BRB No. 94-0643 BLA

RUBY SAMMONS)
(Widow of RICHARD SAMMONS))
)
Claimant-Respondent)
)
v.)
)
WOLF CREEK COLLIERIES)
)
Employer-Petitioner)
)
DIRECTOR, OFFICE OF WORKERS') DATE ISSUED:
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-in-Interest) DECISION and ORDER

Appeal of the Decision and Order on Remand of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Paul D. Deaton, Paintsville, Kentucky, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson and Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-0799) of Administrative Law Judge Lawrence E. Gray awarding benefits on a survivor's 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

[1]Claimant, Ruby Sammons, is the widow of the miner, Richard Sammons, who died in a coal mine explosion on March 11, 1976, Director's Exhibit 8. The death certificate lists only the coal mine explosion as the cause of death. Director's

claim is before the Board for a second time. In the initial Decision and Order, the administrative law judge, after crediting the miner with at least ten years of coal mine employment, Decision and Order at 2, found the x-ray evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), Decision and Order at 3. The administrative law judge further found that the evidence of record was sufficient to

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Exhibit 8.

establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1). Decision and Order at 3-5. Accordingly, benefits were denied.

Subsequent to an appeal by claimant, the Board issued a Decision and Order vacating the denial of benefits. *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Dec. 5, 1990)(unpub.). The Board affirmed, as unchallenged on appeal, the administrative law judge's finding of invocation pursuant to Section 727.203(a)(1), *Sammons*, slip op. at 2 n.2, and noted that claimant did not challenge the administrative law judge's finding that death was not due to pneumoconiosis, but reversed the finding of rebuttal of the total disability presumption at Section 727.203(b)(1), *Sammons*, slip op. at 2-3, specifically holding that "employer presented no evidence relevant to the miner's ability to perform his job as a federal mine inspector at the time of his death." *Sammons*, slip op. at 3.[2] The Board further held that the evidence of record was insufficient as a matter of law to establish rebuttal of the total disability presumption pursuant to Section 727.203(b)(2). *Sammons*, slip op. at 3. The Board remanded the case to the administrative law judge to consider rebuttal pursuant to Section 727.203(b)(3), *Sammons*, slip op. at 3, and also noted that, based on the finding of invocation pursuant to Section 727.203(a)(1), rebuttal was precluded pursuant to Section 727.203(b)(4), *Sammons*, slip op. at 3 n.4. Finally, the Board noted that the administrative law judge was not required to consider entitlement pursuant to the permanent criteria at 20 C.F.R. Part 410, Subpart D, or under 20 C.F.R. Part 410.490, but in the absence of a finding of entitlement under Part 727, consideration of entitlement under 20 C.F.R. Part 718 was to be given pursuant to *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). *Sammons*, slip op. at 4. Employer subsequently filed a Motion for Reconsideration and Suggestion for Reconsideration *En Banc* before the Board. On February 5, 1992, the Board issued a Decision and Order on Reconsideration in which it granted employer's Motion for Reconsideration, but denied the relief requested. *Sammons v. Wolf Creek Collieries*, BRB No. 88-4342 BLA (Decision and Order on Reconsideration) (Feb. 5, 1992)(unpub.). The Board again noted that employer "presented no evidence relevant to the miner's ability to perform his job as a federal coal mine inspector at the time of his death," and therefore "the evidence of record [was] insufficient to support a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(1)." *Sammons* (Decision and Order on Recon.), slip op. at 2.

[2]The Board noted that medical opinions relied upon by the administrative law judge as relevant evidence pursuant to Section 727.203(b)(1) predated the miner's death by several years and therefore it was "irrational for the administrative law judge to find this evidence relevant to the miner's ability to perform his usual coal mine employment at the time of his death." *Sammons*, slip op. at 3.

On remand, the administrative law judge concluded that it was "uncontroverted that the miner was killed in a coal mine explosion while he was working at his regular job as a coal mine inspector." Decision and Order on Remand at pp. 1-2 (unpaginated). The administrative law judge further found that rebuttal was not established pursuant to Section 727.203(b)(3) and, accordingly, awarded benefits. On appeal, employer contends that the administrative law judge erred in finding rebuttal not established pursuant to Section 727.203(b)(3), contending that the administrative law judge failed to specifically address the medical evidence or explain how he weighed such evidence. Alternatively, employer contends that claimant is entitled to no recovery under the Black Lung Act, inasmuch as the benefits claimant has received under the Federal Employees' Compensation Act provide the exclusive remedy in this case. Claimant, in response, urges that the Decision and Order on Remand of the administrative law judge be affirmed. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has not filed a brief in this appeal.[3]

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[3]We note that employer states that it preserves all arguments raised in its motion for reconsideration for the purposes of further appeal. Employer's Brief at 5 n.1. Employer asserts, as it did in its motion for reconsideration, that since "the miner was working" at his usual coal mine employment as a federal mine inspector at the time of his death, "rebuttal ha[s] been established under subsection (b)(1) as a matter of law." Employer's Brief at 5 n.1. In rejecting this contention, the Board cited the opinion of the United States Court of Appeals for the Sixth Circuit, in whose jurisdiction this claim arises, in *Farmer v. Director, OWCP*, 839 F.2d 259, 11 BLR 2-53 (6th Cir. 1988). *See also* 20 C.F.R.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer, on appeal, asserts that the administrative law judge failed to apply the proper rebuttal standard at Section 727.203(b)(3). Employer specifically asserts that "[t]he medical evidence...developed during the miner's life time [sic] is uncontradicted in showing that the miner's lungs were 'normal' in terms of pulmonary function." Employer's Brief at 8. Employer further asserts that the "administrative law judge clearly has failed to consider all relevant medical evidence and has failed to offer any rationale for his findings in violation of the mandates of the Administrative Procedure Act." Employer's Brief at 11. In determining that employer failed to establish rebuttal pursuant to Section 727.203(b)(3), the administrative law judge's entire finding was as follows:

> Under Section 727.203(b)(3), the presumption of death due to pneumoconiosis shall be rebutted if the evidence establishes that the death of the miner did not arise in whole or in part out of coal mine employment. It is uncontroverted that the miner was killed in a coal mine explosion while he was working at his regular job as a coal mine inspector. The presumption has not been rebutted under 20 C.F.R. §727.203(b)(3).

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§727.205(a). Inasmuch as employer has provided no basis for an exception to application of the law of the case doctrine, *see Williams v. Healy-Ball-Greenfield,* 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting), we hold that the previous holding, that rebuttal has not been established pursuant to Section 727.203(b)(1), constitutes the law of the case on this issue, and we therefore need not revisit the issue, *see Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Decision and Order on Remand at pp. 1-2 (unpaginated). Invocation of the interim presumption in a survivor's claim gives rise to two presumptions, *i.e.*, that the miner was totally disabled due to pneumoconiosis at the time of his death and that the miner's death was due to pneumoconiosis. 20 C.F.R. §727.203(a); *Jennings v. Brown Badgett, Inc.*, 9 BLR 1-94 (1986), *rev'd on other grounds,* 842 F.2d 899, 11 BLR 2-92 (6th Cir. 1988); *Conners v. Director, OWCP*, 7 BLR 1-482 (1984); *Husk v. Sewell Coal Co.*, 4 BLR 1-7 (1981). Once the presumption is invoked, in order to defeat entitlement employer must rebut both of these presumptions. *Jennings*, *supra*. As indicated *supra,* the Board noted in its Decision and Order, slip op. at 3, that claimant did not contest the administrative law judge's finding that the miner's death was not due to pneumoconiosis, Decision and Order at 3. *See Skrack v. Island Creek Coal Co.,* 6 BLR 1-710 (1983); *see also* Director's Exhibit 8; Employer's Exhibits 1, 2, 3, 6, 7.

In the instant case, the evidence of record relevant to rebuttal of the disability presumption consists of the medical opinions of three physicians submitted subsequent to the death of the miner. Dr. Broudy opined that the miner did not have coal workers' pneumoconiosis, that the miner exhibited no significant respiratory or pulmonary disability, and that prior to his death the miner had the respiratory capacity to perform his coal mine employment. Employer's Exhibits 1, 6. Dr. Lane opined that the miner suffered from no pulmonary disability prior to his death.[4] Dr. Anderson opined that the miner had the respiratory capacity to perform the work of an underground miner. Employer's Exhibits 2, 7. The record also contains the death certificate which indicates only that the miner's death was due to a coal mine explosion, Director's Exhibit 8, a 1968 medical opinion by Dr. Hall, who diagnoses "normal lung," Director's Exhibit 10, and the pre-employment physical examinations of Dr. Howze and Dr. Hodges, both of whom opined that the miner was physically capable of

[4]In his two reports, Dr. Lane makes various statements relevant to the issue of pulmonary impairment. In the opinion provided by Dr. Lane on October 6, 1987, Employer's Exhibit 3, Dr. Lane stated that the miner "might have had mild impairment [but] not ... disability." In that opinion, Dr. Lane also indicated that he was unable to state whether the miner had the respiratory capacity to perform his coal mine work, whereas in his December 24, 1987 opinion, Employer's Exhibit 6, Dr. Lane stated that the miner had no pulmonary disability and would have had the respiratory capacity to perform underground coal mine work. It is the duty of the administrative law judge to resolve inconsistencies within a physician's conclusions. *Hvizdzak v. North American Coal Corp.,* 7 BLR 1-469, 1-470-71 (1984); *see Lafferty v. Cannelton Industries, Inc.,* 12 BLR 1-190, 1-192 (1989); *Revnack v. Director, OWCP,* 7 BLR 1-771, 1-773-74 (1985).

performing hazardous and arduous duties of coal mine employment, Employer's Exhibit 5.

The United States Court of Appeals for the Sixth Circuit, in whose jurisdiction this claim arises, has held that, in order to establish rebuttal of the total disability presumption pursuant to Section 727.203(b)(3), employer must show that pneumoconiosis played no part in causing a miner's disability. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116, 105 S.Ct. 2357 (1985); *Warman v. Pittsburg and Midway Coal Mining Co.*, 4 BLR 1-601 (1982), *aff'd*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *see Roberts v. Benefits Review Board*, 822 F.2d 636, 639, 10 BLR 2-153, 2-157 (6th Cir. 1987). The Administrative Procedure Act (the APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all relevant material issues of fact, law, or discretion presented...." 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 30 U.S.C. §932(a); *see Arnold v. Sec'y, HEW,* 567 F.2d 258, 259 (4th Cir. 1977); *Robertson v. Alabama By-Products Corp.,* 7 BLR 1-793, 1-795 (1985); *Arnold v. Consolidation Coal Co.,* 7 BLR 1-648, 1-651 (1985); *Tenney v. Badger Coal Co.,* 7 BLR 1-589, 1-591 (1984); *New v. Director, OWCP*, 6 BLR 1-597, 1-599 (1983). In the instant case the record contains the evidence, discussed above, which, if fully credited, could support employer's burden of establishing rebuttal of the total disability presumption pursuant to Section 727.203(b)(3), *i.e.*, evidence that pneumoconiosis did not contribute to the miner's disability. Inasmuch as the Decision and Order on Remand of the administrative law judge fails to comport with the APA in that it fails to address all relevant evidence of record, *see Robertson, supra; Arnold, supra,* we vacate the administrative law judge's finding that rebuttal was not established pursuant to Section 727.203(b)(3), and remand the case for specific consideration of the relevant evidence of record, *see Gibas*, *supra*; *Warman*, *supra*; *see also Roberts*, *supra*.

We further hold that the administrative law judge, in evaluating the medical opinions of record on remand in this Sixth Circuit case, must give consideration to the pronouncements of the United States Court of Appeals for the Sixth Circuit in *Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993) and *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1041, 17 BLR 2-16, 2-24 (6th Cir. 1993), regarding the probative value of medical evidence relevant to the Section 727.203(b)(3) causation issue that finds that claimant did not suffer from pneumoconiosis, when, in fact the administrative law judge has found to the contrary. *See Skukan*, *supra*; *Tussey*, *supra*; *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52, 1-54 (1988); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986). In view of the change in law since the administrative

law judge handed down his decision, on remand he must decide whether it is necessary to reopen the record to afford the parties an opportunity to present relevant evidence in order to avoid a manifest injustice and a denial of due process. *See Harlan Bell Coal Co. v. Lemar,* 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990); *see also Tackett v. Benefits Review Board,* 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

Employer also contends, in the alternative, that claimant has received "full entitlement" under the Federal Employees' Compensation Act (FECA), 5 U.S.C. §§8101-8193, and that "any recovery under the Black Lung Act should [therefore] be disallowed." Employer's Brief at 15. Employer notes, Employer's Brief at 13, and the record indicates, Employer's Exhibit 4 at 7; Hearing Transcript at 23, that claimant was receiving almost $1500.00 per month in FECA benefits arising out of the miner's death[5] at the time of the hearing.

[5]The Board has held that a federal coal mine inspector is a miner under the Act because he meets the "situs-function" requirements. *See Bartley v. Director, OWCP*, 12 BLR 1-89 (1988); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2 (1981); *see also Mounts v. Director, OWCP*, 8 BLR 1-425 (1985); *Lynch v. Director, OWCP*, 6 BLR 1-1088 (1984); *Mansell v. Republic Steel Corp.*, 5 BLR 1-842 (1983); *Moore v. Duquesne Light Co.*, 4 BLR 1-40.2 (1981); *but see Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Eastern Associated Coal Co. v. Director, OWCP* [*Patrick*], 791 F.2d 1129 (4th Cir. 1986)(federal coal mine inspectors are *not* covered by the Act).

FECA, 5 U.S.C. §§8101-8193, provides compensation for federal employees,[6] and their dependents, for disability or death resulting from personal injury sustained while in the performance of duty. 5 U.S.C. §§8101(1), 8102(a), 8110(1)-(4). Employer asserts that "where an award is made under FECA, it is intended to be the exclusive 'compensation' recoverable. 5 U.S.C. §8116." Employer's Brief at 14. While FECA does state that "[t]he liability of the United States...with respect to the injury or death of an employee is exclusive...", 5 U.S.C. §8116(c), the purpose of FECA, to provide compensation for federal employees injured on the job, is different from that of the Black Lung Act, the purpose of which is to compensate coal miners who are totally disabled from pneumoconiosis arising out of coal mine employment and surviving dependents of miners who were either totally disabled due to pneumoconiosis at the time of death or whose death was due to pneumoconiosis,[7] 30 U.S.C. §901. In an analogous case involving railroad employees, *Roberson v. Norfolk & Western Railway Co.*, 13 BLR 1-6 (1989), *aff'd*, 918 F.2d 1-444 (4th Cir. 1990), the Board held that "[t]he mere existence of other federal remedial statutes...is not conclusive with respect to the inquiry of whether such...employees may also be considered miners under the Act. Moreover...the Act does not limit its applicability on the basis of other existing parallel statutes." *Roberson*, 13 BLR at 1-10-1-11. Further, we reject employer's contention that "any benefits recoverable under the Black Lung Act would be totally offset by the amount claimant has already recovered under FECA," Employer's Brief at 14. The offset provisions of the Black Lung Act contemplate a reduction or offset in federal black lung benefits by any other state or federal award made on the basis of the miner's "death or partial or total disability due to pneumoconiosis," 20 C.F.R. §725.533(a)(1). Although the Black Lung Act contemplates that such an award may occur pursuant to "Federal Laws relating to workers' compensation," 20 C.F.R. §727.535(a); *see* 30 U.S.C. §932(g), inasmuch as claimant's award under FECA was, in view of the record in this case, apparently based on the miner's accidental death rather than death or total disability due to pneumoconiosis, and as employer has not demonstrated otherwise, we reject employer's alternative argument. We therefore hold that if, on remand, an award of benefits is made, no offset for

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[6]A federal employee is defined as a "civil officer or employee in any branch of the Government of the United States including an officer or employee of an instrumentality wholly owned by the United States." 5 U.S.C. §8101(1)(A).

[7]Although the grounds for recovery in survivors' claims was limited by the 1981 Amendments, *see* Pub. L. 97-119, Title II, §203(a)(4), Dec. 29, 1981, 95 Stat. 1644, that change does not apply to the instant claim which was filed prior to January 1, 1982, the effective date of the 1981 Amendments.

the FECA award, *see* 20 C.F.R. §§725.533, 725.535; *see also* 20 C.F.R. §410.515, is required.

Finally, if, on remand, entitlement to benefits is not established pursuant to Part 727, then consideration must be given to entitlement pursuant to 20 C.F.R. Part 718.[8] *See Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[8]We note that, if reached on remand, the administrative law judge must specifically determine whether claimant has established at least fifteen years of coal mine employment. *See* 20 C.F.R. §718.305.