BRB No. 04-0284 BLA

JOHN PIERSON (Deceased)	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MIDLAND COAL COMPANY	)	
	)	DATE ISSUED: 01/18/2005
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Denying Modification and Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (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.

PER CURIAM:

Employer appeals the Order Denying Modification and Granting Benefits (1997-BLA-1001) of Administrative Law Judge Pamela Lakes Wood with respect to 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 been before the Board several times.[1] In its most recent Decision and Order, the Board vacated the Decision and Order in which Administrative Law Judge John C. Holmes dismissed the case on the ground that no party remained to pursue the miner's and survivor's claims.[2] The Board remanded the case to Judge Holmes for *de novo* consideration of employer's request for modification. Because Judge Holmes was no longer with the Office of Administrative Law Judges, the case was assigned to Administrative Law Judge Pamela Lakes Wood (the administrative law judge).

On remand, the administrative law judge initially determined that Mr. Pierson was engaged in coal mine employment while working for employer. The administrative law judge also found that the evidence of record did not establish a mistake of fact in the award of benefits to Mr. Pierson and, derivatively, to Mrs. Pierson. Accordingly, the administrative law judge denied employer's request for modification and awarded benefits.

Employer argues on appeal that the administrative law judge erred in finding that it was bound by an earlier stipulation as to the nature of the miner's employment. Employer also maintains that the administrative law judge did not properly weigh the evidence relevant to invocation and rebuttal of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §§727.203(a)(2), 727.203(b)(3) and 727.203(b)(4). The Director, Office of Workers' Compensation Programs (the Director), has responded and asserts that the administrative law judge's findings on the issue of Mr. Pierson's status as a miner and the merits of entitlement are rational and should be affirmed.[3] Employer has filed a reply brief reiterating its contentions.

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[1] A complete recitation of the procedural history of this case appears in *Pierson v. Midland Coal Co.*, BRB No. 02-0254 BLA (Sep. 30, 2002)(unpub.), slip op. at 2-4.

[2] Mr. Pierson filed a claim for benefits on March 21, 1978. Director's Exhibit 1. The district director made an initial finding of entitlement and began to make payments of interim benefits to Mr. Pierson. Mr. Pierson died on June 21, 1992. Director's Exhibit 40. Mr. Pierson's widow filed a claim for survivor's benefits on February 17, 1995. She began receiving interim benefit payments as a result of the district director's finding that she was derivatively entitled to benefits. *Id.*; 30 U.S.C. §932(l). Mrs. Pierson died on July 27, 1999.

[3] As discussed in the Board's prior decision, the Director seeks to recoup from employer the interim benefits paid to the Piersons by the Black Lung Disability Trust Fund. *Pierson,* slip. op. at 5.

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 applicable 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 initially challenges the administrative law judge's finding that Mr. Pierson was a miner under the terms of the Act. The roots of this issue can be traced to the beginning of the adjudication of Mr. Pierson's 1978 claim for benefits. The initial hearing on Mr. Pierson's claim was held before Judge Holmes on February 9, 1983. However, the parties, Judge Holmes, and the Department of Labor never received a copy of the transcript. To remedy this situation, Judge Holmes held another hearing on November 4, 1983, at which the parties agreed that the miner need not testify again as to the nature of his coal mine employment. Instead, the parties stipulated to the miner's testimony as recorded in Judge Holmes's notes of the first hearing which, by agreement of the parties, were made part of the record. The facts to which the parties stipulated were that:

> [T]he claimant worked in excess of 25 years in the mines. The evidence supports a finding of 29 years. All of his work was in strip mines. The large majority of it, claimant testified 20 to 25 years, was as a welder. While located on the mine site, claimant most often worked in the repair shop as far as three to six miles from the pit. However, he was exposed to substantial amounts of coal dust in addition to welding fumes.

Hearing Transcript at 5. Employer's counsel at the rehearing also withdrew controversion of all issues except those concerning the medical issues listed on Form CM-1025. *Id*. at 8.

In determining whether Mr. Pierson was a miner for purposes of the Act, the administrative law judge explicitly stated that she would not rely upon a stipulation that Mr. Pierson was a miner for purposes of the Act. Order at 9 n. 8. The administrative law judge therefore indicated that she need not decide whether employer's stipulation that Mr. Pierson was a miner was a legal conclusion that no longer bound employer due to a change in the relevant law. Rather, the administrative law judge applied the Seventh Circuit's decision in *Director, OWCP v. Zeigler Coal Co. [Wheeler]*, 853 F.2d 529 (7th Cir. 1988), to the factual record agreed upon by the parties.[4] *Id.* The administrative law

[4] In *Director, OWCP v. Zeigler Coal Co. [Wheeler]*, 853 F.2d 529 (7th Cir. 1988), the United States Court of Appeals for the Seventh Circuit affirmed an administrative law judge's determination that the claimant, who worked in an off-site repair shop at least a

judge noted that although the court held that geographical distance from the mine site was a relevant factor in the situs analysis, the court "'caution[ed] against an inflexible fixed distance rule.'" *Id*., citing *Wheeler*, 853 F.2d at 535. The administrative law judge also indicated that the facts in the present case are distinguishable from those in *Wheeler*, as the claimant in *Wheeler* worked at a repair shop approximately 1.5 miles from the nearest mine and there was no information as to the extent of his coal dust exposure, while in this case, the parties agreed that Mr. Pierson worked on the mine site and was exposed to substantial amounts of coal dust. *Id*. Based upon this analysis, the administrative law judge determined that Mr. Pierson's work as a welder in a repair shop was integral to the extraction of coal and that employer admitted that Mr. Pierson worked at a repair shop on the mine site and was exposed to a substantial amount of coal dust. Accordingly, the administrative law judge found that Mr. Pierson's work met the Seventh Circuit's situs-function test and that therefore, Mr. Pierson was a miner under the terms of the Act. Order at 7-8.

Employer contends that the administrative law judge erred in holding it to stipulations that "took on new significance" after the court's decision in *Wheeler* was issued. Employer's Brief in Support of Petition for Review at 14. In addition, employer argues that the administrative law judge erred in applying *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), in this case.[5] Employer also asserts that the administrative law judge ignored alleged due process violations that require that this issue be resolved in employer's favor.

The Director responds that employer is precluded from raising the issue of whether Mr. Pierson was a miner, because of the stipulations and admissions made at the November 4, 1983 hearing. The Director further maintains that even if the administrative law judge properly reached this issue, her factual finding that the record does not establish that Mr. Pierson was not a miner is rational and should be affirmed.

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mile and a half from the nearest coal mine, was not a miner under the Act, as he did not work in or around a coal extraction site. The case at bar arises within the Seventh Circuit, as Mr. Pierson's entire tenure with employer occurred in Illinois. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[5] In *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), the Seventh Circuit addressed the issue of whether a claimant responsible for maintaining and repairing electrical equipment in all areas of a mine facility had worked for at least fifteen years in conditions substantially similar to those in an underground coal mine. The court held that the evidence of record concerning the claimant's coal dust exposure supported a finding of substantially similar conditions.

We hold that employer's allegations of error with respect to this issue are without merit. As the administrative law judge indicated, she did not base her finding upon employer's stipulation to the legal conclusion that Mr. Pierson was a miner under the terms of the Act. Rather, the administrative law judge examined the factual record available to her--which was the product of employer's decision not to have Mr. Pierson testify at the second hearing about the nature of his work--and rationally found that in accordance with the analysis in *Wheeler*, Mr. Pierson was a miner based upon employer's acknowledgement that the repair shop was on the mine site and that Mr. Pierson was exposed to substantial amounts of coal dust.[6]

Accordingly, we affirm the administrative law judge's finding that Mr. Pierson was a miner for purposes of the Act. Therefore, we need not reach employer's argument regarding the administrative law judge's reference to the Seventh Circuit's decision in *Summers*. We also reject employer's assertion that the failure to acquire a transcript of the February 9, 1983 hearing and the tortuous procedural history of this case, during which both claimants died, constitute violations of employer's right to due process. Employer chose not to rectify any deficiencies attributable to the absence of a transcript from the first hearing. In addition, throughout the lengthy adjudication of this case, employer has had the opportunity to present a meaningful defense of the miner's and survivor's claims and has taken advantage of this opportunity. *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 22 BLR 2-514 (7th Cir. 2002).

Employer next argues that the administrative law judge erred in finding that there was no mistake of fact in Judge Holmes's determination that invocation of the interim presumption was established pursuant to Section 727.203(a)(2) based upon the pulmonary function studies of record. In her Order, the administrative law judge reviewed the relevant evidence, Judge Holmes's invocation finding, and the Board's affirmance of that finding. Order at 10. The administrative law judge concluded that "[e]mployer's sole basis for modification on this issue was rejected by Judge Holmes and the BRB. I find no mistake of fact in Judge Holmes' finding of invocation under (a)(2)." Order at 10. We affirm the administrative law judge's determination as it is rational and supported by substantial evidence. *Zeigler Coal Co. v. Sieberg***,** 839 F.2d 1280, 11 BLR 2-80 (7th Cir. 1988).

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[6] The dearth of information regarding Mr. Pierson's work is similar to the situation in *Wheeler* insofar as the *Wheeler* court noted that "the record contains remarkably little evidence about the physical relationship between the repair shop and [the] extraction site" due to a "strategic decision" by the Director at the hearing. 853 F.2d at 535. Here, employer chose not to elicit Mr. Pierson's testimony at the 1983 rehearing.

Regarding rebuttal pursuant to Section 727.203(b)(4), the administrative law judge found that employer did not satisfy its burden of proof, because the x-ray evidence regarding clinical pneumoconiosis was in equipoise, "the medical experts disagree" as to whether the miner had legal or clinical pneumoconiosis, and because "the newly submitted autopsy evidence tends to support a finding of clinical pneumoconiosis." Order at 15. The administrative law judge reached the latter conclusion based upon the fact that three out of five Board-certified pathologists, including the autopsy prosector, found evidence consistent with at least simple coal workers' pneumoconiosis. *Id*.; Director's Exhibits 48, 53; Employer's Exhibits 1, 2. The administrative law judge gave little weight to Dr. Tuteur's finding that the miner did not have clinical pneumoconiosis because he is not a pathologist. Employer's Exhibit 3. The administrative law judge then determined that because autopsy evidence is the most reliable type of evidence regarding the presence of pneumoconiosis and because it tended to support a finding of pneumoconiosis, employer did not establish Section 727.203(b)(4) rebuttal. Order at 15-16; Director's Exhibits 44, 48, 53; Employer's Exhibits 1, 2.

Employer contends that the administrative law judge did not provide a rationale for her finding pursuant to Section 727.203(b)(4). We disagree. As indicated, the administrative law judge reviewed the relevant evidence, assigned weight to the medical opinions, and explained her decision to either credit or discredit individual opinions as to the existence of either legal or clinical pneumoconiosis. We therefore affirm the administrative law judge's finding that employer did not establish rebuttal under Section 727.203(b)(4). *Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990).

With respect to rebuttal pursuant to Section 727.203(b)(3), the administrative law judge reviewed the newly submitted medical opinions and discredited the opinions in which Drs. Hansbarger and Crouch attributed the miner's respiratory condition solely to cigarette smoking because, contrary to the administrative law judge's finding, neither physician believed that Mr. Pierson had pneumoconiosis. Director's Exhibit 53; Employer's Exhibit 1. The administrative law judge found that Dr. Naeye "left open the possibility that a small portion of [the miner's] emphysema was associated with coal dust exposure." Order at 15; Employer's Exhibit 2. The administrative law judge determined that Dr. Tuteur's opinion, that the miner's chronic obstructive pulmonary disease and emphysema were due to smoking, was "entitled to additional weight because of his superior credentials" as a Board-certified internist and pulmonologist. *Id*.; Employer's Exhibit 3. The administrative law judge also determined that Dr. Strauch's opinion, that the miner's respiratory condition was due to pneumoconiosis, was "entitled to additional weight as a treating physician who treated [the miner] for his respiratory problems for seven years and diagnosed his condition for treatment purposes." *Id*.; Director's Exhibit 42, 45. Based upon these findings, the administrative law judge concluded that employer

failed to establish rebuttal at Section 727.203(b)(3) because the evidence was in equipoise.

Employer contends that the administrative law judge erred in finding that the opinions regarding whether pneumoconiosis played a role in the miner's total disability were in equipoise. Specifically, employer argues that the administrative law judge did not apply the relevant law when she found that Dr. Strauch's opinion was entitled to additional weight based upon his status as the miner's treating physician. This contention has merit. As employer notes, the Seventh Circuit has held that the administrative law judge must identify a medical reason for preferring one physician's conclusion over another's and that a treating physician's opinion must be supported by medical reasons if it is to be given legal effect. *Zeigler Coal Co. v. Director, OWCP [Villain]*, 312 F.3d 332, 335, 22 BLR 2-581, 2-588 (7th Cir. 2002); *Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-318 (7th Cir. 2001). Because the administrative law judge did not discuss the documentation or reasoning underlying Dr. Strauch's and Dr. Tuteur's conclusions and identify a medical reason for crediting Dr. Strauch's views, we must vacate the administrative law judge's finding that rebuttal was not established under Section 727.203(b)(3). Once the administrative law judge has reassessed the opinions of Drs. Tuteur and Strauch, she must determine whether employer has established, by a preponderance of the newly submitted evidence, that the miner's total disability was not wholly or in part caused by exposure to coal dust or that the miner's disability was caused by factors totally distinct from pneumoconiosis. *Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

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

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