BRB No. 00-0624 BLA

MARGARET I. ENDRES (Widow of JOSEPH J. ENDRES)	)	
Claimant-Petitioner	)	
v.	)	
CONSOLIDATION 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 Third Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

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

Dorothy L. Page (Judith E. Kramer, 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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (1996-BLA-0930) of Administrative Law Judge Clement J. Kichuk 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).[2] This case is before the Board for the fourth time and has a lengthy procedural history which was accurately detailed in the Board's previous Decision and Order. In its most recent Decision and Order, the Board vacated Judge Morin's findings of invocation pursuant to 20 C.F.R. § 727.203(a)(1), (2), and (4)(2000), as well as his findings of rebuttal pursuant to 20 C.F.R. §727.203(b)(3), (4)(2000), and remanded the case for the administrative law judge to reconsider invocation pursuant to Section 727.203(a)(2000), and to determine whether employer established rebuttal pursuant to subsections (b)(3) and (b)(4). *Endres v. Consolidation Coal Co.*, BRB No. 98-0777 BLA (Mar. 3, 1999)(unpub.).

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[1]Claimant is Margaret I. Endres, widow of Joseph J. Endres, the miner. The miner 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(1) of the Act, 30 U.S.C. §932(1), relieves survivors of the burden of filing a claim and proving their own 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).

[2]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). For the convenience of the parties, all citations to the regulations herein refer to the previous regulations, as the disposition of this case is not affected by the amendments.

On remand, due to Judge Morin's unavailability, the case was assigned to Judge Kichuk (the administrative law judge) who found that employer conceded invocation pursuant to Section 727.203(a)(2), (4)(2000). The administrative law judge then considered the x-ray evidence of record and found that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000). The administrative law judge further found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3), (4)(2000) and, consequently, granted modification of the previous award of benefits pursuant to 20 C.F.R. §725.310 (2000). Accordingly, benefits were denied.

In the instant appeal, claimant challenges the administrative law judge's weighing of the evidence at Section 727.203(b)(3), (4)(2000). Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, declining to submit a brief on appeal.[3]

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, 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, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on February 21, 2001, to which employer and the Director have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant did not respond to the Board's Order.[4] Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

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

[3]We affirm the administrative law judge's finding pursuant to 20 C.F.R. §727.203(a)(1) (2000) as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on February 21, 2001, would be construed as a position that the challenged regulations will not affect the outcome of this case.

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).

After consideration of the administrative law judge's Decision and Order and the evidence of record, we conclude that the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence and contain no reversible error therein. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that in order to establish rebuttal pursuant to Section 727.203(b)(3)(2000) employer must rule out the causal relationship between the miner's total disability and his coal mine employment in order to rebut the interim presumption. *Consolidation Coal Company v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999); *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 122-25 (4th Cir. 1984). In the instant appeal, claimant contends that the administrative law judge failed to consider Dr. Rasmussen's opinion that the miner had pneumoconiosis and that his lung disease was due to the combined effect of coal dust exposure and smoking. Claimant's Brief at 4; Director's Exhibit 62.

Contrary to claimant's contention, the administrative law judge considered Dr. Rasmussen's opinion, as well as the opinions of Drs. Naeye, Kleinerman, Caffrey, Fino and Bellotte, that the miner did not have pneumoconiosis and that his disabling respiratory impairment was due to his cigarette smoking and was in no way aggravated by his coal mine dust exposure. Decision and Order on Third Remand at 4-11; Claimant's Brief at 4; Director's Exhibit 84; Employer's Exhibits 1-4. The administrative law judge noted that it is "significant that Dr. Rasmussen did not have the benefit of reviewing any of the post mortem evidence which solidly refuted Dr. Rasmussen's reliance in part upon a positive x-ray reading." Decision and Order on Third Remand at 13. The administrative law judge then acted within his discretion in assigning great weight to the opinions of Drs. Fino and Bellotte on the basis of their credentials[5] and because they reviewed all of the medical evidence and gave detailed explanations of the bases for concluding that the miner suffered from a disabling respiratory impairment which resulted only from his cigarette smoking and was not aggravated by exposure to coal dust. Decision and Order on Third Remand at 14; *Lafferty v. Cannelton Industries,* Inc., 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Fields*

[5]Drs. Fino and Bellotte are Board-certified in internal medicine and pulmonary diseases while Dr. Rasmussen is Board-certified in internal medicine. Director's Exhibit 63; Employer's Exhibits 3, 4.

v. Island Creek Coal Co., 10 BLR 1-19 (1987); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Hutchens v. Director*, OWCP, 8 BLR 1-16 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). Consequently, we reject claimant's contention of error and affirm the administrative law judge's weighing of the medical opinion evidence pursuant to Section 727.203(b)(3)(2000) as it is supported by substantial evidence and in accordance with law.[6] Furthermore, inasmuch as claimant makes no other specific allegation of error regarding the administrative law judge's finding that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3)(2000), we affirm the administrative law judge's subsection (b)(3) finding and the denial of benefits.[7]

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[6]Claimant also asserts that the interim presumption was invoked pursuant to Section 727.203(a)(1)(2000). Claimant's Brief at 3. However, contrary to claimant's assertion, the administrative law judge specifically found that the x-ray evidence was insufficient to establish invocation pursuant to subsection (a)(1). Decision and Order at 13.

[7]The administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(3)(2000) precludes entitlement under 20 C.F.R. Part 410, Subpart D (2000). *Pastva v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-829 (1985); *see Muncy v. Wolfe Creek Collieries Coal Co.*, 3 BLR 1-627 (1981).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge