BRB No. 99-0843 BLA

LEOTHA B. LOWE (Widow of CLAUDE W. LOWE)	)	
Claimant-Respondent	)	
v.	)	
HOBBS BROTHERS COAL COMPANY	)	DATE ISSUED:_____
and	)	
OLD REPUBLIC INSURANCE COMPANY	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Sparkle Bonds (The Virginia Black Lung Association), Richlands, Virginia, for claimant.

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

Edward Waldman (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, SMITH,

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

PER CURIAM:

Employer appeals the Decision and Order (98-BLA-0206 and 98-BLA-0207) of Administrative Law Judge Pamela Lakes Wood 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). The instant case involves a miner's claim filed on October 6, 1975 and a survivor's claim filed on October 7, 1996. Claimant[1] sought modification of the denial of the miner's claim.[2] After

[1]Claimant is the surviving spouse of the deceased miner who died on February 8, 1996. Director's Exhibit 8 (Survivor).

[2]The relevant procedural history of the instant case is as follows: The miner filed a claim for benefits on October 6, 1975. Director's Exhibit 1. In the initial decision, Administrative Law Judge V. M. McElroy, after crediting the miner with thirty-five years of coal mine employment, found that the pulmonary function study evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). Director's Exhibit 73. However, Judge McElroy found that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). *Id.* Judge McElroy also found that the miner was not entitled to benefits under 20 C.F.R. Part 410, Subpart D and 20 C.F.R. §410.490. *Id.* Accordingly, Judge McElroy denied benefits. *Id.* By Decision and Order dated April 29, 1988, the Board affirmed, *inter alia*, Judge McElroy's finding that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *Lowe v. Hobbs Brothers Coal Co.*, BRB No. 86-2464 BLA (Apr. 29, 1988) (unpublished); Director's Exhibit 80. The Board, therefore, affirmed Judge McElroy's denial of benefits. *Id.*

The miner subsequently requested modification of his denied claim. Director's Exhibit 81. In a Decision and Order dated October 24, 1991, Administrative Law Judge Giles J. McCarthy found that the miner failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Judge McCarthy, therefore, denied the miner's request for modification. Director's Exhibit 105.

The miner subsequently filed a second request for modification. Director's Exhibit 107. In a Decision and Order dated March 24, 1993, Administrative Law

crediting the miner with thirty-five years of coal mine employment, the administrative law judge found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis. The administrative law judge, therefore, found that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Having found the evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310, the administrative law judge considered the miner's 1975 claim on the merits. The administrative law judge found that the pulmonary function study evidence was sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge further found that the evidence was

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Judge Edward J. Murty, Jr. found that the miner failed to demonstrate a change in conditions or a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Judge Murty, therefore, denied the miner's request for modification. Director's Exhibit 148.

The miner subsequently filed a third request for modification. Director's Exhibit 149. In a Decision and Order dated May 16, 1995, Judge Murty found that the evidence was insufficient to establish the existence of pneumoconiosis. Judge Murty, therefore, denied the miner's request for modification. Director's Exhibit 165.

The miner died on February 8, 1996. Director's Exhibit 8 (Survivor). Claimant filed a survivor's claim on March 22, 1996. Director's Exhibit 1 (Survivor). Claimant filed a request for modification of the miner's claim on March 29, 1996. Director's Exhibit 167.

In a Proposed Decision and Order dated April 18, 1997, the district director denied claimant's request for modification of the miner's claim. Director's Exhibit 169. In a separate Proposed Decision and Order dated April 18, 1997, the district director also denied claimant's survivor's claim. Director's Exhibit 39 (Survivor).

Both cases were forwarded to the Office of Administrative Law Judges for a hearing on June 7, 1997. Director's Exhibit 173; Director's Exhibit 46 (Survivor).

In a Motion dated March 3, 1998, claimant requested that her survivor's claim be decided on the record. By Order dated March 9, 1998, Administrative Law Judge Pamela Lakes Wood (the administrative law judge) canceled the hearing. By Order dated May 18, 1998, the administrative law judge consolidated the miner's claim and the survivor's claim. The administrative law judge issued an "Erratum" on May 19, 1998 clarifying the state of the evidence submitted in connection with the two claims.

insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1)-(4). Accordingly, the administrative law judge awarded benefits on the miner's claim. In his consideration of the merits of 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 claimant's survivor's claim. The administrative law judge, however, found that claimant was entitled to derivative survivor's benefits. On appeal, employer argues that multiple petitions for modification are barred by *res judicata* and collateral estoppel. Employer also contends that the administrative law judge erred in finding a mistake in a determination of fact pursuant to 20 C.F.R. §725.310. Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §727.203(b)(3) and (b)(4). Employer finally contends that the administrative law judge erred in his determination regarding the date of entitlement to benefits. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that multiple requests for modification are not barred by *res judicata* and collateral estoppel. The Director further contends that the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3) does not comply with the Administrative Procedure Act. In a combined reply, employer reiterates its previous contentions.

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).

Employer, asserting that modification is only available within one year of the first rejection of a claim, initially argues that claimant's request for modification of the miner's claim is barred by the doctrines of *res judicata* and collateral estoppel. We disagree. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that a new modification petition may be filed within a year of the denial of a prior one. *See Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *see also Garcia v. Director, OWCP*, 12 BLR 1-24 (1988) (The one year period for modification set forth in Section 725.310 begins to run anew from the date of each denial). We, therefore, reject employer's contention that claimant's fourth request for modification was barred by the doctrines of *res judicata* and collateral estoppel.

Employer next argues that the administrative law judge erred in finding the evidence sufficient to establish modification pursuant to 20 C.F.R. §725.310. Based upon her crediting of the autopsy prosector's opinion, the administrative law judge

found that the autopsy evidence was sufficient to establish the existence of pneumoconiosis. Decision and Order at 14. The administrative law judge, therefore, found that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310.[3] *Id.*

Employer contends that the administrative law judge erred in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis. Employer specifically argues that the administrative law judge erred in crediting Dr. Stefanini's opinion based upon his status as the autopsy prosector. We agree. When evaluating the pathology-related evidence relevant to the existence of pneumoconiosis, an administrative law judge must first determine the credibility and weight of the reviewing pathologists' contrary opinions before giving complete deference to a doctor's opinion based upon his status as the autopsy prosector. *Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20 (1992). Should an administrative law judge credit the opinion of a physician based upon his status as an autopsy prosector, she must provide an adequate rationale for concluding that the prosector's additional gross examination provided him with an advantage over the reviewing physicians under the particular facts of the case. *Id.* In the instant case, the administrative law judge did not provide a rationale for concluding that the

[3]The miner's claim was previously denied based upon the Board's affirmance of Judge McElroy's finding that the evidence was sufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *See Lowe v. Hobbs Brothers Coal Co.*, BRB No. 86-2464 BLA (Apr. 29, 1988) (unpublished); Director's Exhibit 80. Consequently, a finding that the autopsy evidence was sufficient to establish the existence of pneumoconiosis would call into question the previous finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4).

additional gross examination conducted by Dr. Stefanini provided him with any advantage over the reviewing physicians.[4]

[4]Drs. Jones, Crouch, Kleinerman and Hansbarger reviewed the autopsy slides. While Dr. Jones opined that the miner suffered from pneumoconiosis, Director's Exhibit 38 (Survivor), Drs. Kleinerman, Crouch and Hansbarger concluded that the miner did not suffer from the disease. Employer's Exhibits 1, 10, 11. The administrative law judge identified Drs. Stefanini, Jones, Kleinerman, Crouch and Hansbarger as Board-certified pathologists. Decision and Order at 8-10.

We also agree with employer that the administrative law judge mischaracterized the autopsy evidence. Contrary to the administrative law judge's characterization, there is no indication that Drs. Crouch, Kleinerman and Hansbarger improperly incorporated a requirement that the miner's pneumoconiosis be of clinical significance before it could be diagnosed.[5] *See* Decision and Order at 18.

In his consideration of the autopsy evidence, the administrative law judge stated that while Dr. Kleinerman suggested that there was an agreement as to the criteria to be utilized in diagnosing the existence of pneumoconiosis, the disagreement between Board-certified pathologists in the instant case suggested that this was not accurate. Decision and Order at 18. However, the mere fact that physicians may disagree as to whether a particular miner suffers from pneumoconiosis does not mean that there are not accepted criteria for the diagnosis of the disease. Dr. Kleinerman testified that a committee of pathologists, sponsored by the National Institute for Occupational Safety and Health, published a treatise in 1979 in which the necessary pathological criteria for the diagnosis of coal workers' pneumoconiosis were set out. Employer's Exhibit 7 at 23. Dr. Kleinerman, in fact, was chairman of the committee.[6] *Id.* at 24.

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[5]Dr. Crouch clearly explained that the changes that he observed on the autopsy slides were "considered insufficient for a diagnosis of simple coal workers' pneumoconiosis." Director's Exhibit 10 (Survivor). Dr. Kleinerman opined that the miner did not have "any pathologically determinable pneumoconiosis." Director's Exhibit 37 (Survivor); Employer's Exhibit 11. Dr. Kleinerman opined that the miner did not suffer from simple coal workers' pneumoconiosis, simple nodular silicosis or complicated pneumoconiosis. *Id.* Dr. Kleinerman further opined that since there was "no evidence of pneumoconiosis of any kind," the miner's coal mine dust inhalation and deposition did not cause, contribute to, or hasten his death. *Id.* Although Dr. Hansbarger diagnosed anthracotic pigmentation of the lung, Dr. Hansbarger further explained that the findings of anthracotic pigmentation of the lung were "not of a degree sufficient to warrant the diagnosis of coal workers' pneumoconiosis." Employer's Exhibit 1.

[6]The article, entitled "Pathology Standards for Coal Workers' Pneumoconiosis, Report of the Pneumoconiosis Committee of the College of American Pathologists to the National Institute for Occupational Safety and Health" was published in the Archives of Pathology and Laboratory Medicine in 1979. A copy of the article is contained in the record as an exhibit to Dr. Kleinerman's March 13, 1998 deposition. *See* Employer's Exhibit 7.

Dr. Fino testified that:

> The gold standard in diagnosing coal workers' pneumoconiosis was published in the Archives of Pathology and Laboratory Medicine in 1979. The chairman of the committee that prepared that report was Dr. Kleinerman. So Dr. Kleinerman, if you will, is the grandfather of the pathologic diagnosis of pneumoconiosis in terms of setting up the standards.

Employer's Exhibit 8 at 17-18.

Dr. Jones also referenced the article in his February 9, 1997 report. *See* Director's Exhibit 38 (Survivor).

In finding the autopsy evidence sufficient to establish the existence of pneumoconiosis, the administrative law judge also noted that the miner's chronic obstructive pulmonary disease and emphysema would qualify as pneumoconiosis if they were caused or aggravated by the miner's coal dust exposure. Decision and Order at 14 n.16. The administrative law judge, however, did not identify any pathologist who opined that the miner's chronic obstructive pulmonary disease or emphysema was caused or aggravated by his coal dust exposure.

In light of the above-referenced errors, we vacate the administrative law judge's finding that the autopsy evidence was sufficient to establish the existence of pneumoconiosis. In light of this holding, we also vacate the administrative law judge's finding of modification pursuant to 20 C.F.R. §725.310 and remand the case for further consideration.[7]

The administrative law judge found that there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 based upon his finding that the newly submitted autopsy evidence was sufficient to establish the existence of pneumoconiosis. On remand, the administrative law judge should also consider whether the newly submitted autopsy evidence of pneumoconiosis is sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310. *See Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156

[7]On January 5, 1998, claimant submitted Dr. Kahn's April 23, 1997 consultation report to the Office of Administrative Law Judges. Claimant requested that this report be admitted into the record. In his April 23, 1997 report, Dr. Kahn, based upon his review of the miner's autopsy slides and the autopsy report, diagnosed pulmonary emphysema, simple coal workers' pneumoconiosis, focal atelectasis and bronchopneumonia. It does not appear that the administrative law judge ever formally admitted this evidence into the record. Consequently, the administrative law judge, on remand, should clarify whether this evidence has been admitted into the record.

(1990), *modified on recon.*, 16 BLR 1-71 (1992).

Turning to the merits of the miner's claim, 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).[8] The Director contends that the administrative law judge's subsection (b)(3) rebuttal analysis fails to comply with the requirements of the Administrative Procedure Act. We agree with the Director. The administrative law judge's subsection (b)(3) rebuttal analysis does not comply with the Administrative Procedure Act, specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge failed to provide a basis for crediting the opinions of Drs. Rasmussen, Jones and Patel over those of Drs. Crouch, Kleinerman, Hansbarger, Fino, Castle and Garzon.[9] *See* Decision and Order at 17-18. Consequently, the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(3) is vacated.

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[8]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).

[9]Employer also accurately notes that although the administrative law judge discussed Dr. Rasmussen's reliance upon "epidemiological studies," the administrative law judge failed to address the significance of statements from Drs. Castle and Fino questioning the validity of the studies. *See* Director's Exhibits 129, 131.

Employer also challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(4). In light of the administrative law judge's above-referenced errors in finding the autopsy evidence sufficient to establish the existence of pneumoconiosis, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(4).

Finally, employer challenges the administrative law judge's determination that claimant was entitled to benefits commencing on October 1, 1975. If a miner is found entitled to benefits, he is entitled to benefits beginning with the month of onset of his total disability due to pneumoconiosis. See 20 C.F.R. §725.503(b); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). Consequently, should an administrative law judge find a miner entitled to benefits, he must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). After concluding that the date of onset was "unclear," the administrative law judge stated that the miner appeared to have been totally disabled at the time that he filed his claim for benefits in 1975. Decision and Order at 19. The administrative law judge based this finding on Dr. Claustro's finding in October of 1975 that the miner could not perform light duty work. *Id.*; Director's Exhibit 13. The administrative law judge, therefore, found that benefits should commence as of October 1, 1975, the date that the miner's claim was filed. *Id.*

We agree with employer that the administrative law judge failed to adequately address whether Dr. Claustro's opinion was sufficiently reasoned.[10] Inasmuch as the administrative law judge failed to properly address whether Dr. Claustro's opinion was sufficient to establish that claimant was totally disabled due to pneumoconiosis, we vacate the administrative law judge's determination regarding

[10]In a report dated October 15, 1975, Dr. Claustro diagnosed "chronic obstructive pulmonary disease probably pneumoconiosis [with] emphysema." Director's Exhibit 13. Dr. Claustro related the miner's pulmonary condition to his coal dust exposure. *Id.* Dr. Claustro further opined that the miner was unable to perform light jobs like mowing or climbing five steps without shortness of breath. *Id.*

Although Dr. Claustro conducted a pulmonary function study on October 15, 1975, *see* Director's Exhibit 7, Dr. O'Neill questioned the reliability of the study. *See* Director's Exhibit 49. In his August 29, 1986 Decision and Order, Administrative Law Judge V. M. McElroy accepted Dr. O'Neill's conclusion that the miner's October 15, 1975 pulmonary function study was defective. *See* Director's Exhibit 73.

the date of entitlement to benefits. On remand, should the administrative law judge find the miner entitled to benefits, she must determine whether the medical evidence establishes when the miner became totally disabled due to pneumoconiosis. *Rochester & Pittsburgh Coal Co. v. Krecota*, 868 F.2d 600, 12 BLR 2-178 (3d Cir. 1989). If the medical evidence does not establish the date on which the miner became totally disabled, then the miner is entitled to benefits as of his filing date, unless there is credited evidence which establishes that the miner was not totally disabled at some point subsequent to his filing date. *Lykins*, *supra*.

Inasmuch as no party challenges the administrative law judge's finding that the evidence is insufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c), this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the administrative law judge's denial of claimant's 1996 survivor's claim on the merits. However, should the administrative law judge, on remand, award benefits on the miner's claim, claimant is entitled to derivative survivor's benefits. *See* 30 U.S.C. §901(a); 20 C.F.R. §§725.212(a), 718.1(a); *Smith v. Camco Mining Inc.*, 13 BLR 1-17 (1989).

Accordingly, the administrative law judge's Decision and Order awarding benefits is 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

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge