BRB No. 04-0845 BLA

ESTATE OF LEOTHA B. LOWE (Deceased) (o/b/o CLAUDE W. LOWE (Deceased))	)	
Claimant-Respondent	)	
v.	)	
HOBBS BROTHERS COAL COMPANY	)	DATE ISSUED: 07/29/2005
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 Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (Virginia Black Lung Association), Richlands, Virginia, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order On Remand Granting Benefits (04-BLA-0018) of Administrative Law Judge Pamela Lakes Wood (the administrative law

judge) on a request for modification in a miner's claim[1] 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).[2] This case is before the Board for the second time. Pertinent to the miner's claim *sub judice*, the Board, in *Lowe v. Hobbs Bros. Coal Co.*, BRB No. 99-0843 BLA (Sept. 15, 2000)(unpublished), vacated the administrative law judge's finding that the newly submitted autopsy evidence proved that the miner had pneumoconiosis, which established a mistake in a determination of fact at 20 C.F.R. §725.310 (2000), and prevented employer from establishing rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) (2000). *Lowe*, slip op. at 7. The Board also vacated the administrative law judge's finding that the evidence was insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000) because the administrative law judge failed to provide a basis for crediting the opinions of Drs. Rasmussen, Jones and Patel over those of Drs. Crouch, Kleinerman, Hansbarger, Fino, Castle and Garzon. *Id.* at 8. The Board further vacated the administrative law judge's finding that benefits

[1]The instant, fourth request for modification under 20 C.F.R. §725.310 (2000) in the miner's claim filed on October 6, 1975, is being pursued by the Estate of Loetha B. Lowe, the miner's widow. By Decision and Order dated May 16, 1995, Administrative Law Judge Edward J. Murty, Jr. denied the miner's third request for modification, finding that the evidence was insufficient to establish the existence of pneumoconiosis. Director's Exhibit 165. Subsequent to the miner's death on February 8, 1996, Director's Exhibit 8 (Survivor), claimant, the now-deceased miner's widow, timely requested modification. Director's Exhibits 166, 167. The miner's claim was then consolidated with a then-pending survivor's claim. Administrative Law Judge Pamela Lakes Wood (the administrative law judge) issued her Decision and Order dated April 14, 1999, awarding benefits in the miner's claim and denying benefits in the survivor's claim. The Board, in *Lowe v. Hobbs Bros. Coal Co.*, BRB No. 99-0843 BLA (Sept. 15, 2000)(unpublished), affirmed the administrative law judge's denial of the survivor's claim, vacated the administrative law judge's finding that claimant established modification in the miner's claim, and remanded the miner's claim for further consideration. The administrative law judge on remand noted that claimant had died and indicated that Lynne Jean Breedlove, administrator of claimant's estate, pursued the claim. Decision and Order on Remand at 1 n.2. In the instant appeal, employer initially urged the Board to dismiss the appeal for lack of a proper party in interest to pursue the claim. In its reply brief, however, employer withdraws its challenge to Ms. Breedlove's standing to pursue the claim.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

properly commence on October 1, 1975. *Id.* at 9. Accordingly, the Board remanded the miner's claim for further consideration.

By Decision and Order on Remand Granting Benefits dated July 16, 2004, the administrative law judge found that the autopsy evidence established the existence of clinical coal workers' pneumoconiosis and determined that employer did not establish rebuttal at 20 C.F.R. §727.203(b)(4) (2000).[3] The administrative law judge next found that employer failed to rule out the causal connection between the miner's total disability and his coal mine employment and thus did not establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000) under *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). The administrative law judge indicated that Drs. Crouch, Kleinerman, Hansbarger, Fino, Castle and Garzon assumed that the miner did not have pneumoconiosis and thus, their opinions regarding whether pneumoconiosis contributed to the miner's total disability are not credible. The administrative law judge determined that employer failed to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). Accordingly, the administrative law judge awarded benefits, determining at 20 C.F.R. §725.503(b) that benefits properly commence on October 1, 1975.

On appeal, employer alleges error in the administrative law judge's findings that employer did not establish rebuttal at 20 C.F.R. §727.203(b)(3) or (b)(4) (2000), and that benefits properly commence on October 1, 1975. Claimant's lay representative responds in support of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief addressing, *inter alia*, employer's challenge to the validity of the regulation at 20 C.F.R. §725.503(b) regarding

[3] By Order of Remand dated July 7, 2003, the administrative law judge ordered the district director to ask pathologists Drs. Stefanini, Crouch, Jones, Hansbarger and Kahn whether Dr. Kleinerman's July 6, 1979 article entitled "Pathology Standards for Coal Workers' Pneumoconiosis" sets forth a uniform standard for the diagnosis of coal workers' pneumoconiosis on autopsy; whether coal workers' pneumoconiosis may be diagnosed on autopsy in the absence of focal emphysema; and (3) whether the uniform standard, if any, has been satisfied. Administrative Law Judge's July 7, 2003 Order of Remand at 4. The administrative law judge further directed that the claim be returned for a hearing after the conclusion of the development of additional evidence. Dr. Kahn subsequently submitted a report dated August 21, 2003. Director's Exhibit 243. Dr. Stefanini submitted a report dated August 30, 2003. Director's Exhibit 244. Dr. Crouch submitted a report dated August 5, 2003. Director's Exhibit 250. Dr. Hansbarger, by letter dated July 24, 2003, indicated that he had retired. Director's Exhibit 241A. The record reflects the district director's unsuccessful attempt to reach Dr. Jones. *See* Director's Exhibit 249. On September 10, 2003, the district director denied claimant's request for modification under 20 C.F.R. §725.310 (2000); he subsequently forwarded the case to the administrative law judge in accordance with the administrative law judge's July 7, 2003 Order of Remand. Director's Exhibit 253.

the commencement of benefits. Employer has filed a Combined Reply Brief, restating its arguments.

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

Rebuttal under 20 C.F.R. §727.203(b)(4) (2000)

With regard to rebuttal at 20 C.F.R. §727.203(b)(4) (2000), employer argues that the administrative law judge failed to heed the Board's holding that she mischaracterized the pathological evidence of record, failed to follow the Board's remand instructions, and provided irrational reasons for discrediting the reports by employer's experts in finding the that autopsy evidence proved that the miner had pneumoconiosis and thus, that claimant proved a mistake in a determination of fact at 20 C.F.R. §725.310 (2000). The Board, in its September 15, 2000 Decision and Order in *Lowe*, held that the administrative law judge erred in crediting Dr. Stefanini's opinion based on his status as the autopsy prosector. *Lowe,* slip op. at 5. The Board specifically held that the administrative law judge did not provide a rationale for concluding that the gross examination conducted by Dr. Stefanini provided him with any advantage over the reviewing physicians. *Id.* The Board also held that, contrary to the administrative law judge's finding, "there is no indication that Drs. Crouch, Kleinerman and Hansbarger improperly incorporated a requirement that the miner's pneumoconiosis be of clinical significance before it could be diagnosed." *Id.* at 5-6. On remand, the administrative law judge found that the opinions of Drs. Stefanini, Kahn, and Jones, that the autopsy showed that the miner had coal workers' pneumoconiosis, were more probative than the contrary opinions of Drs. Hansbarger, Kleinerman and Crouch.

The administrative law judge found that Dr. Hansbarger's opinion, that the anthracotic pigmentation seen on the lung tissue slides was not of a degree sufficient to warrant a diagnosis of coal workers' pneumoconiosis, Employer's Exhibit 1, was confusing because it suggests that anthracotic pigmentation alone, if of sufficient quantity, might warrant a diagnosis of pneumoconiosis. Decision and Order on Remand at 20. The administrative law judge noted that such an opinion would be contrary to the regulations. *Id.* The administrative law judge further noted that Dr. Hansbarger did not submit a supplemental report in connection with the administrative law judge's July 7, 2003 Order, and thus it was unclear what diagnostic criteria he applied. *Id.*

The administrative law judge also found that Dr. Kleinerman, as well as Dr. Crouch, in reaching his opinion that the miner did not have pneumoconiosis, incorporated requirements that are not accepted by other pathologists as necessary for a diagnosis of

coal workers' pneumoconiosis. Decision and Order on Remand at 20. The administrative law judge determined that Dr. Crouch requires a certain size and amount of coal dust macules for a diagnosis of coal workers' pneumoconiosis. *Id.*; *see* Director's Exhibit 239B. The administrative law judge also noted that most of the pathologists reviewed different tissue slides, and found that it was unclear whether Dr. Crouch reviewed "all of the significant ones." *Id.* at 21. The administrative law judge also noted Dr. Kleinerman's testimony in which he acknowledged that there were three tissue slides that he did not review and that there was a possibility, however unlikely, that those slides could show coal dust macules as seen by Drs. Stefanini, Kahn, Jones, and Crouch. Decision and Order on Remand at 14, 21; *see* Director's Exhibit 182 at 45-47. Dr. Kleinerman added that, assuming the existence of "a few coal dust macules in three of thirty or so sections would indicate to me that the amount of simple coal workers' pneumoconiosis present overall in Mr. Lowe's lung would be vanishingly small. Therefore, it would still be my opinion that the degree of simple coal workers' pneumoconiosis would not in any way have contributed to Mr. Lowe's respiratory disease, his discomfort, his symptoms, nor his death." *Id.* at 47. Employer argues that the administrative law judge failed to heed the Board's ruling that she mischaracterized the autopsy evidence in finding that Drs. Crouch, Kleinerman, and Hansbarger improperly incorporated a requirement that the miner's pneumoconiosis be of clinical significance before it could be diagnosed. Employer argues that the administrative law judge's finding - that while it is unclear whether Dr. Hansbarger applied the requirement that the miner's pneumoconiosis be of clinical significance before it could be diagnosed, "Drs. Crouch and Kleinerman clearly adopted criteria relating to the magnitude of the findings," Decision and Order on Remand at 20 - conflicts with the Board's contrary indication in *Lowe*.

A review of the medical evidence of record supports the administrative law judge's determination that Dr. Kleinerman, in his 1979 article, did not set forth a standard for the pathological diagnosis of pneumoconiosis that is acceptable to all pathologists. *See* Decision and Order on Remand at 20. The administrative law judge provided proper reasons for her discrediting of the opinions of Drs. Hansbarger, Kleinerman, and Crouch. Specifically, the administrative law judge noted that Dr. Hansbarger had not submitted a supplemental report in connection with the administrative law judge's July 7, 2003 Order of Remand and thus determined, within her discretion, that it was unclear what diagnostic criteria the physician applied in finding that the autopsy evidence did not show that the miner had coal workers' pneumoconiosis. *Id.*; *see Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Further, the administrative law judge noted Dr. Kleinerman's testimony in which he acknowledged that there were three lung tissue slides that he did not review and that there was a possibility, however unlikely, that those slides could show coal dust macules as seen by Drs. Stefanini, Kahn, Jones, and Crouch. Decision and Order on Remand at 14, 21; *see* Director's Exhibit 182 at 45-47. The administrative law judge could properly accord Dr. Kleinerman's opinion less weight on this basis. *Lane v. Union Carbide Corp.*, 105 F.3d

166, 21 BLR 2-34 (4th Cir. 1997)(administrative law judge does not have to accept the opinion or theory of any given medical witness but must weigh the medical evidence and draw his own conclusions). Further with regard to Dr. Crouch's opinion, the administrative law judge noted that Dr. Crouch reviewed fourteen tissue slides but did not indicate the numbers labeled on the slides. The administrative law judge could permissibly find Dr. Crouch's opinion less persuasive on this basis. *Roberts*, 8 BLR at 1-211; *Kuchwara*, 7 BLR at 1-167. Based on the foregoing, we hold that substantial evidence supports the administrative law judge's determination that the weight of the relevant evidence is insufficient to meet employer's burden on rebuttal at 20 C.F.R. §727.203(b)(4) (2000) and we affirm the administrative law judge's finding.

Rebuttal under 20 C.F.R. §727.203(b)(3) (2000)

In order to establish rebuttal at 20 C.F.R. 727.203(b)(3) (2000), employer must rule out the causal relationship between the miner's total disability and his coal mine employment under *Lockhart* and *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Employer contends that the opinions of its medical experts are sufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000) under *Lockhart* because they attribute the miner's impairment to causes other than coal mine employment. Employer states, "The proof showed that even if Lowe did have pneumoconiosis, the disease was far too isolated to have contributed to Lowe's impairment. Rather, Lowe's disabling respiratory condition was due solely to cigarette smoking induced emphysema." Employer's Brief at 20. The Board, in its September 15, 2000 Decision and Order in *Lowe*, held that the administrative law judge, at 20 C.F.R. §727.203(b)(3) (2000), failed to provide a basis for crediting the opinions of Drs. Rasmussen, Jones and Patel, who attributed the miner's disability to his coal workers' pneumoconiosis, over the opinions of Drs. Kleinerman, Hansbarger, Fino, Castle and Garzon. *Lowe*, slip op. at 8. On remand, the administrative law judge initially found that the miner had a severe respiratory impairment. She then determined that employer failed to rule out the causal connection between the miner's total disability and his coal mine employment and thus, did not establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000) under *Lockhart*. The administrative law judge noted that Drs. Crouch, Kleinerman, Hansbarger, Fino, Castle and Garzon attributed the miner's disability to cigarette smoking and "assumed" that the miner did not have pneumoconiosis. The administrative law judge determined that these physicians thus "were in no position to comment upon whether [pneumoconiosis] contributed to the Miner's total disability." Decision and Order on Remand at 23-24. Citing *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002), the administrative law judge added, "Inasmuch as I have found the evidence to preponderate in favor of a finding of [coal workers' pneumoconiosis,] their opinions are entitled to less weight as they rely upon an assumption that I have rejected." *Id.* at 24. The administrative law judge further found that the evidence was in equipoise on the issue of whether the miner's emphysema was related to his exposure to coal mine dust. The administrative law judge thus determined that employer had also not ruled out an

association between the miner's emphysema and his exposure to coal dust. *Id.* at 25. The administrative law judge thus determined that employer failed to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). Employer challenges the administrative law judge's finding that while employer's experts attribute the miner's lung problems entirely to cigarette smoking, their opinions neither establish cigarette smoking as the only cause, nor rule out other causes. Employer's Brief at 21. Employer asserts that the administrative law judge thereby held it to a rebuttal standard higher than the applicable standard, and irrationally discredited employer's proof.

Employer's contentions lack merit. The administrative law judge held employer to the correct standard of proof, *see* Decision and Order on Remand at 21-22, 24-25, and did not err in finding the opinions of Drs. Crouch, Kleinerman, Hansbarger, Fino, Castle and Garzon to be insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). The administrative law judge permissibly accorded less weight to the opinions of Drs. Crouch, Kleinerman, Hansbarger, Fino, Castle and Garzon because they were based on the physicians' mistaken assumption that the miner did not have coal workers' pneumoconiosis. The administrative law judge's rationale is not compromised by the fact that Drs. Kleinerman, Fino, and Castle alternatively assumed the existence of the disease and hypothetically opined that even if the miner had pneumoconiosis, it did not contribute to any impairment. *Grigg v. Director, OWCP*, 28 F.3d 416, 419, 18 BLR 2-299, 306-307 (4th Cir. 1994); *see Lockhart*, 137 F.3d at 799, 21 BLR at 2-302; *see generally Scott*, 289 F.3d at 269, 22 BLR at 2-382; *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 115, 116, 19 BLR 2-70, 82-83 (4th Cir. 1995).

Employer next contends that the administrative law judge did not provide a reason as to why the opinions of Drs. Stefanini, Kahn, and Jones "were entitled to any weight" in finding that employer did not establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). Employer makes several arguments in support of its assertions that this evidence is not credible and is insufficient to establish that the miner's total disability is attributable to his pneumoconiosis. Employer's contentions lack merit. Once a miner establishes invocation of the interim presumption at 20 C.F.R. §727.203(a) (2000), the party opposing entitlement, employer in this case, bears the burden to rebut the presumption at 20 C.F.R. §727.203(b) (2000). *Massey*, 736 F.2d at 120, 7 BLR at 2-72. Thus, employer's arguments regarding the administrative law judge's treatment of medical evidence that is favorable to claimant's case and does not support employer's burden on rebuttal, are unavailing. Based on the foregoing, we affirm the administrative law judge's finding that employer did not establish rebuttal at 20 C.F.R. §727.203(b)(3) (2000). We thus affirm the administrative law judge's award of benefits under 20 C.F.R. Part 727.

Commencement of Benefits

Employer contends that the administrative law judge failed to follow the Board's remand order regarding the commencement of benefits, and summarily determined that the date of the onset of the miner's disability due to pneumoconiosis was unclear. The Board, in *Lowe*, vacated the administrative law judge's finding regarding the commencement of benefits because he relied on Dr. Claustro's October 15, 1975 opinion without determining whether the opinion was reasoned and sufficient to establish that the miner was totally disabled due to pneumoconiosis. *Lowe*, slip op. at 9. The Board remanded the case, instructing the administrative law judge to determine whether the medical evidence establishes when the miner became totally disabled. The Board added, "If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date." *Id.* On remand, the administrative law judge merely stated, "in view of the conflicting evidence (discussed above and in the Board's decision), it is unclear when the Miner became disabled. As the date of onset is unclear, I find that benefits shall commence as of October 1, 1975, the date the initial claim was filed. *See* 20 C.F.R. §725.503(b)." Decision and Order on Remand at 25. Employer seeks a remand of the case for the administrative law judge to set forth explicit evidentiary findings on this issue. Alternatively, employer argues that, assuming that the administrative law judge's award of benefits is based on a finding of a change in conditions pursuant to claimant's modification request filed March 29, 1996, Director's Exhibit 167, benefits are payable as of March of 1996 under 20 C.F.R. §725.503(b). Employer further asserts that insofar as the regulation at 20 C.F.R. §725.503(b) allows for benefits to be awarded as of the date the miner's claim was filed, namely October of 1975, it is invalid because it resolves a medical issue by application of a legal rule and circumvents the burden of proof requirements through regulation. The Director argues that the regulation is valid, and notes that employer has not alleged that the record contains evidence that actually demonstrates that the miner was not totally disabled until sometime after the October of 1975 filing date of the miner's claim.

Employer correctly argues that the administrative law judge erred by not grappling with the medical evidence of record when she determined that, in light of the conflicting evidence, it was "unclear when the Miner became disabled," Decision and Order on Remand at 25; *see* 20 C.F.R. §725.503(b); *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). We, therefore, vacate the administrative law judge's finding and remand the case for explicit evidentiary findings, if possible, regarding the date from which benefits commence under the revised

regulation at 20 C.F.R. §725.503.[4] If such analysis does not establish the month of onset, then benefits will be payable beginning with the month during which the claim was filed, unless credible evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990). Further, the administrative law judge's award of benefits is based on a finding of a mistake in a determination of fact in the prior denial of benefits in this miner's claim, which was based on the miner's failure to establish the existence of pneumoconiosis. *See* 20 C.F.R. §725.310 (2000); Decision and Order on Remand at 18; Director's Exhibit 165. The regulation at 20 C.F.R. §725.503(d)(1) provides that where an award of benefits is made pursuant to a finding of a mistake in a determination of fact, the regulation at 20 C.F.R. §725.503(b) determines the date of the commencement of benefits where benefits are awarded in a miner's claim. 20 C.F.R. §725.503(b), (d)(1). The regulation at 20 C.F.R. §725.503(b) provides that benefits commence with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, and that if the evidence does not establish the month of onset, then benefits commence with the month in which the claim was filed. 20 C.F.R. §725.503(b). On remand, the administrative law judge must determine the date upon which benefits commence based on his review of the pertinent evidence under the applicable regulatory scheme.

[4]We reject employer's challenge to the validity of 20 C.F.R. §725.503; subsection 725.503(b) is a permissible evidentiary presumption that shifts the burden of production, not the burden of proof. *Nat'l Mining Ass'n v. Chao*, 160 F. Supp.2d 47, 70-71 (D.D.C. 2001), *rev'd in part on other grounds and aff'd in part by Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 871-72 (D.C. Cir. 2002).

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge