BRB No. 98-1519 BLA

LESLIE WHITMAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits Upon Remand From the Benefits Review Board of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Monhollon & Kelley), Madisonville, Kentucky, for claimant.

John D. Maddox (Arter & Hadden, LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits Upon Remand From the Benefits Review Board (84-BLA-9098) of Administrative Law Judge Paul H. Teitler 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 a fourth time. Claimant filed his claim on April 27, 1978. Director's Exhibit 1. In a Decision

and Order issued on August 21, 1987, the administrative law judge found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1), (2) and (4) and further found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded. Subsequent to an appeal by employer, the Board vacated the administrative law judge's findings of invocation at Section 727.203(a)(1), (2) and (4), and the findings that rebuttal was not established pursuant to Section 727.203(b)(3) and (4). The Board also modified the entitlement date and instructed the administrative law judge to consider entitlement under Part 718 if necessary. *Whitman v. Peabody Coal Co.*, BRB No. 87-2473 BLA (June 30, 1989). On remand, the administrative law judge found the evidence sufficient to establish invocation at Section 727.203(a)(1) and (2) and found the evidence insufficient to establish rebuttal at Section 727.203(b)(1)-(4). Accordingly, benefits were awarded. Employer appealed and the Board affirmed the award of benefits. *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA (Mar. 30, 1993). Subsequently, the Board granted employer's Motion for Reconsideration, and pursuant to the holding of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 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), vacated the administrative law judge's findings at Section 727.203(a)(1), (b)(3) and (4), and remanded the case for further consideration. *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA (Order on Motion for Reconsideration)(Aug. 11, 1995).[1]

Pursuant to the second remand, the administrative law judge found rebuttal established at Section 727.203(b)(3) and, accordingly denied benefits. Claimant appealed and the Board vacated the finding of rebuttal pursuant to Section 727.203(b)(3). The Board also vacated the finding of no rebuttal at Section 727.203(b)(4) and remanded the claim for further consideration of those subsections and, if necessary, for consideration of entitlement at Part 718. *See Whitman v. Peabody Coal Co.*, BRB No. 97-0720 BLA (Mar. 5, 1998)(unpub.).

On third remand, the administrative law judge found that the x-ray evidence of record established invocation of the interim presumption pursuant to Section 727.203(a)(1). Decision and Order on Remand at 4-5. The administrative law judge further concluded that the evidence of record supported a finding of rebuttal at Section 727.203(b)(3), but that the evidence failed to support such a finding pursuant to Section 727.203(b)(4). Decision and Order at 5-8. The administrative law judge also found that claimant failed to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 inasmuch as the evidence of record

[1] The Board left undisturbed its affirmance of the finding of invocation at Section 727.203(a)(2).

failed to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b). Accordingly, benefits were denied.

In the appeal now before the Board, claimant contends that the administrative law judge erred in failing to reopen the record for the submission of new evidence. Claimant further asserts that the previous finding of invocation at Section 727.203(a)(2) constitutes the law of the case and that since the opinions of the physicians relied on by the administrative law judge to support a finding of rebuttal pursuant to Section 727.203(b)(3) predate evidence used to support the finding of invocation at Section 727.203(a)(2), the opinions are not credible. Claimant also contends that the administrative law judge erred in his reliance on certain evidence as support for a finding of rebuttal at Section 727.203(b)(3), and that the Board lacked the authority to "reverse itself" on a Motion for Reconsideration. Claimant's Brief at 15. Lastly, claimant contends that the administrative law judge erred in denying benefits pursuant to Part 718. Employer, in response, contends that the administrative law judge properly found rebuttal established pursuant to Section 727.203(b)(3) and properly denied benefits pursuant to Part 718. Employer, further asserts that the administrative law judge erred in finding that the x-ray evidence established invocation of the interim presumption pursuant to Section 727.203(a)(1), and further erred in finding rebuttal not established pursuant to Section 727.203(b)(4). The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has declined to participate in 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 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).

Initially, claimant asserts that the administrative law judge erred in failing to acknowledge its request to reopen the record for the submission of more current medical evidence. We disagree. Contrary to claimant's assertion that the administrative law judge ignored claimant's request to reopen the record in order to allow for the submission of new evidence, the administrative law judge specifically concluded that a reopening of the record would further delay the case. Decision and Order on Remand at 3-4.[2] The decision as to whether to reopen the record on remand is within the province of the administrative law judge. 20 C.F.R. §725.456(e); *see Tackett v. Director, OWCP*, 806 F.2d 640, 10 BLR 2-92 (6th Cir. 1986); *Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 (1989); *Toler v. Associated*

[2] The record does not contain any formal motion requesting the reopening of the record, however.

Coal Co., 12 BLR 1-49 (1989); *Borgeson v. Kaiser Steel Coal Co.*, 12 BLR 1-169 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988). Claimant has failed, in the instant case, to demonstrate an abuse of that discretion. Accordingly, we affirm the administrative law judge's decision not to reopen the record.[3] *See* 20 C.F.R. §725.456(e).

Claimant next asserts that the administrative law judge erred in finding that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3) inasmuch as the medical evidence relied upon by the administrative law judge to support the finding of rebuttal, *i.e.*, the opinions of Drs. Getty, Anderson and Gallo, that claimant did not suffer from pneumoconiosis and/or that claimant's total disability was not due to a pulmonary or respiratory impairment, Director's Exhibit 24, 25; Claimant's Exhibit 5, predated the evidence relied upon by the administrative law judge to support the finding of invocation at Section 727.203(a)(2). Because of this, claimant contends that the opinions are not credible. Likewise, claimant asserts that the medical opinion of Dr. Getty may not be used to support a finding of rebuttal inasmuch as the Board previously concluded that the opinion was insufficient as a matter-of-law to support a finding of rebuttal at Section 727.203(b)(3).

In order to establish rebuttal pursuant to Section 727.203(b)(3), the United States Court of Appeals for the Sixth Circuit within whose jurisdiction this case arises has held that the party opposing entitlement must establish that pneumoconiosis played no part in causing the miner's disability. *See Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*,748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985). In the instant case, the administrative law judge concluded that the medical opinion of Dr. Getty, as buttressed by the opinions of Drs. Anderson and Gallo, supports a finding of rebuttal at Section 727.203(b)(3). Decision and Order on Remand at 6-8.

[3] Inasmuch as this case must be remanded for further consideration, *see* discussion, *infra*, the administrative law judge may, on remand, reopen the record, for further submission of evidence. *See* 20 C.F.R. §725.456(e). *Tackett, supra*; *Lynn, supra*; *Toler*, *supra*.

When this case was most recently before the Board, the Board vacated the administrative law judge's finding of rebuttal at Section 727.203(b)(3). *Whitman*, BRB No. 97-0720 BLA, slip op. at 4-5. Specifically, the Board instructed the administrative law judge to consider the opinions of Drs. Anderson and Gallo in light of the holding of the Sixth Circuit in *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). In *Cooley*, the Sixth Circuit court stated that the interim presumption would be of little value if it can be rebutted by medical opinions based upon examinations conducted at a time before claimant established the conditions required to invoke the presumption. *Id*. In the instant case, the administrative law previously found invocation of the interim presumption established at Section 727.203(a)(2), based, in part, on a qualifying pulmonary function study dated September 9, 1986.[4] Claimant's Exhibit 5. The examinations conducted by both Drs. Gallo and Dr. Anderson occurred in 1981, Claimant's Exhibit 5; Director's Exhibit 24, and thus predated the qualifying pulmonary function study used to establish invocation of the interim presumption at Section 727.203(a)(2). Accordingly, the Board instructed the administrative law judge to reconsider the probative value of these opinions on remand. *Whitman*, BRB No. 97-0720 BLA, slip op. at 5.

[4] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. §727.203(a)(2). A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §727.203(a)(2).

On remand, the administrative law judge credited Dr. Anderson's invalidation of the June 10, 1986, qualifying pulmonary function study, and concluded that because there were no credible pulmonary function studies performed after the dates on which Drs. Anderson and Gallo examined claimant, their opinions were probative at Section 727.203(b)(3). Decision and Order on Remand at 8. Contrary to the administrative law judge's determination, however, as claimant contends, the administrative law judge failed to address, as the Board instructed, the medical opinions of Drs. Anderson and Gallo in relation to the qualifying pulmonary function study of September 9, 1986. Accordingly, the administrative law judge has failed to comply with the Board's previous remand instructions, *see generally Hall v. Director, OWCP*, 12 BLR 1-80, and we remand the claim for consideration of the probative value of the opinions of Drs. Anderson and Gallo at Section 727.203(b)(3). *Cooley*, *supra*.[5] Further, we similarly vacate the administrative law judge's decision to rely on the opinion of Dr. Getty as support for a finding of rebuttal at Section 727.203(b)(3), inasmuch as the administrative law judge again failed to address the fact that the opinion was made prior to the date of the qualifying pulmonary function study of September 9, 1986. Accordingly, we vacate the administrative law judge's finding of rebuttal at Section 727.203(b)(3) and remand the claim for further consideration at that subsection.[6]

[5] Employer, in its response brief, asserts that the pulmonary function study of September 9, 1986, could not support a finding of invocation at Section 727.203(a)(2) as a matter of law based on the same rationale given by Dr. Anderson for invalidating the June 10, 1986 study and because it lacked the required statement of cooperation. Credibility determinations are outside our scope of review, however, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989), and we thus decline employer's request to engage in this fact-finding. Nothing in our opinion, however, precludes the administrative law judge from making a credibility assessment of the September 9, 1986 pulmonary function study, however. *See generally Director, OWCP v. Siwiec*, 894 F.2d 635, 13 BLR 2-259 (3d Cir. 1990); *Director, OWCP v. Mangifest*, 826 F.2d 1318, 10 BLR 2-220 (3d Cir. 1987); *Winchester v. Director, OWCP*, 9 BLR 1-177 (1986).

[6] We reject, however, claimant's assertion that, on its face, Dr. Getty's opinion could not support a finding of total disability based on the earlier holding of the Board. When this case was before the Board for a second time, we held that Dr. Getty's opinion was insufficient as a matter of law to support a finding of rebuttal at Section 727.203(b)(3). *Whitman v. Peabody Coal Co.*, BRB No. 90-0217 BLA, slip op. at 3 n.3 (Mar. 30, 1993). Subsequently, when this case was most recently before the Board, we held that our previous determination was in error and that Dr. Getty's opinion that claimant's inability to work was due to heart disease and that he had no pulmonary dysfunction, was sufficient, if credited, to support a finding of rebuttal at Section 727.203(b)(3). *Whitman v. Peabody Coal Co.*, BRB No. 97-0720 BLA (Mar. 5, 1998).

For the same reasons, we also vacate the administrative law judge's determination that claimant has failed to establish entitlement at Part 718. The Sixth Circuit has held that, pursuant to Section 718.204(b), a claimant must establish that his totally disabling respiratory impairment was due, at least in part, to pneumoconiosis. *See Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989); *see also Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). In finding that claimant failed to establish total disability due to pneumoconiosis pursuant to Section 718.204(b), the administrative law judge accorded greatest weight to Dr. Getty's conclusions. As we discussed, *supra*, however, inasmuch as the administrative law judge's determination regarding the opinion of Dr. Getty failed to account fully for the documentation of record, *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Arnold v. Consolidation Coal Co.*, 7 BLR 1-648 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979), the administrative law judge must, if reached on remand, consider Section 718.204(b) in conjunction with the entirety of relevant evidence of record.

Employer, in its response brief, challenges the administrative law judge's finding that the x-ray evidence was sufficient to establish invocation of the interim presumption at Section 727.203(a)(1).[7] Employer contends that the administrative law judge erroneously relied on the positive x-ray interpretation of Dr. Traughber as support for his conclusion that the evidence supported a finding of invocation at Section 727.203(a)(1). In concluding that the x-ray evidence of record established invocation of the interim presumption at Section 727.203(a)(1), the administrative law judge accorded greatest weight to the positive interpretation of Dr. Traughber, Claimant's Exhibit 4, as it was the only interpretation of the most recent x-ray of record. Decision and Order on Remand at 4-5. A review of the x-ray evidence of record, however, demonstrates that the administrative law judge erred in characterizing the x-ray interpreted by Dr. Traughber as being taken on July 16, 1986. The x-ray film was actually taken on June 20, 1986 and read by Dr. Traughber on July 16, 1986. Claimant's Exhibit 4. Thus, the administrative law judge erred in determining the recency of this x-ray by relying on the date of the reading rather than on the date the x-ray was taken. *See Wheatley v. Peabody Coal Co.*, 6 BLR 1-1214 (1984). In addition, the June 20, 1986 x-ray was read by two other physicians. Claimant's Exhibit 1; Employer's Exhibit 3. We, therefore, vacate the administrative law judge's finding that the interim presumption was invoked pursuant to Section 727.203(a)(1), and remand the case for the administrative law

[7] Inasmuch as we vacate the administrative law judge's finding that rebuttal was established pursuant to Section 727.203(b)(3) and that entitlement was not established pursuant to Part 718, we address arguments submitted by employer in its response brief, which are in support of the denial below. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983).

judge to consider all the relevant x-ray evidence of record. *See Tackett*, *supra*; *Arnold, supra*; *Branham*, *supra*.

Employer next contends that the administrative law judge erred in failing to find that rebuttal established pursuant to Section 727.203(b)(4), inasmuch as the administrative law judge failed to correctly address the entirety of x-ray evidence and improperly based his findings regarding the relevant medical opinions on a mere "counting of heads" without any further analysis.

In order to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4), employer must establish the absence of pneumoconiosis as defined by the Act, *see Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991); *aff'g sub nom., Bethenergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989); *Pavesi v. Director, OWCP*, 758 F.2d 956, 7 BLR 2-184 (3d Cir. 1985); *Dockins v. McWane Coal Co.*, 9 BLR 1-5 (1986). A finding of invocation at Section 727.203(a)(1), however, precludes a finding of rebuttal at subsection (b)(4). *See Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 145 n.16, 11 BLR 2-1, 2-6 n.16 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988). In the instant case, the administrative law judge did not rely on his finding of invocation at subsection (a)(1) to preclude a finding of rebuttal at subsection (b)(4), but instead made a specific finding that employer failed to affirmatively establish rebuttal under this subsection. Decision and Order on Remand at 8. Inasmuch as we have held that the administrative law judge's analysis of the x-ray evidence of record is flawed, however, *see* discussion, *supra*, we vacate the administrative law judge's determination that the evidence of record did not establish rebuttal at Section 727.203(b)(4) and remand the claim for further consideration of the issue if reached. *See Dockins*, *supra*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits Upon Remand From the Benefits Review Board is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge