BRB No. 99-0159 BLA

MORRISON MULLINS	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED:
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION AND ORDER
Respondent		

Appeal of the Decision and Order Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher (Wolfe & Farmer), Norton, Virginia, for claimant.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-BLA-1526) of Administrative Law Judge Alexander Karst 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). In his Decision and Order, the administrative law judge considered claimant's request for modification of a prior denial of benefits and determined that a change of conditions was established pursuant to Section 725.310(a), as the newly submitted x-ray evidence supported a finding of invocation under 20 C.F.R. §727.203(a)(1).[1] After determining that

[1]The relevant procedural history of this case is as follows: Claimant filed an application for benefits on April 20, 1978. In a Decision and Order issued on September 11, 1987, Administrative Law Judge Peter McC. Giesey accepted the parties' stipulation to at least twenty years of coal mine employment and considered the claim pursuant to the regulations set forth in 20 C.F.R. Part 727.

Judge Giesey found that claimant failed to establish invocation of the interim presumption under 20 C.F.R. §727.203(a) and denied benefits accordingly. The Board affirmed the denial of benefits. *Mullins v. Director, OWCP*, BRB No. 87-2929 BLA (Dec. 29, 1989)(unpub.).

Claimant filed a request for modification which Administrative Law Judge Michael P. Lesniak denied in a Decision and Order issued on September 9, 1992. Judge Lesniak determined that the newly submitted evidence was insufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310(a) and that a review of the prior Decision and Order did not reveal a mistake in a determination of fact. Judge Lesniak further found that even assuming that claimant had established the grounds for modification, the evidence of record as a whole did not support a finding of invocation under Section 727.203(a). Accordingly, benefits were denied. The Board again affirmed the denial of benefits. *Mullins v. Director, OWCP*, BRB No. 93-0167 BLA (Feb. 27, 1995). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises,

rebuttal was not demonstrated pursuant to 20 C.F.R. §727.203(b)(1), the administrative law judge found rebuttal established under 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. Claimant asserts on appeal that the administrative law judge erred in finding rebuttal established. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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 applicable 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).

Claimant initially argues that in assessing the evidence under Section 727.203(b)(2), the administrative law judge erred in placing the burden of proof upon claimant. The administrative law judge reviewed the medical opinions of record under Section 727.203(b)(2) and stated that:

> No physician of record has mentioned any disabling condition other than respiratory, and for the reasons discussed below, I have discredited the physicians finding Claimant disabled on this basis.

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declined to disturb the Board's Decision and Order. *Mullins v. Director, OWCP*, No. 95-1709 (4th Cir. Apr. 12, 1996)(unpub.). Claimant filed a second request for modification on April 11, 1997.

[2]The Board denied a second request by the Director, Office of Workers' Compensation Programs, for an extension of time within which to file a response brief. *Mullins v. Director, OWCP*, BRB No. 99-0159 BLA (Feb. 19, 1999)(unpub. Order). Inasmuch as the administrative law judge's findings under 20 C.F.R. §§725.310(a) and 727.203(a)(1), and 727.203(b)(1) have not been challenged on appeal, they are affirmed. *See Skrack v. Island Creek Coal*, 6 BLR 1-710 (1983).

> Thus, I find the presumption rebutted on the basis of the opinions of Drs. Paranthaman and Spagnolo who found the Claimant capable of performing his coal mine work.

Decision and Order at 4. Under Section 727.203(b)(2), the appropriate inquiry is whether *the party opposing entitlement* has put forth evidence which affirmatively establishes that claimant is not totally disabled, without regard to the cause of the total disability. *See Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). The administrative law judge's reference to the fact that none of the physicians indicated that claimant is disabled by a nonrespiratory impairment does not accord with this standard as, in essence, the administrative law judge required *claimant* to conclusively demonstrate that he is suffering from a totally disabling condition of some kind. We must, therefore, vacate the administrative law judge's determination that the interim presumption was rebutted under Section 727.203(b)(2). *See Sykes*, *supra*.

Turning to the administrative law judge's findings with respect to the medical reports of record under Section 727.203(b)(2), claimant maintains that the administrative law judge erred in failing to treat the opinions of Drs. Paranthaman and Spagnolo as consistent with a finding of total respiratory disability. Claimant argues specifically that the administrative law judge should have compared the physicians' diagnoses of a mild respiratory impairment to the exertional requirements of claimant's usual work as a coal truck driver. This contention is without merit with respect to Dr. Spagnolo's opinion, as he explicitly indicated that claimant is not suffering from any respiratory disability and should be able to perform his usual coal mine work. Director's Exhibit 42; *see Turner v. Director, OWCP*, 7 BLR 1-419 (1984); *Bueno v. Director, OWCP*, 6 BLR 1-865 (1984). Moreover, the administrative law judge's did not commit error in his treatment of Dr. Paranthaman's opinion. After his 1992 examination of claimant, Dr. Paranthaman who was aware that claimant's last coal mine job was driving a coal truck, diagnosed a mild functional respiratory impairment and concluded that claimant retains the capacity to perform the work of a coal miner. Director's Exhibit 57. Under these circumstances, the administrative law judge acted rationally in declining to treat these statements as a diagnosis of total respiratory or pulmonary disability. Decision and Order at 4; *see Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). We affirm, therefore, the administrative law judge's findings with respect to the opinions of Drs. Spagnolo and Paranthaman, but remand the case to the administrative law judge for reconsideration of Section 727.203(b)(2) rebuttal under the standard set forth in *Sykes*.[3]

[3]We decline claimant's request that we hold, as a matter of law, that

If the administrative law judge finds that rebuttal has not been established at Section 727.203(b)(2) on remand, he should determine whether rebuttal has been established under 20 C.F.R. §727.203(b)(3) by evidence that affirmatively rules out any connection between claimant's coal mine employment and his presumed total disability.[4] *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120 (4th Cir. 1984); *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Cox v. Shannon Pocahontas Mining Co.*, 6 F.3d 190, 18 BLR 2-31 (4th Cir. 1993). In this regard, under the holdings of the United States Court of Appeals for the Fourth Circuit, whether a physician's statement that the miner does not have a disabling respiratory impairment meets the Section 727.203(b)(3) rebuttal standard is governed by an analysis that differs from that used under Section 727.203(b)(2). Opinions in which the physician indicates that the miner does not have a disabling respiratory or pulmonary impairment are insufficient to establish Section 727.203(b)(3) rebuttal unless the physician states without equivocation that the miner suffers from no respiratory or pulmonary impairment of any kind. *See Curry v. Beatrice Pocahontas Coal Co.*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995). Thus, a doctor's conclusion that there is no evidence of impairment does not establish rebuttal under Section 727.203(b)(3). *See Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998). Lastly, if the administrative law judge determines that entitlement has not been established under Part 727, he must consider entitlement under 20 C.F.R. Part 410, Subpart D. *See Muncy v. Wolfe Creek Collieries Coal Co., Inc.*, 3 BLR 1-627 (1981).

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claimant is entitled to benefits under 20 C.F.R. Part 727, as there is conflicting evidence regarding the issue of rebuttal of the interim presumption which the administrative law judge, in his role as fact-finder, must weigh. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

[4]Invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) precludes rebuttal under 20 C.F.R. §727.203(b)(4). *See Buckley v. Director, OWCP,* 11 BLR 1-37 (1988).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge