BRB No. 98-0577 BLA

GEORGE N. DEPEW	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SHACKLEFORD COAL COMPANY	)	DATE ISSUED:
	)	
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 Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

John D. Maddox (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (83-BLA-6450) of Administrative Law Judge Daniel L. Leland 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). This case is on appeal to the Board for the third time. In the original Decision and Order, the parties stipulated to at least fifteen years of coal mine employment, and the administrative law judge found this stipulation supported by the record evidence. He adjudicated this claim pursuant to

20 C.F.R. Part 727. The administrative law judge found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (2) and (3), and found the evidence insufficient to establish rebuttal of this presumption. Accordingly, benefits were awarded.

Employer appealed, and in *Depew v. Shackleford Coal Co.*, BRB Nos. 87-1134 BLA and 86-1590 BLA (Mar. 30, 1992)(unpublished), the Board affirmed the administrative law judge's finding of invocation of the interim presumption pursuant to Section 727.203(a)(2) and declined to address the propriety of the administrative law judge's findings of invocation pursuant to subsections (a)(1) and (4). Decision and Order at 3. However, the Board vacated and remanded the findings made pursuant to Section 727.203(b)(3), holding that the administrative law judge failed to provide a rationale for finding the evidence insufficient to establish rebuttal. The Board also directed the administrative law judge to address the failure of Drs. Matheny and Wright to account for claimant's smoking history. *Depew*, *supra* at 4-5. The Board rejected employer's argument that due process and laches barred imposition of liability on employer, but held that the administrative law judge's computation of prejudgment interest was flawed. *Depew*, *supra* at 5.

On remand, the administrative law judge found that employer failed to establish rebuttal at Section 727.203(b)(3) and awarded benefits. Decision and Order on Remand at 2-5. Employer appealed this determination. The Board affirmed the Section 727.203(b)(3) finding, and thus, the award of benefits was affirmed. *Depew v. Shackleford Coal Co.*, BRB No. 93-1381 BLA (May 27, 1994)(unpublished). Thereafter, employer filed a request for reconsideration, asserting that the Board should reassess the administrative law judge's Section 727.203(a)(1) finding in light of the intervening case law of *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). On reconsideration, the Board vacated the administrative law judge's Section 727.203(a)(1) finding and remanded the case for further consideration. *Depew v. Shackleford Coal Co.*, BRB No. 93-1381 BLA (Aug. 27, 1996)(unpublished). The Board noted that as it vacated the Section 727.203(a)(1) findings, it would also vacate the administrative law judge's Section 727.203(b)(4) findings and remand the case for further consideration at this section as well, if reached. *See Consolidation Coal Co. v. McMahon*, 77 F.3d 898, 20 BLR 2-152 (6th Cir. 1996). The Board also vacated the administrative law judge's Section 727.203(b)(3) finding as the Section 727.203(a)(1) findings impacted the administrative law judge's analysis at subsection (b)(3). *Depew*, *supra*.

On remand, the administrative law judge credited the most recent x-ray evidence, which is positive for the presence of pneumoconiosis, based on his finding that pneumoconiosis is a progressive disease. Thus, he found that the interim presumption was invoked pursuant to Section 727.203(a)(1). Decision and Order on Remand at 2. With respect to Section 727.203(b)(3), the administrative law judge held that the medical report of Dr. Anderson, upon which employer relies, failed to rule out any relationship between the claimant's total disability and his coal mine employment and was therefore insufficient to rebut the interim presumption pursuant to Section 727.203(b)(3). Decision and Order on Remand at 5. Finally, the administrative law judge held that rebuttal pursuant to Section 727.203(b)(4) was precluded in view of his finding that invocation was established pursuant to Section 727.203(a)(1). *See* Decision and Order on Remand at 5; *Bates v. Island Creek Coal Co.*, 18 BLR 1-1 (1993). In the instant appeal, employer contends that the administrative law judge erred in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1) and in failing to find rebuttal of the interim presumption established pursuant to Section 727.203(b)(3), (4). Claimant has not responded to the appeal. The Director, Office of Workers' Compensation Programs (the Director), responds seeking affirmance of the administrative law judge's findings under Section 727.203(a)(1). Employer filed a reply brief to address the arguments presented by the Director.[1]

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 the Board and may not be disturbed. 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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). Initially, employer asserts that the administrative law judge erred in crediting the positive interpretation of the x-ray

[1] The Director, Office of Workers' Compensation Programs has also filed a supplemental authority. The Board hereby accepts the supplemental authority as part of the record.

taken on October 26, 1983 on the basis of the position that pneumoconiosis is a progressive disease. The Director asserts that the administrative law judge correctly recognized pneumoconiosis as a progressive disease, noting that he "implicitly utilized the progressivity principle in crediting the most recent, and positive, x-ray as consistent with the next most recent, and negative x-ray." We agree with the Director. The administrative law judge found as follows:

> The last reading submitted is of an x-ray dated October 26, 1983, at least seven years after any of the previous x-rays, and is read as positive. The x-ray read by the most-qualified (sic) physician was interpreted as 0/1. An x-ray taken seven years later was interpreted as 1/1....these x-rays are consistent and establish [that] the claimant has pneumoconiosis as pneumoconiosis is a progressive disease. *See Woodward v. Director, OWCP*, 991 F.2d 314 (6th Cir. 1994).

Decision and Order on Remand at 4. We note that the United States Court of Appeals for the Sixth Circuit, wherein jurisdiction of this case arises, as well as several other Courts, have recognized that pneumoconiosis is a progressive disease. *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Lisa Lee Mines v. Director, OWCP*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Lukman v. Director, OWCP,* 896 F.2d 1248, 13 BLR 2-332 (10th Cir. 1990); *see also Ondecko*, *supra*. Thus, the administrative law judge did not error in crediting the positive interpretation of the most recent x-ray.[2]

Next, employer asserts that the administrative law judge erred in failing to find rebuttal under Section 727.203(b)(3) in that he "made material omissions and mischaracterizations" of the evidence. Employer's Brief at 16. Specifically, employer maintains that the administrative law judge failed to mention that Drs. Fleenor, Wright, Jones and Matheny, all of whom support claimant's position, are not specialists, and that Dr. Anderson, who diagnosed claimant's total disability as due to heart disease, is renowned in the field of pulmonology. *Id.* We disagree. The administrative law judge recognized Dr. Anderson as a pulmonary disease specialist and reviewed his examination and diagnosis of claimant's condition. Decision and Order on Remand at 3-5. The administrative law judge's rejection of Dr. Anderson's diagnosis was not based on a comparative analysis of the reporting

[2] We note that employer failed to avail itself of the opportunity to have the October 26, 1983 x-ray read by one of its medical experts.

doctors's credentials. Rather, the administrative law judge noted that:

> Dr. Anderson stated in his deposition that his conclusion that claimant did not have pneumoconiosis was based entirely on negative x-ray readings. As the most recent x-ray is positive for pneumoconiosis, Dr. Anderson's opinion [is given] little weight.

Decision and Order on Remand at 5. Further, the administrative law judge found that Dr. Anderson's opinion was inconsistent with those of the other four physicians of record in that only he opined that claimant's total disability did not arise out of coal mine employment. *Id*. We note that in *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993), the United States Court of Appeals for the Sixth Circuit held that the medical opinion of the physician who concluded that the miner's total disability was not due to pneumoconiosis, but rather to cigarette smoking, was of no probative value given that the physician diagnosed the absence of pneumoconiosis which the administrative law judge found established by x-ray evidence. Thus, the court observed that a medical opinion at odds with the administrative law judge's factual findings carries no probative weight in the resolution of the case. *Tussey*, *supra*; *see Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); *see also Toler v. Eastern Associated Coal Co.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995)(wherein the Fourth Circuit Court of Appeals held that the interim presumption that pneumoconiosis caused disability cannot be rebutted by a medical report finding no respiratory or pulmonary impairment, if the physician premised this finding on the erroneous assumption that the miner did not have pneumoconiosis). In *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993), we held that the administrative law judge may not reject a medical opinion because it relies, *in part*, on x-ray evidence which is at odds with the fact finders ultimate conclusion. In the instant case, however, Dr. Anderson's sole basis for diagnosing the absence of pneumoconiosis was his reliance on negative x-ray evidence. Dr. Anderson testified that based on negative x-ray evidence, claimant does not suffer from pneumoconiosis and that consequently his total disability is not attributable to coal mine employment. *See* Deposition at 18, Director's Exhibit 40. Thus, the opinion of Dr. Anderson cannot support a finding of rebuttal under Section 727.203(b)(3) as a matter of law. *See Tussey*, *supra*; *Griffith*, *supra*; *Trujillo*, *supra*; *Toler*, *supra*; *Kertesz v. Crescent Hills Coal Co.*, 8 BLR 1-112 (1985). In light of the administrative law judge's finding that the presence of pneumoconiosis was established pursuant to Section 727.203(a)(1), under the standard enunciated in *Tussey*, *supra*, the contrary opinion of Dr. Anderson has no probative value as to the issue of the cause of claimant's total disability, and therefore can not establish rebuttal pursuant to Section 727.203(b)(3).

Finally, in view of our affirmance of the administrative law judge's finding that the interim presumption was invoked pursuant to Section 727.203(a)(1), we affirm his finding that subsection (b)(4) rebuttal is precluded in this case. *Bates*, *supra*; *Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge