

BRB No. 00-1173 BLA

WILSON MARCUM)

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Claimant - Respondent)

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v.)

DATE ISSUED: _____

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ORA MAE COAL COMPANY, INC.)

)

Employer- Petitioner)

)

DIRECTOR, OFFICE OF WORKERS')

COMPENSATION PROGRAMS,)

UNITED STATES DEPARTMENT)

OF LABOR)

)

Party - in - Interest)

DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor.

Leonard Slayton, Inez, Kentucky, for claimant.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Helen H. Cox (Howard M. Radzely, 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: SMITH, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (85-BLA-2409) of Administrative Law Judge Richard E. Huddleston (the administrative law judge) 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).¹ The case is before the Board for the third time. Initially, claimant filed his application for benefits with the Department of Labor (DOL) on February 6, 1980. Director's Exhibit 1. Following a hearing, the administrative law judge found that the evidence established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), and that the evidence was insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(1)-(4). Accordingly, he awarded benefits in a Decision and Order dated December 24, 1987. Director's Exhibit 46. Following employer's appeal, the Board affirmed the administrative law judge's finding that the evidence established invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), but vacated his finding that the evidence was insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(2), and remanded the case to him. *Marcum v. Ora Mae Coal Co.* BRB No. 88-0483 BLA (Dec. 24, 1990)(unpub.). Director's Exhibit 57. On remand, the administrative law judge again awarded benefits in a Decision and Order dated February 7, 1992, finding that the evidence failed to establish rebuttal at 20 C.F.R. §727.203(b)(2) and (b)(3). Director's Exhibit 58. Following employer's second

¹The 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 they 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.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, 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, determined that the regulations at issue in the lawsuit would 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). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F. Supp. 2d 47 (D.D.C. 2001). The court's decision renders moot those arguments made by the parties regarding the impact of the challenged regulations.

appeal, the Board affirmed the administrative law judge's award of benefits. *Marcum v. Ora Mae Coal Co.* BRB No. 92-1121 BLA (June 29, 1993)(unpub.). Director's Exhibit 70. Employer requested reconsideration. Director's Exhibit 71. Initially, the Board denied reconsideration, Director's Exhibit 75. *Marcum v. Ora Mae Coal Co.* BRB No. 92-1121 BLA (July 30, 1996)(Decision and Order on Motion for Reconsideration)(unpub.). Following employer's second request for reconsideration, Director's Exhibit 76, the Board granted the motion, and vacated its affirmance of the administrative law judge's finding that the evidence failed to establish rebuttal at 20 C.F.R. §727.203(b)(3). *Marcum v. Ora Mae Coal Co.* BRB No. 92-1121 BLA (Mar. 12, 1998) (Decision and Order on Motion for Reconsideration)(unpub.); Director's Exhibit 94. The Board then denied claimant's request for reconsideration. *Marcum v. Ora Mae Coal Co.* BRB No. 92-1121 BLA (Mar. 12, 1998)(Decision and Order on Reconsideration)(unpub.); Director's Exhibits 94- 96. Claimant appealed to the United States Court of Appeals for the Sixth Circuit. The Court issued an Order dismissing the appeal as premature. *Marcum v. Ora Mae Coal Co.*, No. 98-3681 (6th Cir. Nov. 3, 1998)(Order). On remand from the Court of Appeals, the administrative law judge reopened the record for the submission of additional evidence relevant to rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Director's Exhibit 102. After both parties submitted additional evidence, the administrative law judge issued a Decision and Order dated August 17, 2000. Therein, the administrative law judge found that the evidence failed to establish rebuttal at 20 C.F.R. §727.203(b)(3), and accordingly, awarded benefits. Employer then filed the instant appeal with the Board.

On appeal, employer challenges the administrative law judge's finding that the evidence fails to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not file a response brief in this appeal.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 into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

²The regulations contained in 20 C.F.R. Part 727 are not affected by the recent amendments to the Black Lung regulations.

Employer challenges the administrative law judge's determination that the evidence is insufficient to establish rebuttal at 20 C.F.R. §727.203(b)(3). Specifically, employer contends that the administrative law judge erred when he concluded that the opinions of Drs. Broudy, Castle, Fino, Hippensteel and Dahhan were legally insufficient to establish subsection (b)(3) rebuttal. Employer also challenges the administrative law judge's determination to credit the opinion of Dr. Baker at subsection (b)(3).

The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction the instant case arises, has held that an employer must prove pneumoconiosis did not partially or totally cause the miner's disability. Thus, if pneumoconiosis is at least a contributing cause of a miner's total disability, he is conclusively entitled to benefits. In effect, employer is required to rule out pneumoconiosis as a source of the miner's disability. *See Youghioghney & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *Warman v. Pittsburg & Midway Coal Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

The administrative law judge first considered the opinion of Dr. Broudy. The administrative law judge correctly found that Dr. Broudy concluded that claimant did not have pneumoconiosis, and even if pneumoconiosis were present, that claimant did not have an impairment due to coal workers' pneumoconiosis or coal dust exposure. Director's Exhibit 37; Employer's Exhibits 7, 15, 26, 31, 33; Decision and Order at 5-6. The administrative law judge correctly found that this opinion was legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3), as it failed to rule out conclusively that pneumoconiosis was a contributing factor to claimant's disability. *See Webb, supra; Warman, supra; Gibas, supra.* We therefore affirm the administrative law judge's rejection of Dr. Broudy's opinion as legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3).

Next, the administrative law judge considered the opinion of Dr. Castle. Employer's Exhibit 19; Decision and Order at 7. The administrative law judge concluded that Dr. Castle opined that claimant retained the respiratory capacity to perform his usual coal mine employment, that he may be totally disabled due to orthopedic abnormalities, and that his respiratory impairment, if found, was due to cigarette smoking. *Id.* The administrative law judge properly found that this opinion was legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3), as it failed to rule out conclusively that pneumoconiosis was a contributing factor to claimant's disability. *See Webb, supra; Warman, supra; Gibas, supra.* We therefore affirm the administrative law judge's rejection of Dr. Castle's opinion as legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3).

Further, the administrative law judge considered the opinion of Dr. Hippensteel. Employer's Exhibit 4; Decision and Order at 7-8. The administrative law judge concluded that Dr. Hippensteel opined that claimant's impairment was due to non-respiratory problems, and that his mild respiratory impairment would not prevent him from going back to work in the mines. *Id.* The administrative law judge correctly found that this opinion was legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3), as it failed to rule out conclusively that pneumoconiosis was a contributing factor to claimant's disability. *See Webb, supra; Warman, supra; Gibas, supra.* We therefore affirm the administrative law judge's rejection of Dr. Hippensteel's opinion as legally insufficient to establish rebuttal pursuant to Section 727.203(b)(3).

Employer specifically argues that Drs. Broudy, Castle and Hippensteel list the causes of claimant's disability and, therefore, unlike the opinions in *Webb, Warman, and Gibas*, these opinions are sufficient to satisfy the requirements of subsection (b)(3) rebuttal. Contrary to employer's contention, these doctors all failed to address whether claimant's disability is also caused by pneumoconiosis. Each of the three doctors relied upon by employer states that claimant is disabled by non-respiratory impairments and that those listed impairments are not related to pneumoconiosis. As the administrative law judge correctly stated, however, these doctors failed to address whether pneumoconiosis also contributed, even partially, to claimant's disability and, therefore, failed to rule out pneumoconiosis as a contributor to claimant's disability, in accordance with applicable case law. *Id.* We reject, therefore, employer's contention and hold that the administrative law judge's findings with respect to Drs. Broudy, Castle and Hippensteel are in accordance with applicable law.

Employer's contentions with respect to the opinions of Drs. Fino and Dahhan, however, have merit. Dr. Fino concluded that claimant's disability was not related to, or aggravated by, coal dust exposure. Employer's Exhibit 36. He also concluded that there was no contribution to any impairment or disability as a result of lung disease. *Id.* This opinion could, therefore, if credited, establish rebuttal pursuant to Section 727.203(b)(3) under the standard set forth in *Webb, Warman, and Gibas*. Likewise, Dr. Dahhan stated that claimant was disabled due to a stroke, vision impairment and the effects of diabetes, but had no condition which is aggravated by, or altered by, the presence of pneumoconiosis. This statement, if credited, could establish rebuttal pursuant to Section 727.203(b)(3) under the applicable standard.

Employer finally challenges the administrative law judge's determination to credit the opinion of Dr. Baker as an opinion supportive of a finding of no rebuttal pursuant to Section 727.203(b)(3). The administrative law judge correctly concluded that Dr. Baker found that claimant was totally disabled as a result of the cumulative effects of a stroke, hypertension, heart disease, diabetes and pneumoconiosis and that pneumoconiosis was a

contributing factor to claimant's disability. Claimant's Exhibits 4, 5, 6; Employer's Exhibit 13; Decision and Order at 9. Employer's contentions with respect to the administrative law judge's crediting of Dr. Baker's opinion, namely that the other doctors are better qualified, and that other opinions are better explained, go to the weight to be accorded to Dr. Baker's opinion. Employer's Brief at 23-25. As such, these contentions constitute a request to reweigh the evidence, which the Board cannot do. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-149 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1- 77 (1988). On remand, however, the administrative law judge is instructed to weigh the medical opinion of Dr. Baker, along with all the other medical opinions of record relevant to the issue of Section 727.203(b)(3) rebuttal. The administrative law judge is instructed to considered such pertinent issues as the relative qualifications of the doctors rendering opinions and whether those opinions are sufficiently reasoned. *See Dillon v. Peabody Coal Coal Co.*, 11 BLR 1-113 (1988); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In light of the foregoing, we remand the case to the administrative law judge for further consideration of the medical opinions of record pursuant to 20 C.F.R. §727.203(b)(3).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

