BRB No. 98-0169 BLA

REBA MURDOCK (Daughter of ROBERT FREEMAN) Claimant v. EASTERN ASSOCIATED COAL COMPANY Employer-Petitioner 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 Remand - Awarding Benefits of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Helen H. Cox (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, the United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (87-BLA-2047) of Administrative Law Judge Frederick D. Neusner awarding benefits on a miner'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 is on appeal before the Board for a second time. In the initial Decision and Order issued on July 10, 1989, Administrative Law Judge Robert M. Glennon credited the miner with thirty years of qualifying coal mine employment, and adjudicated the claim, filed on April 24, 1978, pursuant to the provisions at 20 C.F.R. Part 727. 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), and that employer failed to establish rebuttal of that presumption pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits in the miner's claim, and found that the miner's widow was automatically entitled to derivative survivor's benefits.

On appeal, the Board initially affirmed the administrative law judge's award of benefits in the miner's claim and his award of derivative benefits to the surviving spouse pursuant to 20 C.F.R. §725.212. *See Murdock v. Eastern Associated Coal Co.*, BRB No. 89-2521 BLA (Dec. 16, 1992)(unpublished). On reconsideration, however, the Board vacated the administrative law judge's rebuttal findings at Section 727.203(b)(3), (4), and remanded this case for reconsideration of the relevant evidence thereunder. The Board instructed the administrative law judge on remand to address the credibility of the medical opinions in light of *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996), in determining whether the evidence ruled out the causal relationship between the miner's total disability and his coal mine employment at Section 727.203(b)(3) pursuant to *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). The Board further instructed the administrative law judge, in determing whether the evidence was sufficient to establish rebuttal at Section 727.203(b)(4), to weigh the negative x-ray evidence and Dr. Tuteur's opinion that the miner did not suffer from pneumoconiosis with Dr. Daniel's opinion that he could not rule out the existence of pneumoconiosis. *See Murdock v. Eastern Associated Coal Co.*, BRB No. 89-2521 BLA (Aug. 27, 1996)(unpublished).

On remand, this case was assigned to Administrative Law Judge Frederick D. Neusner. In a Decision and Order on Remand issued on September 17, 1997, the administrative law judge found the evidence insufficient to establish rebuttal at Section 727.203(b)(3), (4), and consequently awarded benefits.

In the present appeal, employer challenges the administrative law judge's rebuttal findings at Section 727.203(b)(3), (4), and urges dismissal of this case for

lack of a proper party. Claimant has declined to participate in this appeal.[1] The Director, Office of Workers' Compensation Programs (the Director), responds, urging the Board to reject employer's arguments regarding dismissal of the case and the administrative law judge's weighing of Dr. Daniel's opinion, but agreeing with employer's argument that the case should be remanded for reconsideration of Dr. Tuteur's opinion. Employer filed a reply brief, reiterating its arguments on appeal and requesting that the case be remanded and assigned to a different administrative law judge.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Turning first to employer's contention that this case should be dismissed for lack of a proper party, employer notes that both the miner and his surviving spouse are deceased and their estates closed, and that the Black Lung Disability Trust Fund (Trust Fund) paid interim benefits and survivor's benefits ending in 1987, more than ten years ago. Employer thus argues that dismissal of the case would cause no harm to claimant because she would have defenses in the West Virginia statutes of repose, laches, or limitations available to protect the estates from any repayment claims filed against them by the Trust Fund in the event that benefits are ultimately denied. The Director, however, correctly asserts that the issue of employer's liability for repayment to the Trust Fund pursuant to 26 U.S.C. §934(b)(2), 20 C.F.R. §725.603(a), remains undetermined. Consequently, dismissal of this case is not appropriate absent a motion or written agreement by the Director, which the Director has declined to provide. *See* 20 C.F.R. §725.522.

Turning to the merits, employer contends that the administrative law judge erred in evaluating the evidence relevant to rebuttal at Section 727.203(b)(3), (4), and provided invalid reasons for discounting the uncontradicted opinions of Drs. Daniel and Tuteur thereunder. Employer notes that the Board previously indicated

[1] Claimant is Reba Murdock, the daughter of the miner, Robert Freeman, who died on October 11, 1982, and his widow, Dorothy Mae Freeman, who died on July 14, 1987. Director's Exhibit 2; Hearing Transcript at 19. Claimant was appointed Executrix of the Estate of Dorothy Mae Freeman, and is pursuing the litigation of the miner's claim to its conclusion in that status.

that Dr. Daniel's checking of the "no" box on Department of Labor (DOL) Form CM-988 could establish rebuttal pursuant to Section 727.203(b)(3), and argues that the administrative law judge mischaracterized Dr. Daniel's opinion and took his deposition testimony out of context. Employer additionally maintains that the administrative law judge drew improper inferences from Dr. Tuteur's report, and imposed an unreasonable standard of proof on employer. We disagree.

After consideration of the administrative law judge's Decision and Order on Remand, the arguments on appeal, and the evidence of record, we conclude that the Decision and Order is supported by substantial evidence, consistent with applicable law, and must be affirmed. In finding Dr. Daniel's opinion insufficient to establish rebuttal at Section 727.203(b)(3), (4), the administrative law judge reasonably relied on the physician's deposition testimony rather than his DOL Form CM-988, on which he checked the "no" box without explanation. Decision and Order on Remand at 4, 5, 7, 8; *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). The administrative law judge accurately determined that Dr. Daniel testified he could not rule out the existence of pneumoconiosis, and admitted that his objective test results indicated a severe respiratory impairment and the destruction of lung tissue which could have resulted from coal dust exposure, but Dr. Daniel would not affirmatively diagnose pneumoconiosis or attribute the miner's disability to pneumoconiosis absent positive x-ray evidence of pneumoconiosis.[2] Decision and Order on Remand at 4-5, 7-8; Claimant's Exhibit 1 at 10, 16-18, 20, 29. Inasmuch as Dr. Daniel premised his opinion on the absence of a positive x-ray but could not rule out the presence of pneumoconiosis, the administrative law judge acted within his discretion as trier-of-fact in finding Dr. Daniel's opinion unpersuasive and

[2] Employer argues that Dr. Daniel's opinion was not based entirely on negative x-rays, and correctly notes that Dr. Daniel testified that it is possible for a person to contract pneumoconiosis without it being shown on an x-ray. Contrary to employer's argument, however, Dr. Daniel explicitly testified that he needed positive x-ray, biopsy or autopsy evidence in order to affirmatively diagnose pneumoconiosis. Claimant's Exhibit 1 at 16, 18, 20, 29. Nevertheless, Dr. Daniel further testified that he could not rule out the presence of pneumoconiosis, *see* Claimant's Exhibit 1 at 17; that he would probably change his opinion regarding the cause of the miner's disabling lung disease if shown clinical evidence of pneumoconiosis, *see* Claimant's Exhibit 1 at 16; and agreed that legally, with invocation of the interim presumption, the miner was totally disabled due to pneumoconiosis, *see* Claimant's Exhibit 1 at 20, 29-30. We therefore agree with the Director's argument that Dr. Daniel's opinion is insufficient to establish rebuttal at Section 727.203(b)(3), (4) as a matter of law. *See Massey, supra*; *Sakach v. Director, OWCP*, 8 BLR 1-237 (1985).

insufficient to establish rebuttal at Section 727.203(b)(3), (4). *See Massey, supra*; *Sakach v. Director, OWCP*, 8 BLR 1-237 (1985).

Similarly, in evaluating Dr. Tuteur's opinion, the administrative law judge accurately determined that the physician did not examine the miner but reviewed medical records between 1960 and 1979 and concluded that "the normal examination of the chest, the normal chest radiographs, and the absence of interpretable pulmonary function data do not support the presence of clinically significant, physiologically significant, or radiographically significant coal workers' pneumoconiosis." Decision and Order on Remand at 4-5, 8; Employer's Exhibit 1 at 2. The administrative law judge permissibly found the opinion insufficiently persuasive to establish rebuttal at Section 727.203(b)(3), (4), because he found Dr. Tuteur's medical conclusions were not well-reasoned, as evidenced by the physician's reliance on the absence of positive x-rays, the absence of abnormal chest examination findings during treatments for medical conditions unrelated to any chronic lung condition, and his rejection of the miner's pulmonary function study results due to illegibility, despite the fact that the record contained the original legible tracings and the administering physician did not question the reliability of the study, which was contemporaneously validated by reviewing expert Dr. Gaziano.[3] Decision and Order on Remand at 5-8; *see generally Lucostic v. United States Steel Corp.*, 8

[3] While employer and the Director argue that the administrative law judge improperly inferred that Dr. Tuteur's review of the medical evidence of record was neither comprehensive nor complete, any error is harmless inasmuch as the administrative law judge provided valid alternative reasons for discounting Dr. Tuteur's opinion. *See generally Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

BLR 1-46 (1985). An administrative law judge does not have to accept the opinion or theory of any given medical witness, but may weigh the evidence and draw his own conclusions, and the Board is not empowered to reweigh the evidence. *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997). The administrative law judge's finding that the evidence of record was insufficient to satisfy employer's burden of establishing rebuttal at Section 727.203(b)(3), (4), is supported by substantial evidence and is affirmed. Consequently, we affirm the administrative law judge's award of benefits.[4]

[4] We also reject, as unsupported by the record, employer's argument that the administrative law judge's intransigence and bias necessitate reassignment of this case to a different administrative law judge. *See* Employer's Reply Brief at 6. Adverse rulings, by themselves, are not sufficient to show bias on the part of the administrative law judge. *See generally Orange v. Island Creek Coal Co.*, 786 F.2d 724, 8 BLR 2-192 (6th Cir. 1986); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the Decision and Order on Remand of the administrative law judge awarding 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