BRB No. 92-2468 BLA

ERNEST EDWARDS )
)
Claimant-Respondent )
)
v. )
)
CLINCHFILED COAL COMPANY )
) DATE ISSUED:
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 of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

J. Matthew McCracken (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: , Acting Chief Administrative Appeals Judge, and , Administrative Appeals Judges.

Employer appeals the Decision and Order (90-BLA-0021) of Administrative Law Judge Clement J. Kichuk 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). Claimant filed a claim for benefits on August 30, 1978. In a Decision and Order dated January 5, 1987, Administrative Law Judge Bernard J. Gilday, Jr. found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, benefits were denied. Claimant then filed two claims for benefits on February 5, 1987 and July 25, 1988, both of which were considered to be requests for modification of the Decision and Order denying benefits. Upon considering the request for modification, the administrative law judge determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (2) and that employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b). The administrative law judge then determined that claimant established a change in conditions pursuant to 20 C.F.R. §725.310 and, accordingly, benefits were awarded. On appeal, employer contends that the administrative law judge erred in failing to specifically address the issue of whether claimant established a change in condition pursuant to 20 C.F.R. §725.310; that the administrative law judge erred in finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (2) and in failing to find that employer established rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2)-(4); and that the administrative law judge erred

in determining the onset date of disability. Claimant responds in support of the administrative law judge's Decision and Order Granting Benefits. The Director, Office of Workers' Compensation Programs (the Director), responds stating that the administrative law judge used the proper standard in determining that claimant established a change in condition pursuant to 20 C.F.R. §725.310.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with law. 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 first contends that the administrative law judge erred in failing to specifically address whether claimant established a change in condition pursuant to 20 C.F.R. §725.310. In determining whether claimant has established a change in conditions pursuant to 20 C.F.R. §725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). Claimant's first claim was denied after Administrative Law Judge Gilday determined that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and that employer established

rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Thus, the administrative law judge properly considered the old and new evidence of record pursuant to 20 C.F.R. §727.203 to determine if claimant established entitlement to benefits, and, therefore, a change in condition pursuant to 20 C.F.R. §725.310. *See* Decision and Order at 13, 22; *Nataloni*, *supra*. As a result, employer's first contention of error is rejected.

Employer next contends that the administrative law judge erred in finding that claimant established invocation of the interim presumption pursuant 20 C.F.R. §727.203(a)(1). Specifically employer contends that the administrative law judge erred by considering only the x-ray evidence developed since the prior denial and that the administrative law judge erred in applying the true doubt rule. In his Decision and Order, the administrative law judge stated that he found the x-ray evidence sufficient to invoke the true doubt rule, as the x-ray evidence is equally probative but conflicting, and resolved the issue in claimant's favor. *See* Decision and Order at 14. However, the administrative law judge's invocation of the true doubt rule is now contrary to law. *See Director, OWCP v. Greenwich Collieries*, U.S. , No. 93-744 (Jun. 20, 1994). As a result, the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) is vacated.

Employer next contends that the administrative law judge erred in weighing the pulmonary function study evidence pursuant to 20 C.F.R. §727.203(a)(2). Specifically, employer first contends that the administrative law judge erred in not

considering the fact that the November 1, 1979 pulmonary function study produced non-qualifying FEV-1 results. *See* Director's Exhibit 52. However, upon considering this pulmonary function study, the administrative law judge permissibly found it not to be probative as to invocation because Dr. Byers reported that claimant's effort on the MVV was "poor". *See* Decision and Order at 14; Director's Exhibit 52; *Runco v. Director, OWCP*, 6 BLR 1-945 (1984). Employer's second contention of error on this issue is that the administrative law judge erred in failing to consider the invalidation reports of reviewing physicians and in according greater weight to the observations of the technicians who administered the pulmonary function studies. However, the administrative law judge properly considered all of the invalidation reports of record and, as the administrative law judge is not required to accept the opinion of any particular medical witness or expert, the administrative law judge permissibly assigned greater to the observations of the technicians. *See* Decision and Order at 15; *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986). As a result, the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2) is affirmed as it is supported by substantial evidence.

Regarding the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(2), employer first contends that the administrative law judge erred in relying on Dr. Rasmussen's opinion because Dr.Rasmussen's understanding of

claimant's work requirements were more extensive than the work requirements found by the administrative law judge. In his Decision and Order, the administrative law judge found that claimant was last employed as a roofbolter and that claimant was required to lift approximately twenty to thirty pounds. *See* Decision and Order at 17. Dr. Rasmussen described claimant's duties as a roofbolter to include lifting about 100 pounds 75 to 100 times per day and he reported that claimant stated that twenty percent of his work was heavy manual labor. Dr. Rasmussen further stated that claimant is totally disabled for performing heavy manual labor. *See* Director's Exhibit 54. While it appears that Dr. Rasmussen's understanding of claimant's usual job requirements differs from the administrative law judge's findings of claimant's regular job duties, the administrative law judge is not precluded from considering Dr. Rasmussen's opinion concerning claimant's functional capacity when determining whether claimant can perform his usual coal mine employment. *See Hardy v. Director, OWCP*, 7 BLR 1-722 (1985); *Daniel v. Westmoreland Coal Co.*, 5 BLR 1-196 (1982). The administrative law judge may consider Dr. Rasmussen's finding that claimant is totally disabled from performing heavy manual labor, along with evidence of the nature of the miner's usual coal mine employment, and reach a conclusion on his ability to do his usual work. *See Hardy*, *supra*; *Daniel*, *supra*. As a result, employer's contention of error regarding the administrative law judge's consideration of Dr. Rasmussen's opinion pursuant to §727.203(b)(2) is rejected. Employer's second contention of error concerning 20 C.F.R. §727.203(b)(2) is that

the administrative law judge erred in relying on Dr. Kanwal's opinion when he had found that the medical opinion evidence did not establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(4). Employer states that the administrative law judge found that Dr. Kanwal diagnosed claimant to be totally disabled based on claimant's respiratory condition, and not any other condition and, thus, contends that the administrative law judge's previous finding that the evidence was insufficient to support a finding of the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §727.203(a)(4) precludes the administrative law judge from relying on Dr. Kanwal's opinion when considering rebuttal at 20 C.F.R. §727.203(b)(2). However, upon considering Dr. Kanwal's opinion pursuant to 20 C.F.R. §727.203(a)(4), the administrative law judge did not reject Dr. Kanwal's opinion but merely found it outweighed by the totality of the medical opinion evidence. *See* Decision and Order at 16. Thus, Dr. Kanwal's opinion is relevant to the issue of whether claimant is totally disabled by any cause and was properly considered along with the other relevant evidence of record pursuant to 20 C.F.R. §727.203(b)(2). *See* Decision and Order at 18; *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). As a result, the administrative law judge's finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2) is affirmed as it is supported by substantial evidence.

Employer next contends that the administrative law judge erred in finding that

employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Employer first contends that the administrative law judge erred in relying Dr. Kanwal's opinion because he earlier discounted this opinion when considering the medical opinion evidence on invocation. However, as stated above, the administrative law judge did not reject Dr. Kanwal's opinion and the opinion is relevant to the issue of rebuttal pursuant to 20 C.F.R. §727.203(b)(3), thus the administrative law judge permissibly considered Dr. Kanwal's opinion. *See* Decision and Order at 18; *Kuchwara*, *supra*. Employer next contends that the administrative law judge erred in relying on Dr. Rasmussen's report because Dr. Rasmussen relied on an erroneous job description. However, subsection (b)(3) concerns the cause of claimant's disability and not whether total disability is established. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Therefore, the physician's understanding of the exertional requirements of claimant's job is less relevant at subsection (b)(3) than at subsection (b)(2). Thus, it is within the administrative law judge's discretion to consider and weigh Dr. Rasmussen's opinion. *See Lafferty*, *supra*. Employer next contends that the administrative law judge erred in relying on Dr. Robinette's opinion because Dr. Robinette did not address the issue of total disability and he only concluded that claimant has a mild respiratory impairment occurring as a consequence of his pulmonary disease. However, the administrative law judge permissibly considered Dr. Robinette's opinion that claimant has a mild respiratory impairment occurring as a consequence

of his pulmonary disease, which Dr. Robinette found to be occupational pneumoconiosis due to his prior coal mine employment, and permissibly concluded that Dr. Robinette's opinion is not sufficient to support rebuttal pursuant to subsection (b)(3). *See* Decision and Order at 21; *Borgeson v. Kaiser Steel Corp.*, 12 BLR 1-169 (1989); *Massey*, *supra*; *Kuchwara*, *supra*. Employer further contends that the administrative law judge erred in weighing the opinions of Drs. Fino and Sargent and by simply concluding that the medical opinions are conflicting and thus create true doubt. Regarding the administrative law judge's weighing of the reports of Drs. Fino and Sargent, the administrative law judge did not assign these opinions less weight than the remaining opinions of record, but permissibly found them to be equally probative. *See* Decision and Order at 21; *Lafferty*, *supra*. The administrative law judge then erroneously applied the true doubt rule as the true doubt rule is not applicable on rebuttal because where the evidence is equally probative, then necessarily the party opposing entitlement has failed to carry its burden of proof. *See* Decision and Order at 21; *O'Brien v. United States Steel Corp.*, 8 BLR 1-103 (1985); *Ham v. Bethlehem Mines Corp.*, 8 BLR 1-3 (1985); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983). However, as employer has failed to carry its burden of proof pursuant to 20 C.F.R. §727.203(b)(3), any error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). As a result, the administrative law judge's finding that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) is affirmed as it is supported by substantial evidence.

Employer next challenges the administrative law judge's finding that rebuttal pursuant to 20 C.F.R. §727.203(b)(4) is precluded by a finding of invocation pursuant to 20 C.F.R. §727.203(a)(1). While the Board has previously held that a finding of invocation pursuant to subsection (a)(1) precludes a finding of rebuttal pursuant to subsection (b)(4), the administrative law judge's finding of invocation pursuant to 20 C.F.R. §727.203(a)(1) is vacated. *See Curry v. Beatrice Pocahontas Coal Co.*, BRB No. 92-0525 BLA (Apr. 25, 1994). As a result, the administrative law judge's finding that employer did not establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4) is vacated and the case is remanded to the administrative law judge for consideration of the evidence of record pursuant to 20 C.F.R. §727.203(a)(4).

Employer's final contention of error is that the administrative law judge erred in finding the onset date of disability to be February 1987. As the case is remanded to the administrative law judge for further consideration, employer's contention of error regarding the administrative law judge's determination of the onset date of disability may be moot. However, we will address the issue in this opinion. In making his finding, the administrative law judge states that the date of onset of total disability due to pneumoconiosis is not ascertainable from the relevant evidence of record. The administrative law judge then found that benefits shall commence as of February 1987, the month during which modification was first requested. In his Decision and Order, the administrative law judge listed all of the evidence of record and discussed all of the medical findings. The administrative law judge did not

question the credibility of any of this evidence. Thus, as the administrative law judge considered all of the evidence of record, the administrative law judge permissibly determined that the date of onset of total disability due to pneumoconiosis is not ascertainable from the relevant evidence of record and permissibly found that benefits shall commence as of February 1987. *See Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Green v. Director, OWCP*, 790 F.2d 1118, 9 BLR 2-32 (4th Cir. 1986). As a result, the administrative law judge's finding as to the onset date of total disability due to pneumoconiosis is affirmed as it is supported by substantial evidence.

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

SO ORDERED.

Administrative Appeals Judge

Administrative Appeals Judge

Administrative Appeals Judge