BRB No. 03-0521 BLA

WILSON MARCUM	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ORA MAE COAL COMPANY, INCORPORATED	)	DATE ISSUED: 02/25/2004
	)	
Employer-Petitioner	)	
	)	
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 Richard E Huddleston, Administrative Law Judge United States Department of Labor.

Leonard Stayton, Inez, Kentucky, for claimant.

Natalee A. Gilmore (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

BEFORE: SMITH, McGRANERY, and HALL, Administrative Appeals Judges

PER CURIAM:

Employer appeals the Decision and Order on Remand (1985-BLA-2409) of Administrative Law Judge Richard E Huddleston awarding benefits 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).[1] This claim has a lengthy procedural

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

history which is set forth in the Board's most recent Decision and Order on this case in *Marcum v. Ora Mae Coal Company, Inc.*, BRB No. 00-1173 (November 15, 2001) (unpublished). In that Decision and Order, the Board vacated the administrative law judge's decision awarding benefits and remanded the case for the administrative law judge to reconsider whether the interim presumption of totally disabling pneumoconiosis was rebutted at 20 C.F.R. §727.203(b)(3). The Board directed the administrative law judge to reconsider the medical opinions of Drs. Baker, Dahhan and Fino at Section 727.203(b)(3), taking into consideration the relevant qualifications of the physicians and whether their opinions were sufficiently reasoned. On remand, the administrative law judge weighed the opinions of Drs. Dahhan and Fino against that of Dr. Baker and again found the opinions of Drs. Dahhan and Fino insufficient to establish rebuttal of the interim presumption. Accordingly, benefits were awarded.

On appeal, employer argues that the administrative law judge erred in finding that the opinions of Drs. Dahhan and Fino were insufficient to establish rebuttal under Section 727.203(b)(3). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs, (the Director) is not participating 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 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).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that an employer must prove that pneumoconiosis did not partially or totally cause the miner's disability. Thus, if pneumoconiosis is at least a contributing cause of a miner's total disability, he is conclusively entitled to benefits. In effect, employer is required to rule out pneumoconiosis as a source of the miner's disability. *See 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).

In finding the opinions of Drs. Fino and Dahhan insufficient to establish rebuttal of the interim presumption at subsection (b)(3), the administrative law judge weighed the opinions of Drs. Dahhan and Fino against the contrary opinion of Dr. Baker, finding that all three physicians were highly qualified and were qualified to render opinions on disability causation. The administrative law judge further found that all three physicians

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regulations. The regulations at 20 C.F.R. Part 727, at issue in this case, were not affected by the new regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

had sufficient access to claimant and his medical records to be able to render such opinions and that they had explained and documented their opinions. Finding no reason to prefer one opinion over the others in terms of qualifications or reasoning, the administrative law judge found the evidence to be at best equivocal on the issue of causation and that employer had not, therefore, met its burden of establishing rebuttal. Decision and Order on Remand at 8.

Employer first argues that the administrative law judge erred in relying primarily on Fourth Circuit precedent in *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); and *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-373 (4th Cir. 2002), *rev'g on other grds*, 14 BLR 1-37 (1990)(*en banc*) to reject the opinions of Drs. Dahhan and Fino, in this case which falls within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Those cases held that where physicians opine that claimant does not have legal or medical pneumoconiosis in direct contradiction to the administrative law judge's finding that claimant suffers from legal or medical pneumoconiosis, those opinions can carry little weight unless the administrative law judge provides specific and persuasive reasons for concluding that the doctor's judgment on the question of disability causation does not necessarily contradict the administrative law judge's finding of pneumoconiosis.

The administrative law judge pointed out, however, that while the Sixth Circuit has not ruled on this issue under Part 727, it has ruled on this issue under Part 718 where it has held that opinions where a physician finds no pneumoconiosis, in direct contradiction to the administrative law judge's finding that claimant does suffer from pneumoconiosis, should be treated as less significant on the issue of causation. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-103-4 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *see also Adams v. Director, OWCP*, 886 F.2d 818, 826, 13 BLR 2-52, 2-63 (6th Cir. 1989). The Board has similarly held that such opinions are entitled to little weight. *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472, 1-473 (1986).

In this case, the administrative law judge found the opinions of Drs. Fino and Dahhan entitled to little weight because their findings that claimant did not have pneumoconiosis were inconsistent with the established finding of pneumoconiosis. Decision and Order on Remand at 6. Thus, pursuant to the Sixth Circuit's holdings in *Skukan*, 993 F.2d 1227, 17 BLR 2-97; *Tussey*, 982 F.2d at 1042, 17 BLR at 2-24; *Adams*, 886 F.2d at 826, 13 BLR at 2-63, and the Board's holding in *Trujillo*, 8 BLR at 1-473, the administrative law judge properly found that the opinions of Drs. Dahhan and Fino, that claimant does not have pneumoconiosis, were entitled to less weight. Accordingly, we

affirm the administrative law judge's treatment of the opinions of Drs. Dahhan and Fino as consistent with the law of the Sixth Circuit and the Board.

Employer next argues that there were specific and persuasive reasons as to why the opinions of Drs. Dahhan and Fino should be credited. Specifically, employer argues that Dr. Dahhan, in a well-reasoned opinion based on his own examination of claimant and a thorough review of the medical record, clearly explained that coal workers' pneumoconiosis did not contribute to claimant's disability and also opined that heart problems, diabetes, and hypertension were not and would not be impacted or altered by the presence of pneumoconiosis. Dr. Dahhan opined that claimant's conditions, *i.e.*, old cardiovascular accident with vision impairment, essential hypertension and non-insulin dependent diabetes mellitus "[were] conditions of the general public at large and . . . not caused by, contributed to or aggravated by coal dust exposure, or coal workers' pneumoconiosis." Employer's Exhibit 16; Employer's Exhibit 32.

Likewise, employer argues that Dr. Fino clearly found, in an opinion based on the objective medical evidence and a thorough review of claimant's medical history, that claimant was disabled due to a stroke which was not associated with coal mine dust inhalation, and would not be related to or aggravated by his occupational exposure to coal dust. Dr. Fino further opined that even if claimant had category I pneumoconiosis or any simple degree of coal workers' pneumoconiosis it had not caused any pulmonary impairment or disability.

The administrative law judge discussed the findings of Drs. Dahhan and Fino, Decision and Order on Remand at 6, noting that both doctors found that claimant did not have medical pneumoconiosis or legal pneumoconiosis, *i.e.*, a respiratory impairment due to coal mine employment. The administrative law judge accorded less weight to those opinions, however, because he found that they contradicted his finding that pneumoconiosis was established by x-ray. This was proper. *Skukan*, 993 F.2d at 1233, 17 BLR at 2-103-4; *Tussey*, 982 F.2d at 1042, 17 BLR at 2-24; *Adams*, 886 F.2d at 826, 13 BLR at 2-63; *Trujillo*, 8 BLR at 1-473.

Finally, employer argues that the administrative law judge erred in crediting Dr. Baker's opinion over the opinions of Drs. Dahhan and Fino because Dr. Baker's opinion was based solely on a one-time examination of claimant and Dr. Baker made no reference to other medical data of record, unlike Drs. Dahhan and Fino who reviewed all of claimant's medical records. Further, employer notes that Dr. Dahhan examined claimant and that Dr. Fino, a consulting physician, corroborated Dr. Dahhan's findings. Additionally, employer contends that Dr. Baker's opinion should be accorded less weight because Dr. Baker did not explain how his findings of mild impairment rendered claimant totally disabled and because he did not address what role claimant's significant smoking

history played in causing claimant's disability or how he could rule out claimant's smoking history as a cause of respiratory impairment.

Under Part 727, claimant is provided a rebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §727.203(a)(1)-(4). It is employer's burden to rebut the presumption. Under Section 727.203(b)(3), employer must present evidence which rules out pneumoconiosis as a cause of claimant's totally disabling respiratory impairment. *Webb*, 49 F.3d 244, 19 BLR 2-123; *Warman*, 839 F.2d 257, 11 BLR 2-62; *Gibas*, 748 F.2d 1112, 7 BLR 2-53. Contrary to employer's assertions, therefore, the administrative law judge was not required to consider how Dr. Baker ruled out smoking as a cause of disability, nor whether Dr. Baker sufficiently explained how his findings of mild impairment rendered claimant totally disabled at Section 727.203(b)(3). *See Webb*, 49 F.3d 244, 19 BLR 2-123; *Warman*, 839 F.2d 257, 11 BLR 2-62; *Gibas*, 748 F.2d 1112, 7 BLR 2-53.[2]

In weighing the opinions at Section 727.203(b)(3), the administrative law judge noted that all three physicians were equally qualified and equally qualified to render opinions on causation. Specifically, the administrative law judge noted that he found no reasons to accord greater weight to the opinions of Drs. Dahhan and Fino over that of Dr. Baker, noting that all practice in the field of internal medicine, all are B-readers and Drs. Baker and Fino are Board-certified in internal medicine and pulmonary diseases. The administrative law judge further noted that Dr. Baker had examined claimant twice, Dr. Dahhan had examined claimant once, Dr. Fino had reviewed the medical evidence, and Drs. Baker and Dahhan had performed appropriate objective testing in addition to examining claimant. We reject employer's contention, therefore, that Drs. Dahhan and Fino proffered opinions which were more credible than Dr. Baker's. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[2] In its previous Decision and Order, the Board held that the administrative law judge correctly concluded that Dr. Baker found that claimant was totally disabled as a result of the cumulative effects of stroke, hypertension, heart disease, diabetes and pneumoconiosis and that pneumoconiosis was a contributing factor to claimant's disability. *Marcum v. Ora Mae Coal Co., Inc.*, BRB No. 00-1173 BLA (Nov. 15, 2001) (unpub.).

Accordingly, the administrative law judge's the Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge