BRB No. 10-0730 BLA

RENA GABBARD (o/b/o CLYDE GABBARD, deceased)	)	
Claimant-Respondent	)	
v.	)	
MOUNTAIN CLAY, INCORPORATED	)	
and	)	
	)	DATE ISSUED: 09/29/2011
LIBERTY MUTUAL 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 on Remand of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (03-BLA-0118) of Administrative Law Judge Larry S. Merck awarding benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C.

§§921(c)(4) and 932(*l*)) (the Act).[1] This case, involving a miner's claim filed in 1974, has a lengthy and complicated procedural history.

The miner filed a claim for benefits on January 18, 1974. In a Decision and Order dated July 30, 1990,[2] Administrative Law Judge Charles W. Campbell found, *inter alia*, that the miner failed to establish the existence of pneumoconiosis, and denied benefits. The Board subsequently affirmed Judge Campbell's denial of benefits. *Gabbard v. Mountain Clay, Inc.*, BRB No. 90-2112 BLA (Jan. 13, 1993) (unpub.).

The miner filed a second claim on July 15, 1993. Since the miner's 1993 claim was filed within one year of the issuance of the last denial of his 1974 claim, the 1993 claim constituted a timely request for modification of the 1974 claim pursuant to 20 C.F.R. §725.310 (2000). *See Stanley v. Betty B Coal Co.*, 13 BLR 1-72 (1990). The district director denied the miner's request for modification on September 1, 1993.

On November 24, 1993, the miner submitted new medical evidence. Afterward, the miner filed another claim for benefits on January 9, 1995. In subsequent decisions, the miner's 1995 claim was treated as a duplicate claim.[3] However, in its most recent consideration of this case, the Board held that the miner's submission of new evidence on November 24, 1993 constituted a request for modification of his 1974 claim. *See C.G.* [*Gabbard*] *v. Mountain Clay, Inc.*, BRB No. 08-0666 BLA, slip op. at 7 (June 18, 2009) (unpub.). The Board also affirmed Administrative Law Judge Thomas F. Phalen, Jr.'s finding, in his May 15, 2008 decision, that the new x-ray evidence, *i.e.*, the evidence submitted after the district director's September 1, 1993 denial of benefits, established the existence of clinical pneumoconiosis, thereby establishing a change in conditions pursuant to 20 C.F.R. §725.310 (2000). *Gabbard*, slip op. at 10. The Board further

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2010). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 version of the Code of Federal Regulations.

[2] Almost sixteen years passed between the filing of the miner's claim and a decision by an administrative law judge, because the case was remanded to the district director on several occasions for investigation and designation of the responsible operator.

[3] For a complete procedural history of this case, *see Gabbard v. Mountain Clay, Inc.*, BRB Nos. 05-0993 BLA and 01-0875 BLA (Nov. 29, 2006) (unpub.).

affirmed Judge Phalen's finding, on the merits, that the x-ray and medical opinion evidence established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (4). *Gabbard.*, slip op. at 10-11. However, the Board vacated Judge Phalen's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4),[4] and remanded the case for further consideration. *Gabbard*, slip. op. at 11-15. The Board also vacated Judge Phalen's findings pursuant to 20 C.F.R. §718.204(b)(2)(i), (iv) and (c). *Gabbard*, slip op. at 15-23.

On remand, due to Judge Phalen's unavailability, the case was reassigned, without objection, to Administrative Law Judge Larry S. Merck (the administrative law judge). In a Decision and Order on Remand dated August 2, 2010, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge also found that the evidence established total disability pursuant to 20 C.F.R. §718.204(b), and that the miner's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). In addition to finding that the miner was entitled to benefits under 20 C.F.R. Part 718, the administrative law judge alternatively found that the miner was also entitled to benefits under 20 C.F.R. Part 727. Specifically, the administrative law judge credited the miner with twenty years of coal mine employment,[5] and found that the x-ray evidence established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). The administrative law judge further found that employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, the administrative law judge awarded benefits.

[4] Ordinarily, the Board's affirmance of an administrative law judge's finding that the x-ray and medial opinion evidence established the existence of clinical pneumoconiosis at Section 718.202(a)(1), (4) would obviate the need for the Board to address the administrative law judge's separate finding regarding whether the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4). *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the Board recognized that Administrative Law Judge Thomas F. Phalen, Jr.'s finding of legal pneumoconiosis was critical to his disability causation finding at 20 C.F.R. §718.204(c). Consequently, the Board found it necessary to review Judge Phalen's finding of legal pneumoconiosis pursuant to Section 718.202(a)(4).

[5] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

On appeal, employer contends that the administrative law judge erred in adjudicating the miner's claim under 20 C.F.R. Part 727. Employer also argues that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b), (c). Neither claimant[6] nor the Director, Office of Workers' Compensation Programs, has filed a response 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 rational, supported by substantial evidence, and 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).

Part 727 Entitlement

We initially reject employer's contention that the administrative law judge erred in adjudicating the miner's claim under 20 C.F.R. Part 727. Because the miner's 1974 claim was filed prior to April 1, 1980, it is subject to review pursuant under 20 C.F.R. Part 727. 20 C.F.R. 718.1(b). Moreover, in light of the administrative law judge's finding of twenty years of coal mine employment,[7] and the Board's previous affirmance of Judge Phalen's finding that the x-ray evidence established the existence of clinical pneumoconiosis, the administrative law judge properly found that the evidence established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1). Decision and Order at 36 n.15.

Section 727.203(b)(1) and (b)(4) Rebuttal

Because the miner's last day of coal mine employment was on November 26, 1973, Director's Exhibit 1, employer cannot establish rebuttal pursuant to 20 C.F.R. §727.203(b)(1). Moreover, the administrative law judge's finding of invocation pursuant to 20 C.F.R. §718.203(a)(1) precludes a finding of rebuttal pursuant to 20 C.F.R. §727.203(b)(4). *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988).

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[6] The miner died on April 30, 2006. Decision and Order on Remand at 1. Claimant, the miner's surviving spouse, is pursuing the miner's claim.

[7] The Board previously affirmed Administrative Law Judge Paul H. Teitler's finding that the miner had twenty years of coal mine employment. *Gabbard*, BRB Nos. 05-0993 BLA and 01-0875 BLA, slip. op. at 5 n.4.

Section 727.203(b)(2) Rebuttal

In order to establish rebuttal pursuant to 20 C.F.R. §727.203(b)(2), the party opposing entitlement must establish that the miner is able to do his usual coal mine work, without regard to cause. *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987). Subsection (b)(2) rebuttal is not established merely by proving that the miner is not totally disabled by a respiratory impairment. *Id.*

The administrative law judge considered the medical opinions of Drs. Vaezy, Vuskovich, Baker, Dahhan, Jarboe, Wright, Fino, Tuteur, and Broudy. Because neither Dr. Vaezy nor Dr. Vuskovich addressed whether the miner was totally disabled,[8] the administrative law judge accurately determined that their opinions are not relevant to the issue of whether the miner was totally disabled. Decision and Order on Remand at 13.

Dr. Broudy opined that the miner retained the respiratory capacity to perform his usual coal mine employment. Director's Exhibit 70. However, because Dr. Broudy opined only that the miner was not totally disabled from a pulmonary standpoint, his opinion does not support a finding of subsection (b)(2) rebuttal. *York*, 819 F.2d at 137, 10 BLR at 2-103.

The administrative law judge accurately determined that Drs. Baker, Dahhan, and Jarboe opined that the miner was totally disabled from a pulmonary impairment.[9] Decision and Order on Remand at 14-18. Consequently, the opinions of these physicians do not support a finding of subsection (b)(2) rebuttal. Similarly, because Drs. Wright, Fino, and Tuteur opined that the miner was totally disabled, albeit from non-respiratory problems, their opinions are also insufficient to assist employer in establishing subsection (b)(2) rebuttal.[10] *York*, 819 F.2d at 137, 10 BLR at 2-103.

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[8] Although Dr. Vaezy diagnosed a moderate pulmonary impairment, he did not address whether the miner was totally disabled. Director's Exhibits 6, 7. Dr. Vuskovich opined that the miner's impairment was "secondary to therapy for colon cancer causing pleural effusion," but did not address whether the miner was capable of performing his usual coal mine employment. Director's Exhibit 33.

[9] Dr. Baker opined that the miner did not retain the respiratory capacity to perform the work of a coal miner. Claimant's Exhibit 1. Dr. Dahhan opined that the miner did not retain the respiratory capacity to return to his past coal mine work. Director's Exhibit 70 (Dahhan Deposition) at 12. Dr. Jarboe opined that the miner was totally disabled from a respiratory standpoint. Employer's Exhibit 1.

[10] Dr. Wright opined that the miner could not perform the work of a coal miner, when "considering his heart disease and other infirmities." Director's Exhibit 27.

Because it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence did not establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(2).

Subsection (b)(3) Rebuttal

In order to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must prove that the miner's total disability did not arise in whole or in part out of coal mine employment. The United States Court of Appeals for the Sixth Circuit has held that an employer has satisfied the requirements of this subsection when it shows that pneumoconiosis played no part in causing a miner's disability. 20 C.F.R. §727.203(b)(3); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *cert. denied*, 471 U.S. 1116 (1985).

Relevant to rebuttal at Section 727.203(b)(3), the administrative law judge considered the opinions of Drs. Vaezy, Vuskovich, Baker, Dahhan, Jarboe, Wright, Fino, Tuteur, and Broudy.

Dr. Wright opined that the miner's pulmonary impairment "may be related to effort and obesity." Director's Exhibit 27. However, the administrative law judge found that Dr. Wright did not adequately explain why the miner's twenty years of coal mine dust exposure did not contribute, along with his obesity, to his pulmonary impairment. The administrative law judge, therefore, properly accorded less weight to Dr. Wright's opinion. *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 22.

Dr. Vuskovich opined that the miner's pulmonary impairment was due to colon cancer therapy causing pleural effusion, not to his coal mine employment. Director's Exhibit 33. However, the administrative law judge permissibly questioned the reasoning underlying Dr. Vuskovich's opinion, noting that the physician failed to explain his opinion in light of the fact that the miner's pulmonary symptoms existed both before and

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Although Dr. Fino opined that the miner retained the respiratory capacity to perform his usual coal mine employment, he opined that the miner's other conditions, namely, a heart attack, triple bypass operation, cancer, high blood pressure, and diabetes, would prevent him from returning to his usual coal mine employment. Director's Exhibit 70 (Fino Deposition) at 13. Dr. Tuteur opined that the miner was totally and permanently disabled from returning to his coal mine work because of his severe coronary artery disease, obesity, diabetes, stroke, and occasional elevated high blood pressure. Employer's Exhibit 2.

after his chemotherapy.[11] *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order on Remand at 24.

The administrative law judge also accorded less weight to the opinions of Drs. Dahhan, Jarboe, and Tuteur, that the miner's coal mine dust exposure did not contribute to his pulmonary impairment. These doctors based their opinions, in part, on the fact that the miner showed no signs of pulmonary impairment in 1988, fifteen years after ceasing his coal mine employment. Director's Exhibit 70 (Dahhan Deposition) at 13; Employer's Exhibits 1-2. The administrative law judge permissibly discounted their opinions, finding that their views conflicted with the medical science credited by the Department of Labor, which holds that pneumoconiosis may be latent and progressive. Decision and Order on Remand at 27-28, 30-32 *citing* 20 C.F.R. §718.201(c); 65 Fed. Reg. 79,971 (Dec. 20, 2000).

Dr. Fino opined that the miner did not suffer from a respiratory impairment. Director's Exhibit 70 (Fino Deposition) at 13. The administrative law judge accorded less weight to Dr. Fino's assessment because he found that Dr. Fino improperly discounted the results of two qualifying pulmonary function studies conducted on January 24, 1995, and April 30, 1997. Decision and Order on Remand at 16. Because the administrative law judge permissibly determined that these pulmonary function studies are valid,[12] we affirm the administrative law judge's finding that Dr. Fino's

[11] The Board previously affirmed Judge Phalen's discrediting of Dr. Vuskovich's opinion for this same reason. *C.G.* [*Gabbard*] *v. Mountain Clay, Inc.*, BRB No. 08-0666 BLA, slip op. at 7 (June 18, 2009) (unpub.).

[12] Although Drs. Fino and Jarboe, two Board-certified internists, invalided the miner's January 24, 1995 qualifying pulmonary function study, Director's Exhibit 70, the administrative law noted that two equally qualified physicians, Drs. Kraman and Tuteur, also reviewed the study, and determined that the results were valid. Decision and Order on Remand at 10; Director's Exhibit 5; Employer's Exhibit 2. Moreover, the administrative law judge noted that Dr. Vaezy, the administering physician, and also a Board-certified internist, did not question the validity of the study. Decision and Order on Remand at 10; Director's Exhibits 6, 7. Given the validation by Dr. Vaezy, the administering physician, and the supporting validations provided by Drs. Kraman and Tuteur, the administrative law judge permissibly found that there was no basis for finding that the study was invalid. *See Siegel v. Director, OWCP*¸ 8 BLR 1-156 (1985).

Dr. Fino also invalidated the miner's April 30, 1997 qualifying pulmonary function study. Director's Exhibit 70. However, Dr. Baker, the physician who

opinion regarding the extent of the miner's pulmonary impairment was not well-reasoned. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155; *Lucostic*, 8 BLR at 1-47.

Dr. Broudy opined that the miner did not suffer from "any impairment arising from the inhalation of coal mine dust based, in part, on a 1988 pulmonary function study showing only a "slight abnormality." The administrative law judge permissibly discounted Dr. Broudy's opinion as unreasoned, because the physician also reviewed a 1995 qualifying pulmonary function study, but did not explain why this more recent study was not a valid indicator of a pulmonary impairment. *See Tenn. Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Clark*, 12 BLR at 1-155; Decision and Order on Remand at 17; Director's Exhibit 70. Because a review of Dr. Broudy's opinion supports the administrative law judge's credibility determination, it is affirmed. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005).

The administrative law judge accurately determined that Drs. Vaezy and Baker opined that the miner's pulmonary impairment was due to his pneumoconiosis.[13] Consequently, the opinions of these physicians do not support a finding of subsection (b)(3) rebuttal.

It is within the purview of the administrative law judge to weigh the evidence, draw inferences, and determine credibility. *Crisp*, 866 F.2d at 185, 12 BLR at 2-129. Because substantial evidence supports the administrative law judge's finding that employer failed to establish rebuttal of the presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(b)(3), this finding is affirmed. *See*

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administered the study, did not question its validity. Director's Exhibit 34. Moreover, the administrative law judge accurately noted that Dr. Tuteur also validated the results of this study. Employer's Exhibit 2. Although Dr. Jarboe agreed with Dr. Tuteur that this study was not "completely valid," the administrative law judge noted that Dr. Jarboe explained that, even if the study had been perfectly performed, it would still have "demonstrated a significant respiratory impairment." Decision and Order on Remand at 11; Employer's Exhibit 1. The administrative law judge, therefore, permissibly found that the miner's qualifying April 30, 1997 pulmonary function study was a valid indicator of the miner's pulmonary function.

[13] Dr. Vaezy attributed the miner's moderate pulmonary impairment to his coal mine dust exposure, arteriosclerotic heart disease, and obesity. Director's Exhibits 6, 7. Dr. Baker attributed the miner's pulmonary disability to his coal mine dust exposure and cigarette smoking. Claimant's Exhibit 1.

Cornett v. Benham Coal, Inc., 227 F.3d 569, 576, 22 BLR 2-107, 2-120 (6th Cir. 2000). We, therefore, affirm the administrative law judge's finding that the miner is entitled to benefits under 20 C.F.R. Part 727.[14]

Onset Date

Employer contends that the administrative law judge erred in finding that the miner is entitled to benefits as of November 1993, the month in which he filed his request for modification. In a case where a miner has established modification based upon a change in conditions, benefits are payable to the miner beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, provided that no benefits shall be payable for any month prior to the effective date of the most recent denial of the claim by a district director or administrative law judge. 20 C.F.R. §725.503(d)(2). Where the evidence does not establish the month of onset, benefits shall be payable to the miner from the month in which he requested modification. *Id.* Upon review of the record, we find no error in regard to the administrative law judge's determination that the record does not establish the month of onset of total disability due to pneumoconiosis. Decision and Order on Remand at 36. We, therefore, affirm the administrative law judge's determination that the miner was entitled to benefits as of November 1993, the month in which he filed his request for modification.

[14] In light of our affirmance of the administrative law judge's award of benefits under 20 C.F.R. Part 727, we need not address employer's contentions of error raised in connection with the administrative law judge's award of benefits under 20 C.F.R. Part 718. *See Larioni v. Director, OWCP*, 6 BLR 1-1284 (1986).

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge