

BRB No 03-0278 BLA

STANLEY JONES)	
)	
Claimant-Respondent)	
)	
v.)	
)	
DANTE COAL COMPANY)	DATE ISSUED: 01/30/2004
)	
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-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

James Hook, Waynesburg, Pennsylvania, for claimant.

Ashley M. Harman (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Jennifer U. Toth (Howard M. Radzely, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand-Awarding Benefits (98-BLA-0607) of Administrative Law Judge Daniel L. Leland 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 When this case was most recently before the Board, the Board affirmed the administrative law judge's Decision and Order awarding benefits. *Jones v. Dante Coal Co.*, BRB No. 00-0554 BLA (Apr. 20, 2001)(unpub.). Specifically, the Board affirmed, as unchallenged on appeal, the administrative law judge's finding that invocation of the interim presumption of totally disabling pneumoconiosis was established pursuant to 20 C.F.R. §727.203(a)(2), (4) and that claimant had, therefore, established a change in conditions in this request for modification. *Jones*, slip op. at 4-5. The Board also affirmed the administrative law judge's finding that the presumption was not rebutted pursuant to 20 C.F.R. §727.203(b)(3) and (4) based on the opinions of Drs. Castle and Fino. *Jones*, slip op. at 5-7. Consequently, the Board affirmed the administrative law judge's award of benefits pursuant to Part 727.

Subsequently in an appeal by employer to the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, that court held that the administrative law judge erred in relying on the proposition that pneumoconiosis always constitutes a progressive and irreversible disease process to credit the opinion of Dr. Abrahams over the contrary opinions of Drs. Castle and Fino. *Dante Coal Co. v. Jones*, 37 Fed. Appx 637, 2002 WL 128634 (4th Cir. June 11, 2002). The court held that even if that proposition were accepted as true, it would undercut only one of the arguments offered by Drs. Castle and Fino for finding that claimant's obstructive airway disease was not coal dust related, but it would not dispose of their opinions that claimant's small airway obstruction demonstrates that his condition was not caused by coal mine employment and would not damage their credibility to any greater extent than it would damage the credibility of the opinion of Dr. Abraham, who testified that coal dust-induced lung disease can be reversible. Accordingly, the court vacated the Board's Decision and Order affirming the administrative law judge's award of benefits and remanded the case to the Board for further remand to the administrative law judge for a proper weighing of the evidence.

On remand, the administrative law judge again found that invocation of the interim presumption was established pursuant to Section 727.203(a)(2) based on qualifying pulmonary function studies and at Section 727.203(a)(4) based on the opinions of Drs. Abrahams and Fino finding a totally disabling respiratory impairment. The administrative law judge further found that the presumption was not rebutted pursuant to Section 727.203(b)(3) and (4). Decision and Order on Remand at 2. The administrative law judge

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). The regulations at issue in this case, however, are not affected by the revised regulations. 20 C.F.R. §§725.2, 725.4(a), (d), (e).

concluded that because the opinions of Drs. Castle and Fino, attributing claimant's respiratory impairment to smoking, were based upon questionable reasoning they did not satisfy employer's burden of rebuttal pursuant to Section 727.203(b)(3), (4). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to rebut the presumption. Specifically, employer argues that the administrative law judge erred in his weighing of the medical opinion evidence. Employer also argues that the administrative law judge erred in applying the newly revised definition of pneumoconiosis in this case because the application of that definition after the closure of evidentiary development constitutes a deprivation of its due process rights. Employer argues, therefore, that the administrative law judge's decision awarding benefits should be vacated and the case should be remanded and the record reopened for the development of additional medical evidence in light of the newly revised definition of pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response challenging employer's assertion that due process requires a reopening of the record in this case. The Director takes no position on the merits of entitlement. In reply, employer reiterates its contentions on 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 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To rebut the interim presumption of totally disabling pneumoconiosis at Section 727.203(b)(3), employer must rule out any causal connection between claimant's total disability and his coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-313-14 (4th Cir. 1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72 (4th Cir. 1984). To rebut the presumption under Section 727.203(b)(4), employer must prove that claimant does not have either clinical or legal pneumoconiosis. See 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 18 BLR 2-61, 2-66-67 (4th Cir. 1995).

In connection with his modification request, claimant was examined and tested by Dr. Abrahams, who is Board-certified in Internal Medicine and Pulmonary Disease. Based upon findings of a chronic, productive cough, moderate obstructive ventilatory impairment on pulmonary function study, negative chest x-ray, normal blood gas study, and wheezing and dyspnea on exertion, Dr. Abrahams diagnosed chronic obstructive airway disease. Claimant's Exhibits 1, 5. Dr. Abrahams considered claimant's past habit of smoking one pack of cigarettes a day for forty years along with his thirty-three years of coal dust

exposure,² and concluded that claimant's obstructive disease was a combination of chronic obstructive pulmonary disease due to smoking and obstructive airway disease due to industrial bronchitis from coal dust exposure. *Id.* Dr. Abrahams cited medical studies to support his view that the inhalation of coal dust causes chronic, permanent obstruction to airflow. *Id.*

Subsequently, Dr. Castle, who is Board-certified in Internal Medicine and Pulmonary Disease, examined and tested claimant and reviewed other medical evidence. Based upon findings of a negative chest x-ray, moderate airway obstruction, and normal blood gas study, Dr. Castle concluded that claimant did not have coal workers' pneumoconiosis and that his airway obstruction was related solely to smoking. Employer's Exhibits 8, 15, 18. Dr. Castle disagreed with Dr. Abrahams that the inhalation of coal dust caused industrial bronchitis, which in turn left claimant with chronic airway obstruction. Dr. Castle stated that industrial bronchitis is a temporary condition of cough and mucus production which abates shortly after removal from coal dust. Thus, Dr. Castle reasoned that since claimant left the mining industry in 1981, he would have no "ongoing physiologic abnormalities associated with industrial bronchitis," and concluded that his airway obstruction was related to smoking. Employer's Exhibit 8 at 12; *see also* Employer's Exhibit 18 at 10-11, 15, 28.

Thereafter, Dr. Fino, who is also Board-certified in Internal Medicine and Pulmonary Disease, reviewed the medical evidence of record. Dr. Fino stated that there was insufficient evidence to justify a diagnosis of simple coal workers' pneumoconiosis, and concluded that claimant's pulmonary function studies showed an obstructive ventilatory abnormality due to smoking. Dr. Fino stated that a form of obstructive lung disease known as industrial bronchitis temporarily affects working miners, but resolves within six months of leaving the mines. Employer's Exhibit 10 at 15, 17 at 31, 19 at 7-9. Dr. Fino also noted that obstructive lung disease can arise from coal workers' pneumoconiosis, but only in the presence of significant fibrosis. Dr. Fino further stated that the presence of reversible obstruction involving claimant's small airways was consistent with smoking and asthma.

Employer contends that the administrative law judge erred in concluding that the opinions of Drs. Castle and Fino failed to support a finding of rebuttal at either Section 727.203(b)(3) or (4). Employer makes several specific assertions in support of this

² Claimant informed the examining physicians that he quit smoking in 1978. Claimant's Exhibits 1, 5; Employer's Exhibit 8. The record reflects that he ended his coal mine employment in 1981. Hearing Transcript of November 22, 1999 at 14. The Fourth Circuit's statement in *Dante Coal Co. v. Jones*, 37 Fed. Appx 637, 2002 WL 128634 (4th Cir. June 11, 2002) claimant's coal mine employment ended in 1991 is obviously a typographical error. *Jones*, 37 Fed. Appx at 638, 2002 WL 1283634 at 1.

contention that the administrative law judge erred in finding that the doctors did not address the existence of pneumoconiosis as defined by the Act since both physicians did, in fact, address the existence of legal pneumoconiosis and that the administrative law judge failed to consider in totality the opinions of Drs. Castle and Fino, who opined that claimant did not have industrial bronchitis as diagnosed by Dr. Abrahams. Employer contends, therefore, that the administrative law judge erred by selectively analyzing the evidence. *See* Employer's Brief at 6-23.

We reject employer's assertions and hold that the administrative law judge complied with the directions of the court in this case. Review of the record shows that the administrative law judge properly determined that the opinions of Drs. Fino and Castle are not well-reasoned and do not, therefore, credibly support rebuttal of the interim presumption at Section 727.203(b)(3) and (4). Substantial evidence supports the administrative law judge's findings that the focus of Drs. Fino and Castle on the absence of lung fibrosis or interstitial abnormality associated with claimant's obstruction reflects their concern with features of clinical pneumoconiosis rather than legal pneumoconiosis. Employer's Exhibit 9 at 13; compare 20 C.F.R. §718.201(a)(1)(describing "Clinical Pneumoconiosis" as a "fibrotic reaction of the lung tissue to" dust deposition), with 20 C.F.R. §718.201(a)(2)(b)(defining "Legal Pneumoconiosis" as "any chronic restrictive or pulmonary disease" that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment."). Specifically, the administrative law judge concluded that both Dr. Fino and Dr. Castle appeared to require the presence of "fibrosis" to diagnose pneumoconiosis as a contributing cause of claimant's lung disease. Decision and Order at 4. Thus, the administrative law judge rationally concluded that such a requirement indicates that both physicians fail to recognize the possibility of legal pneumoconiosis. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000) in which the Sixth Circuit considered a similar opinion by Dr. Fino regarding fibrosis and held that the administrative law judge erred by failing to consider whether Dr. Fino employed a more restrictive medical definition of pneumoconiosis when he opined that Mr. Cornett's obstructive impairment was not pneumoconiosis. *Cornett*, 227 F.3d 576-577, 22 BLR at 2-121-122; *see also Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483 and n.7, 222 BLR 2-265, 2-281 and n.7 (7th Cir. 2001) in which the Seventh Circuit upheld the administrative law judge's discounting Dr. Fino's opinion on causation because it was premised on essentially the same basis as that set forth in the case at bar.

Moreover, the administrative law judge found that both physicians failed to address fully the complete history of claimant's productive cough which was demonstrated by the evidence of record, *i.e.*, the administrative law judge stated that while Dr. Castle opined that claimant did not have chronic or industrial bronchitis because claimant did not have a chronic productive cough and Dr. Fino opined that claimant did not have chronic bronchitis because of his variable history of productive cough, their opinions were not credible because six other medical opinions which Drs. Castle and Fino allegedly reviewed, all reported a consistent

history of productive cough. This was rational. Decision and Order on Remand at 5. See *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985).

We further hold that the administrative law judge rationally found Dr. Castle's conclusion that coal dust exposure was not a cause of claimant's obstructive airways disease because there was "not a mixed irreversible obstructive and restrictive ventilatory impairment." Employer's Exhibit 8; Decision and Order at 3. The new regulations specifically recognize that legal pneumoconiosis may contain either a restrictive or obstructive component. 20 C.F.R. §§718.201(a)(2), 727.203(c); see *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); but see *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). Further, the administrative law judge addressed Dr. Fino's conclusion that there was a greater reduction in the small airways than in the large airways and that such a finding is associated with smoking or asthma. Employer's Exhibit 17. The administrative law judge concluded that Dr. Fino failed to explain how coal mine dust exposure could be ruled out as a causative factor in the miner's disease when "the values for the airflow in both the small and large airways varied over time." Decision and Order at 3-4. We hold that this constitutes a permissible exercise of the administrative law judge's discretion. *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985).

Likewise, contrary to employer's assertion, the administrative law judge properly rejected the opinions of Drs. Castle and Fino because they failed to fully explain the degree of reversibility present in claimant's condition. The administrative law judge found their opinions to be inconsistent and poorly explained. Specifically, the administrative law judge found that while Dr. Castle opined that claimant's 1998 pulmonary function study showed a "very marked degree of reversibility in the degree of obstruction," which reinforced his opinion that claimant did not have pneumoconiosis and was not disabled by pneumoconiosis and Dr. Fino stated that the variation in values between Dr. Abrahams's and Dr. Castle's pulmonary function studies showed an obstruction which could not have been caused by coal dust exposure because coal dust diseases are not reversible. The administrative law judge stated that Drs. Castle and Fino failed to explain the results of the two pulmonary function studies conducted in 1999 showed minimal reversibility (less than 4% on each study) nor did they "explain how much reversibility was necessary to rule out coal mine employment as a causal factor" of respiratory impairment. Decision and Order on Remand at 4. The administrative law judge, therefore, found that the opinions of Drs. Castle and Fino failed to rule out coal mine employment as the source of claimant's totally disabling respiratory impairment or to establish that claimant did not have pneumoconiosis as defined by the Act. This was rational. See *Lockhart*, 137 F.3d 799, 21 BLR 2-302; *Massey*, 736 F.2d 120, 7 BLR 2-72; *Barber v. Director, OWCP*, 43 F.3d 899, 901, 18 BLR 2-61, 2-66-67 (4th Cir. 1995);

York, 7 BLR 1-766; *Oggero*, 7 BLR 1-860; *Cooper* 7 BLR 1-842 (1985); *see also Hicks*, 138 F.3d 524, 21 BLR 2-323; *Akers*, 131 F.3d 438, 21 BLR 2-269; *see generally Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

Our dissenting colleague correctly points out that on remand the administrative law judge did not discuss Dr. Abrahams's opinion. Unlike our dissenting colleague, however, we do not read the court's opinion to require a comparative evaluation of all three medical opinions. The court held that the "administrative law judge erred in relying on the conclusion that pneumoconiosis is a progressive and irreversible disease to credit Dr. Abrahams'[s] opinion that Jones suffered from pneumoconiosis over Dr. Castle's and Fino's contrary opinions." 37 Fed. Appx. at 639, 2002 WL 1283634 at 2. The court's opinion indicates that Dr. Castle and Fino do not believe pneumoconiosis is progressive but do believe that it is irreversible, while Dr. Abrahams believes pneumoconiosis is progressive but does not believe it is irreversible.³ Accordingly, the court declared that acceptance of the proposition that pneumoconiosis is both progressive and reversible would not undermine the credibility of the opinions of Drs. Castle and Fino any more than it would undermine the credibility of Dr. Abrahams's opinion. For that reason the court held that the administrative law judge had erred in crediting Dr. Abrahams's opinion over the opinions of Drs. Castle and Fino. On remand, the administrative law judge did not credit the opinion of Dr. Abrahams over the opinions of Drs. Castle and Fino; he properly determined that these opinions were insufficient to carry employer's burden of persuasion on remand. Nothing more was required. Since the administrative law judge has offered several permissible bases for concluding that the opinions of Drs. Castle and Fino failed to carry employer's burden of rebuttal at Section 727.203(b)(3) and (4), he has weighed the relevant evidence in accordance with the court's opinion.

The administrative law judge is not bound to accept the opinion or theory of any medical expert, but must evaluate the evidence, weigh it, and draw his own conclusions. *Underwood v Elkay Mining Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-2-28 (4th Cir. 1997). The administrative law judge has done that here utilizing the proper legal standards. *See Massey, supra; Barber, supra*. His findings are rational, in accordance with law, and are supported by substantial evidence. Therefore, we affirm the administrative law judge's findings that rebuttal was not established pursuant to Section 727.203(b)(3), (4).

Lastly, we reject employer's assertion that the administrative law judge's application of the newly revised definition of pneumoconiosis constitutes a deprivation of its due process

³ Review of Dr. Abrahams's deposition reveals that his opinion is more nuanced than this summary would indicate. He was emphatic that "the pneumoconiosis is not treatable. [But] [t]he obstructive airway disease from bronchitis does respond some to treatment, and it depends." Claimant's Exhibit 5 at 25.

rights, requiring remand of the case and reopening of the record. The Director, in response to employer's assertion, recognizes that in some circumstances, due process may require a reopening of the record when the legal standard has changed. Director's Brief at 2; *see Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1049, 14 BLR 2-1, 2-7 (6th Cir. 1990). The Director argues that in the case at bar, however, the change in the definition of legal pneumoconiosis, was not a change of legal standards. The newly revised regulation at 20 C.F.R. §718.201(a), defining pneumoconiosis, is consistent with precedent established by the Fourth Circuit and the Board. *National Mining Association v. Department of Labor*, 292 F.3d 849 (D.C. Cir. 2002); *see Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Accordingly, employer had ample opportunity to develop evidence under the applicable legal standard. We, therefore, reject employer's assertion, and hold that the administrative law judge permissibly declined to reopen the record for further development of the evidence on this issue.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to affirm the award of benefits. I believe that this case must be remanded for the administrative law judge to consider the opinions of Drs. Castle, Fino and Abrahams pursuant to the instructions of the United States Court of Appeals for the Fourth Circuit in *Dante Coal Co. v. Jones*, 37 Fed. Appx. 637, 2002 WL 1283634 (4th Cir. June 11, 2002).

In that decision, the court stated that the administrative law judge erred in relying on the proposition that pneumoconiosis always constitutes a progressive and irreversible disease process to credit the opinion of Dr. Abrahams over the contrary opinions of Drs. Castle and

Fino on rebuttal at 20 C.F.R. §727.203(b)(3), (4). The court went on to state that even if that proposition were accepted as true, it would undercut only one of the arguments offered by Drs. Castle and Fino for finding that claimant's obstructive airway disease was not coal dust related, but it would not dispose of their opinions that claimant's small airway obstruction demonstrates that his condition was not caused by coal mine employment and would not damage their credibility to any greater extent than it would damage the credibility of Dr. Abrahams, who also testified that coal-dust induced lung disease can be reversible.

I do not believe that the administrative law judge's Decision and Order on remand sufficiently addresses the court's concerns regarding the administrative law judge's assessment of the credibility of the medical opinions. As the court held, Dr. Abrahams, like Drs. Fino and Castle, opined that coal-dust induced lung disease could be reversible. Although, as my colleagues hold, Dr. Abrahams's opinion, that claimant's chronic obstructive pulmonary disease was due in part to coal mine employment, cannot rebut the presumption, inasmuch as the court directed the administrative law judge to reconsider all three opinions on the issues of causation and existence of pneumoconiosis, the administrative law judge must do so. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *see also Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 804, 21 BLR 2-302, 2-313-14 (4th Cir. 1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 123, 7 BLR 2-72 (4th Cir. 1984); *Barber v. Director, OWCP*, 43 F.3d 899, 901, 18 BLR 2-61, 2-66-67 (4th Cir. 1995). Because the administrative law judge failed to address Dr. Abrahams's opinion on these issues, he failed to comply with the instructions of the court. Such failure, because it touches on the credibility of all the medical opinions, cannot be deemed to be harmless error. I would, therefore, vacate the administrative law judge's award of benefits, and remand this case for the administrative law judge to consider all the medical opinions pursuant to the instructions of the court.

ROY P. SMITH
Administrative Appeals Judge