BRB No. 95-1652 BLA

BRUNETTE SCOTT (Widow of WILLIAM SCOTT)	)	
Claimant-Respondent	)	
v.	)	
	)	DATE ISSUED:
OLD BEN COAL COMPANY	)	
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 Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr. (Culley & Wissore), Raleigh, Illinois, for claimant.

Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (91-BLA-2800) of Administrative Law Judge Lawrence E. Gray awarding benefits on a claim[1] filed pursuant to

[1] William Scott, the miner, filed this claim for benefits on January 12, 1976. Director's Exhibit 1. Mr. Scott died on May 4, 1983, and Brunette Scott, his widow, now pursues the claim. Director's Exhibit 31. Section 422(l) of the Act, 30 U.S.C. §932(l), relieves survivors of the burden of filing a claim and proving their own entitlement to benefits in cases involving awards to deceased miners on claims filed prior to January 1, 1982. *Smith v. Camco Mining Inc*., 13 BLR 1-17 (1989). Thus, if the miner's claim is awarded,

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 third time. Initially, Administrative Law Judge Lawrence E. Gray found the evidence insufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a) and denied benefits. The Board affirmed the denial on appeal. *Scott v. Old Ben Coal Co*., BRB No. 85-2403 BLA (Jan. 28, 1988)(unpub.).

Claimant timely requested modification pursuant to 20 C.F.R. §725.310 and submitted additional evidence. Director's Exhibit 17. Administrative Law Judge Peter McC. Giesey found that the newly submitted evidence established a mistake in fact pursuant to Section 725.310 and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). He further found that rebuttal was not established pursuant to 20 C.F.R. §727.203(b) and, accordingly, awarded benefits.

Employer appealed, and in *Scott v. Old Ben Coal Co*., BRB No. 93-0594 BLA (July 28, 1994)(unpub.), the Board vacated the administrative law judge's finding pursuant to Section 727.203(a)(1) because he relied on the true-doubt rule in finding invocation established. The Board remanded the case for the administrative law judge to reconsider the entire record pursuant to Sections 725.310 and 727.203.[2] [1994] *Scott*, slip op. at 3-4.

On remand, the case was again assigned to Judge Gray who found invocation of the interim presumption established pursuant to Section 727.203(a)(1), concluded that the evidence failed to establish rebuttal pursuant to Section 727.203(b)(3), (4), and awarded benefits effective April 1, 1976.

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claimant will be eligible for derivative benefits.

[2] The Board affirmed as unchallenged the administrative law judge's findings that rebuttal pursuant to 20 C.F.R. §727.203(b)(1) and (2) was precluded. [1994] *Scott*, slip op. at 3.

On appeal, employer contends that the administrative law judge failed to render modification findings pursuant to Section 725.310. Employer's Brief at 15-19. Employer further challenges the administrative law judge's weighing of the x-ray evidence at Section 727.203(a)(1) and the medical opinions at Section 727.203(b)(3). Employer's Brief at 20-26. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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

Pursuant to Section 725.310, employer contends that the administrative law judge failed to make a finding regarding the grounds for modification. Employer's Brief at 16-18. Section 22 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §922, as incorporated into the Act by 30 U.S.C. §932(a) and as implemented by Section §725.310, provides that upon his own initiative, or upon the request of any party on the ground of a change in conditions or because of a mistake in a determination of fact, the fact-finder may, at any time prior to one year after the date of the last payment of benefits, or at any time prior to one year after the denial of a claim, reconsider the terms of an award or a denial of benefits. Pursuant to Section 725.310, the administrative law judge must consider the entirety of the evidentiary record in making a determination of a mistake of fact. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *see O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971).

Here, the administrative law judge, who once before considered all the evidence and found invocation not established, stated that upon consideration of the "entirety of the evidentiary record," invocation was established pursuant to Section 727.203(a)(1). Decision and Order on Remand at 1. Subsumed within his decision on the merits is the determination, based upon "further reflection on the evidence," *O'Keeffe*, 404 U.S. at 256, that the earlier decision contains a mistake of fact. *See Kovac v. BCNR Mining Corp.*, 16 BLR 1-71 (1992); *Cooper v. Director, OWCP*, 11 BLR 1-95 (1988). Therefore, we reject employer's

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

contention that we must remand the case for an explicit modification finding. *See Eifler v. Peabody Coal Co.*, 926 F.2d 663, 15 BLR 2-1 (7th Cir. 1991).

Pursuant to Section 727.203(a)(1), employer contends that the administrative law judge erred by relying upon the recent x-ray evidence to find invocation established. Employer's Brief at 23. Contrary to employer's contention, the administrative law judge acted within his discretion as fact-finder in according greater weight to the recent x-ray evidence. *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276, 18 BLR 2-42, 2-45 (7th Cir. 1993); *Dotson v. Peabody Coal Co.*, 846 F.2d 1134, 1139 (7th Cir. 1988); *Consolidation Coal Co. v. Chubb*, 741 F.2d 968, 973 (7th Cir. 1984).

The record contains sixty-six readings of sixteen x-rays taken between 1975 and 1983; nine of the sixteen films were taken in 1983. The administrative law judge reasonably concluded that the 1983 films were more probative than the earlier films,[4] *see Battram*, *supra*; *Dotson*, *supra*; *Chubb*, *supra*, and permissibly accorded greater weight to the positive readings by physicians who were both Board-certified radiologists and B-readers.[5] *See Battram*, 7 F.3d at 1276, 18 BLR at 2-45. Therefore, we reject employer's argument.

[4] Review of the record indicates that the x-ray evidence is almost uniformly negative until 1983, when eight positive readings appear. Director's Exhibits 20-22. Thus, the administrative law judge's weighing of the recent x-ray readings is consistent with "the progressive nature of pneumoconiosis." *Chubb*, 741 F.2d at 973; *see Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

[5] Drs. Fisher and Marshall, Board-certified B-readers, read the January 31, 1983 x-ray as 2/2 and 2/1, and both read the April 22 and May 3, 1983 films as 2/1. Director's Exhibits 20-21. The administrative law judge noted that their positive readings were corroborated by the 1/0 readings of the January 31 and April 22 x-rays by Dr. Traughber, a B-reader. Decision and Order on Remand at 1; Director's Exhibit 22.

We also reject employer's contention that the administrative law judge ignored recent negative x-ray readings. Employer's Brief at 22. The administrative law judge recognized that the record also contained negative readings of 1983 x-rays by Drs. Felson, Saba, and Scott, but permissibly accorded greater weight to the positive readings of Drs. Fisher and Marshall, who were more highly qualified. *See Battram, supra*.

We likewise reject employer's contentions that the administrative law judge ignored uncontradicted earlier negative readings by dually-qualified readers or the more recent readings by Dr. Wheeler. Employer's Brief at 21-23. Although he relied on the recent x-ray readings, the administrative law judge also considered the 1976 and 1980 negative readings by Board-certified radiologists and B-readers, but found the "readings of these earlier chest x-ray[s] less probative in light of the availability of more recent evidence on the issue." Decision and Order on Remand at 2 n.1.; *see Battram, supra*; *Dotson, supra*; *Chubb, supra*. Regarding the three negative 1983 readings by Dr. Wheeler, the administrative law judge concluded that Dr. Wheeler's "dual radiological qualifications [do] not change the result" because the "preponderance of the chest x-ray evidence, consisting of the recent readings of both Drs. Fisher and Marshall" established the existence of pneumoconiosis. Decision and Order on Remand at 2 n.1; *see Battram, supra*.

Pursuant to Section 727.203(b), employer contends that the administrative law judge failed to explain his rebuttal finding. Employer's Brief at 25. We reject this contention, inasmuch as the administrative law judge explained that he accorded diminished weight to the medical opinions submitted in support of rebuttal because they were based on the premise that the miner did not have pneumoconiosis.[6] Decision and Order on Remand at 2; *see Peabody Coal Co. v. Shonk*, 906 F.2d 264, 271 (7th Cir. 1990); *see also Bobick v. Saginaw Mining Co.*, 13 BLR 1-52 (1988); *Trujillo v. Kaiser Mining Co.*, 8 BLR 1-472 (1986).

Employer also challenges the administrative law judge's rationale for discounting those medical opinions that concluded that the miner did not have pneumoconiosis.

[6] The administrative law judge phrased his rebuttal finding in terms of both 727.203(b)(3) and (4). Decision and Order on Remand at 2. In light of his invocation finding pursuant to Section 727.203(a)(1), he need not have considered rebuttal under 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); *Freeman United Coal Mining Co. v. Director, OWCP*, [Forsythe], 20 F.3d 289, 295, 18 BLR 2-189, 2-198 (7th Cir. 1994); *Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994)(Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

Employer's Brief at 25. The United States Court of Appeals for the Seventh Circuit, within whose appellate jurisdiction this case arises, has held that to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must rule out pneumoconiosis as a contributing cause of the miner's total disability. *Freeman United Coal Mining Co. v. Director, OWCP*, [Forsythe], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *Battram*, *supra*; *Wetherill v. Director, OWCP*, 821 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). The Seventh Circuit court has further held that the administrative law judge may reasonably accord diminished weight to a medical opinion rejecting the possibility that the miner has pneumoconiosis. *Shonk, supra*.

In this case, the medical opinions of Drs. Castle, O'Neill, and Renn, submitted by employer in support of rebuttal, all concluded that the miner did not have pneumoconiosis. Employer's Exhibits 2, 3, 5, 6, 8, 9. Thus, the administrative law judge acted within his discretion in according diminished weight to them. *See Shonk, supra*; *Bobick, supra*; *Trujillo, supra*. Therefore, we reject employer's contention.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge