BRB No. 10-0328 BLA

RENEVA HALCOMB (Widow of ARNOLD L. HALCOMB)	)	
Claimant-Respondent	)	
v.	)	
TRACY COAL COMPANY	)	
	)	DATE ISSUED: 01/31/2011
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 Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

Sandra L. Mayes, Worcester, Massachusetts, for claimant.

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

Barry H. Joyner (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 Decision and Order on Remand (2000-BLA-0001) of Administrative Law Judge Joseph E. Kane rendered on a miner's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case, which is now being considered pursuant to employer's request to modify the miner's award of benefits to a denial, has been before the Board previously. The lengthy procedural history of this case was fully set forth in the Board's prior decisions in *Halcomb v. Tracy Coal Co.*, BRB No. 01-0392 BLA (Jan. 10, 2002)(unpub.), *Halcomb v. Tracy Coal Co.*, BRB No. 04-0591 BLA (Feb. 14, 2005), and *Halcomb v. Tracy Coal Co.*, BRB No. 06-0794 BLA (July 16, 2007).

In the last appeal, filed by claimant, the Board vacated Administrative Law Judge Rudolph L. Jansen's decision granting employer's request for modification pursuant to 20 C.F.R. §725.310 (2000).[3] Judge Jansen found that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §410.490(b)(1)(i), but failed to establish that the disease arose out of coal mine employment pursuant to 20 C.F.R. §410.490(b)(2).[4] Accordingly, Judge Jansen denied benefits. On appeal, the Board held that, in finding that claimant failed to establish that his pneumoconiosis arose out of coal mine

[1] The miner filed his claim for benefits on March 5, 1980. Director's Exhibit 1. The miner died on December 27, 1992, while an appeal was pending before the Board, and claimant, the miner's surviving spouse, is pursuing the miner's claim on his behalf.

[2] 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 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[3] The amendments to the regulation at 20 C.F.R. §725.310 do not apply to claims, such as this one, that were pending on January 19, 2001. 20 C.F.R. §725.2(c).

[4] In claims filed on or before March 31, 1980, where a miner has established less than ten years of coal mine employment, claimants may avail themselves of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490(b), by establishing the existence of pneumoconiosis by x-ray, autopsy, or biopsy evidence, and by establishing that the pneumoconiosis arose from coal mine employment. *See Phipps v. Director, OWCP*, 17 BLR 1-39, 1-44 (1992)(*en banc*)(Smith, J., concurring, and McGranery, J., concurring and dissenting).

employment pursuant to Section 410.490(b)(2), Judge Jansen erred in placing the burden of proof on the miner to establish entitlement, rather than placing the burden on employer to establish a basis for modification. [2007] *Halcomb*, slip op. at 4. Specifically, the Board held that, as the party seeking modification, employer must prove that termination of benefits is appropriate by disproving one of the elements of entitlement already established by the miner. [2007] *Halcomb*, slip op. at 4. Therefore, the Board remanded the case for Judge Jansen to first consider whether employer satisfied its burden of disproving that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §410.490(b)(2), and, if employer did not, to consider whether employer established rebuttal of the Section 410.490 presumption.[5] *See* 20 C.F.R. §727.203(b)(1)-(4). The Board rejected claimant's assertion, however, that Judge Jansen was required to determine, on remand, whether granting employer's modification request would render justice under the Act.

Pursuant to employer's motion for reconsideration, the Board rejected employer's assertion that the Director, Office of Workers' Compensation Programs (the Director), lacked standing to raise the issue that Judge Jansen misapplied the burden of proof. *Halcomb v. Tracy Coal Co.*, BRB No. 06-0794 BLA (Apr. 15, 2008), *aff'g on recon. Halcomb v. Tracy Coal Co.*, BRB No. 06-0794 BLA (July 16, 2007). The Board also rejected employer's alternative contention that, even if the burden of proof argument were properly before the Board, remand was not necessary, as employer had carried its burden of proof on modification by demonstrating a mistake of fact in the previous determination of entitlement, namely, that certain physicians' opinions credited in the award of benefits were based on an inaccurate coal mine employment history. The Board reiterated its prior holding that, as the party seeking modification, employer must prove that termination of benefits is appropriate by disproving one of the elements of entitlement. Thus, the Board denied the relief requested in employer's motion for reconsideration. The Board amended its July 16, 2007 Decision and Order, however, to instruct Judge Jansen, on remand, to explicitly determine whether granting employer's modification request would render justice under the Act. [2008] *Halcomb*, slip op. at 3-4.

On remand, due to Judge Jansen's retirement, the case was reassigned, without objection, to Administrative Law Judge Joseph E. Kane (the administrative law judge). Decision and Order on Remand at 2. Consistent with the Board's instructions, the administrative law judge first considered whether employer satisfied its burden of disproving disease etiology at 20 C.F.R. §410.490(b)(2), and found that employer did not meet its burden. Thus, the administrative law judge found that claimant remained

[5] The interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.490(b) may be rebutted by any one of the available methods contained at 20 C.F.R. §727.203(b). *See Phipps*, 17 BLR at 1-47.

entitled to the presumption that the miner was totally disabled due to pneumoconiosis at the time of his death. Decision and Order on Remand at 7. The administrative law judge further determined that employer failed to establish rebuttal of the Section 410.490 presumption. *See* 20 C.F.R. §727.203(b)(1)-(4). Finally, the administrative law judge found that, although granting employer's modification request would not thwart justice under the Act, since employer did not satisfy its burden to establish a mistake in a determination of fact in the original determination of entitlement, employer's modification request was denied. Decision and Order on Remand at 13-16.

In the present appeal, employer initially reasserts that it previously satisfied its burden of establishing a mistake of fact by demonstrating that the original determination of entitlement was based, in part, on physicians' opinions that were based on an inaccurate coal mine employment history. Relevant to the current administrative law judge's findings, employer asserts that the administrative law judge erred in failing to consider the issue of the existence of pneumoconiosis and, assuming the existence of the disease, erred in finding that employer did not meet its burden to disprove that the miner's pneumoconiosis arose out of coal mine employment pursuant to Section 410.490(b)(2). Employer also challenges the administrative law judge's finding that employer failed to rebut the Section 410.490 presumption by establishing that the miner's disability did not arise out of coal mine employment, pursuant to 20 C.F.R. §727.203(b)(3). Claimant responds, urging affirmance of the administrative law judge's denial of employer's modification request, to which employer replies in support of its position. The Director has filed a limited response, urging the Board to reject employer's contention that it satisfied its burden to establish a mistake of fact in the original determination of entitlement.[6]

By Order dated April 26, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Claimant and the Director have responded, correctly asserting that Section 1556 does not apply to this case, because the miner's claim was filed before January 1, 2005. Claimant's Brief at 9; Director's Brief at 1. The Director further asserts, however, that as the miner filed his claim in 1980, if the award of benefits in the miner's claim is upheld, claimant is automatically entitled to benefits based on the miner's claim award, pursuant to Section 422(*l*). *See* 30 U.S.C. §932(*l*); Director's Brief at 1-2.

[6] We affirm, as unchallenged on appeal, the administrative law judge's findings that rebuttal of the 410.490 presumption was not established by the methods available at 20 C.F.R. §727.203(b)(1), (2), (4). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[7] 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).

Relevant to employer's appeal, we initially decline to reconsider employer's assertion that it need not disprove an element of entitlement in order to establish a mistake of fact in the previous determination of entitlement. Employer's Brief at 16. The Board previously rejected employer's argument, and employer has not demonstrated any reason for us to revisit our prior holding. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984); Director's Brief at 2.

We reject employer's assertion that the administrative law judge erred in failing to consider the issue of the existence of pneumoconiosis, pursuant to 20 C.F.R. §410.490(b)(1). Contrary to employer's argument, the administrative law judge properly found that Judge Jansen previously determined that the chest x-ray evidence established the existence of pneumoconiosis pursuant to Section 410.490(b)(1), and that the Board did not disturb Judge Jansen's finding on appeal. Rather, the Board held that, on remand, the administrative law judge should "first consider whether employer satisfied its burden of disproving disease etiology at Section 410.490(b)(2), and, if employer did not, to consider whether employer established rebuttal of the Section 410.490 presumption," [2007] *Halcomb*, slip op. at 4. Moreover, in its motion for reconsideration, employer did not challenge the Board's holding, or otherwise preserve its objection for appeal.[8] *See Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6 (1995).

We next address employer's assertion that the administrative law judge erred in finding that employer failed to disprove that the miner's pneumoconiosis arose out of coal mine employment. Employer specifically asserts that the administrative law judge erred in discrediting the opinions of Drs. Tuteur and Broudy, and in crediting the opinions of Drs. Powell, Wright, O'Neil, Buchanan, and Funneman. Employer contends that the physicians' opinions linking the miner's pneumoconiosis to his coal mine employment are unreasoned or undocumented. Employer's Brief at 19-21. We reject

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment was in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 2.

[8] Therefore, we decline to address employer's remaining arguments that the x-ray evidence disproves the existence of pneumoconiosis. Employer's Brief at 17-19.

employer's assertions of error, as they are without merit, and we conclude that substantial evidence supports the administrative law judge's denial of employer's modification request.

In considering whether employer met its burden to establish that the miner's pneumoconiosis did not arise out of coal mine employment, the administrative law judge initially considered the medical opinions of Drs. Tuteur, Broudy, and Powell, submitted by employer in support of its modification request. Decision and Order on Remand at 5. Contrary to employer's assertion, the administrative law judge permissibly accorded little probative weight to the opinions of Drs. Tuteur and Broudy, because neither physician diagnosed pneumoconiosis, contrary to the finding in this case, and because, even though they assumed the presence of the disease, neither physician offered an opinion as to its cause.[9] *See generally Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds, Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); Decision and Order on Remand at 5; Employer's Brief at 20; Employer's Exhibit 3; Director's Exhibit 47.

The administrative law judge further correctly found that Dr. Powell diagnosed pneumoconiosis by x-ray, and opined that it could be either coal workers' pneumoconiosis or, considering that the miner's job duties included welding, it could be siderosis, a pneumoconiosis arising from the inhalation of iron particles. Decision and Order on Remand at 6. Thus, because Dr. Powell acknowledged that the miner's pneumoconiosis could have arisen out of coal mine employment, the administrative law judge permissibly found that his opinion did not disprove disease etiology. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003), 23 BLR at 1-19-20; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); Decision and Order on Remand at 6; Employer's Exhibit 2.

Similarly, the administrative law judge reasonably concluded that because Drs. O'Neill and Wright diagnosed "coal workers' pneumoconiosis," their opinions supported, and did not disprove, a causal connection between the miner's coal mine employment and

[9] Dr. Tuteur opined that, assuming positive x-ray evidence of pneumoconiosis, the disease was not clinically or physiologically significant. Director's Exhibit 47 at 4. Dr. Broudy similarly opined that, assuming the presence of clinical pneumoconiosis, it did not cause a pulmonary impairment. Employer's Exhibit 3 at 7-8. .

his pneumoconiosis.[10] *See Stroud v. Director, OWCP*, 8 BLR 1-309, 1-311 (1985); Decision and Order on Remand at 6; Director's Exhibits 14, 24. Contrary to employer's contention, in concluding that the reliance by Drs. Powell, O'Neill, and Wright on an inflated coal mine employment history did not require that he discredit their opinions, the administrative law judge did not substitute his opinion for that of the physicians. Employer's Brief at 21. Rather, the administrative law judge properly took this factor into account, and explained that the miner's testimony that he had no occupational dust exposure other than coal supported the physicians' opinions that his pneumoconiosis arose out of coal mine employment. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Gross*, 23 BLR at 1-19-20; *Clark*, 12 BLR at 1-155; Decision and Order at 6-7 n.8. The administrative law judge also permissibly found that the opinions of Drs. Buchanan and Funneman do not support employer's burden to disprove that the miner's pneumoconiosis arose out of his coal mine employment, as both physicians attributed the miner's disease, at least in part, to his coal mine employment. Decision and Order on Remand at 7; Employer's Brief at 21-22. In asserting that these physicians' opinions are unreasoned or undocumented, employer is attempting to redirect the burden of proof. Employer, in this case, bears the burden of persuasion. *Branham v. BethEnergy Mines*, 20 BLR 1-27, 1-34 (1996).

The administrative law judge considered all of the relevant medical opinions, and permissibly concluded that employer failed to disprove that the miner's pneumoconiosis arose out of his coal mine employment. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Gross*, 23 BLR at 1-19-20; *Clark*, 12 BLR at 1-155. We, therefore, affirm the administrative law judge's determination that employer failed to demonstrate that it was error to invoke the 20 C.F.R. §410.490(b)(2) presumption that the miner was totally disabled due to pneumoconiosis.

We next consider employer's challenge to the administrative law judge's finding that rebuttal of the presumption of total disability due to pneumoconiosis is not established pursuant to Section 727.203(b)(3). In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must prove that pneumoconiosis is not a contributing cause of total disability. 20 C.F.R. §727.203(b)(3); *Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *cert. denied*, 471 U.S. 1116 (1985). Relevant to rebuttal at Section 727.203(b)(3), the administrative law judge considered the miner's treatment notes and death certificate, and the opinions of

[10] While employer accurately asserts that Dr. O'Neill alternatively diagnosed "peribronchiolar fibrosis of small airways disease," the administrative law judge correctly found that Dr. O'Neill's opinion does not support employer's burden to disprove a connection between the miner's pneumoconiosis and his coal mine employment.

Drs. Funneman, Anderson, Tuteur, Broudy, and Powell. Employer maintains that the administrative law judge erred in finding the opinions of Drs. Tuteur, Broudy, and Powell insufficient to establish that pneumoconiosis did not contribute to the miner's disability, pursuant to 20 C.F.R. §727.203(b)(3).[11] Employer's assertions lack merit.

In considering Dr. Tuteur's opinion that the miner was "not totally disabled in whole or in part due to pneumoconiosis or any other coal mine dust disease process," the administrative law judge noted that Dr. Tuteur relied, in part, on pulmonary function and blood gas studies from 1979 that did not reveal a physiologic impairment. Contrary to employer's assertions, the administrative law judge permissibly discounted Dr. Tuteur's opinion as unreasoned, because the physician also reviewed a 1988, qualifying[12] pulmonary function study, but did not explain why this more recent study was not a valid indicator of a pulmonary impairment. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Gross*, 23 BLR at 1-19-20; *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 10; Employer's Brief at 22-23; Director's Exhibit 47. As a review of Dr. Tuteur's opinion supports the administrative law judge's credibility determination, it is affirmed. *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge also acted within his discretion to discount Dr. Broudy's opinion, that the miner did not suffer from a respiratory impairment due to coal workers' pneumoconiosis or the inhalation of coal mine dust, because it was based, in part, on the physician's opinion that a disabling respiratory impairment "is almost always associated with complicated coal workers' pneumoconiosis." Employer's Exhibit 3; *see* 65 Fed. Reg. 79,951 (2000) ("The statute contemplates an award of benefits based upon proof of pneumoconiosis as defined in the statute (which encompasses simple pneumoconiosis), and not just upon proof of complicated pneumoconiosis."). Further, the administrative law judge permissibly discounted Dr. Broudy's opinion because Dr. Broudy did not explain why pneumoconiosis could not have been at least a contributing cause of the miner's disability. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Gross*, 23 BLR at

[11] Employer does not challenge the administrative law judge's finding that the evidence is insufficient to establish that pneumoconiosis did not contribute to the miner's death. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711; Decision and Order on Remand at 9-12.

[12] A "qualifying" pulmonary function or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. §410.490(b)(1)(ii), App. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §410.490(b)(1)(ii), App.

1-19-20; *see also Consolidation Coal Co. v. Swiger*, 98 F. App'x 227, 237 (4th Cir. May 11, 2004)(unpub); Decision and Order on Remand at 11; Employer's Brief at 23-24;.

Finally, there is no merit to employer's assertion that the administrative law judge erred in his evaluation of Dr. Powell's opinion, that pneumoconiosis played no part in the miner's disability. Decision and Order on Remand at 12; Employer's Brief at 25; Employer's Exhibit 4. The administrative law judge permissibly discounted Dr. Powell's opinion because it was based, in part, on his belief that simple pneumoconiosis rarely progresses after cessation of exposure to coal mine dust for at least five years; the administrative law judge observed that this view conflicts with the medical science credited by the Department of Labor which holds that pneumoconiosis may be latent and progressive. Decision and Order on Remand at 12, *citing* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,920, 79,971. Additionally, the administrative law judge reasonably found that, assuming such progression is rare, Dr. Powell did not explain why the miner could not have been one of those rare cases. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Gross*, 23 BLR at 1-19-20; Decision and Order on Remand at 12; Employer's Brief at 25; Employer's Exhibit 4 at 17.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because substantial evidence supports the administrative law judge's finding that employer failed to establish rebuttal of the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3), we affirm the administrative law judge's denial of employer's request for modification. *See Martin*, 400 F.3d at 305, 23 BLR at 2-283; *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000); *Branham*, 20 BLR at 1-34.

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

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