

BRB No. 97-0886 BLA

MELDA SMITH)
(Widow of EMMETT SMITH))
))
Claimant-Petitioner)
))
v.)
))
WESTMORELAND COAL COMPANY)
))
Employer-Respondent)
))
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 of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Don Stacy, Beckley, West Virginia, for claimant.

Ann B. Rembrandt (Jackson & Kelly), Charleston, West Virginia, for employer.

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

PER CURIAM:

Claimant, the miner's widow, appeals the Decision and Order on Remand (81-BLA-10587) of Administrative Law Judge John C. Holmes denying benefits on the miner's 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 on appeal to the Board for the fourth time. In his original Decision and Order denying benefits, the administrative law judge credited the miner with thirty-one years of coal mine employment and found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but that rebuttal was established pursuant to 20 C.F.R. §727.203(b)(2). The administrative law judge further found that claimant was not entitled to the benefit of the irrebuttable presumption of total disability due to pneumoconiosis

pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), or entitlement pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied. Claimant appealed and in *Smith v. Westmoreland Coal Co.*, BRB No. 84-1316 BLA (Dec. 30, 1988) (unpub.), the Board affirmed the administrative law judge's finding of invocation pursuant to 20 C.F.R. §727.203(a)(1). The Board also affirmed the administrative law judge's finding that claimant was not entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act. The Board vacated the administrative law judge's finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(2) and remanded the case for consideration of the relevant evidence thereunder in accordance with the holding of the United States Court of Appeals for the Fourth Circuit in *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987) as well as consideration of entitlement pursuant to 20 C.F.R. Part 410, Subpart D, and 20 C.F.R. §410.490, if necessary.

On remand, the administrative law judge again found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2) and that entitlement was precluded under 20 C.F.R. Part 410, Subpart D, and 20 C.F.R. §410.490. Accordingly, benefits were denied. Claimant appealed and in *Smith v. Westmoreland Coal Co.*, BRB No. 89-1741 BLA (Aug. 27, 1992) (Bonfanti, J., *dissenting*) (unpub), the Board again vacated the administrative law judge's finding that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(2) and again remanded the case for reconsideration of the relevant evidence thereunder.

On second remand, the administrative law judge stated that he properly considered the evidence in his previous Decision and Order, reinstated his findings and again found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, benefits were denied. Claimant appealed and in *Smith v. Westmoreland Coal Co.*, BRB No. 93-2232 BLA (Jan. 12, 1995) (unpub), the Board reversed the administrative law judge's finding that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(2) and held that the evidence of record, as credited by the administrative law judge, was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2) as a matter of law. The Board remanded the case for review of the relevant evidence pursuant to the rebuttal provision set forth at 20 C.F.R. §727.203(b)(3).

On third remand, the administrative law judge found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, benefits were denied. In the instant appeal, claimant contends that the administrative law judge erred in finding that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Employer responds, urging affirmance of the denial of benefits. The Director, Office of Workers' Compensation Programs, has not participated in this appeal.

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 law. 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).

After consideration of the administrative law judge's Decision and Order on Remand, the arguments raised on appeal and the evidence of record, we conclude that the administrative law judge's Decision and Order is supported by substantial evidence and contains no reversible error therein. The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, see *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989), which has held that in order to establish rebuttal pursuant to Section 727.203 (b)(3), the party opposing entitlement must rule out a causal relationship between the miner's disability and coal mine employment. *Cox v. Shannon-Pocahontas Mining Co.*, 6 F.3d 199, 18 BLR 2-31 (4th Cir. 1993); *Bethlehem Mines Corporation v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). In finding that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3), the administrative law judge permissibly relied on the opinion of Dr. Kress, a pulmonary specialist who noted the existence of pneumoconiosis and diagnosed no impairment due to pneumoconiosis, but concluded that the miner had an exceedingly mild pulmonary impairment due to smoking, unrelated to coal dust exposure and that the minimal impairment would not prevent the miner from performing his usual coal mine employment. *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order at 6-8; Hearing Transcript at 144-149; Director's Exhibit 20; Employer's Exhibit 2. The administrative law judge also rationally found that the opinions of Drs. Rasmussen and Morgan supported Dr. Kress' opinion of a mild impairment and that claimant was able to perform his usual coal mine employment Decision and Order at 9; Hearing Transcript at 121; Director's Exhibit 21. The administrative law judge, in the instant case, properly considered the entirety of the medical opinion evidence of record and permissibly concluded that the credible medical opinion evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Decision and Order at 8-9; see *Lane Hollow Coal Co. v. Director, OWCP*, [*Lockhart*], No. 96-2819 (4th Cir. Mar. 3, 1998); *Grigg, supra*; *Cox, supra*; *Massey, supra*; *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge has broad discretion in weighing and assessing the evidence of record in determining whether a party has met its burden of proof and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. See *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). Thus, we affirm the administrative law judge's determination that the evidence of record was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge