BRB No. 91-1978 BLA

RALPH M. HANNA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	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 of Reno E. Bonfanti, Administrative Law Judge, United States Department of Labor.

S.F. Raymond Smith (Rundle & Rundle), Pineville, West Virginia, for claimant.

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (85-BLA-6573) of Administrative Law Judge Reno E. Bonfanti denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1] Claimant is Ralph M. Hanna, the miner, who filed a claim for benefits on January 17, 1980. Director's Exhibit 1.

of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This claim is before the Board for the third time. In the initial Decision and Order, the administrative law judge found that claimant established thirty-four years of qualifying coal mine employment and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. On appeal, the Board vacated the administrative law judge's finding pursuant to subsection (b)(2) and remanded the claim for the administrative law judge to reconsider rebuttal pursuant to the standards enunciated in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987), *Taylor v. Clinchfield Coal Co.*, 895 F.2d 178, 13 BLR 2-294 (4th Cir. 1990), and *Dayton v. Consolidation Coal Co.*, 895 F.2d 173, 13 BLR 2-307 (4th Cir. 1990). *Hannah v. Eastern Assoc. Coal Corp.*, BRB No. 88-0999 BLA (May 30, 1990)(unpub.).

On remand, the administrative law judge found rebuttal of the interim presumption established pursuant to Section 727.203(b)(2) and (b)(3), invocation of the presumption at 20 C.F.R. §410.490 based on x-ray evidence and rebuttal established pursuant to Section 410.490(c)(2). Accordingly, benefits were denied. On appeal, the Board affirmed the administrative law judge's finding of subsection (b)(3) rebuttal and the denial of benefits. *Hannah v. Eastern Assoc. Coal Corp.*, BRB No. 91-1978 BLA (Jun. 20, 1994)(unpub.). Claimant appealed the Board's Decision and Order to the United States Court of Appeals for the Fourth Circuit,

within whose jurisdiction this claim arises. The Court, citing *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), held that the record does not support the findings of the Board and the administrative law judge that the presumption is rebutted pursuant to subsection (b)(3) and remanded the case to the Board to permit the filing of additional briefs or memoranda by the parties and for reconsideration of whether or not subsection (b)(2) applies to bar the claim. *Hannah v. Eastern Assoc. Coal Co.*, No. 94-2017 (4th Cir. Apr. 11, 1997)(unpub.).

By Order of July 28, 1997, the Board vacated its June 20, 1994 Decision and Order, reinstated the appeal, and directed the parties to file briefs addressing whether subsection (b)(2) should apply to bar the claim. Employer filed a motion for reconsideration of the Board's Order requesting that the case be remanded to the Office of Administrative Law Judges to permit employer an opportunity to respond with new proof as to whether claimant's disability is due, in whole or in part, to pneumoconiosis. The Board, by Order on Reconsideration of September 18, 1997 denied employer's request for reconsideration and allowed employer ten days from the receipt of the order to file a brief. Presently, employer argues that the Board should affirm the administrative law judge's (b)(2) finding or, if that finding is not affirmed, remand the claim to the administrative law judge to allow employer the opportunity to respond to *Grigg* with new evidence. Claimant argues that the reports of Drs. Daniel and Zaldivar, and the objective findings, cannot support a finding of (b)(2) rebuttal and that benefits should be awarded. Claimant also argues that

employer is not entitled to develop additional evidence. The Director, Office of Workers' Compensation Programs (the Director), has not responded.

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).

The United States Court of Appeals for the Fourth Circuit has held that total disability is without regard to cause and thus, in order for a party to establish rebuttal of the interim presumption pursuant to subsection (b)(2), the party must show that the miner is not disabled for any reason. A showing that the miner is not disabled for pulmonary or respiratory reasons alone is not sufficient to establish rebuttal pursuant to subsection (b)(2). Once total disability is established, the issue of the cause of disability should be addressed in subsection (b)(3). *Sykes, supra*.

In the instant case, the record contains pulmonary function study, arterial blood gas study, and medical opinion evidence which are relevant to the issue of whether claimant is totally disabled. The pulmonary function study evidence consists of six studies, two of which, dated October 3, 1980 and August 16, 1983, yielded qualifying results. Director's Exhibits 8-12, 15; Employer's Exhibit 1. The

most recent pulmonary function study, which yielded non-qualifying results, is dated October 30, 1987. Employer's Exhibit 1. The record contains no qualifying arterial blood gas studies. Director's Exhibits 14, 15; Employer's Exhibit 1.

The medical opinion evidence consists of opinions by Drs. Cardona, Zaldivar, Daniel, Jones and Hayes. Dr. Cardona opined that claimant is totally disabled from performing his usual coal mine employment, any type of work with dust exposure in the mining industry or comparable work requiring similar amounts of exertion as a direct result of his pulmonary problem alone. Claimant's Exhibit 1. Drs. Jones and Hayes concluded that claimant has pneumoconiosis with no impairment of capacity for work therefrom. Director's Exhibit 31. Dr. Zaldivar opined that claimant does not have any pulmonary impairment and that from a pulmonary standpoint claimant is capable of performing all work for which he has been trained. Employer's Exhibit 1. Dr. Daniel opined that claimant has no evidence of pulmonary dysfunction due to his chronic obstructive lung disease and pneumoconiosis and that claimant should be able to carry out the usual and customary activities required of a coal miner. Director's Exhibit 31.

In his Decision and Order on Remand, the administrative law judge found that the most recent and credible pulmonary function study and arterial blood gas study results are not indicative of impairment, that Dr. Zaldivar's opinion is more persuasive than Dr. Cardona's opinion and that the opinions of Drs. Daniel and

Zaldivar were "to the effect that claimant was able to do his usual work as a miner." He concluded that claimant does not have any impairment or disability from a chronic pulmonary or respiratory condition. He further noted that "the examinations were comprehensive and do not disclose impairment from any other medical conditions. The references to arthritis, acute right knee, and prostrate problems do not disclose any significant limitations or restrictions." The administrative law judge concluded, after consideration "for the totality of [claimant's] medical problems," that employer established (b)(2) rebuttal because claimant is not disabled and is capable of engaging in his usual coal mine employment. Decision and Order on Remand at 2.

Contrary to the administrative law judge's findings, the opinions of Drs. Zaldivar, Daniel, Jones and Hayes, indicate that claimant does not have any pulmonary impairment but do not address whether claimant is totally disabled due to any other cause. Director's Exhibit 31; Employer's Exhibit 1. Further, while the administrative law judge found that the pulmonary function study and arterial blood gas study evidence does not establish that claimant is totally disabled from a respiratory standpoint, these studies do not address the issue of whether claimant is totally disabled by any other means. As a result, these opinions and studies are insufficient to establish rebuttal pursuant to subsection (b)(2) in light *Sykes*. Thus, because there is no medical opinion evidence which would be sufficient to support a finding of rebuttal pursuant to *Sykes*, we vacate the administrative law judge's

finding of subsection (b)(2) rebuttal. Consequently, because the United States Court of Appeals for the Fourth Circuit instructed that claimant was to be awarded benefits if the administrative law judge's finding of subsection (b)(2) rebuttal was vacated, we reverse the denial of benefits.[2]

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN

[2] Because the United States Court of Appeals for the Fourth Circuit remanded the case to the Board to determine if the administrative law judge's prior finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(2) was proper, the Board is required to make that determination based on the record that was established before the administrative law judge. Further, since the Court has reversed the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3), we will not address that issue further. Consequently, we deny employer's request that the case be remanded for the development of additional evidence in light of *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994).

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge