BRB No. 03-0305 BLA

JEARLDINE WHITED on behalf of JAY L. WHITED Claimant-Respondent v. VANDYKE & VANDYKE COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/18/2003 DECISION and ORDER

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

Jearldine Whited, Swords Creek, Virginia, *pro se*.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Rita Roppolo (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Third Remand – Awarding Benefits of Clement J. Kichuk on a miner's 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).[1] This case has been before the Board previously.[2] The procedural history of this case is set forth in the Board's Decision and Order dated April 13, 2000, *see Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 99-0164 BLA (Apr. 13, 2000)(unpub.), and the Board's Decision and Order on Reconsideration dated Nov. 14, 2000, *see Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 99-0164 BLA (Nov. 14, 2000)(Decision and Order on Recon.)(unpub.). In the Decision and Order on Reconsideration issued on November 14, 2000, the Board reaffirmed its holding that Judge McCarthy did not provide a valid rationale for excluding the medical reports of Drs. Garzon and Hippensteel and the Board instructed the administrative law judge to weigh these opinions on remand. However, the Board vacated its earlier holding and affirmed Judge McCarthy's finding that Dr. Endres-Bercher's report was submitted late and was, therefore, rationally excluded. In addition, the Board held that because the previously excluded medical reports of Drs. Garzon and Hippensteel were submitted marginally before twenty days prior to the 1988 hearing, claimant could request that the administrative law judge reopen the record to permit her to submit evidence responsive to this evidence. *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 99-0164 BLA (Nov. 14, 2000)(Decision and Order on Recon.)(unpub.).

Employer then filed a Motion for Reconsideration with the Board. The Board reaffirmed its holding regarding Dr. Endres-Bercher's report. The Board noted that, contrary to employer's contention, it did not "order" the administrative

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[1] 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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The miner filed his initial application for benefits on August 4, 1976, which was denied by the district director on March 21, 1980. Director's Exhibits 1, 19. No further action was taken on this claim. The miner died on January 30, 1991. His widow is pursuing his claim. *See Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 92-1809 BLA, slip op. at 1, n.1 (Dec. 30, 1993)(unpub.).

law judge to reopen the record, rather, it indicated that claimant could request that the administrative law judge reopen the record to give her the chance to submit responsive evidence. The Board also declined employer's request to require the administrative law judge to reopen the record for it to submit new evidence, however, the Board indicated that employer could request the administrative law judge to reopen the record on remand. *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 99-0164 BLA (Aug. 22, 2001)(Decision and Order on Motion for Recon.)(unpub.).

On remand, the administrative law judge found the x-ray evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) (2000), and found the evidence insufficient to establish rebuttal of this presumption pursuant to 20 C.F.R. §727.203(b)(3) (2000).[3] The administrative law judge also declined to consider employer's transfer request. Consequently, the administrative law judge awarded benefits.

On appeal, employer asserts that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) (2000), and in finding that rebuttal is not established pursuant to Section 727.203(b)(3) (2000). Employer also contends that the administrative law judge erred in denying its request to transfer liability for the payment of benefits to the Black Lung Disability Trust Fund (Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), responds only to employer's transfer argument, urging the Board to reject employer's arguments regarding the transfer of liability. Claimant has not submitted a brief in this appeal. Employer has filed a reply brief, arguing that transfer of liability to the Trust Fund is appropriate.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

As an initial matter, we address employer's challenge to the administrative law judge's finding that the evidence is sufficient to establish invocation of the

[3] The Board previously held that rebuttal of the interim presumption was not available under 20 C.F.R. §727.203(b)(1), (b)(2) or (b)(4) (2000). *Whited v. Vandyke & Vandyke Coal Co.*, BRB No. 92-1809 BLA, slip op. at 4-5 (Dec. 30, 1993)(unpub.).

interim presumption pursuant to Section 727.203(a)(1) (2000). The record contains one interpretation of each of three chest x-rays. The x-ray dated March 14, 1977 was interpreted as negative for pneumoconiosis by Dr. Bassham, who is a B-reader, according to Dr. Buddington. Director's Exhibits 10, 13; Employer's Exhibit 3. Dr. Basssali, who is both a Board-certified radiologist and a B-reader, read the December 5, 1984 x-ray as positive for pneumoconiosis. Director's Exhibit 22; Employer's Exhibit 3. Dr. Sullivan, whose credentials are not contained in the record, read an x-ray dated November 11, 1987. Dr. Sullivan noted two questionable abnormalities, but he did not provide any diagnosis regarding the existence of pneumoconiosis. Employer's Exhibits 2,3.

Employer asserts that the administrative law judge's analysis is flawed, urging that a physician's opinion that an x-ray does not indicate the existence of pneumoconiosis "casts doubt" on an earlier contrary x-ray interpretation.

The administrative law judge stated:

> I find it reasonable to give greatest weight to Dr. Bassali, the most qualified physician to render an x-ray interpretation. I herein adopt my previous reasoning on this issue and add that, after reviewing the evidence once again, I find that Dr. Sullivan's reading is also entitled to less weight for the reason that there is no indication in his report that he read the x-ray for the presence or absence of pneumoconiosis, and no indication that he compared it to the standard films for the classification of pneumoconiosis. Dr. Sullivan's reading was not "completely negative"; in fact, he found two questionable abnormalities.
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> …My analysis of the x-ray evidence is that the Miner developed pneumoconiosis, which was apparent on Dr. Bassali's reading of the 1984 x-ray. Dr. Sullivan's reading does not show that the pneumoconiosis disappeared; he has neither the qualifications nor the reading to case doubt on Dr. Bassali's finding of pneumoconiosis.

Decision and Order at 6.

We affirm the administrative law judge's weighing of the x-ray evidence and hold that the administrative law judge, who is charged with weighing the medical evidence, properly accorded greatest weight to the interpretation of Dr. Bassali, based on his superior qualifications. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985).

Inasmuch as the administrative law judge has provided a valid basis for his weighing of the evidence pursuant to Section 727.203(a)(1) (2000), we need not further address the administrative law judge's findings at this subsection.[4] *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

We now consider employer's challenge to the administrative law judge's finding pursuant to Section 727.203(b)(3) (2000). Section 727.203(b)(3) (2000) provides that the presumption "shall be rebutted if…the evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment." 20 C.F.R. §727.203(b)(3) (2000). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that in order to establish rebuttal pursuant to Section 727.203(b)(3) (2000):

> [A]n employer must "rule out the causal relationship between the miner's total disability and his coal mine employment." *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123 (4th Cir. 1984). An employer can accomplish this task with evidence that establishes either that the miner has no respiratory or pulmonary impairment of any kind, *see Grigg*, 28 F.3d at 419, or that such impairment was not caused in whole or in part by his coal mine employment, *see Lane Hollow*, 137 F.3d at 804.

Consolidation Coal Co. v. Borda, 171 F.3d 175, 184-185, 21 BLR 2-545, 2-562 (4th Cir. 1999).

In finding the evidence insufficient to establish rebuttal pursuant to Section 727.203(b)(3) (2000), the administrative law judge found the opinions of Drs. Buddington, Garzon and Hippensteel, individually and taken together, insufficient to satisfy employer's burden at Section 727.203(b)(3) (2000). The administrative law judge noted that all of the physicians found some impairment. The administrative law judge then considered each physician's opinion separately.

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[4] We note that the administrative law judge did not address Dr. Stewart's x-ray interpretation which was submitted as a part of Dr. Endres-Bercher's report. Since the Board affirmed the administrative law judge's decision to exclude the medical report of Dr. Endres-Bercher, as having been untimely submitted, *see Whited*, BRB No. 99-0164 (Nov. 14, 2000)(Decision and Order on Recon.), slip op. at 5; *Whited*, BRB No. 99-0164 (Aug. 22, 2001)(Decision and Order on Motion for Recon.), slip op. at 3-4, this interpretation is a part of the excluded evidence. Therefore the administrative law judge did not err by not addressing this x-ray interpretation.

The administrative law judge found that Dr. Buddington's opinion[5] does not satisfy either of the criteria of *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and is insufficient to establish rebuttal pursuant to Section 727.203(b)(3) (2000), as the physician found a slight impairment from claimant's pulmonary disease, and the physician did not address the etiology of claimant's impairment to adequately "rule out" a causal connection between claimant's disability and his coal mine employment. Decision and Order at 7-8. Employer maintains that the administrative law judge misconstrued Dr. Buddington's opinion when he found it insufficient to establish rebuttal. Specifically, employer asserts that Dr. Buddington noted a slight respiratory defect that would not prevent the miner from returning to work, which, employer contends, proves that the miner did not have a respiratory impairment for work. Therefore, employer argues, the physician had no reason to address the etiology of the impairment.

We hold that the administrative law judge did not misconstrue Dr. Buddington's opinion and we affirm the administrative law judge's finding that Dr. Buddington's opinion does not satisfy employer's burden pursuant to Section 727.203(b)(3) (2000). This opinion does not establish that the miner had no respiratory or pulmonary impairment, nor does it establish that any such impairment was not due, in whole or in part, to the miner's coal mine employment. *See* Director's Exhibit 10; Decision and Order at 7-8; *Borda*, 171 F.3d 175, 21 BLR 2-545; *Lockhart*, 137 F.3d 799, 21 BLR 2-302; *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984).

[5] Dr. Buddington examined the miner in 1977 and diagnosed a slight chronic pulmonary disease and a "slight chronic respiratory impairment." Director's Exhibit 10. Dr. Buddington opined that the miner's impairment would not prevent him from performing his usual coal mine employment of loading coal. Director's Exhibit 10.

The administrative law judge found that Dr. Garzon's opinion[6] contains "similar flaws [to Dr. Buddington's opinion] with regard to (b)(3) rebuttal." Decision and Order at 8. The administrative law judge stated that although Dr. Garzon found no "significant" pulmonary impairment, he provided no opinion regarding the cause of this impairment, however small. In addition, the administrative law judge noted that Dr. Garzon's opinion does not take into account legal pneumoconiosis. Decision and Order at 8. Employer asserts that the administrative law judge erred in discounting Dr. Garzon's opinion for not considering the possibility of legal pneumoconiosis. Employer also contends that Dr. Garzon's opinion, that the miner had no respiratory impairment for work, establishes rebuttal.

We affirm the administrative law judge's finding that Dr. Garzon's opinion is not sufficient to establish rebuttal at Section 727.203(b)(3) (2000). As the administrative law judge found, Dr. Garzon diagnosed no "significant" pulmonary impairment, Employer's Exhibits 1, 3, which does not constitute an opinion of no respiratory or pulmonary impairment. In addition, we hold that Dr. Garzon's opinion does not affirmatively "rule out" the connection between the miner's impairment and his coal mine employment, as it is too qualified to satisfy the strict standard set out in *Massey*. *Borda*, 171 F.3d 175, 21 BLR 2-545; *Lockhart*, 137 F.3d 799, 21 BLR 2-302; *Massey*, 736 F.2d 120, 7 BLR 2-72. Consequently, we further hold that any error by the administrative law judge in noting that Dr. Garzon did not address legal pneumoconiosis, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

The administrative law judge found that Dr. Hippensteel diagnosed no significant impairment.[7] The administrative law judge noted that the blood gas

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[6] In his 1987 report, Dr. Garzon stated that claimant has no significant pulmonary impairment and opined that claimant has no medical evidence of a totally disabling chronic respiratory impairment arising out of his coal mine employment. Employer's Exhibit 1. In a 1988 report, Dr. Garzon stated that claimant has no evidence of significant pulmonary impairment, and he opined that there is no medical evidence of a totally disabling chronic respiratory impairment arising out of his coal mine employment. Based on his review of claimant's records, Dr. Garzon opined that there is no medical evidence of a totally disabling chronic respiratory impairment arising out of coal mine employment. Dr. Garzon stated that there is not evidence of a "pulmonary disability significant enough to keep [claimant] from performing his regular coal mine employment." Employer's Exhibit 3.

[7] In a 1988 opinion, Dr. Hippensteel opined that claimant does not have a ventilatory impairment from his coal mine employment or other causes, and

test showed some impairment, but that Dr. Hippensteel did not address the cause of the impairment. Decision and Order at 8. Employer asserts that Dr. Hippensteel's opinion establishes rebuttal pursuant to Section 727.203(b)(3) (2000), as the physician explains the miner's impairment and attributes it to sources other than coal mine employment.

We affirm the administrative law judge's finding that Dr. Hippensteel's opinion does not support employer's burden of establishing rebuttal pursuant to Section 727.203(b)(3) (2000). The administrative law judge permissibly found that this opinion is insufficient to "rule out" the connection between the miner's total disability and his coal mine employment. In addition, Dr. Hippensteel's opinion does not establish that the miner does not have any respiratory or pulmonary impairment. *Borda*, 171 F.3d 175, 21 BLR 2-545; *Lockhart*, 137 F.3d 799, 21 BLR 2-302; *Massey*, 736 F.2d 120, 7 BLR 2-72.

Employer also asserts that in evaluating the evidence at Section 727.203(b)(3) (2000), the administrative law judge erred by not considering the results of the objective tests and the miner's testimony concerning his respiratory conditions. We disagree. A physician must interpret the results of the objective test and provide an opinion as to whether the test demonstrates the absence of a respiratory or pulmonary impairment. The administrative law judge is not qualified to make such a determination. *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987). Consequently, we reject employer's assertion and hold that there was no error by the administrative law judge in this regard. Similarly, we reject employer's assertion that the administrative law judge erred by failing to consider the miner's testimony concerning the reasons for his retirement. This testimony is not probative of the issue of rebuttal at Section 727.203(b)(3) (2000). *See generally Madden v. Gopher Mining Co.*, 21 BLR 1-122 (1999); *Tucker v. Director, OWCP*, 10 BLR 1-35, (1987).

Employer also maintains that the holdings of the United States Court of Appeals for the Fourth Circuit are in accord with the holdings of the United States Court of Appeals for the Seventh Circuit in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995), and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994), where the Seventh Circuit court held that rebuttal was established pursuant to Section 727.203(b)(3) (2000), when the miner was totally disabled by a stroke

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concluded that claimant does not have a significant impairment from any pulmonary problems. Dr. Hippensteel also stated that the miner was prevented from working by his cardiac problems which are not related to coal dust exposure. Employer's Exhibit 3.

that was not caused by coal mine employment, and the evidence did not establish a connection between the miner's stroke and his respiratory condition. Employer asserts that these holdings are in accord with the Fourth Circuit decisions in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 1195, 19 BLR 2-304, 2-318-19 (4th Cir. 1995). We disagree. In *Bateman v. Eastern Associated Coal Corp.*, 22 BLR 1-255 (2003), the Board rejected a similar argument. In addition, both *Hicks* and *Ballard* are cases which were considered under the regulations contained in 20 C.F.R. Part 718, where the burden of proof is on claimant to establish each element of entitlement, unlike the instant case which is considered under Section 727.203 (2000), where once claimant establishes invocation of the interim presumption of total disability due to pneumoconiosis arising our of coal mine employment, the burden of proof shifts to the employer to rebut this presumption. *See* 20 C.F.R. §727.203(b) (2000); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Trent*, 11 BLR 1-26; *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Employer also challenges the administrative law judge's "presumption of progressivity" of pneumoconiosis. Employer's Brief at 13. In view of our holding that the medical opinions are insufficient to support employer's burden at Section 727.203(b)(3) (2000), we hold that any error by the administrative law judge in considering the progressivity of pneumoconiosis, is harmless. *See Larioni*, 6 BLR 1-1276. Consequently, we affirm the administrative law judge's finding that the evidence is insufficient to satisfy the rigorous standard set out in *Massey* and we affirm the administrative law judge's finding that employer has not established rebuttal pursuant to Section 727.203(b)(3) (2000).

We now turn to employer's assertion that the administrative law judge erred by denying its request to transfer liability for the payment of benefits to the Trust Fund. Employer maintains that the administrative law judge minimized its argument concerning transfer of liability, and employer challenges the administrative law judge's finding that due process rights may be waived. Employer contends that the delays in the processing of this case, in addition to the initial error in considering the second claim as a duplicate claim, rather than a request for modification, resulted in a denial of its right to due process. The Director maintains that due process rights may be waived, and contends that employer has not explained what "developing circumstances" prevented it from raising the issue earlier in the proceedings. Employer has filed a reply brief wherein it restates it position and challenges the Director's arguments.

The administrative law judge provided only a short discussion concerning the transfer of liability to the Trust Fund, stating:

> Employer argued that liability should transfer to the Black Lung Disability Trust Fund due to the OWCP's initial misprocessing of this claim as a duplicate claim. This is an issue that was raised for the first time in the Employer's papers before the Board on the latest appeal. The Director has not consented to the addition of this issue at this late date. Therefore, I will not consider it.

Decision and Order at 9.

After reviewing the arguments raised on this issue and the procedural history of this case, we hold that the administrative law judge properly chose not to consider this issue. By failing to challenge its liability for the payment of benefits when it appealed from the administrative law judge's 1998 award of benefits, employer waived its right to do so. *See Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 36, n.3, 14 BLR 2-68, 2-71, n.3 (4th Cir. 1990); *Bernardo v. Director, OWCP*, 9 BLR 1-97 (1986). In addition, we reject employer's assertion that its ability to defend itself was compromised because it was not informed that it was defending a 20 C.F.R. Part 727 (2000) claim. Employer could have raised this assertion once the Board determined, in the 1991 Decision and Order, that Judge McCarthy had erred in considering this claim under the regulations contained in 20 C.F.R. Part 718. Employer did not. We, therefore, hold that the administrative law judge permissibly declined to consider employer's assertion that liability should transfer to the Trust Fund, as employer did not previously raise this issue.

Accordingly, the administrative law judge's Decision and Order on Third Remand – Awarding Benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge