BRB No. 95-2073 BLA

ALFRED BELCHER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:
CONTRACTING ENTERPRISES	)	
	)	
Employer-Respondent	)	
	)	
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 Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Gregory R. Herrell (Arrington, Schelin & Herrell), Lebanon, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart, Eskridge & Jones), Abingdon, Virginia, for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand (88-BLA-0326) of Administrative Law Judge Frederick D. Neusner denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act

[1] Claimant is Alfred Belcher, the miner, who filed this claim for benefits on December 17, 1979. Director's Exhibit 1.

of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the second time. Initially, Administrative Law Judge John S. Patton credited claimant with eleven years of coal mine employment, found invocation of the interim presumption established pursuant to 20 C.F.R. §410.490(b), and concluded that employer failed to establish rebuttal pursuant to 20 C.F.R. §410.490(c). Accordingly, he awarded benefits.

Employer appealed, and in *Belcher v. Contracting Enterprises*,

BRB No. 90-1727 BLA (July 27, 1992)(unpub.), the Board affirmed the administrative law judge's finding regarding the length of coal mine employment, but vacated the award of benefits and remanded the case for him to explain his reason for excluding from the record certain x-ray readings submitted by employer and to adjudicate the claim pursuant to 20 C.F.R. §727.203. *Belcher*, slip op. at 2-4.

On remand, the administrative law judge[2] found invocation of the interim presumption established pursuant to Section 727.203 (a)(2), but concluded that rebuttal was established pursuant to Section 727.203(b)(3) and (4) and, accordingly, denied benefits.

On appeal, claimant challenges the administrative law judge's findings pursuant to Sections 727.203(a)(1) and 727.203(b)(3)-(4). Employer 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).

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[2] Because Judge Patton is no longer with the Office of Administrative Law Judges, the case was assigned on remand, without objection, to Judge Neusner.

[3] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(2), and (b)(1), (2). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co*., 6 BLR 1-710 (1983).

Initially, in view of our disposition of this case, *see* discussion, *infra*, we address claimant's argument that the administrative law judge failed to provide a rationale for not invoking the interim presumption at Section 727.203(a)(1). Claimant's Brief at 1-2; *cf. 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). Judge Patton initially found the existence of pneumoconiosis established pursuant to the true-doubt rule.[4]

Subsequent to the issuance of his decision, the United States Supreme Court invalidated the true-doubt rule. *Director, OWCP v. Greenwich Collieries [Ondecko],* U.S. , 114 S.Ct. 2251 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP,* 990 F.2d 730, 17 BLR 2-64 (10th Cir. 1993). On remand, Judge Neusner briefly addressed subsection (a)(1) invocation and found that under *Ondecko*, "it is evident that the x-ray readings set forth in Judge Patton's Decision and Order . . . do not" establish invocation. Decision and Order on Remand at 2-3.

Under *Ondecko*, the administrative law judge must weigh all the x-ray evidence to determine whether claimant has met his burden to establish invocation pursuant to Section 727.203(a)(1). *See Ondecko*, *supra*; *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). Because the administrative law judge failed to weigh the x-ray readings, we vacate his finding pursuant to Section 727.203(a)(1) and remand the case for him to reconsider the x-ray evidence. *See Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992) (reliance upon mere numerical superiority a "hollow" approach to resolving evidentiary conflicts). 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*, *supra*; *Curry*, *supra*; *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

Pursuant to Section 727.203(b)(3), claimant contends that the administrative

[4] Judge Patton discussed the seventy-three interpretations of thirteen x-rays, noting that twenty-two physicians made negative readings, and nine physicians rendered positive readings. Decision and Order at 4-7. He concluded that the conflicting x-ray interpretations by qualified readers raised a "true-doubt" that he was required to resolve in claimant's favor. *Id*.

law judge failed to apply the proper legal standard in determining that rebuttal was established. Claimant's Brief at 2-4. Claimant's argument has merit. The United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this case arises, places the affirmative burden of proof on the party challenging entitlement to produce persuasive evidence that "rules out" any causal connection between total disability and coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see Borgeson v. Kaiser Steel Corp*., 12 BLR 1-169 (1989)(*en banc*); *Lattimer v. Peabody Coal Co*., 8 BLR 1-509 (1986).

In this case, the administrative law judge stated the rebuttal standard correctly, but did not determine whether the evidence ruled out such a causal connection; instead, he shifted the burden of proof to claimant to establish that his total disability was due to pneumoconiosis. The administrative law judge stated that the opinions of Drs. Fino, Dahhan, Kress, Sargent, and Schmidt established rebuttal because "I do not find the reports of Drs. Buddington, Robinette, Suwannasri and Baxter[5] sufficient to outweigh the reports of the afore-mentioned physicians." Decision and Order on Remand at 5.

The administrative law judge's analysis does not include a determination of whether employer met its burden to rule out a connection between claimant's respiratory disability and his coal mine employment. *See Cox v. Shannon-Pocahontas Mining Co*., 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993); *Massey, supra*; *see also Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993). Dr. Schmidt's opinion does not address the issue. Director's Exhibit 14. The legal sufficiency of the opinions of Drs. Dahhan and Sargent to establish rebuttal is questionable because, although both attribute claimant's impairment to cigarette smoking, they do not affirmatively address the pulmonary impact of his coal dust exposure. Director's Exhibit 45; Employer's Exhibit 37; *see Goodloe v. Peabody Coal Co*., 19 BLR 1-91 (1995); *Bates v. Creek Coal Co*., 18 BLR 1-1 (1993); *see also Cox, supra*.

Drs. Fino and Kress do purport to rule out a connection between claimant's

[5] The administrative law judge faulted Dr. Suwannasri for failing "to explain why he found the miner's pulmonary disability to be the result of coal mine dust exposure." Decision and Order
on Remand at 5. He found the opinions of Drs. Robinette and Buddington flawed because they relied in part on a positive x-ray reading, when he had found the x-ray evidence to be negative for pneumoconiosis. *Id*. Finally, he criticized Dr. Baxter's opinion because the physician relied on a negative smoking history. *Id*.

impairment and his coal mine employment, but they conclude, as did Drs. Dahhan and Sargent, that claimant does not have pneumoconiosis. The Fourth Circuit court has agreed with those circuits holding that medical opinions premised on an erroneous finding that claimant does not have pneumoconiosis "are not worthy of much, if any, weight" in considering rebuttal pursuant to Section 727.203(b)(3). *See Grigg v. Director, OWCP*, 28 F.3d 416, 419-20, 18 BLR 2-299, 2-306-07 (4th Cir. 1994). Further, Drs. Kress, Sargent, and Fino based their opinions in part on the purely obstructive nature of claimant's respiratory impairment. The Fourth Circuit has held that opinions based on the erroneous assumption that obstructive pulmonary disorders cannot be caused by coal mine employment are not probative in ruling out coal dust exposure as a cause of respiratory disability. *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). Accordingly, we vacate the administrative law judge's conclusion at Section 727.203(b)(3) and remand the case for him to reweigh the evidence under the *Massey* "rule-out" standard, considering the medical opinions of record in light of *Grigg* and *Warth*. *See Cox*, *supra*; *see also Johnson v. Old Ben Coal Co*., 19 BLR 1-103 (1995).

Pursuant to Section 727.203(b)(4), claimant contends that the administrative law judge failed to apply the proper standard in considering the medical opinion evidence. Claimant's Brief at 4. The administrative law judge incorporated his analysis of the evidence pursuant to Section 727.203(b)(3) to find that "based upon the negative x-ray evidence, the non-qualifying blood gas studies, and the reports of the aforementioned physicians," rebuttal was established pursuant to Section 727.203(b)(4). Decision and Order on Remand at 6.

Pursuant to Section 727.203(b)(4), the party opposing entitlement must prove that claimant is not suffering from pneumoconiosis as broadly defined by the Act and regulations. 20 C.F.R. §§727.203(b)(4), 727.202; *Daugherty v. Dean Jones Coal Co*., 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985). Because the administrative law judge did not weigh the medical opinions to determine whether employer carried its burden of proof, we vacate his finding and remand the case for him to reconsider the medical opinions pursuant to Section 727.203(b)(4) and in light of *Warth*, *supra*.[6] *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

Accordingly, the administrative law judge's Decision and Order on Remand is

[6] Only Drs. Fino and Kress appear to address clearly whether statutory pneumoconiosis is present. Director's Exhibit 39; Employer's Exhibits 29, 45. Both purport to exclude a diagnosis of pneumoconiosis based in part on the absence of restriction associated with claimant's obstructive impairment. *Id*.

affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge