as trier-of-fact in finding that the contrary opinions of Drs. Hessl and Barnett were more persuasive and supported by the medical evidence, as the administrative law judge concluded that, given the intense physical demands of claimant's

job involving heavy manual labor, and the exercise study revealing a low work capacity, claimant would not be able to perform his former duties or similar work with a mild obstructive impairment as shown on claimant's pulmonary function tests. Decision and Order on Remand at 10; *see generally Migliorini v. Director, OWCP*, 898 F.2d 1292, 13 BLR 2-418 (7th Cir. 1990); *Hvizdzak v. North American Coal Corp.*, 7 BLR 1-469 (1984). The administrative law judge's findings and inferences pursuant to Section 727.203(a)(4) are supported by substantial evidence and contain no reversible error, thus we affirm his finding that the weight of the evidence was sufficient to establish invocation thereunder.[1]

[1]Since the administrative law judge's above-stated reasons for assigning weight to the medical opinions are valid, we need not address employer's other assertions of error. *See Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

We agree, however, with employer's argument that the administrative law judge did not address all relevant evidence in finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(2)-(4), thus we vacate his findings thereunder and remand this case for further findings and a reevaluation of the evidence relevant to rebuttal.[2] Initially, employer asserts that claimant had no disabling condition when he ceased coal mine employment in 1976, and had no pulmonary impairment or pneumoconiosis when Dr. Nay examined him in 1980, but became totally disabled from performing his job as a trailer park manager and any subsequent employment when he underwent back surgery and qualified for Social Security disability payments in 1981, whereas the administrative law judge determined that claimant was not totally disabled due to pneumoconiosis until September 1, 1993. Inasmuch as rebuttal may be established by proof that claimant would have been totally disabled notwithstanding his pneumoconiosis, *see 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); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990), and the administrative law judge did not address the evidence of record relevant to claimant's back condition, he must determine on remand whether this evidence is sufficient to establish rebuttal at Section 727.203(b)(2) or (3).

[2]We reject employer's assertion that this case must be remanded to another administrative law judge who will give the evidence a "fresh look" and comply with the Board's instructions, as employer has demonstrated no evidence of bias or recalcitrance on the part of the administrative law judge. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

At Section 727.203(b)(3), the administrative law judge found that, while Dr. Castle "reviewed extensive medical documentation and derived conclusions supported by some of that data,"[3] Decision and Order at 12, his opinion was insufficient to establish rebuttal by a preponderance of the evidence because it was outweighed by the contrary opinions of Drs. Barnett and Hessl, which the administrative law judge found were supported by the diagnostic tests, symptomatology, and the significant length of claimant's coal mine employment.[4] Decision and Order at 12. Employer correctly maintains, however, that the administrative law judge could not properly rely on numerical superiority or claimant's history of coal dust exposure to support his credibility determinations, and did not acknowledge the qualifications of the respective physicians or identify which tests or symptoms supported a conclusion that coal dust rather than smoking caused claimant's disability. *See Sahara Coal Co. v. Fitts*, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994). Consequently, on remand, the administrative law judge must assess the relative qualifications of the physicians, the explanations of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses in determining whether rebuttal is established pursuant to Section 727.203(b)(3). *See Fitts, supra; see also Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999).

Lastly, in evaluating the evidence at Section 727.203(b)(4), the administrative law judge found that the opinions of Drs. Andracki and Cugell were "not very probative" because they diagnosed respiratory or pulmonary conditions without determining the etiology of such conditions. The administrative law judge did not state, however, whether either physician's opinion can be reasonably construed as ruling out coal dust exposure as a cause of the condition. On remand he should do so because a physician need not specify a condition's

[3]Employer correctly asserts that while Dr. Cugell did not attribute claimant's obstructive lung disease to smoking, he also did not attribute the condition to coal mine employment, and the record reflects that Drs. Barnett and Hessl related claimant's condition to both smoking and pneumoconiosis, thus the fact that the conclusions of reviewing physician Dr. Castle were "not completely supported by the examining physician, Dr. Cugell," Decision and Order at 9, is not a valid reason for according less weight to the opinion of Dr. Castle. *See generally Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992)(administrative law judge erred in crediting examining physician's opinion over a reviewing physician's opinion simply because he was an examining physician).

[4]Contrary to employer's arguments, the administrative law judge permissibly found that Dr. Nay's opinion was less probative of claimant's current condition pursuant to Section 727.203(b)(3), (4), as Dr. Nay examined claimant in 1980. *See generally Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984).

etiology in order for his opinion to constitute probative evidence on rebuttal. *See generally Honaker v. Habco Coal Co.*, 6 BLR 1-408 (1983). The administrative law judge also failed to explain why he concluded that the opinions of Drs. Hessl and Barnett were more probative than the opinion of Dr. Castle, and did not address the negative x-ray and CT evidence, which is insufficient by itself to establish rebuttal but is relevant to a determination of whether the medical opinions of record are well reasoned. *See generally Peabody Coal Co. v. Lowis*, 708 F.2d 166, 5 BLR 2-84 (7th Cir. 1983); *Honaker*, *supra*. Consequently, on remand, the administrative law judge must reassess the medical opinions pursuant to Section 727.203(b)(4).

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge