BRB No. 98-0665 BLA

EVALENE GULLEY (Widow of DENZLE GULLEY) Claimant v. SAHARA COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION AND ORDER

Appeal of the Decision and Order - Awarding Benefits of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

John G. Paleudis (Hanlon, Duff & Paleudis Co., LPA), St. Clairsville, Ohio, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (82-BLA-4450) of Administrative Law Judge Ellin M. O'Shea 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 has a lengthy procedural history. In a Decision and Order issued on August 6, 1980, Administrative law Judge Jeffrey Tureck credited the miner with eighteen years of qualifying coal mine employment based on employer's stipulation, and adjudicated the claim, filed on May 2, 1977, pursuant to the provisions at 20 C.F.R. Part 727. The administrative law judge found that the evidence was insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1)-(4), and insufficient to establish entitlement under 20 C.F.R. Part 410, Subpart D. Accordingly, benefits

were denied.

While the miner's appeal was pending before the Board, the miner requested that his case be remanded to the district director for modification proceedings pursuant to 20 C.F.R. §725.310. By Order issued on December 29, 1980, the Board granted the miner's motion and dismissed the appeal with prejudice.

Following the district director's denial of modification, this case was assigned to Administrative Law Judge Joan Huddy Rosensweig, who on October 19, 1984, held a hearing limited solely to procedural issues. By Order dated July 29, 1985, the administrative law judge "remanded" the case to the Board to determine whether the petition for modification was properly filed with the district director or with Administrative Law Judge Tureck.

On August 14, 1985, the Board issued an Order holding that it did not accept cases on remand from the Office of Administrative Law Judges. On August 28, 1985, the Director, Office of Workers' Compensation Programs (the Director), filed a motion for reconsideration and a motion for enlargement of time to file supporting brief with the administrative law judge, arguing that her Order "remanding" the case to the Board was not in accordance with law.

On September 27, 1988, the administrative law judge issued an Order Denying Motion for Reconsideration, indicating that the proper course was for counsel to file an appeal with the Board, and that the Board would resolve any timeliness issue. The miner then filed an appeal with the Board on October 26, 1988. On April 7, 1990, the miner died, and his widow, Evalene Gulley, subsequently pursued the claim on his behalf.

On appeal, the Board again held that there is no authority for an administrative law judge to "remand" a case to the Board, and thus vacated the administrative law judge's Order of July 29, 1985 and her denial of the Director's motion for reconsideration, returning the parties to the *status quo ante*. The Board remanded the case for *de novo* review of the merits on modification pursuant to Section 725.310, and held that there was no requirement to assign the petition for modification to the administrative law judge who issued the original Decision and Order.

Following the parties' request for a decision on the record, Administrative Law Judge Ellin M. O'Shea issued a Decision and Order on January 30, 1998. The administrative law judge found that the x-ray evidence, but not the autopsy evidence, was arguably sufficient to establish invocation of the interim presumption at 20

C.F.R. §727.203(a)(1), and that claimant established invocation at Section 727.203(a)(3). The administrative law judge further found that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4), and that modification was appropriate based on a change in conditions pursuant to Section 725.310. Consequently, the administrative law judge awarded benefits.

In the present appeal, employer challenges the administrative law judge's findings at Sections 725.310, 727.203(a)(1), (3), and 727.203(b)(2)-(4). Claimant and the Director have not participated 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer initially contends that the administrative law judge erred in relying on the most recent blood gas study of record to support her finding of invocation at Section 727.203(a)(3) and a change in conditions at Section 725.310. Employer maintains that the administrative law judge failed to explain how the evidence established a change in the miner's condition, and argues that the fluctuations between the non-qualifying blood gas studies obtained on July 11, 1978 and July 27, 1981, and the qualifying blood gas studies obtained on August 26, 1980 and July 9, 1984, indicate that the miner suffered an occasional acute but temporary condition rather than a chronic pulmonary condition.[1] Employer's arguments are without merit. In evaluating the evidence at Section 727.203(a)(3), the administrative law judge accurately determined that the 1984 study was three years more recent and produced qualifying values well out of the range of the values reflected in the other studies. Inasmuch as no physician provided an analysis explaining the significance of the fluctuating blood gas study values, the administrative law judge acted within her discretion as trier-of-fact in finding that the 1984 study was the most probative of the miner's pulmonary condition and established both invocation at Section 727.203(a)(3) and a change in conditions at Section 725.310. Decision and Order at 14-15; *see Old Ben Coal Co. v. Scott*, 144 F.3d 1045, 21 BLR 2-391 (7th Cir. 1998). We affirm the administrative law judge's findings pursuant to Section 727.203(a)(3),

[1] A "qualifying" blood gas study yields values that are equal to or less than the appropriate values set out in the table at 20 C.F.R. §727.203(a)(3). A "non-qualifying" study yields values that exceed those values.

as supported by substantial evidence, and thus need not address employer's arguments regarding the administrative law judge's findings pursuant to Section 727.203(a)(1). *See Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

Employer next contends that the administrative law judge did not apply the correct legal standard in finding that rebuttal was not established at Section 727.203(b)(2), (3). Employer argues that the miner retired in 1976 because he was totally disabled due to blindness, and that the medical opinions of Drs. Partridge, Sloan and Naeye establish that the miner had no coal dust related pulmonary condition which prevented him from performing his usual coal mine employment.

The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that the cross-reference to 20 C.F.R. §410.412(a)(1) at Section 727.203(b)(2) requires consideration not only of the miner's ability to perform his usual coal mine employment but also of coal dust as the cause of any inability to work, thus, employer can rebut the interim presumption by showing that any disabling condition is unrelated to pulmonary problems. *See Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995). At Section 727.203(b)(3), the party opposing entitlement must show, through a preponderance of the evidence, that the miner's pneumoconiosis was not a contributing cause of his total disability. *See Kelley, supra; Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992). A "contributing cause" is a necessary, though not necessarily sufficient, cause of the miner's disability. *Beasley, supra*. If a miner's pneumoconiosis alone is disabling, the fact that the miner has some additional and potentially disabling condition does not preclude an award of benefits. *See Hawkins v. Director, OWCP*, 907 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *Peabody Coal Co. v. Director, OWCP [Huber]*, 778 F.2d 358 (7th Cir. 1985); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985). Silence in the record as to causation will not defeat the presumption favoring the claimant, *Freeman United Coal Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990), but evidence that demonstrates that an ailment other than pneumoconiosis was the sole cause of the miner's total disability will rebut the presumption. *See Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991). The relevant inquiry is whether, had it not been for his pneumoconiosis, the miner would have been able to continue working in the mines. *See Peabody Coal Co. v. Director, OWCP [Durbin]*, _ F.3d _, No. 97-3721 (7th Cir. Jan. 20, 1999); *Kelley, supra*; *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

In evaluating the evidence relevant to rebuttal at Section 727.203(b)(2)-(3) in

the present case, the administrative law judge acknowledged that the miner was totally disabled due to blindness, but found that there was no medical opinion of record which addressed "directly and specifically, the issue of whether the miner's invoked total disability, after 1977 and as of invocation, did not arise in whole or in part out of coal mine employment." Decision and Order at 18-21. The administrative law judge did not determine whether the miner was totally disabled due to pneumoconiosis at the time of the hearing, however, notwithstanding the fact that the miner left coal mine employment due to blindness. Further, there is evidence diagnosing the existence of pneumoconiosis and a disabling respiratory impairment. *See Foster, supra; Vigna, supra*. Consequently, we vacate the administrative law judge's findings at Section 727.203(b)(2), (3) and remand this case for reconsideration of all relevant evidence thereunder pursuant to the appropriate standard. If, on remand, the administrative law judge finds rebuttal established, she must consider entitlement pursuant to 20 C.F.R. Part 718 and determine whether modification is warranted pursuant to Section 725.310.

Lastly, employer contends that the administrative law judge erred in relying on Dr. Partridge's 1977 diagnosis of chronic bronchitis to preclude a finding of rebuttal at Section 727.203(b)(4), and erred in failing to address Dr. Sloan's testimony and records, which employer asserts are sufficient to establish that the miner did not suffer from chronic bronchitis after 1980. Employer's arguments are without merit. The administrative law judge accurately noted in his analysis at subsection (b)(2) that while Dr. Sloan's records did not reflect a diagnosis of pneumoconiosis or a history of chronic pulmonary problems, the physician did not affirmatively opine that the miner suffered no chronic dust disease arising out of coal mine employment. Decision and Order at 15-19; Employer's Exhibits 1, 8. Inasmuch as the administrative law judge determined that the remaining medical opinions of record either diagnosed or did not persuasively rule out "legal" pneumoconiosis as defined at 20 C.F.R. §718.201, we affirm her finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(4), as supported by substantial evidence. Decision and Order at 21-22; *see Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990), *pet. for reh'g denied*, 927 F.2d 969 (7th Cir. 1990).

Accordingly, the Decision and Order of the administrative law judge awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge