BRB No. 99-1042 BLA

OLLIE MULLINS (Widow of WILLIAM E. MULLINS) Claimant-Respondent v. LITTLE JEWELL COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners 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 Modification and Order Denying Reconsideration of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Mark E. Solomons (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

Jennifer U. Toth (Henry L. Solano, 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, McGRANERY,

Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Modification Granting Benefits in Part and Denying Benefits in Part and the Order Denying Reconsideration (98-BLA-0044) of Administrative Law Judge Pamela Lakes Wood on claims 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 instant case involves a miner's claim filed on July 25, 1979 and a survivor's claim filed on September 25, 1990. After crediting the miner with fifteen years of coal mine employment, the administrative law judge found that in the prior decision there had been a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[1] The administrative law judge, therefore, considered the miner's claim on the merits. In her consideration of the miner's claim, the administrative law judge found that the autopsy evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge further found that the evidence was insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, the administrative law judge awarded benefits on the miner's claim. In regard to the survivor's claim, the administrative law judge found that the evidence was insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). The administrative law judge, therefore, denied benefits on the survivor's claim. The administrative law judge, however, found that claimant[2] was entitled to derivative survivor's benefits pursuant to 20 C.F.R. §725.212. The administrative law judge subsequently denied motions for reconsideration filed by claimant and employer.

[1]For a complete procedural history of the instant case, *see* Decision and Order Denying Modification at 2-6.

[2]Claimant is the surviving spouse of the deceased miner who died on June 24, 1990. Director's Exhibits 77, 155.

On appeal, 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). Employer also argues that the administrative law judge erred in not transferring liability to the Black Lung Disability Trust Fund (Trust Fund). The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's refusal to transfer liability to the Trust Fund. In a reply brief, employer reiterates its previous contentions. Claimant has not filed a response brief.[3]

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).

In light of our affirmance of the administrative law judge's finding of invocation pursuant to 20 C.F.R. §727.203(a)(1), employer is precluded from establishing rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied* 484 U.S. 1047 (1988); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988). We, therefore, affirm the administrative law judge's finding that employer is not entitled to rebuttal pursuant to 20 C.F.R. §727.203(b)(4). Decision and Order on Modification at 20-21. Because it is undisputed that the miner did not work anywhere after ceasing his coal mine employment in 1979, the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1) is also affirmed. Decision and Order on Modification at 17.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that in order to establish rebuttal pursuant to subsection (b)(2), the party opposing entitlement must show that the miner is not disabled for "whatever reason." *Sykes v. Director, OWCP*, 812 F.2d 890, 893-94, 10 BLR 2-95, 2-98 (4th Cir. 1987). A general conclusion of no impairment is insufficient to establish rebuttal of the interim presumption under subsection (b)(2). *Id.* Employer does not point to any evidence supportive of a

[3]Inasmuch as no party challenges the administrative law judge's finding that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Inasmuch as no party challenges the administrative law judge's finding of invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), this finding is also affirmed. *Id.*

finding that the miner was not disabled for any reason. In fact, the evidence of record indicates that the miner was disabled prior to his death.[4] 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 argues that the administrative law judge erred in finding the evidence insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Fourth Circuit has held that in order to establish rebuttal pursuant to subsection (b)(3), the party opposing entitlement must rule out any causal connection between a miner's disability and his coal mine employment. *See Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). A causal connection can be "ruled out" if positive evidence demonstrates that the miner suffers from no respiratory or pulmonary impairment of any kind or if such evidence explains all of any impairment present and attributes it solely to sources other than coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart],* 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998).

[4]Drs. Fino, Stewart, Kleinerman and Garzon each opined that the miner was totally disabled due to cancer. Director's Exhibits 80, 101; Employer's Exhibits 3, 6.

Employer contends that the administrative law judge, in finding the evidence insufficient to establish subsection (b)(3) rebuttal, erred in crediting Dr. Nash's opinion based upon his status as the miner's examining physician.[5] The administrative law judge credited Dr. Nash's opinion because he was "the physician who had the benefit of examining the [m]iner most closely to his death and....[was] in a better position to assess both the extent to which the [m]iner was impaired by a pulmonary or respiratory condition and the contribution of the [m]iner's pneumoconiosis (and coal employment) to his disability than his better-credentialed counterparts." Decision and Order on Modification at 19-20.

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[5]Dr. Nash opined that:

> It is my opinion that [the miner] after having worked 16 years in and around the mines in a dusty environment is totally and permanently disabled for all work, especially heavy work in a dusty environment like the coal mines.
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> It is also my opinion that most of his pulmonary problems arose as a result of working this length of time in a dusty environment in the coal mines.
>
> It is also my opinion that a return to this type of work would be extremely hazardous to his health and dangerous to his life.

Director's Exhibit 63.

The Fourth Circuit has held that an administrative law judge should not mechanistically credit, to the exclusion of all other evidence, the opinion of an examining or treating physician solely because the doctor personally examined the claimant. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1998). The Fourth Circuit has further held that "experts' respective qualifications are important indicators of the reliability of their opinions." *Hicks*, 138 F.3d at 536, 21 BLR at 2-341; *accord Akers*, 131 F.3d at 441, 21 BLR at 2-275. In the instant case, the administrative law judge failed to explain how Dr. Nash's physical examination assisted him in rendering his determinations. Moreover, Drs. Garzon, Fino, Stewart and Kleinerman each have qualifications superior to those of Dr. Nash.[6] We, therefore, remand the case to the administrative law judge to reconsider the weight to accord Dr. Nash's opinion in light of *Hicks* and *Akers*.

[6]Dr. Garzon is Board-certified in Internal Medicine. Director's Exhibit 101. Drs. Fino and Stewart are Board-certified in Internal Medicine and Pulmonary Disease. Director's Exhibit 101; Employer's Exhibit 4. Dr. Kleinerman is Board-certified in Anatomic and Clinical Pathology. Director's Exhibit 170. Dr. Nash's qualifications are not found in the record.

Employer also argues that the administrative law judge failed to properly consider whether Dr. Nash based his opinion of total disability with pulmonary problems in part upon an unreliable pulmonary function study. An administrative law judge may properly discredit a physician's finding of total disability if it is based in part upon pulmonary function studies that have been invalidated. *See Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984). Dr. Nash noted that the miner's November 15, 1989 pulmonary function study produced qualifying values. Director's Exhibit 63. However, Drs. Fino, Stewart and Garzon questioned the reliability of the miner's November 15, 1989 pulmonary function study in light of the miner's questionable effort during the administration of the study.[7] Because Dr. Nash's opinion is based in part upon the November 15, 1989 pulmonary function study, the administrative law judge, on remand, should address whether the invalidations of this study undermine Dr. Nash's opinion.

We also agree with employer that the administrative law judge erred in failing to consider whether several negative readings of the November 15, 1989 x-ray that Dr. Nash relied upon in diagnosing pneumoconiosis call into question the reliability of the doctor's conclusions.[8] *See Winters v. Director, OWCP*, 6 BLR 1-877 (1984);

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[7]In his September 10, 1990 report, Dr. Fino opined that the miner's November 15, 1989 pulmonary function study was non-conforming due to a lack of tracings and should not be used in the evaluation of the miner's respiratory status. Director's Exhibit 79. During his February 11, 1998 deposition, Dr. Fino opined that the MVV result obtained from the miner's November 15, 1989 pulmonary function study "was not done maximally." Employer's Exhibit 5 at 15.

Dr. Stewart indicated that the miner's November 15, 1989 pulmonary function test was invalid because the miner was "quite ill with cancer of the colon" at the time that the test was administered. Director's Exhibit 101. Dr. Stewart noted that it was not unusual for patients who are debilitated from a cancer to provide less than a full effort. *Id.*

Dr. Garzon indicated that if the miner was in a weakened state due to his cancer at the time that the November 15, 1989 pulmonary function study was administered, this could have "had something to do with [the results of the study]." Director's Exhibit 101.

[8]Dr. Nash, in diagnosing pneumoconiosis, relied upon his own positive interpretation of a November 15, 1989 x-ray. Director's Exhibit 63. Dr. Ramakrishnan also interpreted this x-ray as positive for pneumoconiosis. *Id.* The radiological qualifications of Drs. Nash and Ramakrishnan are not found in the record. Drs. Wheeler, Scott, Spitz and Shipley, each dually qualified as a B reader

Arnoni v. Director, OWCP, 6 BLR 1-423 (1983); *White v. Director, OWCP*, 6 BLR 1-368 (1983). Although the administrative law judge ultimately found that the autopsy evidence revealed the presence of pneumoconiosis, Dr. Nash relied upon x-ray evidence, not autopsy evidence, in rendering his diagnosis of pneumoconiosis.

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and Board-certified radiologist, interpreted claimant's November 15, 1989 x-ray as negative for pneumoconiosis. Director's Exhibits 67, 69.

Employer also contends that the administrative law judge improperly substituted her opinion for that of the physicians. The administrative law judge found that Dr. Nash's reliance upon an incorrect smoking history[9] was "inconsequential" because the miner was not a heavy smoker and quit smoking approximately thirty-five years prior to his death. Decision and Order on Modification at 20. In making this assessment, the administrative law judge improperly substituted his opinion for that of the physicians of record[10] *See generally Hucker v. Consolidation Coal Co.*, 9 BLR 1-137 (1986) (*en banc*); *see also Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986).

On remand, the administrative law judge should also address whether Dr. Nash's opinion is sufficiently reasoned.[11] *See Lucostic v. United States Steel Corp.*, 8

[9]Dr. Nash was under the mistaken impression that the miner never smoked. *See* Director's Exhibit 63.

[10]Dr. Fino noted that the miner smoked one pack of cigarettes a year for twenty years before quitting in 1955. Employer's Exhibit 5. Dr. Fino opined that the miner's smoking history was sufficient for an individual to develop a pulmonary impairment associated with cigarette smoking. *Id.* Dr. Kleinerman opined that the focal areas of the miner's centriacinar emphysema were in all likelihood due to his prolonged and heavy smoking history. Employer's Exhibit 6.

[11]Employer contends that the administrative law judge, in considering Dr. Nash's opinion, erred in dismissing evidence of the physician's suspension proceedings before the Kentucky Board of Medical Licensure as "arising out of unrelated matters." *See* Decision and Order on Modification at 19. The record contains copies of documents filed in a proceeding before the Kentucky Board of Medical Licensure, indicating, *inter alia*, that Dr. Nash pleaded guilty in U.S. District Court to knowingly prescribing and/or dispensing Schedule V (federal) controlled substances for other than a medical purpose in violation of federal law. *See* Director's Exhibit 81.

The administrative law judge noted that:

> While the fact that [Dr. Nash] was subject to medical license suspension and disciplinary proceedings may undermine the weight to which his opinion is entitled, I do not find it to mandate that his opinion not be given controlling weight. In this regard, the disciplinary proceedings related to the prescription of controlled substances and did not involve findings that he had misrepresented facts in any medical opinions submitted in support of claims for benefits.

BLR 1-46 (1985).

In light of the above-referenced errors, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3) and remand the case for further consideration.

Relying upon *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999) and *Lockhart*, *supra*, employer argues that liability should be transferred to the Trust Fund. Employer contends that delays in the adjudication of the instant case resulted in a deprivation of its constitutional rights to procedural due process of law. Employer argues that it was deprived of any opportunity to obtain the necessary evidence to defend the instant claim.

The administrative law judge rejected employer's contention that liability should transfer to the Trust Fund because it was unable to mount a meaningful defense due to the Department of Labor's (DOL's) delay in processing the miner's claim. The administrative law judge found employer's argument "specious given the extensive proceedings in which…[e]mployer participated (much of which occurred while the [m]iner was still alive)." Order Denying Reconsideration at 2.

Decision and Order on Modification at 18-19.

In considering Dr. Nash's opinion, the administrative law judge noted evidence of Dr. Nash's disciplinary proceeding and criminal conviction for the illegal dispensing of controlled substances. We hold that the administrative law judge did not abuse her discretion in finding that this evidence did not dictate that Dr. Nash's opinion be rejected. *See Brown v. Director*, OWCP, 7 BLR 1-730 (1985); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977).

In *Lockhart*, the Fourth Circuit held that the DOL's inexcusable delay in notifying the employer of its potential liability[12] deprived it of the opportunity to mount a meaningful defense.[13] The Fourth Circuit, therefore, held that benefits were to be paid from the Trust Fund.

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[12]In *Lane Hollow v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), the miner filed a claim for benefits on June 10, 1975. After his claim was denied by the district director, the miner made a request for a hearing before the Office of Administrative Law Judges on July 15, 1981. No responsible operator was named when the case was transferred to the Office of Administrative Law Judges. Five more years passed. On August 12, 1986, the Department of Labor (DOL) filed a motion to have the case remanded so that a responsible operator could be named. The employer was named as one of three potential responsible operators in the motion. The administrative law judge granted the motion on October 3, 1986. Five more years passed. On April 26, 1991, three potential responsible operators were notified, but not the employer. By happenstance, the named potential responsible operators were insured by the same carrier as the employer so that the carrier had the same incentive to defend the claim as it would have had on behalf of the employer. The miner in *Lockhart* died on December 12, 1989.

[13]The Fourth Circuit concluded that the government's protracted delay was the direct cause of the employer's inability to gather medical evidence from the miner to rebut the interim presumption under Section 727.203(b)(3).

In *Borda*, the Fourth Circuit noted that *Lockhart* established a straight forward test for determining whether an employer has been denied due process by the government's delay in notification of potential liability: Did the government deprive the employer of "a fair opportunity to mount a meaningful defense to the proposed deprivation of its property?" *Borda*, 171 F.3d at 183, 21 BLR at 2-559-560 (citation omitted). The Fourth Circuit emphasized that it "is not the mere fact of the government's delay that violates due process, but rather the prejudice resulting from such delay."[14] *Borda*, 171 F.3d at 183, 21 BLR at 2-560.

[14]In *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the Fourth Circuit held that the DOL's failure to notify the employer, to act upon the miner's 1981 request for modification, and to schedule a hearing on the miner's 1978 claim in a timely manner deprived the employer of a meaningful opportunity to defend itself under Section 727.203(b)(1) by showing that the miner was still doing comparable and gainful work as a federal coal inspector. *Id.* Because the miner worked as a federal mine inspector until 1987, six years after making his 1981 request for modification, the Fourth Circuit found that the employer's inability to assert that defense to the 1978 claim was traceable solely to the government's "troubling failure" to process the modification request in a timely

We agree with the Director that the facts of the instant case are distinguishable from those of *Lockhart* and *Borda*. In the instant case, employer was notified of the miner's July 25, 1979 claim on November 17, 1980. Director's Exhibit 28. Employer also received timely notice of the miner's April 1989 request for modification. Director's Exhibits 57, 58. Both of these events occurred prior to the miner's death. Moreover, employer has not identified any harm that resulted from the delays in the processing of the miner's claim or request for modification.[15] Consequently, we hold that the DOL did not deprive employer of a fair opportunity to mount a meaningful defense in the instant case. Consequently, we decline to transfer liability to the Trust Fund.

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manner and notify the employer. *Borda*, 171 F.3d at 183-184, 21 BLR at 2-560. The Fourth Circuit held that the employer's first notice of the pendency of the miner's 1978 claim 16 years after the claim was filed stripped it of a full and fair opportunity to defend itself in the manner that the statutory scheme at that time contemplated. *Borda*, 171 F.3d at 184, 21 BLR at 2-561.

[15]Although employer contends that it was unlawfully deprived of an opportunity to examine the miner after the July 12, 1982 hearing until the miner's death on June 24, 1990, the DOL, during much of this time, was in the process of adjudicating issues arising from employer's challenge of Administrative Law Judge Roy P. Smith's February 9, 1983 Decision and Order awarding benefits.

Accordingly, the administrative law judge's Decision and Order Denying Modification and Order Denying Reconsideration are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge