

BRB No. 96-0376 BLA

THOMAS TAYLOR (Deceased))
)
 Claimant-Petitioner)
)
 v.)
)
 CLINCHFIELD COAL COMPANY)
) DATE ISSUED:
 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 Remand-Denying Request for Modification and Denying Benefits of George A. Fath, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Morgantown, West Virginia, for employer.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant¹ appeals the Decision and Order on Remand-Denying Request for

¹Claimant is Thomas L. Taylor, the miner, who filed a claim for benefits on April 3, 1978 and died on November 26, 1990. Director's Exhibit 1. Anthony Taylor, the miner's son, is pursuing the claim on his behalf.

Modification and Denying Benefits (94-BLA-0010) of Administrative Law Judge George A. Fath 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).² Administrative Law Judge George A. Fath issued a Decision and Order

²This case is before the Board for the fifth time. Only the decisions that are relevant to the disposition of this appeal are discussed herein.

in which he found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3) and (4), that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (4), and that entitlement was precluded pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, claimant's request for modification and benefits were denied.

On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 727.203(a), vacated the administrative law judge's findings pursuant to Section 727.203(b)(3) and (4), and remanded the case for further findings pursuant to those subsections. *Taylor v. Clinchfield Coal Co.*, BRB No. 94-3698 BLA (Jan. 30, 1995)(unpub.). On remand, the administrative law judge again found that employer established rebuttal pursuant to Section 727.203(b)(3) and (4). Accordingly, benefits were denied.

On appeal, claimant contends that the administrative law judge erred in weighing the medical opinion evidence pursuant to Section 727.203(b)(3) and (4). Employer responds urging affirmance of the administrative law judge's Decision and Order and the Director, Office of Workers' Compensation Programs (the Director), responds, declining to participate.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant first contends that the administrative law judge erred in weighing Dr. Buddington's opinion and in finding rebuttal of the interim presumption established pursuant to Section 727.203(b)(3). Claimant's Brief at 3-4. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, held that employer must rule out any relationship between the miner's disability and his coal mine employment to establish rebuttal pursuant to subsection (b)(3). See *Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993); *Phillips v. Jewell Ridge Coal Co.*, 825 F.2d 408, 10 BLR 2-160 (4th Cir. 1987); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); see also *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989)(*en banc*).

Dr. Buddington, in a report dated April 28, 1978, stated that "the patient's chest x-ray was read as 1/1, p by H.L. Basshan, a B reader, indicating that the patient's primary pulmonary disorder is coal workers' pneumoconiosis. . ." Director's

Exhibit 16. Upon considering Dr. Buddington's opinion, the administrative law judge stated:

This report does not support rebuttal under §727.203(b)(3). However, Dr. Buddington is a pathologist, not a pulmonary specialist. As a pathologist, his opinions regarding a biopsy or autopsy might have great weight. For this report, however, he did not examine any tissue. As such, I incorporate and reaffirm my opinion that Dr. Byers' 1986 report. . .and Dr. Fino's report are sufficient to establish rebuttal under §727.203(b)(3). Furthermore, Dr. Buddington authored his report in 1978. As such, it is in no way indicative of a change in condition since 1985. Therefore, the weight of the evidence "rules out" the causal relationship between claimant's disability and his coal mine employment.

Decision and Order on Remand at 3.

Inasmuch as the administrative law judge need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his own conclusions and inferences, see *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and may, in his discretion, assign less weight to a physician's opinion based on that physician's qualifications, *Scott v. Mason Coal Co.*, 14 BLR 1-37 (1990)(*en banc recon.*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988), we affirm the administrative law judge's weighing of Dr. Buddington's opinion.

Claimant next contends that the administrative law judge was inconsistent in his weighing of Dr. Byers' opinions because he found Dr. Byers' opinion that claimant did not have respiratory disability outweighed by other opinions at Section 727.203(a)(4), but entitled to weight on the issue of causation at Section 727.203(b)(3). Claimant's Brief at 4-5. Claimant argues: "How can a physician determine the etiology of a disability if that physician does not first determine that a actually [sic] disability exists?" Claimant's Brief at 5.

In a report dated February 16, 1980, Dr. Byers stated that claimant appeared to have simple pneumoconiosis consistent with anthracosis or silicosis. He stated further that he felt strongly that claimant had a chronic obstructive ventilatory defect almost certainly related to his chronic tobacco abuse. Director's Exhibit 37. In a letter dated February 29, 1980, Dr. Byers stated:

I believe that Mr. Taylor could perform light work that did not require sustained exertion of more than mild degree. From the description of the rock drilling machine that he has operated in the past, it would appear that he should be able to perform this job in spite of his respiratory findings.

Director's Exhibit 37.

In a report dated November 6, 1986, Dr. Byers noted that he examined claimant on October 20, 1986 and stated:

Simple coal workers' pneumoconiosis has been diagnosed radiologically in the past. I could not make this diagnosis based on current x-rays because of the post inflammatory changes. I must say in fact that the right upper lung field is quite clear, somewhat surprising since simple pneumoconiosis initially occurs in the upper lung fields radiologically.

Director's Exhibit 135. Dr. Byers further stated:

This patient is permanently and totally disabled based on severe organic heart disease with congestive heart failure and angina pectoris in the presence of ongoing myocardial ischemia. His heart disease is exacerbated by the hypoxemia which is probably caused by a combination of lung disease related to cigarette smoking, congestive heart failure, and recent pneumonia. . . There is no evidence at this time that Mr. Taylor's cardiac and respiratory impairments are related to his coal mining experience. Based on this examination, I can not document coal workers' pneumoconiosis with respect to this man.

Director's Exhibit 135.

Upon considering these opinions pursuant to Section 727.203(b)(3), the administrative law judge recalled his consideration of these opinions pursuant to Section 727.203(a)(4) in his prior Decision and Order. In that opinion, the administrative law judge stated that Dr. Byers' February, 1980 opinion that the miner was capable of performing his usual coal mine employment is outweighed by the more recent reports which establish the presence of a totally disabling respiratory or pulmonary condition and noted that Dr. Byers' 1986 opinion was one of the more recent reports. 1994 Decision and Order at 11.

The administrative law judge further recalled that, upon considering rebuttal pursuant to Section 727.203(b)(3) in his prior Decision and Order, he stated that Dr. Byers' report was relevant regarding the etiology of the miner's pulmonary disability. Decision and Order at 5; 1994 Decision and Order at 12. In this Decision and Order, the administrative law judge explains:

It is implicit that the report to which I refer here is the October, 1986 report, and not the one dated February, 1980. As I noted above, and at page 11 of my prior decision, it was not until October 1986 that Dr. Byers determined claimant was totally disabled. In invoking the presumption of total disability pursuant to 20 C.F.R. §727.203(a)(4), I found Dr. Byers' 1980 opinion outweighed by other medical reports. In establishing rebuttal under §727.203(b)(3), I found Dr. Byers report from 1986 sufficient. . . I did not inconsistently weigh Dr. Byers' opinion because Dr. Byers provided two opinions, one in 1980 and an updated one in 1986. I weighed both of Dr. Byers' opinions in making my respective findings. Accordingly, I reiterate, and incorporate, my finding that Dr. Byers' 1986 report, along with Dr. Fino's report, are sufficient to establish rebuttal under §727.203(b)(3).

Decision and Order at 5.

Contrary to claimant's contention, the administrative law judge provides an explanation for his weighing of Dr. Byers' report which is sufficient to satisfy the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and U.S.C. §932(a), and clearly explains that he has not inconsistently weighed Dr. Byers' opinions. Decision and Order at 5; Claimant's Brief at 5; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Thus, inasmuch as the evidence of record supports the administrative law judge's finding that employer has ruled out any relationship between claimant's total respiratory disability and his coal mine employment and the administrative law judge has considered all the evidence and reviewed his prior Decision and Order, Director's Exhibits 37, 135; see *Cox, supra*; *Phillips, supra*; *Massey, supra*; *Borgeson, supra*; see also *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), we affirm the administrative law judge's finding pursuant to Section 727.203(b)(3).

Finally, claimant contends that the administrative law judge erred in finding that employer established rebuttal pursuant to Section 727.203(b)(4). Claimant's Brief at 6-7. Subsection (b)(4) allows the party opposing entitlement to rebut the interim presumption by establishing that the miner does not have pneumoconiosis.

To rebut the presumption under subsection (b)(4), the evidence must establish both the absence of clinical pneumoconiosis and the absence of pneumoconiosis as defined in the Act, *i.e.*, the absence of any respiratory or pulmonary impairment arising out of coal mine employment. 20 C.F.R. §§727.203(b)(4); 727.202.

Upon addressing subsection (b)(4), the administrative law judge incorporated his findings pursuant to subsection (b)(4) in his previous Decision and Order and stated that he remained in agreement with those findings. Decision and Order at 6. The administrative law judge further noted that his finding that subsection (b)(4) rebuttal was established was not "simply based on the overwhelming number of negative x-rays." Decision and Order at 6. He stated:

I considered this factor in conjunction with the medical opinion evidence and accorded `greater weight to the extensive negative chest x-ray readings and Dr. Fino's report as opposed to the single positive x-ray reading by Dr. Robinette, and the medical reports of Drs. Robinette and Emery.'

Decision and Order at 6; 1994 Decision and Order at 14.

In his prior decision, the administrative law judge based his weighing of the opinions of Drs. Fino, Robinette and Emery pursuant to subsection (b)(4) on his weighing of these opinions pursuant to subsection (b)(3), and accorded Dr. Fino's opinion that claimant did not have any pulmonary impairment related to his coal mine employment great weight because it was well reasoned, supported by the laboratory test results, the x-ray evidence, and a "thorough discussion of the medical literature." 1994 Decision and Order at 13; Director's Exhibit 160.

The administrative law judge further found that Dr. Emery's diagnosis of coal workers' pneumoconiosis is not entitled to more weight as a treating physician because his diagnosis was made on the basis of his reliance on an earlier diagnosis of pneumoconiosis. 1994 Decision and Order at 13; Employer's Exhibit 12. The administrative law judge then stated that Dr. Robinette's diagnosis of coal workers' pneumoconiosis is based in part on his own positive x-ray interpretation which is outweighed by the numerous negative x-ray interpretations of record by board certified radiologists and B readers. 1994 Decision and Order at 13; Director's Exhibit 137.

Inasmuch as the administrative law judge need not accept the opinion of any particular medical witness or expert, *see Lafferty, supra*, but may rely on the negative x-ray evidence in conjunction with a physician's opinion that claimant has no respiratory impairment related to his coal mine employment, *see Kurcaba v.*

Consolidation Coal Co., 9 BLR 1-73 (1986), and may assign greater weight to an opinion which he determines is better reasoned, see *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc), and better supported by the objective evidence of record, *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Pastva v. The Youghioghny & Ohio Coal Co.*, 7 BLR 1-829 (1985), see *Jessee, supra*, we affirm the administrative law judge's finding that employer established rebuttal pursuant to Section 727.203(b)(4).

Accordingly, the administrative law judge's Decision and Order on Remand denying the request for modification and denying benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge