BRB No. 00-0676 BLA

ESTATE OF J.T. GOODLOE, LARRY GOODLOE, PERSONAL REPRESENTATIVE	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

Jack N. VanStone (VanStone & Kornblum), Evansville, Indiana, for claimant.

W. C. Blanton (Oppenheimer, Wolff & Donnelly LLP), Minneapolis, Minnesota, for employer.

Jeffrey S. Goldberg (Judith E. Kramer, Acting 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 Third Remand[1] (82-BLA-1434) of Administrative Law Judge Clement J. Kichuk awarding benefits 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).[2] The instant case is before the Board for the third time. The miner filed a claim for benefits on May 21, 1979. Director's Exhibit 1. In a Decision and Order dated May 6, 1985, Administrative Law Judge Lawrence E. Gray credited the miner with at least thirty-three years of coal mine employment and found that the arterial blood gas study evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). Judge Gray, however, concluded that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2), (b)(3) and (b)(4). Accordingly, Judge Gray denied benefits.

The miner died while his appeal was pending before the Board.[3] Claimant, the miner's estate (represented by Larry Goodloe), took up the miner's appeal. By Decision and Order dated August 31, 1989, the Board affirmed Judge Gray's finding that the evidence was

[1]Despite the name of the document (Decision and Order on Third Remand), the instant case has only been remanded to the Office of Administrative Law Judges on two occasions.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000) (to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]The miner died on April 14, 1989. *See* Decision and Order on Remand at 1 n.1.

sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). *Goodloe v. Peabody Coal Co.*, BRB Nos. 87-3817 BLA and 87-3817 BLA-A (Aug. 31, 1989) (unpublished). The Board, however, vacated Judge Gray's rebuttal findings pursuant to 20 C.F.R. §727.203(b)(2), (b)(3) and (b)(4) and remanded the case for further consideration. *Id.* The Board further instructed Judge Gray, on remand, to consider the miner's claim under 20 C.F.R. §410.490 and 20 C.F.R. Part 718.

On remand, in a Decision and Order dated February 21, 1992, Judge Gray found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2), (b)(3) and (b)(4). Accordingly, Judge Gray awarded benefits. Judge Gray subsequently denied employer's motion for reconsideration. By Decision and Order dated June 27, 1995, the Board, *inter alia*, affirmed Judge Gray's length of coal mine employment finding and his finding pursuant to 20 C.F.R. §727.203(b)(1) as unchallenged on appeal. *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995). After noting that employer had not challenged Judge Gray's finding that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §718.203(b)(2), the Board affirmed Judge Gray's findings that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §718.203(b)(3) and (b)(4). *Id.* The Board, therefore, affirmed Judge Gray's award of benefits. *Id.* By Order dated February 9, 1996, the Board denied motions for reconsideration filed by claimant, employer and the Director, Office of Workers' Compensation Programs (the Director). *Goodloe v. Peabody Coal Co.*, BRB No. 92-1738 BLA (Feb. 9, 1996) (Order) (unpublished).

By Decision and Order dated June 9, 1997, the United States Court of Appeals for the Seventh Circuit vacated Judge Gray's finding that the evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3) and remanded the case for further consideration. *Peabody Coal Co. v. Goodloe*, 116 F.3d 207, 21 BLR 2-140 (7th Cir. 1997). In light of its decision to remand the case for reconsideration of whether the evidence was sufficient to establish invocation of the interim presumption, the Seventh Circuit held that it was premature for it to decide the rebuttal issues. *Id.*

Due to Judge Gray's unavailability, Administrative Law Judge Clement J. Kichuk (the administrative law judge) reconsidered the claim on remand. The administrative law judge found that the arterial blood gas study evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). The administrative law judge also found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3). Employer also argues that the administrative law judge erred in finding the evidence

insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2), (b)(3) and (b)(4). Claimant responds in support of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous contentions. The Director has not filed a response brief.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001) (order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which all the parties have responded, asserting that the regulations at issue in the lawsuit do not affect the outcome of this case. Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this appeal.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Employer contends that the administrative law judge erred in finding that the arterial blood gas study evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3).[4] The record contains two arterial blood gas studies conducted on June 8, 1979 and March 6, 1984. The miner's June 8, 1979 arterial blood gas study produced non-qualifying values both at rest and after exercise. Director's Exhibit 7. The miner's March 6, 1984 resting arterial blood gas study produced qualifying values. Claimant's Exhibit 1.

Employer argues that administrative law judge erred in relying upon the results of the miner's March 6, 1984 study. In his consideration of whether the miner's March 6, 1984 arterial blood gas study was valid, the administrative law judge noted that Dr. Peters, upon receipt of the results of the study, had the laboratory where the study was performed double-

[4]The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the regulations.

check the results and verify them for accuracy. Decision and Order on Third Remand at 15; Employer's Exhibit 5. The administrative law judge noted that the laboratory confirmed the results of the test to Dr. Peters's satisfaction. *Id.* The administrative law judge further noted that the severe drop in oxygen saturation suggested by the March 6, 1984 blood gas study was corroborated by Dr. Peters's gross findings upon physical examination of the miner in his office in 1984 as well as the results of a CBC study which indicated the presence of polycythemia, a reaction to severe oxygen deficiency. *Id.* Although Drs. Stewart and Howard questioned the pO2 value from the March 6, 1984 blood gas study, *see* Employer's Exhibits 6, 7, the administrative law judge noted that neither of the physicians opined that the study was invalid or unreliable. Decision and Order on Third Remand at 15-16. The administrative law judge conceded that while an additional arterial blood gas study may have given more definitive results, it may not have been prudent to perform another study given the miner's extremely ill appearance. *Id.* at 16. The administrative law judge further accurately noted that there was no evidence to suggest that the equipment malfunctioned, that the results from the study were misread, or that there was any other unusual occurrence affecting the acceptability of this study. *Id.* Having weighed all of the relevant evidence, the administrative law judge found that it was "more likely than not that the 1984 blood gas study [was] valid." *Id.* at 17. Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the miner's March 6, 1984 arterial blood gas study was valid. We, therefore, affirm the administrative law judge's finding that the arterial blood gas study evidence is sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(3).

Employer also argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). Employer initially argues that the administrative law judge erred in even addressing whether the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). Employer contends that Judge Gray's finding, that the miner was not totally disabled by pulmonary disease, was never overturned and constitutes the law of the case. We disagree. The Board vacated Judge Gray's earlier finding that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2). *Goodloe v. Peabody Coal Co.*, BRB Nos. 87-3817 BLA and 87-3817 BLA-A (Aug. 31, 1989) (unpublished). Consequently, we hold that the issue of rebuttal pursuant to 20 C.F.R. §727.203(b)(2) was properly before the administrative law judge.

Employer argues that the administrative law judge erred in finding the opinions of Drs. Stewart and Howard insufficient to establish subsection (b)(2) rebuttal.[5] The

[5]In order to establish rebuttal pursuant to Section 727.203(b)(2), the party opposing entitlement must establish that the miner is able to perform his usual coal mine employment or comparable and gainful work. *See Freeman United Coal Mining Co. v. Foster*, 30 F.3d

administrative law judge noted that Dr. Howard's opinion merely supported a finding that, as of 1979, the miner may have had a minimal respiratory impairment. Decision and Order on Third Remand at 20; Employer's Exhibit 7. The administrative law judge, however, noted that Dr. Howard indicated that a pO2 value of 45 on a blood gas study reflected respiratory failure and was an indication of severe lung failure. *Id.* The administrative law judge observed that it was only after Dr. Howard was asked to assume that the miner's 1984 arterial blood gas study was invalid that he opined that the miner was capable of performing his usual coal mine employment. *Id.* The administrative law judge further noted that Dr. Howard's only statement in regard to the etiology of the miner's impairment was an acknowledgment that coronary artery disease can produce symptoms of shortness of breath. *Id.* The administrative law judge, therefore, concluded that Dr. Howard's opinion was insufficient to support a finding of subsection (b)(2) rebuttal. *Id.* at 20-21.

The administrative law judge noted that in 1979, Dr. Stewart diagnosed mild coronary artery disease and opined that claimant suffered from a mild impairment. Decision and Order on Third Remand at 21; Director's Exhibit 16. During his deposition, Dr. Stewart conceded that if the miner had continued to smoke and had not remained physically active since leaving the coal mines, the miner could not have been expected to do what he did five years ago. Employer's Exhibit 6. The administrative law judge concluded that while Dr. Stewart's opinion might be insufficient to establish total disability, "it certainly support[ed] a finding that the miner in this case deteriorated between 1979 and 1984…." *Id.* The administrative law judge, therefore, concluded that Dr. Stewart's opinion was also insufficient to establish that the miner was able to do his usual coal mine work. *Id.*

The administrative law judge further stated that:

> Neither Dr. Howard nor Dr. Stewart testified as to the degree of impairment they would expect if the 1984 blood gases were accurate. As a result, this Court has no way of determining what their opinions

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834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 115 S.Ct. 1399 (1995). In *Foster,* the Seventh Circuit held that the party opposing entitlement can establish subsection (b)(2) rebuttal by establishing that miner is not totally disabled due to a respiratory or pulmonary impairment.

> would be, given the fact that I have found this study valid. Dr. Howard gave his opinion regarding total disability only after having been asked to presume the 1984 study was *invalid*, and Dr. Stewart gave no opinion at all on total disability, apart from the testimony discussed above. Accordingly, having considered all of the relevant medical evidence on the issue of total disability, I find and conclude that Employer has failed to submit sufficient evidence to establish by a preponderance of the evidence that [the miner] was capable of performing his usual coal mine or other comparable and gainful work, pursuant to 20 C.F.R 727.203(b)(2).

Decision and Order on Third Remand at 21-22.

The administrative law judge has great discretion in weighing the medical evidence. In the instant case, the administrative law judge found that the evidentiary basis for the opinions of Drs. Stewart and Howard was lacking because they failed to address the degree of the miner's impairment in light of the qualifying March 6, 1984 arterial blood gas study. *See generally Cosalter v. Mathies Coal Co.*, 6 BLR 1-1182 (1984) (adjudicator may discount a physician's opinion for failure to account for medical evidence). The administrative law judge, therefore, properly found that the opinions of Drs. Stewart and Howard were insufficient to establish subsection (b)(2) rebuttal. We, therefore, affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2).

Employer contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must establish that pneumoconiosis was not a contributing cause of the miner's disability. *See Ziegler Coal Co. v. Kelley*, 112 F.3d 839, 21 BLR 2-92 (7th Cir. 1997); *Old Ben Coal Co. v. Director, OWCP [Mitchell]*, 62 F.3d 1003, 19 BLR 2-245 (7th Cir. 1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994); *Amax Coal Co. v. Beasley*, 957 F.2d 324 (7th Cir. 1992); *Patrich v. Old Ben Coal Co.*, 926 F.2d 1482, 15 BLR 2-26 (7th Cir. 1991).

Employer contends that the administrative law judge erred in finding the opinions of Drs. Stewart and Howard insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). The administrative law judge noted that Dr. Stewart, in a section of his June 8, 1979 medical report relating to the severity of any chronic respiratory or pulmonary disease, indicated that the miner suffered from a "very mild impairment." Decision and Order on Third Remand at 24; Director's Exhibit 16. The administrative law judge accurately noted that Dr. Stewart never addressed the

cause of the miner's mild impairment. *Id.* The administrative law judge, therefore, found that Dr. Stewart's opinion was insufficient to rule out pneumoconiosis as a contributing cause of the miner's total disability.[6]

[6]The administrative law judge stated:

> Employer asks [the court] to assume that because Dr. Stewart diagnosed coronary artery disease, and stated that coal dust exposure did not contribute to this, this means coal dust exposure [did not contribute] to the pulmonary impairment noted separately on the Department of Labor examination form. I do not accept this rationale. It is true Dr. Stewart diagnosed mild coronary artery disease. However, it is also true that he responded in the affirmative to the question relating to the severity of any chronic respiratory impairment in the miner, by indicating the presence of a "very mild impairment" as of 1979. Moreover, [e]mployer admits, in its opening brief, that it did not specifically question Dr. Stewart at his deposition on the issue of causation. ([Employer's Brief filed June 12, 1996] at p. 42) As a result, Dr. Stewart never addressed the cause of [the miner's] "mild" impairment, as he characterized it in 1979, and his testimony therefore cannot rebut the presumption that coal dust contributed to it.

Decision and Order on Third Remand at 24.

The administrative law judge noted that Dr. Howard testified that pneumoconiosis was characterized by a restrictive, rather than an obstructive, defect. Decision and Order on Third Remand at 22; Employer's Exhibit 7. The administrative law judge, however, properly indicated that chronic obstructive pulmonary disease could meet the definition of pneumoconiosis if it were found to be caused by coal dust exposure. *Id.* Consequently, the administrative law judge found that Dr. Howard's observation, that the miner had a primarily obstructive defect, did not break the causal link or support the conclusion that pneumoconiosis was not a contributing cause of the miner's disability. *Id.*

The administrative law judge noted that Dr. Howard opined that the miner may have suffered from smoking related emphysema, causing a serious impairment. Decision and Order on Third Remand at 23; Employer's Exhibit 7. The administrative law judge stated that Dr. Howard opined that the miner's emphysema was caused by cigarette smoking, rather than coal dust exposure, but that Dr. Howard did not explain the basis for his conclusion. *Id.* The administrative law judge acted within his discretion in according less weight to Dr. Howard's opinion because the doctor failed to explain the basis for his conclusion that the miner's lung impairment was not caused by coal dust exposure. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3).

Employer finally argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). In order to establish rebuttal pursuant to Section 727.203(b)(4), the party opposing entitlement must establish that the miner has neither clinical nor presumed pneumoconiosis. *See Chastain v. Freeman United Coal Mining Co.*, 919 F.2d 485, 14 BLR 2-130 (7th Cir. 1990).

The administrative law judge initially found that the weight of the x-ray evidence was insufficient to establish the existence of pneumoconiosis. Decision and Order on Third Remand at 25. The administrative law judge, however, noted that the absence of pneumoconiosis cannot be established by negative x-rays alone. *Id.* The administrative law judge stated that Dr. Stewart, in his June 8, 1979 report, diagnosed mild coronary artery disease unrelated to the miner's coal dust exposure. Decision and Order on Third Remand at 26; Director's Exhibit 16. The administrative law judge, however, observed that it was entirely possible that the miner suffered from both coronary artery disease and pneumoconiosis and that Dr. Stewart failed to address the etiology of the miner's mild pulmonary impairment.

Decision and Order on Third Remand at 23, 26. The administrative law judge also accurately stated that Dr. Stewart did not address, during his May 18, 1994 deposition testimony, the issue of whether the miner suffered from pneumoconiosis and that Dr. Stewart, in correspondence dated June 27, 1984, indicated that it was debatable whether the miner's June 8, 1979 x-ray was positive for pneumoconiosis. *Id.*; Employer's Exhibit 4. The administrative law judge reasonably found that Dr. Stewart failed to rule out the existence of pneumoconiosis. The administrative law judge also properly discredited Dr. Howard's opinion because he failed to provide a basis for attributing the miner's emphysema to cigarette smoking rather than to coal dust exposure. *See Clark*, *supra*; *Lucostic*, *supra*; Decision and Order on Third Remand at 25-26; Employer's Exhibit 7. Inasmuch as it is supported by the record, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4).

Accordingly, the administrative law judge's Decision and Order on Third Remand awarding benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge