BRB No. 97-0972 BLA

BETTY SORTAL (Widow of STEVE SORTAL) Claimant-Respondent v. FREEMAN UNITED COAL MINING 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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

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

Kathryn S. Matkov (Gould & Ratner), Chicago, Illinois, for employer.

Sarah M. Hurley (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, the United States Department of Labor.

Before: HALL, Chief Administrative Law Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (94-BLA-0993) of Administrative Law Judge Mollie W. Neal awarding benefits on a miner's claim and a survivor'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). The administrative law judge credited

the miner with twenty-one years of qualifying coal mine employment, and adjudicated the miner's claim, filed on March 26, 1974, pursuant to the provisions at 20 C.F.R. Part 727.[1]

[1]The procedural history of this case is as follows. In 1981, the miner's claim was referred to the Office of Administrative Law Judges for hearing upon employer's request after the district director determined that the miner was entitled to benefits. In a Decision and Order issued on August 23, 1982, Administrative Law Judge Joel R. Williams dismissed employer as the responsible operator herein and held the Black Lung Disability Trust Fund liable for payment of benefits. Director's Exhibit 25. On appeal, the Board vacated the administrative law judge's Decision and Order dismissing employer, and remanded this case for a hearing on the merits. Director's Exhibit 28. The miner died on February 10, 1986. Director's Exhibit 29. Employer appealed to the United States Court of Appeals for the Seventh Circuit, which dismissed employer's petition on August 6, 1986, for lack of a final order. Director's Exhibit 31. Claimant Betty Sortal, the miner's widow, filed her survivor's claim on May 12, 1986. Director's Exhibit 30. On October 15, 1993, Administrative Law Judge Julius A. Johnson remanded this case to the district director for consolidation of the claims and further development of the evidence. Director's Exhibit 33. Both claims were forwarded to the Office of Administrative Law Judges for hearing on May 3, 1994, when the parties agreed to a decision on the record. The miner's widow subsequently died on November 12, 1995. Director's Exhibit 40.

The administrative law judge found that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (4), and that employer failed to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits in the miner's claim, and found that the miner's widow was automatically entitled to derivative survivor's benefits.

On appeal, employer challenges the administrative law judge's invocation findings at Section 727.203(a)(1), (4), and his finding that the evidence was insufficient to establish rebuttal at Section 727.203(b)(3), (4). Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's award of benefits.[2]

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).

[2]We affirm, as unchalleged on appeal, the administrative law judge's findings regarding the length of the miner's coal mine employment, and his finding that the weight of the evidence was insufficient to establish invocation at Section 727.203(a)(2), (3), and rebuttal at Section 727.203(b)(1), (2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer initially contends that the administrative law judge erred in finding invocation established at Section 727.203(a)(1). Specifically, employer asserts that the administrative law judge improperly discredited two negative interpretations of recent films by Dr. Wheeler, a Board-certified radiologist and B-reader, merely because another qualified physician found his copy of the films unreadable. Employer notes that Dr. Wheeler did not classify the film quality as "unreadable" but as a "3," which is conforming under the regulations. Employer thus maintains that when Dr. Wheeler's negative interpretations are accorded appropriate weight, the positive and negative interpretations of the most recent films are in equipoise, which does not satisfy claimant's burden of establishing invocation by a preponderance of the evidence.[3] Employer's Brief at 5, 6. Employer essentially requests a reweighing of the evidence, which is beyond the Board's scope of review. *See O'Keeffe, supra; Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Summers v. Freeman United Coal Mining Co.*, 14 F.3d 1220, 18 BLR 2-105 (7th Cir. 1994). Because Dr. Wheeler interpreted the June 13, 1984 and February 4, 1986 films as negative for pneumoconiosis despite his notation concerning the poor quality of the copies,[4] while the equally-qualified Dr. Wiot found the copies of these films unreadable, the administrative law judge reasonably concluded that the interpretations of these films were unreliable and of little probative value. Decision and Order at 10; *see generally Summers, supra*. The administrative law judge thus acted within her discretion in discounting the interpretations of these films and the earlier 1974 and 1976 films, and permissibly found invocation established at Section 727.203(a)(1) based on a numerical preponderance of positive interpretations of the April 23, 1985 film by the best-qualified readers. Decision and Order at 4-6, 9-10; *see Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997).

The administrative law judge's findings pursuant to Section 727.203(a)(1) are

[3]Employer also notes that the numerical preponderance of all x-ray interpretations is negative for pneumoconiosis, and contends that the administrative law judge erroneously discounted three x-ray interpretations of 1974 and 1976 films, pursuant to the rereading prohibition of Section 413(b) of the Act, 20 C.F.R. §727.206(b)(1), without weighing all evidence relevant to the requisite finding of a "significant and measurable level of respiratory or pulmonary impairment." Employer's Brief at 6. Any error is harmless, however, *see Larioni v. Director, OWCP,* 6 BLR 1-1276 (1984), inasmuch as the administrative law judge, in light of the progressive nature of pneumoconiosis, reasonably accorded greater weight to the interpretations of the significantly more recent films, and little weight to all interpretations of the 1974 and 1976 films. Decision and Order at 9, 10; *see Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984).

[4]Dr. Wheeler indicated that "[t]hese are poor quality copies and we should have good quality original films....this report should be considered temporary pending good films." Employer's Exhibit 9; *see also* Employer's Exhibit 10. Additionally, Dr. Wiot opined that "[t]hese are copy films and extremely poor copies and totally unacceptable for evaluation by ILO standards." Employer's Exhibit 8.

supported by substantial evidence and are affirmed. Consequently, we need not address employer's arguments regarding the administrative law judge's finding of invocation at Section 727.203(a)(4), *see Ziegler, supra*, and inasmuch as rebuttal at Section 727.203(b)(4) is precluded, we need not reach employer's arguments thereunder. *See Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994).

Employer next contends that the administrative law judge erred in evaluating the evidence relevant to rebuttal at Section 727.203(b)(3). Employer maintains that medical records which were reviewed by Dr. Kelly, but which were not introduced into the record, establish that the miner was a cigarette smoker. Employer asserts that the opinion of Dr. Kelly is uncontradicted[5] and is sufficient to establish rebuttal, but was erroneously accorded diminished weight on the ground that Dr. Kelly's conclusion, that the miner was a smoker in the past, was undocumented in the record.[6] Employer's Brief at 8, 9. Employer's arguments are without merit.

In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must show, through a preponderance of the evidence, that the miner's pneumoconiosis was not a contributing cause of his total disability. *See Kelley, supra; Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992)*; Vigna*, *supra*. A "contributing cause" is a necessary, though not necessarily sufficient, cause of the miner's disability. *Beasley, supra.* Silence in the record as to causation will not defeat the presumption favoring the claimant, *Freeman United Coal Co. v. Benefits Review Board [Wolfe]*, 912 F.2d 164, 14 BLR 2-53 (7th Cir. 1990), and the concurrence of two sufficient disabling medical causes, one within the ambit of the Act and the other not, will not defeat

[5]Employer maintains that the opinion of Dr. Khan is unreliable because it was based on the faulty premise that the miner never smoked. Employer's Brief at 9. A review of the record reflects that Dr. Khan diagnosed pulmonary emphysema, which he attributed to dust exposure in coal mine employment because the miner never smoked, and separately diagnosed occupational pneumoconiosis. Claimant's Exhibit 1. Dr. Khan opined that pulmonary function tests performed on June 1, 1973 and November 2, 1976 were abnormal and evidenced pulmonary impairment. In view of the miner's complaints of shortness of breath and exercise intolerance, Dr. Khan concluded that the miner was totally disabled from performing his usual coal mine employment as a roof bolter as of the time he filed his claim for benefits in 1974. Decision and Order at 12; Claimant's Exhibit 1.

[6]Employer argues that the rules of evidence are not strictly adhered to in administrative proceedings under the Act, and that pursuant to the holding in *Consolidation Coal Co. v. Chubb*, 741 F.2d 968 (7th Cir. 1984), the administrative law judge could properly rely on Dr. Kelly's medical conclusions based upon his review of the miner's records. Employer also asserts that the miner was in fact a smoker, as evidence by answers to interrogatories attached as Exhibit A to its brief on appeal. Employer's Brief at 9.

entitlement. *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588 (7th Cir. 1985). Evidence that demonstrates that an ailment other than pneumoconiosis was the sole cause of the miner's total disability can rebut the presumption. *See Patrich v. Old Ben Coal Co.,* 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991).

In the present case, Dr. Kelly opined that the miner was totally disabled based on the results of a November 2, 1976 pulmonary function study, and stated that if the miner "was in fact a non smoker, I would attribute his decline in spirometric function to coal dust exposure, as no other causes of respiratory impairment is [sic] noted." Dr. Kelly then observed that records from a July 11, 1977 hospitalization at UMWA Union Hospital referred to "customary smokers rales in both bases. He states he has not smoked in the last 10 years." Dr. Kelly thus concluded that "[t]his raises the question of whether this individual did smoke in the past. A remote history of smoking would be important, and could cause a decline in spirometric function which is irreversible." Employer's Exhibit 5. The administrative law judge reasonably determined that the records of the miner's hospitalization were not included in the record, thus she could not properly assess the credibility of Dr. Kelly's "speculation relating to the role the miner's possible smoking history might have played in his lung impairment." Decision and Order at 13, 14. Even assuming, *arguendo*, that the miner was a smoker, however, the administrative law judge properly found that Dr. Kelly's speculative opinion was insufficient to establish rebuttal because it does not rule out pneumoconiosis as a contributing cause of the miner's disability. Decision and Order at 13; *see Forsythe, supra; Kelley, supra*. The administrative law judge's finding that the evidence of record is insufficient to satisfy employer's burden of establishing rebuttal at Section 727.203(b)(3) pursuant to the applicable standard is supported by substantial evidence and is affirmed. Consequently, we affirm her award of benefits.

Accordingly, the Decision and Order of the administrative law judge awarding benefits on both the miner's claim and the survivor's claim is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge