BRB No. 98-1234 BLA

RICHARD P. GREGORY Claimant-Petitioner v. EASTERN ASSOCIATED COAL CORPORATION Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED: DECISION AND ORDER

Party-in-Interest

Appeal of the Decision and Order on Remand - Denying Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Fairmont, West Virginia, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand - Denying Benefits (83-BLA-0691) of Administrative Law Judge Rudolf L. Jansen 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 fifth time. As the Board stated in its most recent decision, this case has a lengthy procedural history.[1] The Board previously affirmed the administrative

[1] Claimant originally filed for benefits on May 9, 1977. Director's Exhibit 1. In a Decision and Order dated April 16, 1993, Administrative Law Judge Peter McC. Giesey found that claimant established in excess of twenty years coal mine employment and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) - (a)(3). However, the administrative law judge also found that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Benefits were accordingly denied and claimant appealed. Citing *Bethlehem Mines Corp. v. Massey,* 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), the Board determined that the administrative law judge applied an incorrect standard at Section 727.203(b)(3) and failed to properly consider rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and, thus, remanded the case to the administrative law judge for further consideration. *Gregory v. Eastern Associated Coal Corp.,* BRB Nos. 86-1136 BLA and 86-1136 BLA-A (Feb. 23, 1988)(unpub.).

On remand, Judge Giesey found that employer failed to establish rebuttal based, in part, on claimant's totally disabling non-respiratory impairment that arose out of coal mine employment. Benefits were accordingly awarded and employer appealed. The Board agreed with employer that claimant's totally disabling non-respiratory impairment was not the relevant issue at Section 727.203(b)(3). Again citing *Massey,* the Board remanded the case to the administrative law judge to determine whether employer had ruled out any causal relationship between the miner's totally disabling respiratory or pulmonary impairment and his coal mine employment. *Gregory v. Eastern Associated Coal Corp*., BRB No. 88-2828 BLA (Jan. 31, 1990)(unpub.). The Board subsequently granted employer's Motion for Reconsideration and instructed the administrative law judge to also reconsider invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a). *Gregory v. Eastern Associated Coal Corp.,* BRB No.88-2828 BLA (Aug. 12, 1992) (unpub. Order on Motion for Recon.).

On remand, the case was assigned to Administrative Law Judge Rudolf L. Jansen who found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(2). The administrative law judge also found that employer established rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(3). Benefits were accordingly denied. Pursuant to claimant's appeal, the Board initially affirmed the administrative law judge's finding that invocation of the interim presumption was established pursuant to Section

law judge's finding that claimant invoked the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(2), *Gregory v. Eastern Associated Coal Corp.,* BRB No. 94-0395 BLA (May 30, 1995)(unpub.), *aff'd on recon*., *Gregory v. Eastern Associated Coal Corp*., BRB No. 94-0395 BLA (Sept. 7, 1995)(unpub.), and that employer failed to rebut the interim presumption pursuant to 20 C.F.R. §727.203(b)(1) and (b)(2), *see Gregory v. Eastern Associated Coal Corp.*, BRB No. 88-2828 BLA (Jan. 31, 1990)(unpub.). In its two most recent decisions, the Board remanded the case for the administrative law judge to consider whether Dr. Lapp's medical opinion was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). In *Gregory*, BRB No. 94-0395 BLA, *supra*, the Board remanded the case to the administrative law judge to determine whether the medical opinion of Dr. Lapp was sufficient to establish subsection (b)(3) rebuttal, instructing the administrative law judge to first determine whether Dr. Lapp was aware of the specifics of claimant's usual coal mine employment. *Id*. On remand, the administrative law judge awarded benefits, finding that Dr. Lapp was unaware of the exertional requirements of claimant's usual coal mine employment and,

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727.203(a)(1) and (a)(2), but vacated the administrative law judge's denial of benefits and remanded the case for further consideration of the medical opinion of Dr. Lapp. In particular, the Board held that the medical opinion of Dr. Abrons was insufficient, as a matter of law, to establish rebuttal pursuant to Section 727.203(b)(3). However, the Board vacated the administrative law judge's weighing of Dr. Lapp's opinion and remanded the case to the administrative law judge to determine whether Dr. Lapp was aware of the exertional requirements of claimant's usual coal mine employment in weighing whether this opinion was sufficient to establish subsection (b)(3) rebuttal. *Gregory v. Eastern Associated Coal Corp.,* BRB No. 94-0395 BLA (May 30, 1995)(unpub.), *aff'd on recon*., *Gregory v. Eastern Associated Coal Corp*., BRB No. 94-0395 BLA (Sept. 7, 1995)(unpub.).

On remand, the administrative law judge determined that Dr. Lapp's opinion was insufficient to establish rebuttal pursuant to Section 727.203(b)(3), finding that the physician was unaware of the exertional requirements of claimant's usual coal mine employment. On appeal, noting the erroneous instructions in its previous decision concerning Dr. Lapp's opinion, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the opinion of Dr. Lapp to determine whether this opinion was sufficient to rule out any causal relationship between claimant's total disability and his coal mine employment. *Gregory v. Eastern Associated Coal Corp*., BRB No. 96-1381 BLA (Sept. 23, 1997)(unpub.).

therefore, the opinion was insufficient to establish subsection (b)(3) rebuttal. However, acknowledging its prior erroneous instructions concerning Dr. Lapp's opinion, the Board vacated the administrative law judge's award of benefits and remanded the case for further consideration of the opinion of Dr. Lapp and a determination whether this opinion is sufficient to rule out any causal relationship between claimant's total disability and his coal mine employment. *Gregory v. Eastern Associated Coal Corp*., BRB No. 96-1381 BLA (Sept. 23, 1997)(unpub.).

On remand, after noting the lengthy procedural history of this claim and the Board's remand instructions, the administrative law judge found that the medical opinion of Dr. Lapp effectively ruled out any possibility that claimant's pneumoconiosis was a contributing cause of his total disability and, therefore, the administrative law judge found that this opinion was sufficient to establish rebuttal pursuant to Section 727.203(b)(3). Accordingly, the administrative law judge denied benefits.

In challenging the administrative law judge's denial of benefits, claimant contends that the administrative law judge erred in finding that the medical opinion of Dr. Lapp was reasoned and documented and, thus, was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). In response, employer urges affirmance of the administrative law judge's denial of benefits as supported by substantial evidence. In addition, employer again raises the issue of invocation of the interim presumption, arguing that the administrative law judge improperly found the x-ray and pulmonary function study evidence sufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) and (a)(2). The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief 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 applicable 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).

In order to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, has held that the party opposing entitlement must rule out any connection between the total disability and coal mine employment. *Bethlehem Mines Corp v. Massey*, 736 F.2d. 120, 7 BLR 2-72 (4th Cir. 1984); *see also Phillips v. Jewell Ridge Coal Co.*, 825 F.2d. 408, 10 BLR 2-160 (4th Cir. 1987); *see generally Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16

(4th Cir. 1993).

After consideration of the administrative law judge's Decision and Order, the issues raised on appeal and the relevant evidence of record, we conclude that substantial evidence supports the administrative law judge's finding that the medical opinion of Dr. Lapp is sufficient to establish rebuttal pursuant to Section 727.203(b)(3). Within a reasonable exercise of his discretion, the administrative law judge found that Dr. Lapp's opinion was sufficient to rule out pneumoconiosis as a cause of claimant's total disability inasmuch as he determined that the opinion rules out any causal nexus between claimant's total disability and his pneumoconiosis and coal mine employment.[2] Decision and Order at 4; Director's

[2] Dr. Lapp opined that,

> His simple coal workers' pneumoconiosis is a consequence of his underground dust exposure and is occupationally related. His chronic bronchitis is likely a combination of cigarette smoking and dust exposure. He does not have obstructive airways disease as a

Exhibit 42; *see Massey, supra*; *see also Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998); *Lambert v. Itmann Coal Co.*, 70 F.3d 112, 20 BLR 2-119 (4th Cir. 1995); *Thorn, supra*.

Furthermore, we reject claimant's contention that the administrative law judge did not take into consideration whether Dr. Lapp's opinion was compromised by the fact that the physician did not consider the later blood gas studies of record and, thus, that the opinion was not reasoned and documented. The Board in its

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> consequence of his chronic bronchitis or simple pneumoconiosis. He does have a pure minimal restriction on spirometry which I believe is a consequence of his central obesity and chronic back pain. In the absence of a diffusion impairment or impairment of oxygen transfer by blood gases, I do not believe this minimal restriction is a consequence of simple pneumoconiosis or other intrinsic disease of the lungs that would interfere with gas exchange. The minimal restriction could interfere with very heavy physical exertion of competitive sports but would not be expected to disable this man from performing his usual job as a coal cutting machine operator. He is disabled, however, by his chronic low back pain.

Director's Exhibit 42.

1995 decision, BRB No. 94-0395 BLA, rejected these identical contentions holding that the administrative law judge reasonably concluded that the opinion of Dr. Lapp was documented and well reasoned. *Gregory*, BRB No. 94-0395 BLA, slip op. at 4; *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *see also Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting). Inasmuch as the administrative law judge again states that this opinion is well documented and well reasoned, after noting the evidence upon which it is based, we affirm his finding as within a reasonable exercise of the administrative law judge's discretion. Decision and Order at 4; *see Lafferty, supra; Fields, supra*; *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see also Gillen, supra; Cochran, supra; Williams, supra*.

Moreover, contrary to claimant's contention, the administrative law judge's findings are not contrary to the holding of the Fourth Circuit court in *Thorn* and *Cox v. Shannon-Pocahontas Mining Company*, 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993), inasmuch as the administrative law judge did not rely on Dr. Lapp's statement that claimant was able to perform his usual coal mine employment. Rather, that statement was one portion of an overall opinion wherein Dr. Lapp also stated that claimant's minimal pulmonary restriction was not due to his simple pneumoconiosis. Decision and Order at 4; Director's Exhibit 42. Inasmuch as the administrative law judge reasonably considered the entire opinion of Dr. Lapp, that claimant's pulmonary restriction was not due to his simple pneumoconiosis, we affirm his finding that this opinion is sufficient to rule out any causal nexus between claimant's total disability and his pneumoconiosis pursuant to Section 727.203(b)(3). Decision and Order at 3-4; Director's Exhibit 42; 20 C.F.R. §727.203(b)(3); *see Massey, supra; see also Lockhart, supra; Thorn, supra*; *Cox, supra*. Consequently, we affirm the administrative law judge's denial of benefits.[3]

[3] In this case, arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, claimant is entitled to have his claim also considered pursuant to 20 C.F.R. Part 410, Subpart D, *see Muncy v. Wolfe Creek*

Finally, in its response brief, employer again challenges the administrative law judge's finding that the x-ray and pulmonary function study evidence was insufficient to establish invocation of the interim presumption pursuant to Section 727.203(a)(1) and (a)(2), arguing that the administrative law judge erred in relying on the most recent x-ray evidence of record and also erred in his weighing of the pulmonary function study evidence. In its two most recent decisions, the Board addressed and rejected this argument, *see Gregory*, BRB No. 94-0395 BLA, *supra*; *Gregory*, BRB No. 96-1381 BLA, *supra*, and the law of the case doctrine governs. *See Gillen, supra*; *Cochran, supra*; *see also Williams, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

Collieries Coal Co., Inc., 3 BLR 1-627 (1981). However, a finding that the interim presumption set forth at Section 727.203 is rebutted pursuant to subsection (b)(3), precludes entitlement pursuant to Part 410, Subpart D, *see Pastva v. The Youghiogheny & Ohio Coal Co.*, 7 BLR 1-829 (1985); *Spradlin v. Island Creek Coal Co.*, 6 BLR 1-716 (1983).

MALCOLM D. NELSON, Acting
Administrative Appeals Judge