BRB No. 98-0128 BLA

LUCILLE IRWIN (Widow of ERNEST IRWIN)	)	
Claimant-Petitioner	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED:
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

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

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

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant[1] appeals the Decision and Order (89-BLA-0001) of Administrative Law Judge Clement J. Kichuk (the administrative law judge) denying benefits on both 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).[2] This case has been before the Board on two prior occasions. On the last appeal by claimant, the Board affirmed Administrative Law Judge Julius A. Johnson's finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). However, the Board vacated Judge Johnson's finding of rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3), and remanded the case for further consideration. The Board instructed Judge Johnson to consider whether employer established that pneumoconiosis was not a contributing cause of the miner's disability. *Irwin v. Peabody Coal Co.*, BRB No. 95-0107 BLA (May 7, 1996)(unpub.). Subsequently, the Board denied claimant's request for reconsideration.[3] *Irwin v. Peabody Coal Co.*, BRB No. 95-0107 BLA (Nov. 22,

[1]Claimant is the widow of the deceased miner, Ernest Irwin, who died on April 28, 1985. Director's Exhibits 3, 6.

[2]The miner filed his initial claim on February 8, 1979. Director's Exhibit 1. On May 11, 1979, the Department of Labor issued a Notice of Initial Finding that the miner was entitled to benefits. *Id*. However, on September 21, 1981, Administrative Law Judge Victor J. Chao issued a Decision and Order denying benefits on the miner's claim. *Id*. Although Judge Chao credited the miner with twenty-two years of coal mine employment and found the evidence sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(3), he nonetheless found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(2). Moreover, Judge Chao found that the miner was not entitled to benefits under 20 C.F.R. Part 410, Subpart D. *Id*. On March 10, 1983, the Board dismissed the miner's appeal by reason of abandonment. *Irwin v. Peabody Coal Co.*, BRB No. 82-1003 BLA (Mar. 10, 1983)(Order)(unpub.). The miner requested modification on June 28, 1983, Director's Exhibit 45, and filed another claim on May 9, 1984, Director's Exhibit 2. Claimant filed her survivor's claim on June 6, 1985. Director's Exhibit 3.

[3]Employer preserves its contention that the Department of Labor erred by not returning the June 28, 1983 request for modification to Judge Chao, who had presided over the original claim, instead of assigning it to Administrative Law Judge Julius A. Johnson. The Board has previously held that Judge Johnson's adjudication of this case was not prejudicial to employer. *Irwin v. Peabody Coal Co.*, BRB No. 89-3922 BLA, slip op. at 3 (June 29, 1993)(unpub.). We are not persuaded by employer's contention that there are errors in the Board's determination

regarding the transfer of the case to Judge Johnson. Employer also preserves its contention that Judge Johnson erred by reviving this case under 20 C.F.R. Part 727. The Board has previously held that Judge Johnson properly considered the June 28, 1983 request for modification and the second claim, which merged into the modification request, under 20 C.F.R. Part 727. *Id*. We are not persuaded by employer's contention that there are errors in the Board's determination regarding the adjudication of this case under 20 C.F.R. Part 727. Further, employer preserves it contention that the evidence is insufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). The Board has previously affirmed the finding that the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). *Irwin v. Peabody Coal Co.*, BRB No. 95-0107 BLA, slip op. at 2 n.3 (May 7, 1996)(unpub.) We are not persuaded by employer's contention that there are errors in the Board's determination at 20 C.F.R. §727.203(a)(1). Lastly, employer preserves its contention that rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) is not precluded by a finding of invocation of the interim presumption at 20 C.F.R. §727.203(a)(1) in this case. The Board has

1996)(Order)(unpub.).

On the most recent remand, the case was reassigned to the administrative law judge who found the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Accordingly, the administrative law judge denied benefits on both the miner's claim and the survivor's claim. On appeal, claimant contends that the administrative law judge erred by failing to rule on claimant's request for reconsideration before issuing his decision on remand. Claimant also contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). Employer responds, urging affirmance of the administrative law judge's Decision and Order on Remand.[4] The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, claimant contends that the administrative law judge erred by failing to rule on claimant's request for reconsideration of his denial of his prior request to reopen the record, before issuing his decision on remand. Specifically, claimant

---

previously held that rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(4) is precluded in this case because the evidence is sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1). *Id*. at 4. We are not persuaded by employer's contention that there are errors in the Board's determination at 20 C.F.R. §727.203(b)(4).

[4]Claimant filed a brief in reply to employer's brief which reiterates claimant's previous contentions.

asserts that the administrative law judge's decision on remand was premature. The pertinent procedural history of this case is as follows: While the case was pending before the administrative law judge on remand, claimant filed a Motion to Re-Open the Record dated April 28, 1997, requesting that the administrative law judge admit several new articles into the record. These articles address whether the inhalation of coal mine dust can cause an obstructive defect. On June 2, 1997, the administrative law judge denied claimant's Motion to Re-Open the Record for failure to provide a compelling rationale. Claimant filed a request for reconsideration of the administrative law judge's denial of claimant's Motion to Re-Open the Record on June 20, 1997. 20 C.F.R. §725.479(b). On September 24, 1997, the administrative law judge issued his decision on remand denying benefits. Any error by the administrative law judge in failing to specifically address claimant's motion for reconsideration is harmless in view of the fact that claimant did not raise any new issues in support of his request for reconsideration. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With regard to the merits of this case, claimant contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that the party opposing entitlement must establish that the miner's pneumoconiosis was not a contributing cause of the miner's total disability or death. *See Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994)*; Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987). The administrative law judge considered the relevant medical opinions of record.[5] Whereas Drs. Tuteur and Renn opined that neither the miner's respiratory impairment nor death was caused by or related to pneumoconiosis, Director's Exhibit 13; Employer's Exhibits 2, 3, Dr. Gabrawy opined that coal dust inhalation was a contributing cause of the miner's death, Claimant's Exhibit 1. Dr. Davis opined that the miner does not have any disability related to his occupation.[6] Director's Exhibits 11, 13. The administrative law judge properly accorded determinative weight to the opinions of Drs. Tuteur and

[5]The administrative law judge stated that "the reports of Drs. Velez, Paul, Asali, and Summer do not discuss the cause of the miner's impairment or death." Decision and Order on Remand at 10.

[6]Dr. Crouch opined that the immediate cause of the miner's death was respiratory failure that was due to emphysema which was a consequence of pneumonia. Employer's Exhibit 4. The death certificate, which was signed by Dr. Paul, listed the causes of the miner's death as respiratory failure, emphysema and pneumonia. Director's Exhibit 6.

Renn over the contrary opinion of Dr. Gabrawy because he found the opinions of Drs. Tuteur and Renn to be better reasoned and documented,[7] *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984), and because they had a more complete picture of the miner's medical condition, *see Stark v. Director, OWCP*, 9 BLR 1-36 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106 (1984); *Spradin v. Island Creek Coal Co.*, 6 BLR 1-716 (1984). Further, the administrative law judge permissibly discounted the opinion of Dr. Davis because Dr. Davis' opinion is not

[7]The administrative law judge stated that the opinions of Drs. Tuteur and Renn "are based upon the extensive reviews they conducted of the medical evidence." Decision and Order on Remand at 12. The administrative law judge also stated that Drs. Tuteur and Renn "explained the medical basis for distinguishing between the effects of cigarette smoke and exposure to coal mine dust." *Id*. In contrast, the administrative law judge stated that "Dr. Gabrawy's opinion is not well reasoned nor sufficiently explained as to the basis for his finding [that] the miner's emphysema was related to the inhalation of coal and rock dust while employed as a coal miner." *Id*. The administrative law judge observed that "Dr. Gabrawy's findings were conclusory and unsupported as compared to those of Drs. Renn and Tuteur." *Id*. Further, the administrative law judge observed that "[i]t does not appear that Dr. Gabrawy undertook an independent review of the miner's medical records as did Drs. Tuteur and Renn." *Id*. at 11.

well documented.[8] *See Sabett v. Director, OWCP*, 7 BLR 1-299 (1984); *Fuller, supra*.

[8]The administrative law judge stated that the report of Dr. Davis was "submitted prior to the miner's death, and consequently [was] not benefitted by the results of the autopsy." Decision and Order on Remand at 9.

Claimant asserts that the administrative law judge erred by relying on the reports of Drs. Tuteur and Renn because their opinions are in conflict with the holding in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). In *Warth*, the United States Court of Appeals for the Fourth Circuit held that an assumption that an obstructive disorder, rather than a restrictive disorder, cannot be caused by coal mine employment, is erroneous. Subsequently, in *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), the Fourth Circuit explained that an administrative law judge is not precluded from relying on a physician's opinion which is not based upon the erroneous assumption that coal mine employment can never cause a chronic obstructive pulmonary disease. In the instant case, Drs. Tuteur and Renn did not assume that coal mine employment can never cause chronic obstructive pulmonary disease. Rather, the doctors provided explanations for concluding that claimant's pulmonary impairment is due to his cigarette smoking and not coal dust exposure. Hence, we reject claimant's assertion that the administrative law judge erred by relying on the opinions of Drs. Tuteur and Renn. Moreover, substantial evidence supports the administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3).[9]

Finally, inasmuch as benefits have been denied under 20 C.F.R. §727.203 in this case arising within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, entitlement must also be considered under the regulations contained in 20 C.F.R. Part 718. *See Strike v. Director, OWCP*, 817 F.2d 395, 10 BLR 2-45 (7th Cir. 1987). The administrative law judge's finding that the evidence is sufficient to establish rebuttal of the interim presumption at 20 C.F.R. §727.203(b)(3) precludes entitlement at 20 C.F.R. Part 718 inasmuch as this finding precludes claimant from establishing that pneumoconiosis was a substantially contributing cause of the miner's total disability at 20 C.F.R. §718.204(b), *see Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990), and since it precludes claimant from establishing that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c), *see Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). In addition, claimant cannot benefit from the presumption contained in 20 C.F.R. §718.304 inasmuch as the

[9]Rebuttal of the interim presumption under 20 C.F.R. §727.203(b)(3) in the instant case, which includes a survivor's claim, requires rebuttal of both the presumptions of death and total disability due to pneumoconiosis arising from coal mine employment. *See Conners v. Director, OWCP*, 7 BLR 1-482 (1984); *Napier v. Bethlehem Steel Corp.*, 5 BLR 1-1 (1982).

record is devoid of any evidence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge