BRB No. 02-0324 BLA

EUGENE W. HAMBLIN Claimant-Respondent v. EASTERN ASSOCIATED COAL CORPORATION 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 on Second Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Granting

Benefits (1997-BLA-0043) of Administrative Law Judge Pamela Lakes Wood rendered 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] Claimant filed this application for benefits on February 4, 1980. Director's Exhibit 1. His claim is before the Board for the fifth time. The Board in its previous decision set forth this claim's full procedural history. *Hamblin v. Eastern Associated Coal Co.*, BRB No. 00-0801 BLA at 2-4 (Jun. 29, 2001)(unpub.). Accordingly, the Board will now focus only on those procedural aspects relevant to the issues raised in this appeal.

Claimant has established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(2). The issue is whether employer has rebutted the presumption under 20 C.F.R. §727.203(b)(3) by ruling out any causal connection between claimant's total disability and his coal mine employment, *see Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-314 (4th Cir. 1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72, 2-80 (4th Cir. 1984), or under 20 C.F.R. §727.203(b)(4) by proving that claimant does not have pneumoconiosis, in either the clinical or legal sense. *See* 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir. 1995).

In a Decision and Order on Remand issued on April 10, 2000, the administrative law judge found that employer did not establish rebuttal under either subsection (b)(3) or (b)(4). The administrative law judge discounted the opinions of Drs. Fino and Tuteur attributing claimant's chronic obstructive pulmonary disease (COPD) to smoking, and gave greater weight to Dr. Rasmussen's opinion linking claimant's COPD to both smoking and coal dust exposure. Accordingly, the administrative law judge awarded benefits.

Upon consideration of employer's appeal, the Board vacated the administrative law judge's Decision and Order in part and remanded the case for further consideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(3),(4). Relevant to this appeal, the Board held that the administrative law judge did not provide valid reasons for discrediting Dr. Fino's opinion and crediting Dr. Rasmussen's opinion. *Hamblin*, [2001] slip op. at 6. The Board further held that the administrative law judge mischaracterized the opinions of Drs. Fino and Tuteur as rejecting the concept of legal pneumoconiosis. *Hamblin*, [2001] slip op. at 6-7 and n.8. The Board additionally instructed the administrative law judge that

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

if on remand she again credited Dr. Rasmussen's opinion because he examined claimant, she should explain how Dr. Rasmussen's examination gave him an advantage over the reviewing physicians to address the etiology of claimant's respiratory impairment. *Hamblin*, [2001] slip op. at 8. The Board also reconsidered its earlier holding that Dr. Zaldivar's opinion was insufficient to establish (b)(3) or (b)(4) rebuttal, and instructed the administrative law judge to again weigh Dr. Zaldivar's opinion. *Id.* The Board affirmed the administrative law judge's finding that the x-ray evidence did not assist employer in establishing (b)(4) rebuttal and affirmed her determination to discount Dr. Tuteur's opinion that claimant does not have pneumoconiosis, but instructed her to consider whether medical opinions she found to be supportive of Dr. Rasmussen's opinion were documented and reasoned. *Hamblin*, [2001] slip op. at 9. The Board rejected employer's contention that delays and errors in the processing of this claim violated employer's due process rights, and therefore denied employer's request to transfer liability to the Black Lung Disability Trust Fund (the Trust Fund). *Hamblin*, [2001] slip op. at 10-11. Finally, the Board denied employer's request to remand the case to a different administrative law judge. *Id.*

On remand, the administrative law judge again credited Dr. Rasmussen's opinion and discredited Dr. Fino's opinion at subsections (b)(3) and (b)(4), stating that, "I simply found Dr. Rasmussen's discussion more persuasive, based upon the quality of his reasoning and explanation, and Dr. Fino's less persuasive, based upon the quality of his reasoning and explanation, and I continue to do so." [2001] Decision and Order on Remand at 3. The administrative law judge next explained that Dr. Rasmussen's examination of claimant provided him with an advantage in addressing impairment etiology because "a physician examining a patient . . . can observe the patient, question the patient, and perform whatever additional testing is necessary, as Dr. Rasmussen has done here. The thoroughness of the examination and his analysis is evident from Dr. Rasmussen's reports, which are self explanatory." [2001] Decision and Order on Remand at 4. The administrative law judge found that Dr. Zaldivar's opinion did not support (b)(3) or (b)(4) rebuttal because Dr. Zaldivar did not "identif[y] factors that rule out pneumoconiosis" as a cause of claimant's total disability, or "identif[y] factors that show that [claimant] does not have pneumoconiosis." [2001] Decision and Order on Remand at 4, 5. The administrative law judge found that the opinions of Drs. Piracha, Daniel, and Qazi diagnosing pneumoconiosis were sufficiently documented and reasoned to corroborate Dr. Rasmussen's opinion, and were not undercut by negative x-ray readings. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) or (b)(4). Employer further contends that liability in this case must

be transferred to the Trust Fund. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), responds, arguing that liability should not be transferred to the Trust Fund. Employer has filed a reply brief reiterating its contentions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 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).

Employer contends that the administrative law judge did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), because she provided insufficient reasoning for crediting Dr. Rasmussen's opinion and discrediting Dr. Fino's opinion. Employer's Brief at 14-15. This argument has merit, as the administrative law judge stated that Dr. Rasmussen's opinion was more persuasive and Dr. Fino's less persuasive, without explaining how she reached that conclusion. *See Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 191, 22 BLR 2-251, 2-260-61 (4th Cir. 2000)(administrative law judge must explain why certain opinions are more persuasive and others less persuasive). Nor was the Board able to discern the administrative law judge's path as to which qualities of reasoning and explanation differentiated the two medical opinions.

[2] More specific explanation is required to permit review. *See* APA, *supra*; *Caudill v. Arch of Kentucky, Inc.,* 22 BLR 1-97, 1-101 (2000)(*en banc*). Therefore, we must vacate the administrative law judge's findings at 20 C.F.R. §727.203(b)(3),(b)(4), and instruct the administrative law judge to explain her reasoning for whatever weight she accords the opinions of Drs. Rasmussen and Fino.

Employer next contends that the administrative law judge did not validly explain why Dr. Rasmussen's examination of claimant placed him in a better position to determine the etiology of claimant's respiratory impairment. Employer's Brief at 19. The administrative law judge's explanation for crediting the examining physician on the question of etiology differs little from her previous explanation vacated by the Board in the last appeal. *Compare* [2001] Decision and Order on Remand at 3-4 *with* [2000] Decision and Order on Remand at 4. Additionally, review of Dr. Rasmussen's examination report reflects that he diagnosed claimant as not totally disabled due to pneumoconiosis. Claimant's Exhibit 1. Only later, in a record

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[2] The administrative law judge incorporated her prior decisions by reference, [2001] Decision and Order on Remand at 2, 6, but the Board previously vacated her reasons for crediting Dr. Rasmussen and discounting Dr. Fino.

review report, did Dr. Rasmussen diagnose claimant as totally disabled due to pneumoconiosis.

[3] *Id.* Therefore, the administrative law judge should explain why Dr. Rasmussen's etiology opinion merits greater weight based upon his examination of claimant. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-177 (4th Cir. 2000)(administrative law judge should not automatically credit examining physician).

Employer argues that substantial evidence does not support the administrative law judge's finding that Dr. Zaldivar did not identify factors for ruling out coal mine employment as a cause of claimant's total disability or for concluding that claimant has neither clinical nor legal pneumoconiosis. Employer's Brief at 21, 24. This contention has merit. Based on examination and testing Dr. Zaldivar concluded that claimant has no lung disease related to coal mine dust exposure. Employer's Exhibit 8 at 10-11. In his examination report and deposition testimony, Dr. Zaldivar identified the following factors for concluding that claimant's respiratory impairment is asthma unrelated to coal dust inhalation: 1) normal diffusing capacity indicates that claimant's lung tissue is undamaged, 2) normal diffusing capacity coupled with wheezing and obstruction is consistent with airways inflammation and inconsistent with pneumoconiosis, 3) negative chest x-rays, 4) normal blood gas studies at rest and on exercise, 5) fluctuation in pulmonary function study values confirms asthma, 6) asthma is a disease of the general public. Employer's Exhibit 5 at 5-6; Employer's Exhibit 8 at 9-11, 15, 23-25. Since the administrative law judge did not indicate how she weighed these factors, substantial evidence does not support her finding. *See* 33 U.S.C. §921(b)(3). Therefore, on remand the administrative law judge must reweigh Dr. Zaldivar's opinion.

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[3] On examination, Dr. Rasmussen concluded that claimant had minimal obstruction, was not disabled, and that "coal mine dust exposure has not produced significant loss of pulmonary function." Claimant's Exhibit 1. Two months later, after reviewing four positive x-ray readings and discussing medical literature concerning coal dust and obstruction, Dr. Rasmussen opined that claimant was totally disabled by COPD due to smoking and coal dust exposure. *Id.*

Employer contends that the administrative law judge did not comply with the Board's instruction to consider whether the examination reports of Drs. Piracha, Daniel, and Qazi diagnosing pneumoconiosis were documented and reasoned, or whether the opinions of Drs. Daniel and Qazi were undermined by negative readings of a July 9, 1986 x-ray they relied on to diagnose pneumoconiosis. Employer's Brief at 25-26. The administrative law judge on remand found that the reports of Drs. Daniel and Qazi were not undercut by negative x-ray readings because qualified readers classified the July 9, 1986 x-ray as both positive and negative for pneumoconiosis.[4] [2001] Decision and Order on Remand at 5. Additionally, as the administrative law judge found, Drs. Daniel and Qazi based their diagnoses of pneumoconiosis on coal dust exposure and smoking histories, physical examinations, pulmonary function studies, blood gas studies, and chest x-rays, and explained their diagnoses. Director's Exhibits 30, 63. As substantial evidence supports the administrative law judge's discretionary finding that the 1986 and 1989 reports of Drs. Daniel and Qazi were adequately documented and reasoned, employer's argument is rejected. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 and n.4 (1993). However, while the administrative law judge acted within her discretion in finding Dr. Piracha's November 4, 1980 examination report to be documented, *see Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-22 (1987), she did not adequately explain her finding that it was sufficiently reasoned to corroborate Dr. Rasmussen's opinion.[5] *See Hicks, supra*; *Akers, supra*. We agree with employer that the administrative law judge misapplied *Freeman United Coal Mining Co. v. Anderson*, 973 F.2d 514, 16 BLR 2-110 (7th Cir. 1992) as authority for relying on Dr. Piracha's report despite finding that it lacked any explanation, when *Anderson* holds that a minimally reasoned report is not substantial evidence to support a denial of rebuttal at 20 C.F.R. §727.203(b). *Anderson*, 973 F.2d at 519, 16 BLR at 2-115. Consequently, on remand the administrative law judge should adequately address whether Dr. Piracha's opinion was reasoned.

Employer again contends that its due process rights were violated by

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[4] The July 9, 1986 x-ray received three negative and three positive readings by physicians with radiological credentials. Director's Exhibits 48, 52. The Board has affirmed the administrative law judge's finding that the x-ray evidence establishes neither the presence nor absence of pneumoconiosis. *Hamblin*, [2001] slip op. at 9.

[5] Review of Dr. Piracha's report reflects that he diagnosed "COPD-minimal" and checked a box indicating that the COPD was related to coal mine dust exposure, but left blank the portion of the examination form requesting the physician's "medical rationale" for the diagnosis. Director's Exhibit 18 at 4. In the report's history section, Dr. Piracha had previously noted thirty-five years of coal mine employment, but also thirty years of smoking one pack of cigarettes per day. *Id.* at 1-2.

processing delays and errors in this case, requiring transfer to the Trust Fund under the holdings of *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1999), and *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000). Employer's Brief at 27-28; Employer's Reply Brief at 4. The Board previously rejected this argument, *Hamblin*, [2001] slip op. at 10-11, and as employer presents no exception to the law-of-the-case doctrine, the Board declines to change its prior holding on this issue. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J., dissenting). Therefore, employer's contention is rejected.

Finally, employer requests reassignment to a different administrative law judge on remand. Employer contends that Judge Wood is biased against employer. Employer's Brief at 29-30. Upon review, we again conclude that employer has not met the "heavy burden" of demonstrating bias or prejudice on the part of the administrative law judge, *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992); *Hamblin*, 2001 slip op. at 11, and we decline to grant employer's request.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge