BRB No. 99-0261 BLA

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| LOWELL MITCHELL | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
| | ) | DATE ISSUED: |
| OLD BEN COAL COMPANY | ) | |
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| Employer-Petitioner | ) | |
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| 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 - Award of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-4679) of Administrative Law Judge Robert L. Hillyard 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). This case is before the

Board for the fourth time.[1] In the Board's most recent decision, the Board vacated the administrative law judge's denial of benefits and remanded the case to the administrative law judge with instructions to reopen the record for submission of claimant's evidence and to provide employer with an opportunity to submit rebuttal evidence. *Mitchell v. Old Ben Coal Co.*, BRB No. 97-0464 BLA (Nov. 28, 1997)(unpub.). On remand, the administrative law judge reopened the record, admitted additional evidence from both parties and considered the entire medical record. The administrative law judge determined that claimant established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(4) and that employer did not establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, benefits were awarded. The administrative law judge further found that the medical evidence did not establish the date of onset of total disability, and therefore determined that claimant is entitled to benefits commencing January 1, 1980, the month in which the claim was filed. On appeal, employer contends that the administrative law judge erred in his consideration of the medical opinion evidence and in determining the date of onset for the commencement of benefits.[2] Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs has indicated that he will not 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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[1]We incorporate by reference the recitation of the procedural history set forth in *Mitchell v. Old Ben Coal Co.*, BRB No. 97-0464 BLA (Nov. 28, 1997)(unpub.), slip op. at 1-3.

[2]Employer does not challenge the administrative law judge's findings at 20 C.F.R. §§727.203(a)(1) - (3) and 727.203(b)(1), (b)(4). These findings are therefore affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Turning first to the issue of invocation under Section 727.203(a)(4), employer cites *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992) and *Peabody Coal Co. v. Helms*, 901 F.2d 571, 13 BLR 2-449 (7th Cir. 1990), and argues that the administrative law judge erred in mechanically finding that the opinions of Drs. Rosecan and Khan were entitled to more weight than the opinion of Dr. Tuteur based upon their status as treating and examining physicians.[3] Employer also argues that the administrative law judge erred in relying exclusively on the most recent evidence and should have considered the earlier evidence in the record.

These contentions have merit, in part. Employer asserts correctly that the administrative law judge did not engage in a meaningful analysis of the opinions of Drs. Rosecan and Khan. Decision and Order on Remand at 14-15. In *Peabody Coal*

[3]In addition to a 1983 deposition and a 1986 medical report, Dr. Rosecan, who is Board-certified in internal medicine and endocrinology, submitted a medical report dated June 2, 1998, in which he determined that claimant has pneumoconiosis and suffers from a totally disabling pulmonary impairment of which pneumoconiosis is a significant contributing cause. Claimant Exhibit (Reopened Record) 2. Dr. Khan, who is Board-certified in internal medicine, examined claimant on May 20, 1998 and determined that he is totally disabled due to pneumoconiosis and pulmonary emphysema. He also identified hypertension, coronary artery disease, and coronary bypass surgery as factors contributing to claimant's disability. Claimant's Exhibit (Reopened Record) 1. Dr. Tuteur, who is Board-certified in internal medicine and pulmonary disease, reviewed all of the evidence of record and concluded that claimant does not have pneumoconiosis, but is totally disabled due to heart disease and, to a limited extent, chronic obstructive pulmonary disease caused by smoking. Employer's Exhibit (Reopened Record) 1.

*Co. v. Helms*, 901 F.2d 571, 13 BLR 2-449 (7th Cir. 1990), the United States Court of Appeals for the Seventh Circuit held that a blanket rule that the opinion of a treating physician is entitled to greater weight than that of a consulting physician is arbitrary. The court further stated that:

> If the treating physician is not a specialist in black lung disease but the consultant is, and if a judgment of disability depends to a great extent on the expert interpretation of documentary data, such as x-rays and results of gas and ventilatory tests, then reasons may require that the consultant's opinion be given equal or even greater weight than the treating physician's.

*Helms*, 901 F.2d at 574, 13 BLR at 2-451; *see also Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992). Similarly, in *Amax Coal Co. v. Franklin,* 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), the Seventh Circuit rejected the administrative law judge's decision to credit the opinion of a treating physician who had no more than a general practitioner's knowledge of pulmonary diseases, conducted no objective tests, was not deposed and failed to account for the miner's lengthy smoking history, over the longer report and complete deposition of a pulmonary specialist. In the instant case, because the administrative law judge's entire analysis of the opinions by Drs. Rosecan, Khan and Tuteur is based on the relative status of the physicians, and not on any other factors such as the credentials and expertise of the physicians, the objective tests supporting their diagnoses, the other bases underlying their opinions, or the soundness of their reasoning, we must vacate the administrative law judge's findings at Section 727.203(a)(4).[4] On remand, the administrative law judge must reconsider the medical opinions in light of the factors noted above. In particular, the administrative law judge should consider whether Dr. Khan's opinion contains a diagnosis of a totally disabling respiratory or pulmonary impairment as is required pursuant to Section 727.203(a)(4).

We reject, however, employer's assertion that the administrative law judge ignored the earlier evidence of record. The administrative law judge reviewed the record in its entirety and rationally determined that the evidence submitted after the administrative law judge reopened the record, which is a minimum of twelve years

[4]While claimant is correct in asserting that the administrative law judge summarized the physicians' respective qualifications, noted that Dr. Khan found only a slight impairment on objective tests, and accorded less weight to the x-ray interpretations by Drs. Khan and Rosecan because they were not B readers or Board-certified radiologists, the administrative law judge did not discuss why, in light of these factors, the opinions were entitled to greater weight than Dr. Tuteur's.

most recent in time, most accurately depicted the state of claimant's health, and was thus entitled to greater weight. *See Zeigler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

Employer next contends that the administrative law judge erred in failing to evaluate the medical evidence relevant to Section 727.203(b)(2) rebuttal pursuant to *Freeman United Coal Mining Co. v. Foster,* 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), as directed by the United States Court of Appeals for the Seventh Circuit in this case.[5] *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995). Employer argues that it established rebuttal under the holding in *Foster*, as claimant voluntarily retired from mining in 1978, at age sixty-five, and then accepted a "better job" with the union. Petition for Review at 17. Employer also asserts that claimant's various current maladies are a result of old age and not any pulmonary disability. Regarding rebuttal at Section 727.203(b)(3), employer contends that the evidence establishes that claimant's multiple medical problems, including heart disease, prevented him from doing his usual coal mine work.

Inasmuch as the administrative law judge's findings at Section 727.203(b)(2) and (3) are premised on the same reasoning he utilized at invocation, that the examining and treating physicians' opinions are entitled to greater weight than the consulting physician's opinion, we vacate his findings at these subsections and remand the case to the administrative law judge for further consideration of the evidence. If, on remand, the administrative law judge determines that claimant has established invocation, he must then reconsider whether the evidence supports a finding of rebuttal pursuant to Section 727.203(b)(2) in light of the Seventh Circuit's holding in *Foster* and pursuant to Section 727.203(b)(3).[6] *See Franklin*, *supra*; *Beasley*, *supra*; *Helms*, *supra*

[5]In *Freeman United Coal Mining Co. v. Foster,* 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), the Seventh Circuit held that under 20 C.F.R. §727.203(b)(2), a miner whose pneumoconiosis was not disabling and who could have worked except for a work related back injury was not totally disabled by pneumoconiosis and was not entitled to benefits. The court rejected, therefore, the notion that rebuttal under Section 727.203(b)(2) is precluded when the miner is totally disabled as a result of any condition.

[6]In *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995), the Seventh Circuit remanded this case for reconsideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(3) in light of its recent rulings in *Freeman United Coal Mining Co. v. Benefits Review Board*, 912 F.2d 164, 172 (7th Cir. 1992) and *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992). The court reiterated that under Section 727.203(b)(3), the party opposing entitlement must rule out

Employer next contends that the administrative law judge's finding regarding the date of onset for the commencement of benefits was not based on an analysis of the medical evidence and violates the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). Employer alleges that since the finding of pneumoconiosis in this case is based on medical evidence developed in 1998, the administrative law judge cannot determine that onset occurred in an earlier year. Inasmuch as the administrative law judge did not set forth his analysis of the evidence nor explain his finding, the administrative law judge's statement that the medical evidence of record does not establish a date of onset of total disability does not comply with the APA, which requires that every adjudicatory decision be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); Decision and Order on Remand at 16. Thus, on remand, if the administrative law judge reaches this issue again, he must thoroughly discuss the evidence and set forth his findings in detail.

Lastly, claimant's counsel has submitted an attorney's fee petition for work completed before the Board in BRB Nos. 89-3555 BLA and 97-464 BLA, requesting compensation for three hours of work and ten and one-half hours of work, respectively, at the rate of $150.00 per hour. No objections to counsel's fee have been received. We find the fee requested to be reasonable and commensurate with the work performed before the Board and therefore, award a fee in the amount of $2,025 to be paid directly to counsel by employer. Because we vacate the award of benefits and remand the claim for further findings, however, counsel's fee award is neither enforceable nor payable until such time as an award of benefits to claimant is made and becomes final. 30 U.S.C. §928; *see Wells v. Int'l Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (7th Cir. 1982).

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

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pneumoconiosis as a contributing cause of the miner's total disability by a preponderance of the evidence.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge