BRB No. 03-0366 BLA

TILDA COLE (Widow of JOHN COLE) Claimant-Petitioner v. EAST KENTUCKY COLLIERIES Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/27/2004 Decision and Order

Appeal of the Fourth Decision and Order on Remand of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Webster Law Offices), Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Claimant[1] appeals the Fourth Decision and Order on Remand (93-BLA-0602) of Administrative Law Judge Paul A. Mapes (the administrative law judge) denying benefits on both a miner's claim and a 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). This case is before the Board for the fifth time. In the original Decision and Order dated October 1, 1993, Administrative Law Judge Robert S. Amery determined that employer was the properly designated responsible operator, credited the miner with at least eighteen years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (a)(2). Judge Amery also found the evidence insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, Judge Amery ordered the payment of benefits to commence as of June 1979, the month in which he found that the miner became totally disabled due to pneumoconiosis.[2] In response to employer's appeal, the Board affirmed Judge Amery's findings regarding the identity of the responsible operator and the length of coal mine employment. The Board also affirmed Judge Amery's findings at 20 C.F.R. §§727.203(a)(2) and 727.203(b)(1)-(3). However, the Board vacated Judge Amery's findings at 20 C.F.R. §§727.203(a)(1) and 727.203(b)(4), as well as his onset date determination. The Board therefore remanded the case for further consideration of the evidence at 20 C.F.R. §727.203(b)(4) and, if necessary, reconsideration of the evidence relevant to determining the date of onset of total disability due to pneumoconiosis. In addition, the Board noted that invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) need not be reconsidered on remand since it affirmed Judge Amery's finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(2). *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996).

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[1]Claimant is the widow of the deceased miner, John Cole. The miner filed a claim on March 26, 1980. Director's Exhibit 1. In a decision dated May 6, 1981, the Department of Labor found that the miner was entitled to benefits. Director's Exhibit 18. On May 21, 1981, Ratliff Trucking Company controverted its liability for the payment of benefits. Director's Exhibit 20. While the claim was pending before the Department of Labor, the miner died on April 3, 1983. Director's Exhibit 24. Claimant filed a claim for survivor's benefits on April 8, 1983. *Id*.

[2]Administrative Law Judge Robert S. Amery found that claimant was derivatively entitled to an award of benefits based on the filing date of the miner's claim. *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989); *see* 20 C.F.R. §725.212. Judge Amery therefore found that it was unnecessary to adjudicate the survivor's claim under 20 C.F.R. Part 718. *Id*.

On the first remand, the case was reassigned to the administrative law judge, who found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). The administrative law judge also found that entitlement to benefits was precluded at 20 C.F.R. Part 718 because the existence of pneumoconiosis was not established. Accordingly, the administrative law judge denied benefits. In disposing of claimant's appeal, the Board vacated the administrative law judge's finding at 20 C.F.R. §727.203(b)(4) and remanded the case to the administrative law judge for further consideration in accordance with *Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). *Cole v. East Kentucky Collieries*, BRB No. 97-1321 BLA (June 19, 1998)(unpub.).

On the second remand, the administrative law judge found the evidence insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4). Accordingly, the administrative law judge again ordered the payment of benefits to commence as of June 1979, the month in which he found that the miner became totally disabled due to pneumoconiosis. On employer's second appeal, the Board rejected employer's reiteration of its argument concerning Judge Amery's finding that the evidence was insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). The Board also affirmed the administrative law judge's finding at 20 C.F.R. §727.203(b)(4). In addition, the Board addressed employer's argument that it was denied due process by a delay in the designation of a responsible operator by the district director and, therefore, liability for the payment of benefits should transfer to the Black Lung Disability Trust Fund (Trust Fund). The Board declined to hold that employer previously waived its due process argument and remanded the case to the administrative law judge for a determination as to whether actions attributable to the district director resulted in substantial prejudice to employer and, therefore, resulted in a violation of due process. *Cole v. East Kentucky Collieries*, BRB No. 99-0556 BLA (Sept. 29, 2000)(unpub.).

On the third remand, the administrative law judge found that employer's due process rights were not violated, that liability for the payment of benefits did not transfer to the Trust Fund and that employer was liable for the payment of benefits. On employer's third appeal, the Board held that the administrative law judge reasonably determined that employer failed to show that it was denied an opportunity to mount a meaningful defense and thus, transfer of liability was not warranted as no violation of employer's right to due process had occurred. Hence, the Board affirmed the administrative law judge's finding that employer, the properly designated responsible operator, and not the Trust Fund, is the party liable for the payment of any benefits awarded. However, in light of the facts of this particular case, the Board vacated Judge Amery's finding that the evidence was insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and remanded the case to the administrative law judge for further consideration of the relevant medical opinions. The Board instructed the administrative law judge to set forth his credibility determinations regarding the medical opinions of record in detail on remand. *Cole v. East Kentucky Collieries*, BRB No. 01-0563

BLA (Apr. 30, 2002)(unpub.).

On the most recent remand, the administrative law judge found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). According, the administrative law judge denied benefits.

On appeal, claimant contends that the Board did not have authority to revisit its affirmance of Judge Amery's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) because the Board's previous holding at 20 C.F.R. §727.203(b)(3) constitutes the law of the case. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, 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).

Claimant contends that the Board did not have authority to revisit its previous affirmance of Judge Amery's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) because the Board's previous holding at 20 C.F.R. §727.203(b)(3) constitutes the law of the case. Claimant's contention is based on the premise that once the Board decides an issue on appeal, it is bound by its decision and cannot reconsider that issue again on subsequent appeals.

The doctrine of the law of the case is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). However, under the law of the case doctrine, it is proper for a court to depart from a prior holding if there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the decision is clearly erroneous and not in the interest of justice. *Cale v. Johnson*, 861 F.2d 943 (6th Cir. 1988), *citing Arizona v. California*, 460 U.S. 605 (1983); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (Brown, J. dissenting); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

As previously noted, in its 1996 decision, the Board affirmed Judge Amery's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). *Cole*, 20 BLR at 1-55. In reviewing the medical opinion evidence, the Board held that Judge Amery permissibly discounted the opinions of the non-examining physicians. *Id*. Further, in its 2000 decision, the Board addressed employer's arguments

concerning rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and held that its previous holdings on this issue constitute the law of the case and will not be disturbed. *Cole v. East Kentucky Collieries*, BRB No. 99-0556 BLA, slip op. at 4-5 (Sept. 29, 2000)(unpub.). In its 2002 decision, however, the Board acquiesced in employer's request to reevaluate the propriety of its resolution of the issue of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). The Board noted that Judge Amery discounted the opinions of Drs. Broudy, Fino and Tuteur because they merely reviewed the miner's medical records. In analyzing Judge Amery's consideration of the physicians' opinions, the Board noted that although the question of whether a physician's opinion is sufficiently documented and reasoned is a credibility matter for the administrative law judge, *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985), "[c]ircuit law…indicates that automatic preferences are disfavored. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995)." *Cole v. East Kentucky Collieries*, BRB No. 01-0563 BLA, slip op. at 7 (Apr. 30, 2002)(unpub.). Based on its determination that Judge Amery's finding concerning the opinions of Drs. Broudy, Fino and Tuteur does not contain the requisite inquiry into the credibility and reasonableness of the opinions consistent with circuit law, the Board stated that employer correctly argued that it was not in accordance with law for Judge Amery to give an automatic preference to the examining physicians in his consideration of the medical opinion evidence at 20 C.F.R. §727.203(b)(3). The Board therefore vacated Judge Amery's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) and remanded the case for further consideration of this issue. Furthermore, the Board held that its 1996 published decision in *Cole* was overruled to the extent that it was inconsistent with its [2002] opinion. Since the Board correctly determined that the facts of the case before it required that it depart from the law of the case doctrine, we reject claimant's contention that the Board did not have authority to revisit its previous affirmance of Judge Amery's finding that the evidence is insufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) because the Board's previous holding at 20 C.F.R. §727.203(b)(3) constituted the law of the case. *Cale*, 861 F.2d at 947; *Brinkley*, 14 BLR at 1-150-151; *Williams*, 22 BRBS at 237; *Bridges*, 6 BLR at 1-989-990.

Based on his consideration of the relevant medical opinions, the administrative law judge found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Claimant does not challenge the administrative law judge's weighing of the evidence at 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that in order to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), the party opposing entitlement must establish that pneumoconiosis played no part in the miner's disability. *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000); *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995);

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). Thus, if pneumoconiosis is at least a contributing cause of a miner's total disability, he is conclusively entitled to benefits. *Id*. In effect, employer is required to rule out pneumoconiosis as a source of the miner's disability. *Id*.

The administrative law judge considered the reports of Drs. Anderson, Broudy, Fino, Lane, O'Neill, Page, Penman, Sutherland, Tuteur, B.D. Wright and T.L. Wright, and the death certificate signed by Dr. Cool. In the death certificate, Dr. Cool indicated that the causes of the miner's death were acute cardio-respiratory arrest, chronic obstructive pulmonary disease and arteriosclerotic heart disease. Director's Exhibit 24. Dr. Page diagnosed coal workers' pneumoconiosis and opined that the miner should not have been permitted or required to work in or about a dust related industry.[3] Director's Exhibit 10A. Dr. Penman also diagnosed pneumoconiosis and opined that the miner's lung function was impaired. Director's Exhibit 10C. In addition, Dr. Sutherland diagnosed coal workers' pneumoconiosis and opined that the miner suffered from severe obstructive ventilatory insufficiency. Director's Exhibit 11. Moreover, Dr. Sutherland noted that "[the miner] is historically impaired as above." *Id*. Dr. T.L. Wright diagnosed coal workers' pneumoconiosis and opined that the miner was totally disabled for coal mining. Director's Exhibit 10B.

Drs. Anderson and Lane opined that the miner's death was not related to coal workers' pneumoconiosis.[4] Director's Exhibits 26, 29. Similarly, Drs. Broudy, Fino and Tutuer opined that neither the miner's pulmonary impairment nor his death was caused by the

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[3]The administrative law judge stated, "although the report of Dr. Page concludes that [the miner] had coal workers (sic) pneumoconiosis and that [he] should not work in dusty atmospheres, this conclusion is not the same as a finding that [he] was disabled." Decision and Order at 13.

[4]The administrative law judge discounted the opinions of Drs. Anderson and Lane because they did not specifically rule out the possibility that coal mine dust exposure contributed to the miner's chronic obstructive pulmonary disease. Decision and Order at 12.

inhalation of coal mine dust.[5] Director's Exhibits 26, 29. Drs. B.D. Wright and O'Neill did not render opinions concerning the cause of the miner's disability or death.[6] Director's Exhibits 10D, 10F, 24. The administrative law judge properly accorded greater weight to the opinions of Drs. Broudy and Tuteur than to the contrary opinions of Drs. Page, Penman, Sutherland and T.L. Wright because he found that the opinions of the former physicians are better reasoned. *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In weighing the conflicting medical opinions, the administrative law judge stated:

> [T]he opinions of Dr. Broudy and Dr. Tuteur are well reasoned and more convincing than the opinions of [Drs. Page, Penman, Sutherland and T.L. Wright] who might have arguably attributed [the miner's] disability or death to his coal mine employment. In this regard, it is noted that both Dr. Broudy and Dr. Tutuer did not limit their reports to the question of whether coal workers (sic) pneumoconiosis contributed to [the miner's] disability or death, but went further and expressed opinions indicating that they did not believe that [the miner's] disability or death could be connected to any type of disease that arose out of [the miner's] coal mine employment. In addition, the reports of both physicians indicate that when they formulated their opinions they considered the results of virtually all the relevant tests and physical examinations. Moreover, their reports set forth specific reasons for concluding that [the miner] did not have physiologically significant pneumoconiosis and explained that in the absence of such physiologically significant coal workers

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[5]The administrative law judge discounted the opinion of Dr. Fino because Dr. Fino's presumption that the miner's x-rays were negative for pneumoconiosis is inconsistent with prior determinations in this case. Decision and Order at 12. However, as previously noted, the Board vacated Judge Amery's finding that the x-ray evidence was sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). *Cole v. East Kentucky Collieries*, 20 BLR 1-50, 1-53 (1996). Nonetheless, we hold that any error by the administrative law judge in discounting the opinion of Dr. Fino is harmless in view of our disposition of the case at 20 C.F.R. §727.203(b)(3). *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Dr. Fino's opinion supports the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Director's Exhibit 29.

[6]Contrary to the administrative law judge's finding that Dr. B.D. Wright rendered an opinion to the effect that the miner's disability was due to pneumoconiosis, Decision and Order at 11, Dr. B.D. Wright only diagnosed severe chronic obstructive pulmonary disease and coal workers' pneumoconiosis, Director's Exhibit 10F. Dr. Wright did render an opinion with regard to the issues of total disability and total disability due to pneumoconiosis. *Id*.

> (sic) pneumoconiosis, it would be unlikely that [the miner] had any disease related to coal dust that was in any way related to his death. The report further noted that [the miner's] death was associated with COPD.

2003 Decision and Order at 13. In contrast, the administrative law judge stated, "although the reports of [Drs. Page, Penman, Sutherland and T.L. Wright] may vaguely suggest a connection between [the miner's] coal mine employment and his disability, none of these reports is direct enough or clear enough to provide substantial support for an inference that coal mining played any part in [the miner's] disability nor death." *Id*. The administrative law judge additionally stated, "[n]or is the reasoning and documentation contained in these opinions adequate to support such an inference." *Id*. Since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). We therefore affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Fourth Decision and Order on Remand denying 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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BETTY JEAN HALL
Administrative Appeals Judge