BRB No. 98-0268 BLA

MARGARET TAYLOR (Widow of HILLARD TAYLOR)	)	
Claimant-Petitioner	)	
v.	)	
ALABAMA BY-PRODUCTS CORPORATION	)	DATE ISSUED:
Employer-Respondent	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

Richard J. Ebbinghouse (Gordon, Silberman, Wiggins & Childs, P.C.), Birmingham, Alabama, for claimant.

Laura A. Woodruff (Maynard, Cooper & Gale, P.C.), Birmingham, Alabama, for employer.

Jill M. Otte (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, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (83-BLA-1909) of

Administrative Law Judge Clement J. Kichuk denying 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). This case has been before the Board previously. In the original Decision and Order, Administrative Law Judge Ronald T. Osborn credited the miner with twenty-four years of coal mine employment pursuant to a stipulation by the parties and adjudicated the merits of the claims pursuant to 20 C.F.R. Part 727 and 20 C.F.R. Part 410, Subpart D. 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)(2), but also sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3), (4). The administrative law judge further found that entitlement was precluded pursuant to 20 C.F.R. Part 410, Subpart D. Accordingly, benefits were denied and claimant appealed. In *Taylor v. Alabama By-Products Corp.*, BRB No. 86-1088 BLA (Mar. 7, 1988)(unpub.), the Board reversed the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(3), (4), reversed the denial of benefits holding that claimant was entitled to benefits as a matter of law and remanded the case to the administrative law judge for the payment of benefits.

Employer appealed the Board's decision to the United States Court of Appeals for the Eleventh Circuit which reversed the Board's Decision and Order, vacated the Board's findings and remanded the case to the Board. *Taylor v. Alabama By-Products Corp.*, 862 F.2d 1529, 12 BLR 2-110 (11th Cir. 1989). On remand, the Board issued an Order on Remand in which it reinstated and affirmed Administrative Law Judge Osborn's finding that rebuttal of the interim presumption was established pursuant to 20 C.F.R. §727.203(b)(3), but remanded the case to the administrative law judge for consideration of rebuttal pursuant to 20 C.F.R. §727.203(b)(4) and consideration of entitlement pursuant to 20 C.F.R. §410.490, if reached. *Taylor v. Alabama By-Products Corp.*, BRB No. 86-1088 BLA (Apr. 21, 1989)(unpub.).

On remand, Administrative Law Judge Robert L. Cox found that the x-ray and medical opinion evidence was insufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(4). The administrative law judge further found that the evidence was sufficient to establish invocation of the presumption contained in 20 C.F.R. §410.490 and insufficient to establish rebuttal thereunder. Accordingly, benefits were awarded. Employer appealed and in *Taylor v. Alabama By-Products Corp.*, BRB No. 90-1272 BLA (Oct. 14, 1992)(unpub.), the Board, in accordance with the holding of the United States Supreme Court in *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 15 BLR 2-155 (1991), *aff'g sub nom.*, *BethEnergy Mines, Inc. v. Director, OWCP*, 890 F.2d 1295, 13 BLR 2-162 (3d Cir.

1989), vacated the administrative law judges's findings pursuant to 20 C.F.R. §410.490 and reversed the award of benefits. The Board also held that entitlement pursuant to 20 C.F.R. Part 718 was precluded.

On claimant's appeal to the United States Court of Appeals for the Eleventh Circuit, the court vacated the Board's decision and remanded the case. *Taylor v. Director, OWCP*, 16 F.3d 1164 (11th Cir. 1994). The court held that the Board erred in affirming Administrative Law Judge's Osborn's finding that Dr. Jones' opinion was sufficient to establish rebuttal of the interim presumption as "a matter of law." The court instead held that the Board should have addressed the sufficiency of Dr. Jones' opinion under the proper legal standard for rebuttal, along with the sufficiency of the other medical opinions of record, based on the arguments that were raised by claimant in her initial appeal before the Board, but were not addressed by the Board. On remand from the court, the Board issued an Order on Remand in which it held that Judge Osborn permissibly determined that Dr. Jones' opinion was a "reasoned" opinion, but that the bases upon which he relied to discredit the opinions of Drs. Felgner, Goodman, Grimes and Tai were improper. The Board thus remanded the case to the administrative law judge to consider the relevant evidence at 20 C.F.R. §727.203(b)(3). *Taylor v. Alabama By-Products Corp.*, BRB No. 90-1272 BLA (Apr. 19, 1995)(unpub.).

On remand to the Office of Administrative Law Judges, the case was reassigned to Administrative Law Judge Kichuk who found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). The administrative law judge further found that the evidence was insufficient to establish entitlement pursuant to 20 C.F.R. Part 718. Accordingly, benefits were denied in both claims. 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, responds, urging the Board to remand this case for reconsideration of the evidence.[1]

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

[1] The Director has filed a Motion to Remand in this case to which the parties have not responded. The Board accepts the Director's Motion to Remand as his response brief and herein decides the case on its merits.

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).

The instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh 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 establish that the miner's pneumoconiosis is not a contributing cause of his total disability. Rebuttal established under subsection (b)(3) does not permit the award of benefits for partial disability, but only for total disability of which pneumoconiosis is a contributing cause. As to proof that the disability "did not arise in whole or in part" out of coal mining, employer must show that no part of the miner's disability arose out of coal mine employment and even where pneumoconiosis is only a contributing cause of the miner's total disability, benefits must be awarded as long as no other ground for rebuttal has been established. *Black Diamond Coal Mining Co. v. Benefits Review Board*, 758 F.2d 1532, 7 BLR 2-209, *reh'g denied*, 768 F.2d 1353 (11th Cir. 1985); *see Alabama By-Products Corp. v. Killingsworth*, 733 F.2d 1511, 1516 n.10, 6 BLR 2-59, 2-65 n.10 (11th Cir. 1984); *see also Carozza v. United States Steel Corp.*, 727 F.2d 74, 78, 6 BLR 2-15, 2-21 (3d Cir. 1984). Moreover, once the interim presumption is invoked in a survivor's claim, a rebuttable presumption arises that the miner died due to pneumoconiosis in addition to the rebuttable presumption that the miner was totally disabled due to pneumoconiosis at the time of death. 20 C.F.R. §727.203(a); *Jennings v. Brown Badgett, Inc.*, 9 BLR 1-94 (1986); *Conners v. Director, OWCP*, 7 BLR 1-482 (1984); *Husk v. Sewell Coal Co.*, 4 BLR 1-7 (1981). Thus, the party opposing entitlement must rebut both of these presumptions to defeat entitlement. *See Jennings, supra*. In order to find the presumptions rebutted, the administrative law judge must determine both that the pneumoconiosis played no role in the miner's death and that it played no role in his total disability. *Id*.

Contrary to claimant's contention, 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. Jones, a pulmonary specialist who concluded that the miner had a pulmonary impairment due to smoking which was unrelated to coal dust exposure. *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); Decision and Order on Remand 5-6, 14-18; Director's Exhibit 30; Employer's Exhibit 6. In so finding, the administrative law judge, within his discretion as fact-finder, permissibly accorded significant weight to the medical opinion of Dr. Jones on the basis of his qualifications and the documentation and reasoning contained in his report and deposition testimony. *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149

(1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 17-18. Contrary to claimant's contention, the administrative law judge did apply the "reasoned medical judgment" standard in determining whether coal mine employment contributed to the miner's impairment and, within his discretion, permissibly credited the opinion of the physician he found most persuasive. *Clark*, *supra*; *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge gave no weight to the opinion of Dr. Grimes on the issue of causality as Dr. Grimes failed to state the specific cause of the miner's impairment. Decision and Order at 6-7, 11-12; Director's Exhibit 14. In addition, the administrative law judge also rationally accorded little weight to the opinion of Dr. Tai since he found that the physician understated the miner's substantial smoking history. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Decision and Order on Remand at 11; Director's Exhibit 15. The administrative law judge also permissibly gave little weight to Dr. Goodman's opinion since he found it was not well-documented and reasoned. *Clark*, *supra*; Decision and Order at 9-11; Director's Exhibits 26, 29. The administrative law judge also acted within his discretion in according less weight to the opinion of Dr. Felgner, claimant's treating physician, since Dr. Felgner diagnosed chronic obstructive pulmonary disease due to pneumoconiosis and smoking in 1981, but failed to refer to pneumoconiosis in his later treatment notes. *Clark*, *supra*; *Wetzel*, *supra*; *Piccin*, *supra*; Decision and Order on Remand at 6, 12-14; Director's Exhibit 14; Employer's Exhibit 5. 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 on Remand at 18; *Killingsworth*, *supra*; *Wetzel*, *supra*; *Piccin*, *supra*. 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 Clark*, *supra*; *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 in the miner's claim pursuant to Section 727.203(b)(3). Moreover, the administrative law judge's finding that the miner's total disability did not arise out coal mine employment, precludes entitlement pursuant to 20 C.F.R. Part 718. *Defore v. Alabama By-Products Corp.*, 12 BLR 1-27 (1988).

With respect to the survivor's claim, however, the administrative law judge failed to consider whether the presumption of death due to pneumoconiosis was

rebutted in this survivor's case. *Connors*, *supra*. Consequently, we vacate the administrative law judge's finding that rebuttal of the interim presumption was established at subsection (b)(3) in the survivor's case and remand this case for reconsideration of the evidence pursuant to the proper standard. *Carozza*, *supra*; *Connors*, *supra*. Morever, if reached, the administrative law judge is instructed to determine if the evidence is sufficient to establish death due to pneumoconiosis and entitlement under 20 C.F.R. Part 718. *See* 20 C.F.R. §718.205(c); *Bradberry v. Director, OWCP*, 117 F.3d 1361, 21 BLR 2-166 (11th Cir. 1997); *see also Northern Coal Co. v. Director, OWCP [Pickup]*, 100 F.3d 871, 20 BLR 2-335 (10th Cir. 1996); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 816, 17 BLR 2-135 (6th Cir. 1993); *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 178, 183, 16 BLR 2-121 (7th Cir. 1992); *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 980, 16 BLR 2-90 (4th Cir. 1992); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006, 13 BLR 2-100 (3d Cir. 1989).

Accordingly, the Decision and Order on Remand of the administrative law judge denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge