BRB No. 00-0840 BLA

RONALD W. DURBIN (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Raleigh, Illinois, for claimant.

Mark Solomons (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (89-BLA-0694) of Administrative Law Judge Clement J. Kichuk 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] Claimant filed a claim on July 11, 1975. In the initial Decision and Order, Administrative Law Judge Richard D. Mills, after crediting claimant with twenty-five years and three months of coal mine employment, found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4). Judge Mills also found that claimant was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. Accordingly, Judge Mills denied benefits. By Decision and Order dated January 21, 1988, the Board affirmed Judge Mills's denial of benefits.[2] *Durbin v. Peabody Coal*

[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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). On March 9, 2001, the Board issued an order requesting supplemental briefing in the instant case. By Order dated June 29, 2001, the Board held this case in abeyance for the duration of the briefing, hearing and decision schedule set by the United States District Court for the District of Columbia in *Chao*.

On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, Civ. No. 00-3086 (D.D.C. Aug. 9, 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations. By Order dated August 22, 2001, the Board notified the parties that the instant case was no longer in abeyance.

[2]Although the Board noted that Judge Mills should have considered entitlement under 20 C.F.R. Part 718, the Board held that entitlement pursuant to 20 C.F.R. Part 718 was precluded. *Durbin v. Peabody Coal Co.*, BRB No. 85-2201 BLA (Jan. 21, 1988)

Co., BRB No. 85-2201 BLA (Jan. 21, 1988) (unpublished).

(unpublished).

Claimant filed a second claim on March 7, 1988. Since claimant's 1988 claim was filed within one year of the issuance of the last denial of his 1975 claim, the 1988 claim constituted a timely request for modification of the 1975 claim. *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). In his Decision and Order, Administrative Law Judge Lawrence E. Gray did not make a finding regarding whether the evidence was sufficient to establish a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Instead, Judge Gray considered whether the newly submitted evidence was sufficient to establish entitlement pursuant to 20 C.F.R. §410.490. Judge Gray found that the evidence was sufficient to establish invocation pursuant to 20 C.F.R. §410.490(b). Judge Gray further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §410.490(c). Accordingly, Judge Gray awarded benefits. By Decision and Order dated July 20, 1993, the Board vacated Judge Gray's findings on the merits and remanded the case with instructions for Judge Gray to make a determination regarding whether the evidence was sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000). *Durbin v. Peabody Coal Co.*, BRB No. 90-2184 BLA (July 20, 1993) (unpublished). The Board further instructed Judge Gray that, should he find the evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310 (2000), he should consider entitlement to benefits pursuant to 20 C.F.R. Part 727 and 20 C.F.R. Part 718.[3] *Id.*

[3]The Board held that Judge Gray erred in considering entitlement pursuant to 20 C.F.R. §410.490. *Durbin v. Peabody Coal Co.*, BRB No. 90-2184 BLA (July 20, 1993) (unpublished).

On remand, Judge Gray applied the "true doubt" rule and found that the newly submitted x-ray evidence was sufficient to establish the existence of pneumoconiosis. Judge Gray, therefore, found a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). In his consideration of the merits of claimant's 1975 claim, Judge Gray found that the x-ray evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Judge Gray also noted that autopsy evidence "produced uncontroverted evidence of pneumoconiosis." Judge Gray further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, Judge Gray awarded benefits. By Decision and Order dated January 25, 1995, the Board held that Judge Gray, based on wholly new evidence, permissibly concluded that the prior finding of no pneumoconiosis was a mistake in a determination of fact as the newly submitted evidence established the existence of pneumoconiosis. *Durbin v. Peabody Coal Co.*, BRB No. 94-2696 BLA (Jan. 25, 1995) (unpublished). The Board, therefore, affirmed Judge Gray's finding that modification was established based upon a mistake in a determination of fact. *Id.* The Board also affirmed Judge Gray's findings that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and (b)(3).[4] *Id.* The Board further held that Judge Gray properly concluded that he could not determine the date of onset of disability from the evidence of record. *Id.* The Board, therefore, affirmed Judge Gray's finding that benefits were awarded as of the date of the filing of claimant's initial claim inasmuch as Judge Gray found modification establish based upon a mistake in a determination of fact. *Id.* The Board subsequently denied employer's motion for reconsideration. *Durbin v. Peabody Coal Co.*, BRB No. 94-2696 BLA (Sept. 10, 1997) (McGranery, J. dissenting) (unpublished).

Employer subsequently filed an appeal with the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit recognized that Judge Gray had invoked the invalid "true doubt" rule to find the x-ray evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). *Peabody Coal Co. v. Director, OWCP [Durbin]*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999). The Seventh Circuit held, however, that this error did not warrant reversal because Judge Gray found in the alternative that claimant's autopsy "produced uncontroverted evidence of pneumoconiosis." *Id.* But, the Seventh Circuit held that Judge Gray, in his consideration of whether the evidence was sufficient to establish rebuttal of the interim presumption, erred in discrediting Dr. Fino's opinion. *Id.* The Seventh Circuit specifically held that Judge Gray erred in discrediting Dr. Fino's opinion because it was based in part upon Dr. Naeye's report,

[4]Employer did not challenge Judge Gray's findings pursuant to 20 C.F.R. §727.203(a)(1), (b)(1) and (b)(4).

a report that had not been admitted into evidence.[5] *Id.* The Seventh Circuit, therefore, vacated the Board's 1995 Decision and Order and remanded the case for further consideration.[6] *Id.*

[5]In its 1995 Decision and Order, the Board affirmed Judge Gray's rejection of Dr. Naeye's report as untimely submitted. *Durbin v. Peabody Coal Co.*, BRB No. 94-2696 BLA (Jan. 25, 1995) (unpublished).

[6]By Order dated January 11, 2000, the Board further remanded the case to the Office of Administrative Law Judges. *Durbin v. Peabody Coal Co.*, BRB No. 94-2696 BLA (Jan. 11, 2000) (Order) (unpublished).

Due to Judge Gray's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge initially rejected employer's request that it be dismissed as a party and liability transferred to the Black Lung Disability Trust Fund (Trust Fund). The administrative law judge also found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Employer also contends that the evidence is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). Employer further argues that the administrative law judge erred in failing to transfer liability in the instant case to the Black Lung Disability Trust Fund (Trust Fund). Employer finally contends that the administrative law judge erred in his determination regarding the date of entitlement to benefits. Claimant responds in support of the administrative law judge's award of benefits. In a limited response, the Director, Office of Workers' Compensation Programs, argues that the Board should reject employer's argument that liability should be transferred to the Trust Fund. In a reply brief, employer reiterates its previous contentions.[7]

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

Employer contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).[8] Employer specifically argues that the administrative law judge erred in finding Dr. Fino's opinion insufficient to establish subsection (b)(3) rebuttal. We disagree. As the administrative law judge noted, Dr. Fino's report focuses, to a significant extent, upon the cause of the miner's

[7]The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

[8]In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must establish that pneumoconiosis was not a contributing cause of the miner's disability. *See Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992); *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987).

death; specifically whether there was a causal association between claimant's pneumoconiosis and the coronary artery disease which caused his death. Subsection (b)(3) rebuttal, however, is concerned with whether a miner's total disability is attributable to pneumoconiosis. In regard to this issue, Dr. Fino merely stated that:

> When Dr. Naeye reviewed the autopsy he found a pneumoconiosis which he felt was too mild to prevent this man from doing hard physical work. Certainly, the amount of pneumoconiosis that was seen by Dr. Naeye would indeed not be expected to cause a pulmonary disability.
>
> I agree with Dr. Naeye that coal workers' pneumoconiosis did not hasten this man's death. I would note that Dr. Naeye noted emphysema and agreed with him that the type of emphysema which he described would not be attributed to coal mine work. This centrilobular emphysema and chronic obstructive bronchitis was due to cigarette smoking and that is what impaired this man's lung function.
>
> Taking all of this information into consideration, I certainly do not see any evidence that this man's coal mine work contributed to or participated in his respiratory impairment. Coal workers' pneumoconiosis was present but it did not contribute to this man's inability to return to his previous coal mine work. His lung problem was related to cigarette smoking and of course his heart problem as discussed above, was unrelated to the inhalation of coal mine dust.

Employer's Exhibit 8.

The administrative law judge properly discredited Dr. Fino's opinion because he failed to demonstrate that he had knowledge of claimant's coal dust exposure, employment history, medical history, symptomatology, and smoking history. Decision and Order on Remand at 16; Employer's Exhibit 8. An administrative law judge may properly discredit the opinion of a physician which is based upon an inaccurate or incomplete picture of the miner's health. *See Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984). In the instant case, the administrative law judge properly found that Dr. Fino's opinion was not sufficiently reasoned. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that Dr. Fino's opinion is insufficient to support a finding of subsection (b)(3) rebuttal.

Employer also argues that the administrative law judge erred in discrediting Dr. Paul's opinion. In a report dated April 11, 1989, Dr. Paul opined that claimant did not suffer from coal workers' pneumoconiosis. Employer's Exhibit 2. Dr. Paul diagnosed "emphysema with

bronchitis and with an asthmatic component." *Id.* During a July 3, 1989 deposition, Dr. Paul noted that he ruled out pneumoconiosis because claimant's pulmonary function study did not reveal a restrictive defect. Employer's Exhibit 5. Dr. Paul diagnosed asthma, emphysema and chronic bronchitis which he opined were not caused by coal dust exposure. *Id.* The administrative law judge found that Dr. Paul's opinion was entitled to less weight because he failed to diagnose pneumoconiosis based upon his belief that pneumoconiosis cannot manifest itself as an obstructive impairment. Decision and Order on Remand at 15. The administrative law judge properly discredited Dr. Paul's opinion on causation because his underlying premise, that claimant did not have pneumoconiosis, was inaccurate. *See Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986).

Employer also contends that the administrative law judge erred in his consideration of the opinions of Drs. Korda, Drake and Asali. Employer, however, concedes that these opinions, alone, are insufficient to establish subsection (b)(3) rebuttal. Employer's Brief at 20. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).

Employer contends that the non-qualifying arterial blood gas study evidence is sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2).[9] We disagree. Non-qualifying arterial blood gas studies are not sufficient by themselves to establish subsection (b)(2) rebuttal. *See Patellos v. Director, OWCP*, 7 BLR 1-661 (1985).[10]

Employer, citing to the decisions of the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster,* 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994) and *Peabody Coal Co. v. Vigna,* 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), argues that the administrative law judge erred in awarding benefits because claimant was disabled by a heart attack prior to becoming totally disabled from a respiratory standpoint. Although employer asserts that claimant was totally disabled by a heart attack in 1975, employer cites no evidence in support of his assertion. We, therefore, reject employer's contention and affirm the administrative law judge's finding that

[9]In order to establish rebuttal pursuant to Section 727.203(b)(2), the party opposing entitlement must establish that the miner is able to perform his usual coal mine employment or comparable and gainful work. *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); *Freeman United Coal Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990); *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987).

[10]Employer cites no other evidence supportive of a finding of subsection (b)(2) rebuttal.

employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b).

Relying upon *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999) and *Lane Hollow Coal Co. v. Director, OWCP [Lockhart],* 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), employer next argues that liability should be transferred to the Trust Fund. Employer contends that the passage of time in the instant case impaired its ability to defend itself, resulting in a deprivation of its constitutional rights to procedural due process of law.

The administrative law judge rejected employer's contention that liability should be transferred to the Trust Fund. The administrative law judge noted that employer had not made any specific allegation that the district director, the Office of Administrative Law Judges or the Board had taken an unreasonable period of time in processing the claim. The administrative law judge further found that employer had been provided an opportunity to fully develop its evidence. Decision and Order on Remand at 12-13.

In *Lockhart*, the United States Court of Appeals for the Fourth Circuit held that the Department of Labor's (DOL's) inexcusable delay in notifying the employer of its potential liability deprived it of the opportunity to mount a meaningful defense. The Fourth Circuit, therefore, held that benefits were to be paid from the Trust Fund. In *Borda*, the Fourth Circuit noted that *Lockhart* established a straight forward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: Did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property?" *Borda*, 171 F.3d at 183, 21 BLR at 2-559-560 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay."[11] *Borda*, 171 F.3d at 183, 21 BLR at 2-560.

[11]In *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the Fourth Circuit held that the DOL's failure to notify the employer, to act upon the miner's 1981 request for modification, and to schedule a hearing on the miner's 1978 claim in a timely manner deprived the employer of a meaningful opportunity to defend itself under Section 727.203(b)(1) by showing that the miner was still doing comparable and gainful work as a federal coal inspector. *Id.* Because the miner worked as a federal mine inspector until 1987, six years after making his 1981 request for modification, the Fourth Circuit found that the employer's inability to assert that defense to the 1978 claim was traceable solely to the government's "troubling failure" to process the modification request in a timely

The facts of the instant case are distinguishable from those of *Lockhart* and *Borda*. In the instant case, employer was notified of claimant's 1975 claim on December 29, 1977. Director's Exhibit 28. Employer also received timely notice of the miner's March 7, 1988 request for modification. Director's Exhibits 53, 57. Both of these events occurred prior to claimant's death. Moreover, employer has not identified any harm that resulted from the delays in the processing of the miner's claim or the miner's request for modification. Consequently, we hold that the DOL did not deprive employer of a fair opportunity to mount a meaningful defense in the instant case. Consequently, we decline to transfer liability to the Trust Fund.

Employer finally contends that the administrative law judge erred in his determination regarding the date of entitlement to benefits. Employer's argument has merit. In the most recent decision, the administrative law judge incorporated Judge Gray's earlier determination regarding the onset date of claimant's benefits and awarded benefits as of July 1, 1975, the first day of the month that claimant filed his initial claim. Decision and Order on Remand at 18; Director's Exhibit 1.

In its 1995 Decision and Order, the Board held that Judge Gray properly concluded that he could not determine the date of onset of claimant's disability from the evidence of record. *Durbin v. Peabody Coal Co.*, BRB No. 94-2696 BLA (Jan. 25, 1995) (unpublished). Because Judge Gray determined that modification had been established based upon a mistake in a determination of fact, the Board held that Judge Gray properly awarded benefits as of the date of the filing of claimant's initial claim. *Id.*

However, upon review of the record and decisions issued in this case, it is apparent that modification was based upon a change in conditions, not a mistake in a determination of fact. The Seventh Circuit found that the newly submitted autopsy evidence was sufficient to establish the existence of pneumoconiosis, thereby entitling claimant to invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Because claimant's 1975 claim had previously been denied based upon claimant's failure to establish invocation of the

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manner and notify the employer. *Borda*, 171 F.3d at 183-184, 21 BLR at 2-560. The Fourth Circuit held that the employer's first notice of the pendency of the miner's 1978 claim 16 years after the claim was filed stripped it of a full and fair opportunity to defend itself in the manner that the statutory scheme at that time contemplated. *Borda*, 171 F.3d at 184, 21 BLR at 2-561.

interim presumption pursuant to 20 C.F.R. §727.203(a), the autopsy evidence establishes a change in conditions pursuant to 20 C.F.R. §725.310, not a mistake in a determination of fact. Consequently, we modify Judge Gray's previous finding of modification to reflect modification based upon a change in condition, rather than a mistake in a determination of fact.

The revised regulations provide that the onset date for an award on modification based on a change in condition is "the month in which the claimant requested modification" if the actual onset date of disability cannot be ascertained. 20 C.F.R. §725.503(d)(2). The Board previously affirmed Judge Gray's finding that the date of onset of disability could not be determined. Consequently, we modify the date of claimant's entitlement to benefits to March of 1988, the month in which the claimant requested modification of his denied 1975 claim. *See* Director's Exhibit 53.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and modified in part.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge