BRB No. 99-1014 BLA

RUTH COOK (Daughter of THOMAS COOK, Deceased) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 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.

Vernon L. Plummer, II (Plummer Law Offices, P.C.), Shelbyville, Illinois, for claimant.

Richard A. Dean (Arter & Hadden, LLP), Washington, D.C., for employer.

Helen H. Cox (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Award of Benefits (80-BLA-5076 and 88-BLA-0416) of Administrative Law Judge Robert L. Hillyard on miner's and survivor's claims[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] The

[1] Claimant, Ruth Cook, is the surviving disabled daughter of the miner, Thomas Cook, who died on September 15, 1987. The death certificate lists the cause of death as cardiac arrest due to ventricular fibrosis due to coronary artery disease. Director's Exhibit 2 (Survivor's Claim).

[2] This case is before the Board for a fifth time. On May 5, 1981, the administrative law judge issued a Decision and Order awarding benefits on the miner's claim. Subsequent to an appeal by the employer, the Board reversed the findings of invocation at 20 C.F.R. §727.203(a)(2), (4), and remanded the claim for further consideration of invocation at 20 C.F.R. §727.203(a)(1). *Cook v. Peabody Coal Co.*, BRB No. 81-1140 BLA (Apr. 9, 1984) (unpub.). On remand, the administrative law judge found that claimant established invocation of the presumption pursuant to subsection (a)(1) and awarded benefits. Subsequent to an appeal by employer, the Board vacated the administrative law judge's's finding of invocation at subsection (a)(1) and remanded the case for further consideration of all the relevant evidence pursuant to the holding of the United States Supreme Court in *Mullins Coal Company, Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988). The Board also rejected employer's argument that rebuttal should have been found established at 20 C.F.R. §727.203(b)(2), but remanded the claim for further consideration of rebuttal, if reached, at 20 C.F.R. §727.203(b)(3). *Cook v. Peabody Coal Co.*, BRB No. 85-627 BLA (June 30, 1988)(unpub.). On remand, the administrative law judge found that invocation was established pursuant to Section 727.203(a)(1) and that rebuttal pursuant to Section 727.203(b)(3) was not established and, accordingly, benefits were awarded. At the same time, claimant, in a separate Decision and Order, was found to be an eligible survivor of the miner and was awarded benefits. Subsequently, in an Order issued September 25, 1990, the Board consolidated the miner's claim and the survivor's claim, and employer appealed both awards. The Board affirmed both awards of benefits. *Cook v. Peabody Coal Co.*, BRB Nos. 89-3181 BLA and 90-16558 BLA (Dec. 16, 1991)(unpub.). Employer filed a Motion for Reconsideration which the Board granted. The Board vacated the awards of benefits on both claims and remanded the claims for further consideration. *Cook v. Peabody Coal Co.*, BRB Nos. 89-3181 BLA and 90-16558 BLA (D&O on Recon.)(Sept. 9, 1996)(unpub.). Specifically, the Board vacated the administrative law judge's finding of invocation at Section 727.203(a)(1) as the finding was predicated on the since discredited "true doubt" rule. The Board further agreed that the administrative law judge erred in awarding pre-judgement interest from the month the miner

administrative law judge found that the record established a coal mine employment history of "at least" fourteen and one-half years and that the parties agreed with such a determination. Decision and Order at 3. The administrative law judge, on remand, found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), that employer was unable to rebut the presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4), and that the record established entitlement to benefits on the miner's claim. Decision and Order on Remand at 7-8. The administrative law judge further concluded that, inasmuch as the record established entitlement to miner's benefits, claimant was entitled to survivor's benefits based on her relationship and dependency to the miner. Decision and Order on Remand at 8-9; *see* 20 C.F.R. §§725.218, 725.220, 725.221.

On appeal, employer contends that the administrative law judge erred in finding invocation of the interim presumption established pursuant to Section 727.203(a)(1). Employer further asserts that the administrative law judge erred in failing to specifically address whether the evidence of record supported a finding of rebuttal pursuant to Section 727.203(b)(2)-(4), and that the record should be reopened to allow employer to submit new evidence. Employer also asserts that inasmuch as it has been deprived of its right to present a meaningful defense, any liability in the instant case should be transferred to the Black Lung Disability Trust Fund (the Trust Fund). Finally, employer asserts that, if a remand is ordered, the case should be reassigned to a different administrative law judge inasmuch as the case has attained a stalemated posture. Claimant, in response, urges the award of benefits be affirmed. The Director, Office of Workers' Compensation Programs (the Director), has file a brief urging the Board to reject employer's assertion that liability, if any, should be transferred to

---

died. The Board held that if on remand entitlement was again found to have been established, interest was to be assessed beginning 30 days from the date of the initial determination of entitlement. On May 27, 1999, the administrative law judge issued the Decision and Order on Remand awarding benefits on both claims from which employer now appeals.

the Trust Fund. The Director takes no position on the merits of entitlement.[3]

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).

[3] In view of our affirmance of entitlement on the miner's claim, *see* discussion, *infra*, we affirm the administrative law judge's award of benefits on the survivor's claim as unchallenged on appeal. *See Skrack*. We further affirm the administrative law judge's onset date of benefits determinations in both claims as well. *See Skrack, supra*.

Employer contends that the administrative law judge erred in concluding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1). Specifically, employer contends that the "law of the case" doctrine should apply to the administrative law judge's prior determination that the x-ray evidence of record was in equipoise.[4] Employer asserts that a finding that the x-ray evidence is equally probative, *i.e.*, in equipoise, precludes a finding of invocation at Section 727.203(a)(1). Employer further asserts that, pursuant to Section 727.203(a)(1), the administrative law judge impermissibly rejected the negative x-ray interpretation of the most qualified physician of record, Dr. Sargent, Director's Exhibit 14, and, further, impermissibly accorded greatest weight to the positive x-ray interpretation of Dr. Lang, Director's Exhibit 16, inasmuch as the physician, in a subsequent narrative x-ray report did not diagnose the existence of pneumoconiosis.

[4] "Law of the case" is a discretionary rule of practice, based on the policy that once an issue is litigated and decided, the matter should not be relitigated. *See United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950).

When this case was most recently before the Board, it held that the administrative law judge impermissibly found that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) based on the application of the "true doubt" rule. *Cook*, BRB Nos. 89-3181 BLA and 90-1658 BLA (Decision and Order on Reconsideration) at 3. The Board concluded that, inasmuch as the true doubt rule was invalidated in *Ondecko*, *supra*, remand was necessary for the administrative law judge to reweigh all the x-ray evidence.[5] *Id*. We conclude, therefore, that in light of the Board's remand of the case for a weighing of the x-ray evidence, employer's reliance on the "law of the case" doctrine to preclude the administrative law judge from making specific findings regarding the weight of such evidence is misplaced. While the Board recognized that substantial evidence supported a determination that true doubt existed regarding the evaluation of the x-ray evidence at Section 727.203(a)(1). *Cook*, BRB Nos. 89-3181 BLA and 90-16558, *slip op*. at 4 fn. 4, the Board recognized that the Supreme Court's invalidation of the true doubt rule, *see Ondecko, supra*, required a remand for a reconsideration of the x-ray evidence, *see Cook,* BRB Nos. 89-3181 BLA and 90-1658 BLA (Decision and Order on Reconsideration) at 3. Accordingly, we reject employer's assertion that the previous determination that the evidence was in equipoise constitutes the law of the case. *See generally United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950.)

Employer further contends that, on remand, the administrative law judge erred in concluding that the x-ray evidence of record supported a finding of invocation at Section 727.203(a)(1). Specifically, employer asserts that the administrative law judge provided no affirmable basis for discrediting the negative interpretation, Director's Exhibit 14, of the most qualified physician of record, Dr. Sargent. Employer further asserts that a subsequent narrative testimony from Dr. Lang undermined the probative value of his positive x-ray interpretation, Director's Exhibit 16, and that the administrative law judge therefore erred in according Dr. Lang's positive x-ray interpretation the greatest weight. Finally, employer

[5] The "true doubt" rule was an evidentiary rule applicable to the administrative law judge's evaluation of equally probative evidence. "True doubt" was said to have arisen and applied in claimant's favor when "equally probative," but contradictory evidence was presented in the record, and the selection of one set of facts would have resolved the case against the claimant, but the selection of the contradictory set of facts would have resolved the case in favor of the claimant. *See Ondecko*, *supra*.

asserts that the administrative law judge impermissibly failed to weigh the three positive interpretations against the four negative interpretations, and instead relied on irrational reasons for concluding that the positive interpretations supported a finding of invocation at Section 727.203(a)(1).

In finding that the x-ray evidence of record supported a finding of invocation at Section 727.203(a)(1), the administrative law judge considered all the x-ray evidence of record and concluded that the three positive interpretations of record, Director's Exhibits 13, 15, 16, supported a finding of invocation. The administrative law judge, in a permissible exercise of his discretion, found that the x-ray interpretation of Dr. Lang was entitled to great weight based on his affiliation with the radiology department of St. Luke's Hospital. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-131 (1991)(*en banc*). Further, contrary to employer's assertion, the administrative law judge considered Dr. Lang's subsequent narrative statement that the x-ray demonstrated "minimal basilar fibrosis" and an otherwise essentially negative chest, Director's Exhibit 17, and in a permissible exercise of his discretion concluded that such statements did undermine the credibility of his conclusions at Section 727.203(a)(1). *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999). Moreover, also contrary to employer's assertion, the administrative law judge permissibly found that Dr. Sargent's negative interpretation was entitled to less weight, as he was the only physician to provide a negative interpretation of the most recent x-rays. *See generally Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983). Finally, with respect to the evidence at Section 727.203(a)(1), we reject employer's contention that the negative interpretations were numerically superior to the positive x-ray interpretations and thus a true weighing of the evidence would have demonstrated that claimant was unable to carry his burden at Section 727.203(a)(1). Employer's assertions are tantamount to a request that the Board reweigh the evidence, a role outside our scope of review, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Accordingly, the administrative law judge's finding that claimant established invocation pursuant to Section 727.203(a)(1) is affirmed.

Employer further asserts that the administrative law judge erred in failing to consider whether the evidence of record established rebuttal of the interim presumption pursuant to Section 727.203(b)(2)-(4). Employer contends that while the law of the case doctrine would generally preclude its assertions pertaining to rebuttal, it has established an exception to the doctrine and thus the administrative law judge erred in failing to address the issue of rebuttal at Section 727.203(b)(2)-(4).

In not addressing the issue of rebuttal, the administrative law judge acknowledged that the issue was not before him on remand by stating that "the Board has affirmed my previous findings that the Employer has failed to establish rebuttal." Decision and Order at 8. When this case was most recently before the Board, it held that employer was precluded by the law

of the case doctrine from establishing rebuttal at Section 727.203(b)(2), and that the evidence of record precluded a finding of rebuttal at Section 727.203(b)(3) as a matter of law pursuant to *Weatherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). *Cook*, slip op. at 4-5; *Cook* (D&O on Recon.), at 2. Employer raised no challenge to these determinations.

As employer asserts, a well established exception to the law of the case doctrine allows reexamination when controlling authority has made a contrary decision of law applicable to a previously litigated issue. *Richardson v. United States*, 841 F.2d 993 (9th Cir. 1988). In the instant case, however, employer has failed to demonstrate how intervening case law is controlling on the issue of rebuttal at Section 727.203(b)(2) and (3). Accordingly, we conclude that the law of the case is controlling on the issue of rebuttal at these subsections and we reject employer's assertion that the evidence of record establishes rebuttal at Section 727.203(b)(2) and (3). *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *see Williams v. Heally-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(Brown, J. dissenting). Moreover, in view of our affirmance of the administrative law judge's finding of invocation at Section 727.203(a)(1),a finding of rebuttal pursuant to Section 727.203(b)(4) is precluded as a matter of law. *See Mullins*, *supra*; *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988).

Further still, we reject employer's assertion that a remand in the instant case is compelled in order for employer to develop evidence sufficient to establish rebuttal. Employer asserts that the holding of the United States Court of Appeals for the Sixth Circuit in *Cal-Glo Coal Co. v. Yeager*, 104 F.3d 827, 21 BLR 2-1 (6th Cir. 1997), compels a remand in cases where the standards for rebuttal are evolving. Employer asserts that a failure to remand a case where the rebuttal standards have changed causes a manifest injustice to an employer and precludes from it the opportunity of presenting a meaningful defense. We decline to extend the holding of *Yeager* to the facts presented in the instant case which arises within the appellate jurisdiction of the United States Court of Appeals for the Seventh Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989). Employer has contested entitlement throughout each stage of this claim and has been presented with the opportunity to present evidence at each stage. Moreover, as discussed, *supra*, employer has failed to demonstrate how intervening law has changed in a manner which would require the submission of qualitatively different evidence. Accordingly, we reject employer's request to remand the claim in order for the record to be reopened.

Finally, employer asserts that any liability in the instant case should be the responsibility of the Trust Fund. Employer asserts that the death of the miner along with the lengthy duration of this case in the appellate process has precluded it from the opportunity to present a meaningful defense to the claim. Employer asserts that its inability to present a meaningful defense denies it due process and that a transfer of liability to the Trust Fund is therefore required. Employer asserts that the holding of the United States Court of Appeals in *Consolidation Coal Company v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999),

compels this transfer.

We reject employer's assertions and hold that the administrative law judge properly determined that liability rested with employer. In *Borda*, liability was transferred to the Trust Fund upon a showing by employer that the Department of Labor's failure to notify all potential responsible operators constituted prejudice and thus deprived employer of the right to make a meaningful defense to the claim. *See Borda*, *supra*. In the instant case, employer has failed to demonstrate any affirmative actions on the part of the Director which could properly be called prejudicial to its case. In the instant case employer was properly identified and has contested liability from the outset. Accordingly, we reject employer's assertions and hold that liability was properly found to have rested with employer.[6]

Accordingly, the administrative law judge's Decision and Order on Remand-Award of Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[6] Inasmuch as we have affirmed the award of benefits, we need not address employer's request to reassign the instant case to a different administrative law judge. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984).