BRB No. 95-1958 BLA

JOSEPH HAUBER )
)
Claimant-Respondent )
)
v. )
)
THE YOUGHIOGHENY AND OHIO 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 on Remand of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John G. Paleudis (Hanlon, Duff, Paleudis & Estadt), St. Clairsville, Ohio, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (81-BLA-7208) of Administrative Law Judge Richard K. Malamphy setting the entitlement date in 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 fourth time. Initially, administrative Law Judge John C.

Bradley credited claimant[1] with forty years and ten months of qualifying coal mine employment and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1), but rebuttal established pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. On appeal, the Board affirmed invocation of the interim presumption but vacated the administrative law judge's rebuttal finding and instructed him

[1]Claimant is Joseph Hauber, the miner, who filed a claim for benefits on April 13, 1978. Director's Exhibit 1.

on remand to reconsider the evidence relevant to rebuttal pursuant to Section 727.203(b)(3). *Hauber v. Youghiogheny & Ohio Coal Co.*, BRB No. 85-1106 BLA (Sept. 23, 1987)(unpub.).

On remand, Administrative Law Judge Theodor P. Von Brand found the evidence insufficient to establish rebuttal pursuant to Section 727.203(b)(3). Accordingly, benefits were awarded. On appeal, the Board vacated the administrative law judge's findings pursuant to Section 727.203(b)(3) and remanded the case for him to address the opinions of Drs. Kress and Kuziak in his analysis of the rebuttal evidence. *Hauber v. Youghiogheny & Ohio Coal Co.*, BRB No. 88-3349 BLA (April 23, 1992)(unpub.).

On remand, the administrative law judge again found the evidence insufficient to establish rebuttal pursuant to Section 727.203(b)(3). Accordingly, benefits were again awarded. On appeal, the Board affirmed the administrative law judge's findings pursuant to Section 727.203(b)(3) but vacated his entitlement date and remanded the case for him to determine the appropriate date for the commencement of benefits pursuant to 20 C.F.R. §725.503. *Hauber v. Youghiogheny & Ohio Coal Co.*, BRB No. 93-1172 BLA (Sept. 29, 1994)(unpub.). On remand, Judge Malamphy reconsidered the evidence pursuant to Section 725.503(b) and determined the date of onset of total disability due to pneumoconiosis to be October 1, 1978.

On appeal, employer contends that the administrative law judge erred in applying the true-doubt rule pursuant to Section 727.203(a)(1), in finding that the evidence did not establish rebuttal pursuant to Section 727.203(b)(2) and (3), and in determining the entitlement date. The Director, Office of Workers' Compensation Programs (the Director), has chosen not 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 applying the true doubt rule in his weighing of the x-ray evidence pursuant to Section 727.203(a)(1). Employer's Brief at 11. In finding invocation of the interim presumption, Judge Bradley stated: "Taking into consideration the evenly divided x-ray evidence and giving the benefit of the doubt to claimant, it is found that the x-ray evidence in the record is sufficient to trigger the interim presumption pursuant to

§727.203(a)(1)." [1985] Decision and Order at 5. Judge Bradley added that he need not consider invocation pursuant to Section 727.203(a)(2)-(4). *Id*.

Subsequent to the issuance of the 1985 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. Inasmuch as intervening case law is a well-established exception to the law of the case doctrine, *see Cale v. Johnson*, 861 F.2d 943, 947 (6th Cir. 1988); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989) (2-1 opinion with Brown, J., dissenting), we vacate Judge Bradley's finding pursuant to Section 727.203(a)(1) and the award of benefits, and remand the case for further findings pursuant to Section 727.203(a)(1)-(4) and Section 727.203(b)(4) if subsection (a)(1) is not invoked, *see Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994).

Employer next contends that the administrative law judge erred in applying the rebuttal standard set forth in *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987) to the facts in this case because the *York* standard "is an inaccurate and incorrect interpretation of the law." Employer's Brief at 12. This contention is without merit. Because this case arises within the appellate jurisdiction of the United States Court of Appeals for the Sixth Circuit, we are bound to apply the current law in that circuit. *See* [1987] *Hauber*, slip op. at 2. As the Sixth Circuit has not changed its view of the law on this issue, *see Webb*, *supra*, we will continue to apply the *York* standard. Thus, we reject employer's argument.

We also reject employer's contention that the evidence of record is sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Employer's Brief at 12. We previously reviewed the administrative law judge's findings pursuant to subsection (b)(3) and affirmed them as supported by substantial evidence. [1994] *Hauber*, slip op. at 3-4. Inasmuch as 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).

Finally, employer contends that the entitlement date must be March, 1988 because Dr. Levine diagnosed total disability due to pneumoconiosis in a report dated April 22, 1988. Employer's Brief at 16; Claimant's Exhibit II. Pursuant to Section 725.503, the administrative law judge stated: "The undersigned has reviewed the evidence of record but concludes that a clear cut determination as to a

date of total disability cannot be made in this case." Decision and Order on Remand at 4. The administrative law judge then found that the date of onset of total disability is the date beginning with the month in which the miner was no longer working, October 1978. *Id*.

Contrary to employer's contentions, the entitlement date is not established by the first medical evidence of record indicating total disability or by medical evidence sufficient to invoke the interim presumption at 20 C.F.R. §727.203(a). Rather, such medical evidence indicates only that the miner became totally disabled at some time prior to that date. *Merashoff v. Consolidation Coal Co.*, 8 BLR 1-105 (1985). Further, if medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless credited medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

In this case, the administrative law judge permissibly determined that the evidence of record does not establish the date on which claimant became totally disabled because "no one examination clearly reflects the origin of a totally disabling impairment." Decision and Order on Remand at 2-4; *see Edmiston*, *supra*; *Gardner*, *supra*; *Lykins*, *supra*. Also, the administrative law judge properly found that benefits may not be paid to claimant during the period in which he continued to work. *See* 20 C.F.R. §725.503A. Therefore, we affirm the administrative law judge's findings pursuant to Section 725.503.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge