BRB No. 99-1207 BLA

LOUISE R. CONARD (Widow of CHARLES W. CONARD) Claimant-Petitioner v. BETHENERGY MINES, INCORPORATED Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Arthur M. Wilson, Washington, Pennsylvania, for claimant.

Carl J. Smith, Jr. (Richman & Smith), Washington, Pennsylvania, for employer.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (80-BLA-1437) of Administrative Law Judge Clement J. Kichuk denying benefits on claims filed pursuant to

[1]Claimant is Louise R. Conard, the miner's widow. The miner, Charles W. Conard, filed a claim for benefits on July 25, 1978 and died on November 5, 1979. Director's Exhibit 1; Employer's Exhibit 24. Claimant, who has not filed a survivor's claim, is pursuing the miner's claim on his behalf.

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 before the Board for the third time. In the initial Decision and Order, Administrative Law Judge Daniel Goldstein found that claimant established that the miner had "about" nineteen years of qualifying coal mine employment and that the miner established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (3) and (4) and that employer failed to rebut the interim presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. On appeal, the Board affirmed the administrative law judge's finding that claimant established invocation pursuant to Section 727.203(a)(1), (3) and (4) and that employer failed to establish rebuttal pursuant to Section 727.203(b)(1), (2) and (4), but vacated the administrative law judge's finding pursuant to Section 727.203(b)(3) and remanded the claim for further findings pursuant to this subsection. *Conard v. Bethlehem Mines Corp.*, BRB No. 81-1870 BLA (Jan. 22, 1985)(unpub.). The Board affirmed its Decision and Order on reconsideration. *Conard v. Bethlehem Mines Corp.*, BRB No. 81-1870 BLA (May 2, 1985)(unpub.).

On remand, Judge Goldstein reconsidered the medical opinion evidence pursuant to Section 727.203(b)(3) and found that employer failed to establish rebuttal pursuant to that subsection. Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's findings pursuant to Section 727.203(b)(3) and remanded the claim for the administrative law judge to reconsider the medical opinion evidence pursuant to that subsection, and if entitlement is not established under Part 727, to consider the evidence of record pursuant to 20 C.F.R. Part 718. Finally, the Board directed the administrative law judge to weigh the evidence of record relevant to the existence of complicated pneumoconiosis, pursuant to 20 C.F.R. §718.304(a). *Conard v. Bethlehem Mines Corp.*, BRB No. 85-2678 BLA (Aug. 28, 1998)(unpub.).

In the most recent Decision and Order, Administrative Law Judge Kichuk (the administrative law judge) found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R §718.202(a). 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 in finding that the miner did not suffer from pneumoconiosis pursuant to Section 718.202(a). Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, responds, declining to participate on 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 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).

Claimant contends that the administrative law judge erred in his analysis of the evidence at Part 727 and Part 718. With respect to Part 727, claimant's argument is that the law of the case doctrine precludes the administrative law judge from crediting opinions on causation which are based on the view that the miner does not have pneumoconiosis, because the fact that the miner had pneumoconiosis was established at Section 727.203(a)(1), (3) and (4) in a prior proceeding of the instant case, and affirmed an appeal. *Conard v. Bethlehem Mines Corp.*, BRB No. 81-1870 BLA (Jan. 22, 1985)(unpub.). It is true that at Section 727.203(a)(1), (3) and (4), claimant had established entitlement to the interim presumption that the miner was totally disabled due to pneumoconiosis and that the Board affirmed these findings as unchallenged on appeal. *Id.* The law of the case doctrine, however, cannot preclude the administrative law judge from considering the sufficiency of the evidence to establish rebuttal at Section 727.203(b)(3), since the issue of the cause of the miner's total disability and death had never been decided. *See Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 F.3d 28 (3d Cir. 1994).

Nevertheless, there is a superficial appeal to claimant's argument: it appears incongruous for an administrative law judge to rely upon the opinions of physicians who believe claimant does not have pneumoconiosis, when the administrative law judge has credited objective evidence of pneumoconiosis, *i.e.*, x-ray evidence. In this regard, the Third Circuit has made clear that "the ALJ should reject as insufficiently reasoned any medical opinion that reaches a conclusion contrary to objective clinical evidence without explanation." *Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-215 (3d Cir. 1997), quoting *Kertesz v. Director, OWCP*, 788 F.2d 158, 163 (3d Cir. 1986). The key words are, of course, "without explanation." In the case at bar, the administrative law judge fully discussed the medical evidence and set forth his reasons for crediting the opinions of Drs. Morgan, Fisher and Sachs, in which the doctors ruled out pneumoconiosis as a contributing cause of the miner's total disability and death. *Kline v. Director, OWCP*, 877 F.2d 1175, 1179, 12 BLR 2-346, 2-354 (3d Cir. 1989). The administrative law judge considered first the doctors' credentials: Dr. Morgan is a NIOSH-certified B-reader, with a sub-specialty in pulmonary disease; Drs. Fisher and Sach are Board-certified in internal medicine. Decision and Order at 14. Then the administrative law judge considered the doctors' well-reasoned, documented opinions. All three doctors explained that the pathologic evidence demonstrated that the opacities which appeared to be pneumoconiosis on x-rays were due to histoplasmosis. Hence, the doctors fully explained their conclusions that the miner did not have pneumoconiosis despite positive x-ray evidence, and the administrative law judge reasonably relied upon their opinions. *See Mancia*, *supra*. Inasmuch as the administrative law judge properly credited the opinions of Drs. Morgan, Fisher and Sachs, which ruled out pneumoconiosis as a cause of the miner's total disability and death, substantial evidence supports the administrative law judge's finding that employer established rebuttal at Section

727.203(b)(3).

Claimant's remaining argument is that the administrative law judge erred in holding that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a), because claimant had previously invoked the interim presumption of total disability due to pneumoconiosis at Section 727.203(a)(1), (3) and (4). Claimant cites no authority for this proposition. When claimant was unable to establish entitlement pursuant to Part 727, the administrative law judge was required to consider the claim pursuant to Part 718, as directed by the Third Circuit in *Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987), and the remand order of the Board. The claimant in *Caprini* advanced an argument similar to that now advanced by claimant. He asked the Third Circuit to award benefits under Part 718 by applying certain findings made by the administrative law judge pursuant to Part 410. The Third Circuit refused, explaining that the administrative law judge must evaluate the medical evidence under the Part 718 criteria. *Id*., 824 F.2d at 285, 10 BLR at 2-182. Hence, we reject claimant's argument that the administrative law judge erred in considering the evidence pursuant to Section 718.202(a). Since claimant does not contest the administrative law judge's weighing of the evidence at Section 718.202(a), nor the standard applied, *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), we affirm the administrative law judge's determinations that claimant failed to establish the existence of pneumoconiosis at Section 718.202(a) and the denial of benefits under Part 718. *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge