BRB No. 99-0556 BLA

TILDA COLE (Widow of JOHN COLE) Claimant-Respondent v. EAST KENTUCKY COLLIERIES and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Respondent	)	DATE ISSUED: DECISION and ORDER

Appeal of the Second Decision and Order on Remand of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Billy J. Moseley (Law Office of Lawrence R. Webster), Pikeville, Kentucky, for claimant.

John D. Maddox (Arter & Hadden LLP), Washington, D.C., for employer.

Barry H. Joyner (Henry 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, 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 Second Decision and Order on Remand (93-BLA-0602) of Administrative Law Judge Paul A. Mapes awarding benefits 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). This case is before the Board for the third time. The miner filed a claim in March 1980. Director's Exhibit 1. The district director identified Ratliff Trucking Company (Ratliff) as the responsible operator and notified it of the miner's claim on May 6, 1981. Director's Exhibit 18. The miner died in April 1983. The miner's widow, claimant herein, filed a claim for survivor's benefits in April 1983. A hearing was conducted on June 28, 1985, at which testimony was elicited which suggested that Ratliff did not have the financial ability to assume liability for the payment of benefits. The case was remanded to the district director for further development of the responsible operator issue. Director's Exhibit 24.

On May 9, 1986, the district director dismissed Ratliff and identified employer as the responsible operator. *Id*. The case was returned to the Office of Administrative Law Judges for a hearing, but was subsequently twice remanded for reconsideration of the district director's identification of employer as the responsible operator. A hearing was conducted on the merits before Administrative Law Judge Robert S. Amery on June 25, 1993. In a Decision and Order issued in October 1993, Judge Amery determined that employer was the properly designated responsible operator, credited the miner with at least eighteen years of coal mine employment and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1), (2). Judge Amery further found that rebuttal was not established at Section 727.203(b) and, accordingly, awarded benefits as of June 1979.[1]

[1]Based on the filing date of the miner's claim, Judge Amery found it unnecessary to adjudicate the survivor's claim under 20 C.F.R. Part 718. *See* 20 C.F.R. §725.212. Inasmuch as the miner's claim was in payment status when claimant filed her survivor's claim, claimant is entitled to the benefit of the substantive regulations and presumptions available based upon the filing date of the miner's claim. Director's Exhibit 20; 30 U.S.C. §932(1); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

Both employer and the Director, Office of Workers' Compensation Programs (the Director), appealed the award of benefits to the Board. In *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996), the Board affirmed Judge Amery's length of coal mine employment finding and his findings pursuant to Sections 727.203(a)(2) and 727.203(b)(1)
as unchallenged on appeal. The Board also affirmed Judge Amery's finding that employer was the properly designated responsible operator and his findings that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(2) and (3). However, the Board vacated Judge Amery's finding that invocation of the interim presumption was established pursuant to Section 727.203(a)(1) and that rebuttal was precluded pursuant to Section 727.203(b)(4). The Board also vacated Judge Amery's onset date determination. Thus, the Board remanded the case for further consideration of rebuttal pursuant to Section 727.203(b)(4) as well as for consideration of the evidence relevant to determining the onset date for the commencement of benefits. In addition, the Board noted that invocation pursuant to Section 727.203(a)(1) need not be reconsidered on remand inasmuch as Judge Amery's invocation finding at Section 727.203(a)(2) had been affirmed.

On remand, the case was reassigned to Administrative Law Judge Paul A. Mapes (the administrative law judge) who found that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and further found that entitlement was precluded pursuant to 20 C.F.R. Part 718. Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and in *Cole v. East Kentucky Collieries*, BRB No. 97-1321 BLA (June 19, 1998)(unpub.), the Board vacated the administrative law judge's finding that the evidence was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and remanded the case to the administrative law judge for reconsideration of whether the evidence is sufficient to establish, by a preponderance of the evidence, both the absence of clinical pneumoconiosis and the absence of pneumoconiosis as defined by the Act, *i.e.*, the absence of any respiratory or pulmonary impairment arising out of coal mine employment, in accordance with the holding of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989).[2]

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[2]This case arises within the jurisdiction of the United States Court of Appeals for

On remand for the second time, the administrative law judge found that the x-ray interpretations, medical test results and physicians' opinions were insufficient to meet employer's burden of establishing the absence of clinical pneumoconiosis and that employer thus failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4). Accordingly, benefits were awarded commencing June 1979, the month in which the administrative law judge found that the miner became totally disabled due to pneumoconiosis. On appeal herein, employer contends that the administrative law judge erred in finding that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and also asserts that the prior finding of no rebuttal pursuant to Section 727.203(b)(3) should be vacated. In addition, employer argues that it was denied due process by a delay in the designation of a responsible operator and that the administrative law judge erred in failing to transfer liability for the payment of benefits to the Black Lung Disability Trust Fund (Trust Fund). Claimant responds, urging affirmance of the award of benefits. The Director has filed a response limited to opposing employer's argument that liability should transfer to the Trust Fund. Employer has also filed a reply brief wherein it reiterates the arguments set forth in its Petition for Review and brief.

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 evidence, is rational, and is in accordance with law. 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).

With respect to the issue of rebuttal, employer reiterates its arguments concerning Section 727.203(b)(3) for the purpose of preserving them for appeal. Employer's Brief at 17 n. 2. As the Director correctly contends in his response brief, the Board has previously addressed the propriety of Judge Amery's finding that the evidence failed to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) and rejected employer's multiple contentions to the contrary in its 1996 decision. *Cole*, BRB No. 94-0398 BLA, slip op. at 4-5. We held that Judge Amery acted within his discretion in according less weight to the opinions of the non-

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the Sixth Circuit, as the miner's qualifying coal mine employment occurred in the Commonwealth of Kentucky. Director's Exhibit 2; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989).

examining physicians, Drs. Broudy, Fino and Tuteur. *Id.* We rejected employer's contention that Judge Amery ignored medical opinions supportive of subsection (b)(3) rebuttal as Drs. Anderson, Page, O'Neill, and Cool all found some degree of pulmonary impairment, but Drs. Page, O'Neill, and Cool offered no opinion regarding its cause and although Dr. Anderson opined that the miner's total disability was due to smoking, his opinion was legally insufficient to meet employer's burden under Section 727.203(b)(3) to establish that pneumoconiosis played no role in causing the miner's disability. *Id.* We also rejected employer's contention that the administrative law judge mischaracterized the opinions of Drs. T.L. Wright, Penman, B. Wright, and Sutherland and noted these opinions did not meet employer's burden at Section 727.203(b)(3) to establish that pneumoconiosis played no role in causing the miner's disability. *Id.* Therefore, the Board's previous holdings on this issue constitute the law of the case and will not be disturbed. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Employer next contends that the administrative law judge erred in finding that the x-ray and medical opinion evidence was insufficient to establish rebuttal pursuant to Section 727.203(b)(4). In order to establish rebuttal of the interim presumption pursuant to subsection (b)(4), employer must establish by persuasive evidence that the miner has neither clinical pneumoconiosis nor legal pneumoconiosis as defined by the Act. 20 C.F.R. §727.202; *Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 9 BLR 2-221 (6th Cir. 1987); *see Tennessee Consolidated Coal Co. v. Crisp*, 866 F.2d 179, 12 BLR 2-121 (6th Cir. 1989). Pursuant to Section 727.203(b)(4), the administrative law judge found that employer did not establish the absence of clinical pneumoconiosis by x-ray, medical tests or medical opinion evidence. He found that the x-ray evidence was in equipoise and, after noting that Drs. Fino and Broudy failed to explicitly opine that clinical pneumoconiosis was absent, found that none of the medical reports unequivocally ruled out the possibility of clinical pneumoconiosis. Second Decision and Order on Remand at 4-9.

Employer contends that the administrative law judge erred in stating that Dr. White's radiological qualifications were "similar" to those of Drs. Kim and Poulos, which could have affected his conclusion that "the x-ray evidence [was] equally balanced and therefore inconclusive" and thus did not assist employer in establishing the absence of clinical pneumoconiosis. Employer also asserts that the negative x-ray evidence is "overwhelmingly negative" and not equally balanced as the administrative law judge found.[3] Employer's Brief at 21. The administrative law

[3]The record contains nineteen readings of eight x-rays. There are seven positive readings and twelve negative readings. Of the positive readings, one is by a Board-certified radiologist and B-reader, Dr. Brandon, and one by a Board-certified radiologist, Dr. White. Of the negative readings, nine are by Board-certified

judge, noting the Board's remand instructions regarding resolving the conflicts in the x-ray evidence, found that since there were both positive and negative readings by the mostly highly qualified readers, the x-ray evidence was in equipoise and that employer failed to carry its burden of proof in establishing the absence of clinical pneumoconiosis by x-ray evidence pursuant to Section 727.203(b)(4). *See Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988); Second Decision and Order on Remand at 6. As the administrative law judge properly considered both the quality and quantity of the x-ray evidence, we reject employer's contention that the administrative law judge was required to defer to the numerical superiority of the negative x-ray readings. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Moreover, we reject employer's contention that in determining that the x-ray evidence was equally balanced, the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), since he adequately set forth the rationale for his determination. *Id.*

In addition, the administrative law judge also reevaluated the medical opinions and noted that he had previously discounted the opinions of five of the six physicians who had relied on positive x-ray interpretations in making their diagnoses and that the opinions of Drs. Broudy and Fino were found to be convincing since they were consistent with the administrative law judge's prior conclusion that the x-ray evidence was negative. Second Decision and Order on Remand at 7-8. Upon further review of the opinions in accordance with the Board's remand instructions, the administrative law judge found that Drs. Fino and Broudy did not rule out the possibility of clinical pneumoconiosis. *Id.* The administrative law judge thus found that the reports did not establish rebuttal pursuant to subsection (b)(4). *Id.* Inasmuch as the administrative law judge reconsidered and reweighed all of the x-ray and medical opinion evidence as instructed and rationally concluded that the preponderance of the evidence did not establish the absence of the existence of clinical pneumoconiosis, we affirm his findings that the evidence was insufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(4) and the award of benefits.[4] *See Clark*, *supra*; *Wetzel v. Director, OWCP,* 8 BLR 1-139 (1985); *Lucostic v. United States Steel Corp. 8 BLR 1-46 (1985)*.

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radiologists and B-readers, Drs. Combs, Poulos, Westerfield and Kim, and two are by a B-reader, Dr. Fino. October 1, 1993, Decision and Order - Awarding Benefits at 3-4.

[4]The award of benefits applies to both the miner's claim and the survivor's claim. *See* n.1, *supra*. Contrary to the assertion made by the Director, Office of

Finally, we will address the procedural issue raised in employer's appeal. Employer contends that the administrative law judge erred in finding that it was the responsible operator, arguing that it was denied procedural due process due to the six year delay in notifying employer of the claim against it. Employer asserts that the delay prejudiced its ability to present a meaningful defense under Section 727.203(b)(3), as the miner died before employer was aware of the claim. Employer cites *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 180, 21 BLR 2-545, 2-555 (4th Cir. 1999), *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), and *Venicassa v. Consolidation Coal Co.*, 137 F.3d 197, 21 BLR 2-277 (3d Cir. 1998), in support of its argument. The Director suggests that employer waived any allegation of a due process violation, as it did not raise this argument until the Board's most recent remand of the case to the administrative law judge. The Director also asserts that the cases cited by employer are inapposite on the ground that the prejudice to the properly identified responsible operator which occurred in *Borda*, *Lockhart*, and *Venicassa* is not present in this case.

Workers' Compensation Programs, the survivor's claim is in the record. Director's Exhibit 24. In addition, both Judge Amery and the administrative law judge stated that there were two claims at issue in the present case.

Inasmuch as the principle that liability may transfer to the Trust Fund based upon actions by the district director which result in prejudice to the responsible operator was not fully explicated until the issuance of the decisions cited by employer, we decline to hold that employer waived its due process argument. However, based upon the fact that the administrative law judge did not render any findings as to whether actions attributable to the district director resulted in substantial prejudice to employer and, therefore, a violation of due process, we remand the case to the administrative law judge for consideration of this issue in light of the relevant case law including the recent decision of the United States Court of Appeals for the Sixth Circuit in *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000).[5]

[5]In *Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 22 BLR 2-25 (6th Cir. 2000), the Sixth Circuit cited *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302 (4th Cir. 1998), in support of the proposition that an employer need not demonstrate actual prejudice in order for liability to transfer to the Trust Fund when a core violation of due process occurs which prevents an employer from having its fair day in court.

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

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge