BRB No. 97-1307 BLA

ANN EASLEY (Widow of TOM B. EASLEY) Claimant-Respondent v. PEABODY COAL COMPANY Employer-Petitioner 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 - Awarding Benefits in Miner's and Survivor's Claims of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Harold B. Culley, Jr., Raleigh, Illinois, for claimant.

Terri L. Bowman (Arter & Hadden), Washington, D.C., for employer.

Barry H. Joyner (Marvin Krislov, Deputy Solicitor for National Operations; 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 BROWN, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits in Miner's and Survivor's Claims (95-BLA-1240) of Administrative Law Judge Mollie W. Neal, on claims 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 previously has been before the Board.[1] In its last Decision and Order, the Board vacated Administrative Law Judge Richard K. Malamphy's award of benefits under 20 C.F.R. Part 727. The Board remanded the case to the administrative law judge, instructing him to specifically resolve the transfer of liability issue under Section 205(a)(1) of the Act.[2] Additionally, on the merits, the Board affirmed the administrative law judge's finding of invocation at Section 727.203(a)(1) based on the "true doubt" rule, and the administrative law judge's finding that employer failed to establish rebuttal under 20 C.F.R. §727.203(b)(1), (b)(2) or (b)(4), but remanded the case for further consideration under subsection (b)(3). *See Easley v. Peabody Coal Co.,* BRB No. 90-2183 BLA (Sept. 17, 1993)(unpub.). On remand, the case was assigned to Administrative Law Judge Mollie W. Neal. Judge Neal (the administrative law judge) found that good cause did not exist to excuse claimant's failure to return his election card, and therefore that liability did not transfer to the Black Lung Disability Trust Fund. Additionally the administrative law judge re-weighed the evidence of record and found invocation based on the x-ray evidence under Section 727.203(a)(1), and no rebuttal under subsection (b)(3). Accordingly, she awarded benefits on the miner's claim, and found automatic entitlement on the survivor's claim. Employer appeals, arguing that the administrative law judge erred in finding that good cause did not exist to excuse the miner's failure to return the election card. Additionally, employer raises several arguments regarding the administrative law judge's findings on the merits. The Director, Office of Workers' Compensation Programs (the Director), responds to employer's transfer argument, arguing that the administrative law judge's good cause finding is insufficient, and requesting remand. Claimant responds to employer's appeal, arguing that the

[1]The relevant procedural history of this case is set forth in the Board's previous decision. *See Easley v. Peabody Coal Co.,* BRB No. 90-2183 BLA (Sept. 17, 1993)(unpub.); Director's Exhibit 73.

[2]In order for liability to transfer on a Part B claim under Section 205(a)(1), a claimant must have filed a Part B claim which was denied by the Social Security Administration (SSA) prior to March 1, 1978. He must have elected review on the denied claim. The claim must have been approved by the Department of Labor (DOL) pursuant to 30 U.S.C. §945. 20 C.F.R. §725.496.

administrative law judge's decision on the merits is supported by substantial evidence and should be affirmed. Claimant also forwarded to the Board, a copy of the Joint Motion For Transfer which claimant and employer had filed with the administrative law judge.

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).

Initially, regarding the transfer of liability issue, employer contends that the administrative law judge misapplied *Old Ben Coal Co. v. Luker,* 826 F.2d 688, 10 BLR 2-249 (7th Cir. 1987) in invoking a presumption, based on the Director's presentation of a computer printout, that an election card was mailed to the miner on March 24, 1978, and never returned. Employer argues that in *Luker*, the Director produced a sworn affidavit, not merely a computer printout, and therefore that the evidence in the case at hand is insufficient to invoke the presumption that the official acts described were actually performed. The Director argues that employer misreads *Luker*, contending that the administrative law judge properly relied on the presentation of the computer printout, without the affidavit, to establish that an election card was duly sent and never returned. We agree with the Director. In *Luker,* the court did not focus on the sworn element of the affidavit, but rather on the information which provided the basis of the affidavit, *i.e.*, the computer printout. *See Luker, supra* at 697, 2-262. As the Director notes, common law rules of evidence are not binding in Black Lung claims. *See* 20 C.F.R. §725.455(b). Accordingly, we affirm the administrative law judge's decision to invoke the presumption that the official duties described had taken place, and therefore that an election card had been sent to the miner and never returned. *See Luker, supra*.[3] The Director, however, also argues that a remand is necessary because although the administrative law judge properly invoked the presumption that an election card was

[3]We reject employer's argument that the decision of the United States Court of Appeals for the Sixth Circuit in *Director, OWCP v. Quarto Mining Co. [Bellomy]*, 901 F.2d 532, 13 BLR 2-435 (6th Cir. 1990), supports its position that the computer printout itself is insufficient to invoke the presumption that the miner was mailed an election card. Notwithstanding the administrative law judge's improper dismissal of *Bellomy* merely because the instant case arises in a different circuit, *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), we agree with the Director that employer mischaracterizes the case. Unlike the case at hand, in *Bellomy,* the Director was unable to procure a computer printout in the time allotted by the administrative law judge, and the court held, therefore, that it could not be established that an election card was mailed. *See Bellomy, supra* at 537, 2-441.

mailed, she failed to adequately address whether good cause existed to excuse the miner's failure to return it. We agree. As the Director contends, the administrative law judge did not analyze the miner's testimony regarding whether he ever received the card in the mail. The administrative law judge's good cause determination, therefore, is insufficient under 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), and is therefore vacated. On remand, we instruct the administrative law judge to fully weigh all of the relevant evidence of record regarding the issue of whether good cause exists for the miner's failure to return the election card. *See Luker, supra; see also Director, OWCP v. Quarto Mining Co. [Bellomy],* 901 F.2d 532, 13 BLR 2-435 (6th Cir. 1990); *Robertson v. Peabody Coal Co.,* 11 BLR 1-120 (1988).

Turning to the merits of entitlement, initially, employer argues that the administrative law judge erred in reweighing the x-ray readings under 20 C.F.R. §727.203(a)(1) after the issuance of *Director, OWCP v. Greenwich Collieries [Ondecko]*, 117 S.Ct. 2251, 18 BLR 2A-1 (1994), because he had already found them in equipoise, and therefore should have merely found that claimant failed to carry her burden of proof. We disagree that the administrative law judge was barred from reweighing the x-ray evidence. In *Ondecko* itself, the Supreme Court, after invalidating the true doubt rule, remanded the case for further weighing of the evidence previously found in equipoise. *See also Consolidation Coal Co. v. Sisson*, 54 F.3d 434 (7th Cir. 1995)(holding that the administrative law judge must reweigh the evidence without the benefit of the true-doubt rule). Employer's argument is therefore rejected.

Next, employer argues that the administrative law judge erred in her weighing of the various interpretations of the August 3, 1989 x-ray. Employer contends that the administrative law judge failed to explain why she found that the three positive readings of that x-ray outweighed the four findings that the x-ray was unreadable by physicians who are both B-readers and Board-certified radiologists. We agree. Although the administrative law judge noted that "four other physicians" found the August 3, 1989 x-ray to be unreadable, she found the x-ray to be positive for pneumoconiosis in light of the fact that one B-reader and two dually-qualified physicians read it as positive. Decision and Order at 8. The administrative law judge failed to acknowledge, however, that the "four other physicians" were equally, if not better qualified than the physicians upon which she relied. Consequently, we vacate the administrative law judge's findings under Section 727.203(a)(1), and remand the case for a full discussion of the relevant x-ray readings. *See Wojtowicz v. Duquesne Light Co.,* 12 BLR 1-162 (1989)*; cf*. *McGinnis v. Freeman United Coal Mining Co.,* 10 BLR 1-4 1987 (an administrative law judge must provide a reason for

crediting one physician's opinion over another).[4]

Turning to rebuttal under 20 C.F.R §727.203(b)(3), employer argues that the administrative law judge erred in rejecting, as contradictory, Dr. Sanjabi's opinion, without an adequate explanation; simply noting that the doctor found probable pneumoconiosis but no respiratory impairment. We agree with employer that the administrative law judge failed to adequately explain why she found Dr. Sanjabi's opinion "contradictory and too equivocal," Decision and Order at 9, as Dr. Sanjabi's several medical opinions and deposition seem to support rebuttal under subsection (b)(3). Without more analysis, we cannot affirm the administrative law judge's decision to discredit Dr. Sanjabi's opinion. *See Wojtowicz, supra*.

Next, employer argues that the administrative law judge improperly discredited Dr. Renn's opinion for several reasons. First, employer contends that the administrative law judge erroneously disagreed with Dr. Renn's statement that a miner could not develop simple coal workers' pneumoconiosis in the absence of further dust exposure. Employer argues that the administrative law judge's assumption of the progressivity of pneumoconiosis is improper because it has no basis in the record. We disagree. The United States Court of Appeals for the Seventh Circuit, under whose jurisdiction this case arises, has recently rejected this line of argument. *See Old Ben Coal Co. v. Scott,* No. 96-3554*,* 1998 WL 237432 (7th Cir., May 13, 1998).

Next, employer contends that the administrative law judge improperly discredited Dr. Renn's opinion based on the disputed August 3, 1989 x-ray. Contrary to employer's contention, the administrative law judge noted that in reviewing the x-ray evidence, Dr. Renn found irregular opacities, but that better qualified physicians, in reading this latest x-ray of record (which Dr. Renn had not read), found rounded opacities indicative of pneumoconiosis, and that this fact reduced Dr. Renn's credibility. Decision and Order at 11. While this is a reasonable credibility determination within the province of the administrative law judge, *see Mabe v. Bishop Coal Co.,* 9 BLR 1-67 (1988); *Trujillo v. Kaiser Steel Corp.,* 8 BLR 1-472 (1986), in light of our decision to vacate the administrative law judge's findings

[4]Employer's argument that the administrative law judge failed to address the December 29, 1976 film is rejected. We note that the administrative law judge found the December 29, 1976 x-ray to be positive. *See* Decision and Order at 7.

regarding this particular x-ray we must remand the case for further consideration of Dr. Renn's opinion as well under subsection (b)(3). Moreover, as employer contends, we are troubled by the administrative law judge's citation to the decision of the United States Court of Appeals for the Fourth Circuit in *Grigg v. Director, OWCP,* 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), as supportive of her holding that Dr. Renn's opinion is insufficient at subsection (b)(3) in light of his failure to diagnose pneumoconiosis. On remand, we note to the administrative law judge that more recent pronouncements by the Fourth Circuit have retreated from such a strict interpretation of *Grigg*. *See generally Lambert v. Itmann Coal Co.,* 70 F.3d 112, 20 BLR 2-119 (4th Cir. 1995); *see also Stiltner v. Island Creek Coal Co.,* 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996). In light of our remand, we instruct the administrative law judge to consider the relevance of the Fourth Circuit's opinions to the case at hand, and determine whether Dr. Renn's opinion qualifies under the Seventh Circuit's standard for subsection (b)(3) rebuttal. *See, e.g., Amax Coal Co. v. Beasley,* 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Wetherill v. Director, OWCP,* 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987).

Finally, employer argues that the administrative law judge erred in crediting Dr. Partridge's opinion in contravention of the Board's remand instructions, by mechanically applying the treating physician rule. Employer contends that the administrative law judge provided no analysis of why the treating physician would be in a better position to give an opinion in this case, and provided no discussion of the doctor's reliance on an invalidated pulmonary function study. We agree. Although the administrative law judge noted the fact that Dr. Partridge relied upon a twenty-year patient history, as well as extensive treatment notes and records, the administrative law judge failed to provide a rationale for why these factors placed the doctor in a better position to issue an opinion. *See Wojtowicz, supra.* Additionally, the administrative law judge failed to discuss the effect, if any, the doctor's reliance on a invalidated pulmonary function study had on the credibility of his opinion. *See Baker v. North American Coal Co.,* 7 BLR 1-79 (1984). We therefore vacate the administrative law judge's findings under Section 727.203(b)(3).

Accordingly, the administrative law judge's Decision and Order 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

JAMES F. BROWN
Administrative Appeals Judge