BRB No. 96-0879 BLA

CHARLES DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
DOMINION COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand and Order on Reconsideration of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

Stephen E. Arey, Tazewell, Virginia, for claimant.

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand and Order on Reconsideration (80-BLA-7674) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim[1] 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 second time. Initially, Administrative Law Judge John W. Earman credited claimant with twenty-five years of coal mine employment and found the evidence sufficient to establish invocation of the

[1] Claimant is Charles Dye, the miner, who filed this claim for benefits on September 6, 1979. Director's Exhibit 1.

interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but insufficient to establish rebuttal of the presumption pursuant to 20 C.F.R. §727.203(b)(2). Accordingly, he awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding pursuant to Section 727.203(a)(1), but remanded the case for him to consider rebuttal pursuant to Section 727.203(b)(2) and (3) in light of intervening case law. *Dye v. Dominion Coal Co.*, BRB No. 82-2273 BLA (Feb. 24, 1994)(unpub.).

On remand, the case was reassigned, without objection, to Judge Rippey, who found that the evidence failed to establish rebuttal pursuant to Section 727.203(b)(2) or (3) and, accordingly, awarded benefits.[2] Supplemental Decision and Order on Remand. Because the original invocation finding pursuant to Section 727.203(a)(1) was based on the true doubt rule, which was invalidated in *Director, OWCP v. Greenwich Collieries [Ondecko]*, U.S. , 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (10th Cir. 1993), employer moved for reconsideration of the administrative law judge's decision.

On reconsideration, the administrative law judge found that the x-ray evidence established invocation of the interim presumption pursuant to Section 727.203(a)(1). The administrative law judge also reconsidered and reaffirmed his finding that the evidence failed to establish rebuttal pursuant to Section 727.203(b)(3) and awarded benefits.

On appeal, employer contends that the administrative law judge erred in his weighing of the x-ray evidence pursuant to Section 727.203(a)(1). Employer also argues that the administrative law judge erred in evaluating the rebuttal evidence pursuant to Section 727.203(b)(3) and (4). Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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

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[2] Pursuant to the parties' agreement, the record had been reopened on remand for the development of additional medical evidence. Order Summarizing Telephone Conference, Feb. 22, 1995.

[3] We affirm as unchallenged on appeal the administrative law judge's finding pursuant to 20 C.F.R. §727.203(b)(2). *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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).

Pursuant to Section 727.203(a)(1), employer contends that the administrative law judge failed to consider all of the relevant evidence. Employer's Brief at 9-10. Employer's contention has merit. In finding that claimant established by a prepondereance of the positive x-ray evidence the existence of pneumoconiosis, the administrative law judge failed to consider Dr. Cunningham's negative reading of the March 17, 1980 x-ray, Director's Exhibit 15, or Dr. Combs'[4] negative reading of an undated film, Employer's Exhibit 2, which employer contends is a reading of the March 17, 1980 x-ray, based on the film's identification number.[5] Therefore, we vacate the administrative law judge's finding and instruct him on remand to consider all of the x-ray readings, including those of Dr. Naik, Claimant's Exhibit 2, to determine whether claimant has met his burden of proof at Section 727.203(a)(1). *See Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996). In so doing, the administrative law judge must consider all of the relevant evidence and make a finding regarding whether Dr. T.L. Wright's 1/2 reading is a rereading of the January 8, 1980 x-ray, or corresponds to a separate x-ray film.[6] Director's Exhibit 14.

Pursuant to Section 727.203(b)(3), employer contends that the administrative law judge failed to determine whether the evidence meets the applicable rebuttal standard. Employer's Brief at 13. The United States Court of Appeals for the Fourth Circuit, wherein jurisdiction of this case arises, places the affirmative burden of proof on the party challenging entitlement to produce persuasive evidence that "rules out" any causal connection between total disability and coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984); *see*

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[4] The record indicates that Dr. Combs is a B-reader. Employer's Exhibit 2.

[5] Dr. Combs stated that the undated film he read bore the number 3183. Employer's Exhibit 2. Dr. Cunningham's reading of the March 17, 1980 x-ray bears the notation "X-Ray File No.: 3183." Director's Exhibit 15.

[6] In finding that there was "no evidence to establish [the] possibility" that Dr. Wright's reading was merely a rereading of the January 8, 1980 x-ray, the administrative law judge failed to consider the reference to Dr. Wright's 1/2 reading in Dr. Buddington's report of the January 9, 1980 examination of claimant. Order on Reconsideration at 2; Director's Exhibit 12.

Borgeson v. Kaiser Steel Corp., 12 BLR 1-169 (1989)(*en banc*); *Lattimer v. Peabody Coal Co*., 8 BLR 1-509 (1986). Employer submitted the examination report of Dr. Castle, who opined that claimant's "lung function is the same as it would be had he never set foot inside a coal mine," and the consultation report of Dr. Fino, who stated that "there is no respiratory impairment present." Employer's Exhibits 1, 3. Although the administrative law judge's finding that employer failed to establish the absence of a respiratory impairment in light of claimant's hospitalization records detailing treatment for breathing problems is valid with respect to Dr. Fino's opinion, *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987), it does not adequately address Dr. Castle's opinion, which is stated in causal terms. Therefore, we vacate the administrative law judge's finding pursuant to Section 727.203(b)(3) and instruct him that if invocation is found established on remand, he must determine whether the relevant evidence establishes subsection (b)(3) rebuttal under *Massey*. If invocation is established pursuant to Section 727.203(a)(1), the administrative law judge must assess the probative value under *Grigg* of the opinions of Drs. Castle and Fino, neither of whom diagnosed pneumoconiosis.

If on remand the administrative law judge finds the x-ray evidence sufficient to establish invocation at Section 727.203(a)(1), he need not consider rebuttal at Section 727.203(b)(4). *See 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); *Curry v. Beatrice Pocahontas Coal Co*., 18 BLR 1-59 (1994)(Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995); *Buckley v. Director, OWCP*, 11 BLR 1-37 (1988). If the administrative law judge finds the evidence insufficient to invoke the interim presumption at Section 727.203(a)(1), he must then consider invocation pursuant to Section 727.203(a)(2)-(4), and if invocation is established, he must consider rebuttal pursuant to Section 727.203(b)(3) and (4).

Accordingly, the administrative law judge's Supplemental Decision and Order on Remand and Order on Reconsideration are affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge