BRB No. 98-0817 BLA

NOAH W. VANDYKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FAITH COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

W. William Prochot (Arter & Hadden, LLP), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (86-BLA-4122) of Administrative Law Judge Daniel F. Sutton awarding 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). This case is before the Board for the third time. Initially, Administrative Law Judge John H. Bedford found the x-ray evidence sufficient to invoke the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but concluded that the evidence of

record established rebuttal of the presumption pursuant to Section 727.203(b)(2). Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board affirmed as unchallenged the administrative law judge's invocation finding pursuant to Section 727.203(a)(1), but vacated his finding that the evidence established that the miner does not suffer from a totally disabling respiratory impairment pursuant to Section 727.203(b)(2) because it was insufficient to establish rebuttal of the presumption under *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). *Vandyke v. Faith Coal Co.*, BRB No. 91-0490 BLA (Feb. 25, 1993)(unpub.). The Board concluded, however, that a remand was not required because the medical opinions relied upon by the administrative law judge at Section 727.203(b)(2) also established Section 727.203(b)(3) rebuttal as a matter of law by proving the absence of any respiratory or pulmonary impairment. *Vandyke*, slip op. at 3. Accordingly, the Board affirmed the administrative law judge's Decision and Order denying benefits.

Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit vacated the Board's decision. *Vandyke v. Director, OWCP*, No. 93-1465 (4th Cir., Feb. 28, 1995)(unpub.). The Fourth Circuit court held that, with the exception of Dr. Fino, none of the physicians whose reports the administrative law judge relied upon in finding subsection (b)(2) rebuttal found the absence of any respiratory or pulmonary impairment whatsoever, as required under *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), and therefore, their reports did not establish subsection (b)(3) rebuttal as a matter of law. The court concluded that because the reports of Drs. Stewart and Endres-Bercher could ultimately support a finding of subsection (b)(3) rebuttal under *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), remand was required. The court also held, citing *Malcomb v. Island Creek Coal Co.*,15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), that because Dr. Fino was a non-examining physician, his opinion could not establish subsection (b)(3) rebuttal unless the administrative law judge found that his conclusions had also been addressed by an examining physician. Accordingly, the court remanded the case for further consideration.

On remand, Administrative Law Judge Charles P. Rippey found that rebuttal of the presumption was not established pursuant to Section 727.203(b)(3) and awarded benefits. However, in reaching this conclusion he failed to consider all of the relevant evidence and improperly rejected certain medical opinions as biased. Consequently, upon consideration of employer's appeal of the award, the Board vacated the administrative law judge's findings and remanded the case for him to reconsider subsection (b)(3) rebuttal. *Vandyke v. Faith Coal Co.*, BRB No. 96-0882 BLA (Apr. 15, 1997)(unpub.). Employer also argued that the administrative law judge on remand should also reconsider invocation at Section 727.203(a)(1), but the Board concluded that employer provided no reason to disturb Judge Bedford's previously-affirmed finding of subsection (a)(1) invocation. Therefore, the Board

remanded the case for the administrative law judge to reconsider only subsection (b)(3) rebuttal.

Because Judge Rippey is no longer with the Office of Administrative Law Judges, on remand the case was reassigned, without objection, to Judge Sutton, who found that employer's medical opinions could not establish subsection (b)(3) rebuttal because they failed to prove the absence of any respiratory or pulmonary impairment and merely stated that claimant is not totally disabled. Additionally, in response to employer's request to reconsider subsection (a)(1) invocation, the administrative law judge stated that he was bound by the Board's mandate and therefore could not revisit the issue. However, in a footnote, the administrative law judge found that assuming *arguendo* that invocation should be reconsidered, a preponderance of the most probative recent x-ray readings established the existence of pneumoconiosis, thereby invoking the interim presumption pursuant to Section 727.203(a)(1). Accordingly, he awarded benefits.

On appeal, employer contends that the administrative law judge failed to apply the proper rebuttal test at Section 727.203(b)(3). Employer further asserts that the administrative law judge erred in finding that Dr. Fino did not state that there was no respiratory or pulmonary impairment of any kind. Additionally, employer argues that Judge Bedford's subsection (a)(1) invocation finding is plainly erroneous and would work a manifest injustice if allowed to stand, and alleges that the current administrative law judge made factual errors in his analysis of the x-ray evidence on remand that preclude affirmance of his subsection (a)(1) invocation finding. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Upon consideration of the administrative law judge's Decision and Order on Remand, the administrative record as a whole, and the pleadings submitted by the parties, we are unable to conclude that the award of benefits is supported by substantial evidence and that it accords with applicable law. Accordingly, we vacate the Decision and Order on Remand and remand this claim to the administrative law judge for further consideration.

Employer contends that the administrative law judge failed to consider at Section 727.203(b)(3) whether employer's experts ruled out a connection between claimant's total disability and his coal mine employment by attributing his pulmonary problems to heart disease. Employer's Brief at 15-16. This contention has merit.

To rebut the presumption under Section 727.203(b)(3), employer must rule out any

causal connection between the miner's total disability and his coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-313-14 (4th Cir. 1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72, 2-80 (4th Cir. 1984). "[A] causal connection can be 'ruled out' if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind, [citation omitted], *or* if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment." *[Lockhart]*, 137 F.3d at 804, 21 BLR at 2-314 (emphasis supplied); *see Massey*, *supra*.

Here, examining physician Dr. Endres-Bercher and reviewing physician Dr. Stewart opined that claimant could return to his usual coal mine employment from a respiratory standpoint, and stated that his pulmonary problems are due to ischemic heart disease. Employer's Exhibits 1-3, 11, 12, 19. Because Dr. Stewart found claimant's pulmonary symptoms to be consistent with heart disease, he added that he would not attribute claimant's dyspnea or cough to smoking, chronic obstructive pulmonary disease, or coal workers' pneumoconiosis. Employer's Exhibit 3 at 9. Dr. Fino reviewed all of the medical evidence of record and concluded that the results of the pulmonary function studies, blood gas studies, and lung volume tests indicated that claimant has no respiratory or pulmonary impairment. Employer's Exhibit 10. Dr. Fino opined that claimant's complaints of shortness of breath are not related to lung disease, and he appeared to believe that they are due to heart disease, age, and deconditioning. *Id*.

The administrative law judge found that the opinions of Drs. Endres-Bercher and Stewart were insufficient to establish subsection (b)(3) rebuttal because they did not state that claimant has no impairment and because they merely opined that claimant is not totally disabled. Decision and Order on Remand at 8. The administrative law judge additionally found that Dr. Fino's opinion did not establish rebuttal because he failed to state without equivocation that claimant has no respiratory or pulmonary impairment, and even assuming that he did so state, he failed to address the findings of examining physicians who diagnosed a respiratory impairment. *Id*.

Regardless of whether or not employer's medical opinions state that claimant has no impairment, or that he is not totally disabled,[1] the administrative law judge never considered whether the opinions ruled out any causal connection by attributing claimant's pulmonary problems to heart disease. *See Massey*, *supra*. Therefore, we must vacate the administrative law judge's finding pursuant to Section 727.203(b)(3) and remand the case for him to consider this aspect of subsection (b)(3) rebuttal.[2]

Additionally, on remand the administrative law judge should consider the entirety of Dr. Fino's opinion and explain his findings regarding whether or not Dr. Fino expressly found no respiratory or pulmonary impairment. The administrative law judge found that Dr. Fino's opinion fell short of unequivocally stating that there was no respiratory or pulmonary

[1] We agree that had Drs. Endres-Bercher and Stewart stated only that claimant is not disabled, their reports would have been insufficient to meet the *Massey* "rule out" standard. However, their opinions went beyond a mere conclusion of non-disability.

[2] We considered the administrative law judge's brief comment faulting Dr. Fino for failing to identify a non-coal mine employment source for the mild hypoxia seen on some of claimant's blood gas studies. Decision and Order at 8; Claimant's Brief at 6. This is the proper sort of inquiry under *Massey*, but the comment deals with only one part of Dr. Fino's opinion and the administrative law judge did not explain why he rejected Dr. Fino's explanation that the mild hypoxia was not an impairment. *See* discussion, *infra*. Therefore, and in light of the definite need for a remand for reconsideration of the opinions of Drs. Endres-Bercher and Stewart at (b)(3), we do not affirm the administrative law judge's treatment of Dr. Fino's opinion as adequate under *Massey* based solely upon this one comment.

impairment because Dr. Fino acknowledged the presence of mild hypoxia on certain blood gas studies but classified it as clinically insignificant. Decision and Order on Remand at 8. The administrative law judge was apparently unpersuaded by Dr. Fino's explanation that the mild hypoxia did not rise to the level of an impairment, but as employer contends, Employer's Brief at 16-18, did not explain why he rejected Dr. Fino's explanation. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 536, 21 BLR 2-323, 2-335, 2-341 (4th Cir. 1998)(the administrative law judge must assess a physician's reasoning); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997)(same).

The administrative law judge offered a second reason for declining to credit Dr. Fino's "no impairment" opinion, but we are unable to affirm it. The administrative law judge added that even if Dr. Fino unequivocally stated that there was no respiratory or pulmonary impairment, he failed to confront certain findings by examining physicians. Decision and Order on Remand at 8. Specifically, the administrative law judge cited Dr. Endres-Bercher's diagnosis of a restrictive defect based on a lung volume study, Employer's Exhibit 2, and Dr. Garzon's diagnosis of a pulmonary impairment related to smoking and coal dust exposure. Director's Exhibit 21. However, as employer argues, the administrative law judge failed to consider Dr. Endres-Bercher's later report in which he retracted his diagnosis of restriction as based on invalid testing that had yielded falsely low values. Employer's Brief at 19-20; Employer's Exhibit 11. With respect to Dr. Garzon's diagnosis, employer contends that the administrative law judge did not explain why he found Dr. Garzon's conclusions more credible than those of Dr. Fino. Employer's Brief at 18-19. We believe that such an explanation is warranted since Dr. Fino did in fact review and confront Dr. Garzon's findings, stated that he disagreed with Dr. Garzon's diagnosis of a respiratory impairment, and explained why he believed that the pulmonary function studies, blood gas studies, and diffusion tests showed no impairment. Employer's Exhibit 10 at 4, 11-13; *see Hicks*, *supra*; *Akers*, *supra*. Therefore, the administrative law judge should reconsider Dr. Fino's opinion and determine whether he stated unequivocally that claimant has no respiratory or pulmonary impairment. *See Grigg*, *supra*.

Pursuant to Section 727.203(a)(1), employer again argues that Judge Bedford's invocation finding should be vacated. Employer's Brief at 20-23. In our prior decision, we acknowledged that Judge Bedford's subsection (a)(1) finding violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), but held that employer neglected to timely challenge the invocation finding the first time the case was before the Board and presented no exception to the law of the case doctrine in its appeal.[3] [1997]

[3] We rejected employer's characterization of Judge Bedford's (a)(1) analysis as then permissible "head counting" that was now prohibited by *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and rejected employer's argument that Judge Bedford relied

Vandyke, slip op. at 3-4. Therefore, we held that our prior affirmance of Section 727.203(a)(1) invocation as unchallenged on appeal was controlling. Employer now cites our conclusion that Judge Bedford's finding did not comport with the APA and argues that because his finding was plainly erroneous, the Board should depart from the law of the case doctrine as a matter of fairness.

The law of the case doctrine is a discretionary rule of practice intended to promote finality. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Upon further consideration of our application of this principle in the prior appeal, we believe that we may not have adequately considered that employer was the prevailing party in the first round of litigation. Specifically, while employer as the respondent to claimant's appeal of the initial denial might have challenged the administrative law judge's (a)(1) invocation finding without having to file a cross-appeal, *see King v. Tennessee Consolidation Coal Co.*, 6 BLR 1-87, 1-90-92 (1983), its satisfaction with the result may have understandably led it not to challenge (a)(1). In this context, we note further that the law has changed significantly since 1990 to impose a far greater duty of analysis and explanation than Judge Bedford faced. For example, the administrative law judge must now conduct a qualitative analysis of the x-ray evidence, *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992), and may not relieve claimant of his burden of proof, *see Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 67, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, we conclude that under the circumstances, the law of the case doctrine should have imposed no bar to reconsideration of subsection (a)(1) invocation, and since we must apply the law in effect at the time of the appeal, *see Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989), we must vacate Judge Bedford's subsection (a)(1) invocation finding.

We have reviewed Judge Sutton's invocation finding pursuant to Section 727.203(a)(1), but we are unable to affirm it. Judge Sutton admirably attempted to conserve time and resources on remand by addressing the (a)(1) invocation issue, but as employer contends and as is apparent from our review of the record, Judge Sutton failed to consider all of the relevant evidence and inappropriately relied upon the later-is-better principle, when there is no pattern of progression from negative to positive over time in claimant's chest x-rays. *See Adkins*, *supra*. Therefore, we must vacate Judge Sutton's finding pursuant to Section 727.203(a)(1).

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upon the true doubt rule. [1997] *Vandyke*, slip op. at 3-4.

On remand, the administrative law judge must consider whether the weight of the chest x-ray evidence establishes invocation of the interim presumption pursuant to Section 727.203(a)(1).[4] If he finds the presumption invoked, he must consider whether employer's medical opinions establish rebuttal thereof pursuant to Section 727.203(b)(3) under *Massey*, *Grigg*, and *Malcomb*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[4] In our last review of the record, we counted one hundred and six readings of twenty x-rays. In our current review, we detected one hundred and three readings of twenty x-rays. Of those x-rays clearly read for the purpose of detecting pneumoconiosis, thirty-eight were positive, fifty-eight were negative, and five were classified as unreadable. Since a qualitative analysis of these readings will be required on remand, we trust that if the parties choose to file briefs, they will see the need to summarize fully the x-ray readings and the physicians' radiological qualifications.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge