BRB No. 95-1146 BLA

EDGEL HICKS)
)
Claimant-Respondent)
)
v.)
)
BAILEY MINING COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
Employer/Carrier-)
Petitioners)
))
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 Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

John Earl Hunt (Sturgill & Hunt), Prestonsburg, Kentucky, for claimant.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (88-BLA-2318) of Administrative Law Judge Daniel J. Roketenetz 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's counsel [counsel] has also filed an attorney's fee petition requesting $1,925.00 for nineteen and one-quarter hours of services at an hourly rate of $100.00. This case is before the Board for the second time. Initially, the administrative law judge accepted the parties' stipulation to thirty years of qualifying coal mine employment and

found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1). Decision and Order at 3-5. The administrative law judge then found that employer failed to establish rebuttal pursuant to 20 C.F.R. §727.203(b) and, accordingly, awarded benefits. Decision and Order at 6-16. On appeal, the Board affirmed the administrative law judge's findings pursuant to subsections (a)(1) and (b)(1)-(4), but vacated the administrative law judge's finding regarding the entitlement date and remanded the case for further consideration. *Hicks v. Bailey Mining Co.*, BRB No. 90-2105 BLA (Jan. 31, 1994)(unpub.).

On reconsideration, the Board vacated the administrative law judge's findings pursuant to subsections (a)(1) and (b)(4), based on intervening case law,[1] and remanded the case for the administrative law judge to reconsider invocation pursuant to Section 727.203(a)(1)-(4) and rebuttal pursuant to Section 727.203(b)(4), if necessary. *Hicks v. Bailey Mining Co.*, BRB No. 90-2105 BLA (Aug. 9, 1994)(unpub.). On remand, the administrative law judge found that claimant[2] established invocation of the interim presumption pursuant to subsection

[1]The administrative law judge found invocation of the interim presumption established pursuant to Section 727.203(a)(1) based upon his application of the true doubt principle. Decision and Order at 5. Subsequent to the issuance of the 1990 Decision and Order, the United States Supreme Court held in *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), that the true-doubt principle violates Section 7(c) of the Administrative Procedure Act and may not be applied in weighing the evidence to aid a claimant in meeting his burden of proof.

[2]Claimant is Edgel Hicks, the miner, who filed a claim for benefits on August 13, 1974. Director's Exhibit 1.

(a)(2) and that employer failed to establish rebuttal pursuant to subsection (b)(2)-(4). Accordingly, benefits were again awarded commencing in May 1980.

On appeal, employer contends that the administrative law judge erred in finding invocation pursuant to Section 727.203(a)(2), in failing to find rebuttal pursuant to Section 727.203(b)(2)-(4), and in determining the entitlement date. Claimant responds, urging affirmance, and the Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 first contends that the administrative law judge erred in relying on one qualifying pulmonary function study to establish invocation pursuant to Section 727.203(a)(2), without weighing that study against the non-qualifying study of record. Employer's Brief at 32-34. The administrative law judge stated that the record "contains mention of more than fifteen pulmonary function studies dated between 1972 and 1986." Decision and Order on Remand at 3. The administrative law judge discredited many of the pulmonary function studies because they were defective or did not report MVV values. The administrative law judge then stated: "Of the remaining six studies, five resulted in qualifying values." Decision and Order on Remand at 3. After listing the dates of the five qualifying studies and discussing how four of the qualifying studies were challenged as invalid, the administrative law judge concluded: "Even if I reject the validity of all questioned studies, none of the physicians challenged the results of the study dated May 28, 1980. Accordingly, it alone supports invocation of the interim presumption under §727.203(a)(2)." Decision and Order on Remand at 3.

Although the administrative law judge does not specifically mention it, the only non-qualifying pulmonary function study of record is dated August 22, 1974. Director's Exhibit 8. The administrative law judge did not discredit this study but considered it along with the five qualifying studies. Decision and Order on Remand at 3. After rejecting four of the five qualifying studies, the administrative law judge found that the remaining qualifying study dated May 28, 1980 was entitled to more weight than the non-qualifying 1974 study. Decision and Order on Remand at 3.

The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, has affirmed an administrative law judge's crediting of qualifying pulmonary function studies that "showed a progressive worsening" of claimant's condition, despite reviewing physicians' opinions that the studies were invalid. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290, 2-297 (6th Cir. 1994); *see generally Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 13 BLR 2-214 (6th Cir. 1989), *modified on other grounds on reh'g* 915 F.2d 1076, 14 BLR 2-89 (6th Cir. 1990). Further, the Board has held that an administrative law judge may credit a qualifying pulmonary function study that is five years later than a non-qualifying test. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *accord*, *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 1-59 (7th Cir. 1994); *see generally Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Inasmuch as the administrative law judge provided a valid rationale for finding the 1980 qualifying pulmonary function study sufficient to invoke at subsection (a)(2), we reject employer's argument.[3] *See Coleman*, *supra*; *cf*. *Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

Employer also contends that the administrative law judge erred in stating that no physician challenged the results of the May 28, 1980 pulmonary function study, because Dr. Branscomb, in a report dated October 30, 1987, stated that "there is not a single set of PFT's in the record that meet the requirements for validity. The defects are obvious on all of them." Employer's Brief at 34-36; Employer's Exhibit 17 at 28. However, the administrative law judge considered Dr. Branscomb's deposition and various reviews of the medical evidence in detail, and noted his opinion that only the 1974 pulmonary function study was valid. Decision and Order at 13. Further, Dr. Branscomb did not specify why the May 28, 1980 pulmonary function study was invalid, but merely offered a general observation which the administrative law judge acknowledged in finding many of the pulmonary function studies to be "defective." Decision and Order on Reconsideration at 3; Employer's Exhibit 17 at 28.

Inasmuch as the administrative law judge must weigh all of the evidence of record and draw his own conclusions and inferences, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989), and has broad discretion to assess the record

[3]The United States Court of Appeals for the Fourth Circuit has rejected the theory that higher results on one pulmonary function study are necessarily more reliable than lower results on another study, because pneumoconiosis "is a chronic condition, and, on any given day, it is possible to do better, and indeed to exert more effort than one's typical condition would permit." *Greer v. Director, OWCP*, 940 F.2d 88, 90-91, 15 BLR 2-167, 2-170 (4th Cir. 1991).

and determine whether a party has met its burden of proof, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), we affirm the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(2).

Employer also challenges the administrative law judge's findings pursuant to Section 727.203(b)(2)-(3), arguing that once the administrative law judge determined on remand that the x-ray evidence was negative, he was required to re-examine the medical opinion evidence for purposes of rebuttal. Employer's Brief at 39, 41-44. We previously affirmed the administrative law judge's findings pursuant to subsections (b)(2) and (3) as supported by substantial evidence. [Jan. 31, 1994] *Hicks*, slip op. at 2-6. Inasmuch as x-ray evidence is not diagnostic or respiratory disability and its causes, *see Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129, n.4 (1987); *see also Webb v. Armco Steel Corp.*, 6 BLR 1120 (1984), and employer has not demonstrated any basis for a deviation from the law-of-the-case doctrine, nor is any apparent, we hold that this doctrine is controlling, *see Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(2-1 opinion with Brown, J., dissenting).

Employer next contends that, pursuant to Section 727.203(b)(4), the administrative law judge failed to consider the x-ray evidence of record and erred in according more weight to the opinions of examining physicians. Employer's Brief at 39-40. Stating that he had discussed the opinions of all sixteen physicians in his previous Decision and Order, the administrative law judge accorded greater weight to the thirteen opinions of examining physicians because they "had better opportunity to assess" claimant's actual condition, and found that ten of the thirteen examining physicians diagnosed pneumoconiosis as defined in the Act. Decision and Order on Remand at 4-5; Decision and Order at 6-14.

The administrative law judge further found that the contrary opinions of Drs. Anderson and Vuskovich, examining physicians, as well as those of Drs. Lane and Branscomb, both non-examining physicians, were ambiguous because either their opinions regarding statutory pneumoconiosis changed in subsequent reports or they did not definitively state that claimant had no respiratory condition arising out of coal mine employment. Decision and Order on Remand at 4-5. Based on the weight of the medical opinion evidence, the administrative law judge found the opinions of Drs. Dahhan, Vuskovich, Branscomb, Broudy, Anderson, and Lane insufficient to establish rebuttal pursuant to Section 727.203(b)(4).

Pursuant to Section 727.203(b)(4), the party opposing entitlement must establish that claimant has neither pneumoconiosis as defined by the medical

community nor as more broadly defined by the Act. 20 C.F.R. §727.202; *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985); *see Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987). Further, the Sixth Circuit court has rejected the argument that no medical opinion evidence can outweigh the x-ray readings of no clinical pneumoconiosis. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *cf*. *Conn v. White Deer Coal Co.*, 862 F.2d 591, 12 BLR 2-75 (6th Cir. 1988).

Inasmuch as the administrative law judge may assign greater weight to the opinions of examining physicians, *see Hall v. Director, OWCP*, 8 BLR 1-193 (1985), and assign less weight to opinions which he determines are ambiguous, *see Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16 (1987); *Snorton v. Zeigler Coal Co.*, 9 BLR 1-106 (1986), and may rely on the numerical superiority of the evidence in determining whether a party has met its burden of proof, *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990), we affirm the administrative law judge's finding that employer failed to establish rebuttal pursuant to Section 727.203(b)(4).

Employer next contends that the administrative law judge erred in determining the date of onset of total disability due to pneumoconiosis because he based his determination on one item of evidence. Employer's Brief at 44. The administrative law judge considered the evidence of record and determined that, while the existence of pneumoconiosis had been established by earlier evidence, benefits were due from May 1980, the month during which the one unchallenged qualifying pulmonary function study was conducted, because medical evidence "does not conclusively establish an earlier date of disability." Decision and Order on Remand at 5. Inasmuch as the administrative law judge permissibly considered all the evidence of record and determined that claimant was totally disabled due to pneumoconiosis as of May 1, 1980, *see Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989); *Lafferty*, *supra*, we affirm the administrative law judge's finding as to the date of entitlement to benefits.

Finally, counsel requests a fee of $1,925.00 for nineteen and one-quarter hours of services at an hourly rate of $100.00. No objections to counsel's fee petition have been received. We find the fee requested to be reasonable and commensurate with the work performed before the Board and award counsel a fee of $1,925.00 for nineteen and one-quarter hours of services at an hourly rate of $100.00.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed, and counsel is awarded a fee of $1,925.00.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge