BRB No. 03-0313 BLA

MARY F. RIFFLE (Widow of HERBERT E. RIFFLE)	)	
Claimant-Petitioner	)	
v.	)	
CARBON FUEL COMPANY	)	DATE ISSUED: 02/27/2004
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Gregory W. Evers (Franklin W. Kern, L.C.), Charleston, West Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Claimant[1] appeals the Decision and Order On Remand (89-BLA-1959) of Administrative Law Judge John C. Holmes denying benefits on a miner's and a

[1] Claimant, Mary F. Riffle, is the widow of the miner Herbert E. Riffle, who died on October 20, 1988. The death certificate lists the miner's cause of death as cardiopulmonary arrest due to left cerebral artery infarction due to small cell carcinoma of the lung. Director's Exhibit 72. At the time of his death, the miner's claim, filed November 17, 1979, Director's Exhibit 1, was still pending. Subsequent to the miner's

survivor'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).[2] This case is before the Board for a fifth time.[3] In the Board's most recent decision, issued on

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death, claimant filed her survivor's claim, Director's Exhibit 72, which was joined with the miner's claim for adjudication purposes.

[2] 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. The regulations at 20 C.F.R. §727.203, however, were not affected by the revised regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

[3] In the first Decision and Order issued in this case, Administrative Law Judge G. Marvin Bober found the evidence sufficient to establish invocation of the interim presumption pursuant 20 C.F.R §727.203(a)(1) and insufficient to establish rebuttal of the presumption. Accordingly, benefits were awarded on the miner's claim. Benefits were denied on the survivor's claim, however, since Judge Bober found the evidence insufficient to establish that the miner's death was due to pneumoconiosis. Subsequent to an appeal by employer and a cross-appeal by claimant, the Board vacated Judge Bober's finding of entitlement on the miner's claim and remanded the case for further consideration of rebuttal at 20 C.F.R. §727.203(b)(3). *Riffle v. Carbon Fuel Co.*, BRB No. 92-2212 and 92-2212 BLA-A (Jul. 28, 1994)(unpub.). The Board further instructed Judge Bober that if, on remand, benefits were awarded on the miner's claim, claimant would be entitled to derivative benefits. *Id.* On remand, claimant sought to reopen the record, a request which was denied. Administrative Law Judge John C. Holmes found the evidence insufficient to establish rebuttal and thus awarded benefits on both the miner's and survivor's claims. Employer appealed and the Board vacated the award of benefits. *Riffle v. Carbon Fuel Co.*, BRB No. 96-0698 BLA (Apr. 15, 1997)(unpub.). The Board held that the administrative law judge misapplied the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), and failed to consider all relevant evidence. *Id.* Claimant sought reconsideration, which the Board denied with regard to the miner's claim. *Riffle v. Carbon Fuel Co.*, BRB No. 96-0698 BLA (Jul. 21, 1997)(unpub.)(Order on Recon.). The Board, however, instructed the administrative law judge to consider the survivor's claim pursuant to Part 718, if benefits on the miner's claim were denied. On remand, the administrative law judge ordered the record reopened on a "limited basis." The administrative law judge then found that employer failed to establish subsection (b)(3) rebuttal and affirmed the award of benefits on both the miner's and the survivor's claims. Subsequent to an appeal by employer, the Board affirmed the administrative law judge's decision to reopen the

January 31, 2001, the Board vacated Administrative Law Judge G. Marvin Bober's finding of invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(1), made in the first Decision and Order on this case, and remanded the case for the administrative law judge to reconsider the issue of invocation at Section 727.203(a)(1), and, if necessary, to determine whether invocation of the presumption was established pursuant to 20 C.F.R. §727.203(a)(2)-(4). *Riffle v. Carbon Fuel Co.*, BRB No. 00-0324 BLA (Jan 31, 2001)(unpub.), slip op. at 4. The Board also held that the administrative law judge erred in finding that the interim presumption was not rebutted pursuant to 20 C.F.R. §727.203(b)(3) and held that, if reached, on remand the administrative law judge was to reconsider rebuttal. *Riffle*, slip op. at 5. Additionally, the Board held that if the administrative law judge determined that entitlement to the interim presumption was not established in the miner's claim, he must consider entitlement in the miner's claim under 20 C.F.R. Part 410, Subpart D, as well as entitlement in the survivor's claim under 20 C.F.R. Part 718. *Riffle*, slip op. at 6.

On remand, the administrative law judge found that invocation of the interim presumption was not established pursuant to subsection (a)(1), but was established pursuant to subsection (a)(2). Decision and Order on Remand at 3-4. The administrative law judge further found that rebuttal of the presumption was established pursuant to subsection (b)(4). Decision and Order on Remand at 5. Thus, in light of his determination that the presumption was rebutted pursuant to subsection (b)(4), the administrative law judge found that entitlement to benefits in the miner's claim was precluded under Part 410, Subpart D, and that entitlement in the survivor's claim was precluded under Part 718. Decision and Order on Remand at 5-6. Accordingly, benefits were denied on both the miner's and the survivor's claims.

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record on a limited basis, but vacated the administrative law judge's finding that rebuttal was not established. *Riffle v. Carbon Fuel Co.*, BRB No. 98-1103 BLA (May 11, 1999)(unpub.). Specifically, the Board held that the administrative law judge failed to address the opinions of Drs. Fino and Kory both of which were relevant to the issue of rebuttal. The Board also held that remand of the case was necessary for clarification of the administrative law judge's reasoning regarding his accordance of little weight to the opinions of Drs. Kleinerman and Naeye. Accordingly, the Board remanded the case for further consideration of rebuttal at subsection (b)(3). *Id.* On remand, the administrative law judge found that the opinions of Drs. Fino, Kory, Naeye, and Kleinerman did not meet the subsection (b)(3) rebuttal standard enunciated in *Bethlehem Mines Corp. v. Massey*, 736 F.3d 120, 7 BLR 2-72 (4th Cir. 1984). Accordingly, benefits were again awarded on both the miner's and the survivor's claims. Subsequent to an appeal by employer, the Board again vacated the award of benefits on both the miner's and the survivor's claims. *Riffle v. Carbon Fuel Co.*, BRB No. 00-324 BLA (Jan 31, 2001).

On appeal, claimant contends that the Board's most recent remand of the case for further consideration under subsection (a)(1) violates the "law of the case" doctrine. Claimant also contends that, in any case, the administrative law judge erred in finding that the interim presumption was not invoked pursuant to subsection (a)(1). Likewise, claimant argues that the administrative law judge erred in failing to consider whether the interim presumption was invoked pursuant to subsections (a)(3) and (4). Claimant also argues that the administrative law judge erred in finding the interim presumption rebutted pursuant to subsection (b)(4). Additionally, claimant argues that the administrative law judge erred in finding that entitlement was not established under Part 410, Subpart D in the miner's claim and erred in failing to award benefits in the survivor's claim under Part 718. In response, employer urges that the Decision and Order of the administrative law judge denying benefits on both claims be affirmed. The Director, Office of Workers' Compensation Programs, (the Director) has not filed a brief in this appeal.[4]

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).

Claimant first asserts that the Board erred in vacating the initial finding by Judge Bober that the interim presumption was invoked pursuant to subsection (a)(1). Although the administrative law judge's finding of invocation at subsection (a)(2) is affirmed as unchallenged on appeal, *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983), and that finding would normally obviate the need to address any arguments concerning subsection (a)(1) invocation, 20 C.F.R. §727.203(a)(1)-(4), because a finding of subsection (a)(1) invocation would preclude a finding of subsection (b)(4) rebuttal, we will review whether the administrative law judge's finding of invocation at subsection (a)(1) was proper.

Claimant contends that the Board was bound by its earlier affirmance of Judge Bober's subsection (a)(1) finding under "the law of the case" doctrine and that the Board misapplied the holding of the United States Court of Appeals for the Fourth Circuit in *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 22 BLR 2-251 (4th Cir. 2000) to vacate the finding of subsection (a)(1) invocation. Claimant argues that *Sparks* does not constitute intervening case law and thus does not justify setting aside the finding of subsection (a)(1) invocation.

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[4] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established invocation of the interim presumption pursuant to subsection (a)(2). *See Skrack v. Island Creek Coal. Co.*, 6 BLR 1-710 (1983).

Claimant's argument is rejected. When this case was most recently before the Board, the Board, pursuant to *Sparks*, revisited Judge Bober's subsection (a)(1) finding and held that Judge Bober's decision to accord greatest weight to the opinion of Dr. Klapproth because he was the autopsy prosector could not stand. *Riffle v. Carbon Fuel Coal Co.*, BRB No. 92-2212 BLA-A (July 28, 1994)(unpub.), slip op. at 3; *see generally Lynn v. Island Creek Coal Co.*, 12 BLR 1-146 and 13 BLR 1-57 (1989)(*en banc* recon.)(McGranery, J., concurring); *Rapavi v. The Youghiogheny and Ohio Coal Co.*, 7 BLR 1-435, 1-437 (1984). In *Sparks*, the Fourth Circuit held that an administrative law judge must refrain from giving determinative weight to the opinion of an autopsy prosector solely because the autopsy prosector was the only physician with an opportunity to conduct a gross examination near the time of death. *Sparks*, 213 F.3d at 191-192, 22 BLR at 2-261. Since *Sparks* constituted the law of the Fourth Circuit at the time the Board rendered its most recent decision, the Board was not bound by its earlier decision affirming the administrative law judge's subsection (a)(1) finding. *See Hill v. Director, OWCP*, 9 BLR 1-126 (1986); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

Claimant next argues that the administrative law judge erred in concluding that the evidence of record failed to establish invocation of the presumption pursuant to subsection (a)(1). Specifically, claimant argues that the administrative law judge erroneously rejected the opinions of the autopsy prosector, Dr. Klapproth, Director's Exhibit 58; Claimant's Exhibit 12, as well as the opinions of the reviewing pathologists, Drs. Cinco, Muldong and DeLara, Director's Exhibit 67; Unnumbered Exhibits, all of whom concluded that the miner suffered from pneumoconiosis. Claimant argues that the administrative law judge erred in finding that those opinions were equivocal and/or were not well-reasoned as the physicians provided credible opinions supportive of a finding of chronic dust disease of the lungs, *i.e.*, legal pneumoconiosis. Claimant's Brief at 35-38.

In considering the autopsy evidence, the administrative law judge found that while Dr. Klapproth, the autopsy prosector, diagnosed the existence of anthracosis and progressive massive fibrosis, the physician failed to "unequivocally link" the diagnosis of anthracosis to the miner's coal mine employment. Decision and Order on Remand at 3-4. The administrative law judge also found that Dr. Klapproth's autopsy report failed to account for claimant's history of lung cancer, chemotherapy or radiation treatment. Similarly, the administrative law judge found that Dr. Cinco's review of autopsy slides and diagnosis of a condition "compatible" with pneumoconiosis was not a credible diagnosis of the disease as that physician failed to account for cigarette smoking, lung cancer, or lung cancer treatment in his report. Decision and Order on Remand at 4. Moreover, the administrative law judge concluded that the autopsy report of Dr. DeLara was not well-reasoned as it failed to address whether the nodules seen were the result of lung cancer and its treatment. Decision and Order on Remand at 4. Lastly, the administrative law judge concluded that the autopsy opinion of Dr. Muldong, diagnosing

the presence of occupational pneumoconiosis, failed to acknowledge the miner's lung cancer, chemotherapy or radiation treatment. The administrative law judge, therefore, accorded diminished weight to these opinions as the physicians failed to address fully all aspects of the miner's health, specifically the miner's lung cancer and treatment for that disease.

We cannot affirm the administrative law judge's weighing of the reports of Drs. Klapproth, DeLara, Cinca and Muldong and must remand the case for further consideration of the opinions. Inasmuch as each of these doctors found that the miner had anthracosis and/or coal workers' pneumoconiosis based their review of autopsy slides, the administrative law judge erred in rejecting their opinions. *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999). Accordingly, the administrative law judge must again consider these physicians' opinions on remand and determine whether such opinions are supportive of a finding of invocation of the interim presumption pursuant to subsection (a)(1). In making this finding the administrative law judge may consider any factors which affect the doctors' diagnoses of anthracosis and/or coal workers' pneumoconiosis. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000)(*en banc*).

Claimant further argues that the administrative law judge erred in according greater weight to the autopsy reports of Drs. Kleinerman, Naeye and Hansbarger, all of whom concluded that the miner did not suffer pneumoconiosis or any disease related to coal mine employment and or pneumoconiosis. Director's Exhibits 59, 68; Employer's Exhibits 1-3; Unnumbered Exhibits. Claimant argues that the administrative law judge failed to address the foundations of these physicians' opinions and failed to examine the documentation underlying the conclusions they reached. Claimant asserts that these physicians, as pathologists, were unaware of the extent of claimant's treatment for cancer and that their conclusions that the miner's autopsy reflected the effects of the miner's lung cancer, not pneumoconiosis, were not, therefore, credible. Accordingly, the administrative law judge must again address these opinions and weigh them along with the autopsy reports of Drs. Klapproth, Cinco, Muldong, and DeLara. *See Hicks*, 138 F.3d 524, 21 BLR 2-323 *Akers*, 131 F.3d 438, 441, 21 BLR 2-269.

Further, we agree with claimant's assertion that, contrary to the administrative law judge's determination, the record fails to demonstrate that either Dr. Fino or Dr. Kory specifically reviewed the autopsy slides, Director's Exhibits 47, 68. Accordingly, their opinions were not autopsy reports, but medical opinions, *see* 20 C.F.R. §727.203(a)(4), and while relevant to rebuttal at subsection (b)(4), cannot invoke the interim presumption at subsection (a)(1).

Claimant further contends that the administrative law judge erred in failing to address invocation of the interim presumption at subsections (a)(3) and (4). Claimant argues that, in its most recent decision, the Board specifically instructed the administrative law judge to make such an analysis and that the administrative law judge's failure to do so requires remand. In vacating the previous determination of invocation at subsection (a)(1), the Board instructed that if, on remand, the administrative law judge determined that invocation of the presumption is not established pursuant to subsection (a)(1), the administrative law judge should consider whether invocation has been established under subsections (a)(2)-(4). *Riffle*, 00-0324 BLA, slip op. at 4. On remand, the administrative law judge, after determining that claimant failed to establish invocation of the presumption at subsection (a)(1), concluded that the pulmonary function study evidence of record supported a finding of invocation pursuant to subsection (a)(2). Thus, in this case, the administrative law judge's finding of invocation at subsection (a)(2) obviated the need for the administrative law judge to consider whether the presumption was invoked at subsections (a)(3) or (4). *See 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). Claimant's argument is, accordingly, rejected. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Claimant also argues that the administrative law judge erred in finding rebuttal of the presumption established pursuant to subsection (b)(4). Claimant asserts that inasmuch as the administrative law judge should have found the presumption invoked under subsection (a)(1), rebuttal of the presumption at subsection (b)(4) would be precluded. In order to establish rebuttal of the interim presumption pursuant to subsection (b)(4), the party opposing entitlement must affirmatively establish the absence of legal or clinical pneumoconiosis. 20 C.F.R. §727.203(b)(4); *see Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995), *rev'g on other grounds*, 18 BLR 1-59 (1994)(*en banc*).

In finding that employer established rebuttal of the presumption pursuant to subsection (b)(4), the administrative law judge concluded that the weight of the autopsy evidence, discussed under subsection (a)(1), supported a finding that the miner did not suffer from pneumoconiosis. *See Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985). The administrative law judge also concluded that the autopsy evidence, indicating the absence of pneumoconiosis, was buttressed by the x-ray evidence in which the weight of the readings by highly qualified B-reader and/or board-certified radiologists was negative for the existence of both complicated and simple coal workers' pneumoconiosis.[5]

[5] A "B-reader" is a physician who has demonstrated proficiency in classifying x-rays according to the ILO-U/C standards by successful completion of an examination

In view of our conclusion that the administrative law judge's findings at subsection (a)(1) are not affirmable, we must, necessarily, vacate the administrative law judge's determination that rebuttal of the interim presumption was established pursuant to subsection (b)(4). In view of the administrative law judge's findings regarding the autopsy evidence, which is relevant to the presence or absence of pneumoconiosis, *see discussion, supra*, the administrative law judge's finding that employer has rebutted the presumption at subsection (b)(4) by showing claimant does not suffer from pneumoconiosis and cannot stand. Accordingly, the administrative law judge must again consider, on remand, all evidence relevant to the existence of pneumoconiosis at subsection (b)(4), if reached.[6] We reject, however, claimant's assertion that the administrative law judge's failure to consider pulmonary function study evidence at subsection (b)(4) is error, since pulmonary function studies cannot establish the presence or absence of pneumoconiosis, *see Trent v. Director, OWCP*, 11 BLR 1-26 (1987). The failure of the administrative law judge to discuss such evidence in the context of rebuttal at subsection (b)(4) does not, therefore, constitute error.

When this case was most recently before the Board, the Board instructed the administrative law judge that, if reached, he was to reconsider his previous findings under subsection (b)(3) in light of all the relevant evidence. *Riffle* 00-0324 BLA, *slip op.* at 4-5. Accordingly, if reached, on remand, the administrative law judge must again consider rebuttal of the interim presumption pursuant to subsection (b)(3) in a manner consistent with the Board's instructions in *Riffle*, 00-0324 BLA. Additionally, if the administrative law judge determines that entitlement has not been established under Part 727 in the miner's claim, he must consider entitlement, in the miner's claim, under 20 C.F.R. Part 410, Subpart D, and if reached entitlement, in the survivor's claim under 20 C.F.R. Part 718.

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established by the National Institute for Occupational Safety and Health. *See* 20 C.F.R. §718.202(a)(1)(ii)(E); 42 C.F.R. §37.51; *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); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). A board-certified radiologist is a physician who has been certified by the American Board of Radiology as having a particular expertise in the field of radiology.

[6] If, on remand, the administrative law judge concludes that claimant is entitled to the presumption of total disability due to pneumoconiosis pursuant to subsection (a)(1), then a finding of rebuttal of that presumption at subsection (b)(4) is precluded. *See Mullins* 484 U.S. at 150, 11 BLR at 2-9.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge