BRB No. 93-0880 BLA

GEORGE BOCZ Claimant-Respondent v. ROCHESTER & PITTSBURGH COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners 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 of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert J. Bilonick (Pawlowski, Tulowitzki & Bilonick), Ebensburg, Pennsylvania, for claimant.

Alfonso Frioni, Jr. (Tillman & Thompson), Pittsburgh, Pennsylvania, for employer.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-8873) of

Administrative Law Judge Michael P. Lesniak 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). This case is before the Board for the second time. In *Bocz v. Rochester & Pittsburgh Coal Co.*, BRB No. 88-1372 BLA (Feb. 24, 1992)(unpub.), the Board vacated the administrative law judge's findings at 20 C.F.R. §§727.203(a)(1) and 727.203(b)(3), (4), and remanded the case with instructions to reconsider the relevant evidence.

On remand, the administrative law judge found invocation

established at Section 727.203(a)(1) pursuant to the true-doubt rule but found the evidence insufficient to establish rebuttal pursuant to Section 727.203(b)(3). Accordingly, he awarded benefits.

On appeal, employer contends that remand is required because the administrative law judge erred by applying the true-doubt rule, *see Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), and argues that invocation under Section 727.203(a)(1) is precluded because the administrative law judge, by applying the true-doubt rule, found the x-ray evidence to be "equivocal, thus excluding a finding that the x-ray evidence can sustain the Claimant's burden of proof by a preponderance of the evidence." Employer's Brief at 3.

Employer further contends that the administrative law judge erred by according greater weight to the opinion of claimant's treating physician at Section 727.203(b)(3). *Id.* Claimant responds, requesting a remand in light of *Ondecko* and arguing that the administrative law judge may reconsider the x-ray evidence pursuant to Section 727.203(a)(1) to determine whether invocation is established. Claimant's Brief at 1. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[1]

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 by 30 U.S.C. § 932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge's finding of invocation at Section 727.203(a)(1) was based on the true-doubt principle, Decision and Order at 2-3, which has since been rejected by the United States Supreme Court in *Ondecko*. Since we must apply the law in effect at the time of this decision, *see Lynn v. Island Creek Coal Co*., 12 BLR 1-146 (1989), we vacate the administrative law judge's finding at Section 727.203(a)(1) as inconsistent with law.

[1] We affirm as unchallenged on appeal the administrative law judge's finding regarding the date of onset of total disability. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

We reject employer's argument that the administrative law judge's application of the true-doubt rule precludes a finding of invocation pursuant to Section 727.203(a)(1), because the administrative law judge's conclusion that he had a "true doubt" based on the "mixed" readings of the most recent x-rays by experts is not the same as finding the evidence to be equally probative but contradictory.[2] Decision and Order at 2; *see Brinkley v. Peabody Coal Co*., 14 BLR 1-147 (1990), *rev'd on other grounds*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Mucker v. Director, OWCP*, 7 BLR 1-492 (1984). As the United States Court of Appeals for the Fourth Circuit stated in *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 1096-97, 17 BLR 2-123, 2-127-28 (4th Cir. 1993), "true doubt is not any doubt," but rather refers to the specific situation where an administrative law judge actually finds the evidence in support of and against entitlement to be equally probative and persuasive. Therefore, we hold that the administrative law judge in the instant case has not found the x-ray evidence to be in equipoise.

Even had the administrative law judge found the evidence to be in equipoise, we note that in *Ondecko* the United States Court of Appeals for the Third Circuit did not automatically reverse the existence of pneumoconiosis finding because it was based on the true-doubt principle, but instead remanded the case for reconsideration of the evidence, stating:

> It is not clear . . . whether the [administrative law judge] ever considered whether the claimant's evidence satisfied the preponderance standard. It appears that upon reaching what she believed to be the point of equipoise, and believing the true doubt rule to be applicable, the [administrative law judge] may have halted her inquiry short of deciding whether Ondecko's evidence preponderated. We will therefore vacate the [administrative law judge's] Order and remand for further proceedings to allow the [administrative law judge] to make this determination.

Ondecko, 990 F.2d at 737, 17 BLR at 2-76. Therefore, we remand the case for the administrative law judge to reconsider the x-ray evidence.

[2] The administrative law judge considered the seven most recent interpretations of four x-rays; board-certified radiologists/B-readers rendered four negative and two positive readings. Claimant's Exhibits 1-3; Employer's Exhibits 7, 11.

We instruct the administrative law judge that, if on remand he finds the x-ray evidence sufficient to establish invocation at Section 727.203(a)(1), he need not consider rebuttal at Section 727.203(b)(4). *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Curry v. Beatrice Pocahontas Coal Co*., 18 BLR 1-59 (1994)(Brown and McGranery, JJ., concurring and dissenting, separately); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988). If the administrative law judge finds the evidence insufficient to invoke the interim presumption at Section 727.203(a)(1), he must then consider invocation pursuant to Section 727.203(a)(2)-(4), and if entitlement under 20 C.F.R. §727.203 is not established, he must consider entitlement under 20 C.F.R. Part 718. *See Caprini v. Director, OWCP*, 824 F.2d 283, 10 BLR 2-180 (3d Cir. 1987).

Employer states that it does not waive its right to contest any section of the Decision and Order on Remand, but specifically challenges only the administrative law judge's treatment of Dr. Brown's opinion pursuant to Section 727.203(b)(3). Employer's Brief at 3, n.1. We reject employer's challenge to the administrative law judge's determination to accord greater weight to claimant's treating physician at Section 727.203(b)(3) because an administrative law judge may within his discretion credit a treating physician. *See Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *cf*. *Evosevich v. Consolidation Coal Co.*, 789 F.2d 1021, 9 BLR 2-10 (3d Cir. 1986).

The administrative law judge permissibly gave greatest weight to Dr. Brown's opinion that, based on his many years of treating claimant, his physical examination findings, the x-rays and objective study results, and his own experience as a coal miner, pneumoconiosis was at least partially responsible for claimant's respiratory problems, despite claimant's significant smoking history. Director's Exhibit 35; Employer's Exhibit 5 at 9, 12-13, 25, 39, 41; *see Carozza v. U.S. Steel Corp.*, 727 F.2d 74, 6 BLR 2-15 (3d Cir. 1984); *see also Cort v. Director, OWCP*, 996 F.2d 1549, 17 BLR 2-166 (3d Cir. 1993). As employer makes no other specific allegation of error, we affirm the administrative law judge's finding at Section 727.203(b)(3). *See* 20 C.F.R. §802.211(b); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983); *see also BethEnergy Mines, Inc. v. Vrobel*, 39 F.3d 458, 19 BLR 2-95 (3d Cir. 1994).

Accordingly, the Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge