BRB No. 96-0885 BLA

BEVERLY A. TEMPLE (Widow of EDWARD TEMPLE) Claimant-Respondent v. BIG HORN COAL COMPANY and HOME INSURANCE COMPANY Employer/Carrier- Petitioners 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 and Order Denying Motion for Reconsideration of Edward C. Burch, Administrative Law Judge, United States Department of Labor.

Jonathan Wilderman (Wilderman & Linnet, P.C.), Denver, Colorado, for claimant.

John S. Lopatto, III, Washington, D.C., for employer.

Before: SMITH, BROWN, and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand and Order Denying Motion for Reconsideration (80-BLA-1761) of Administrative Law Judge Edward C. Burch 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. In *Temple v. Big Horn Coal Co*., 7 BLR 1-573 (1984),

the Board affirmed the administrative law judge's determination that the miner had established entitlement to benefits pursuant to 20 C.F.R. Part 727. Pursuant to employer's appeal, the United States Court of Appeals for the Tenth Circuit held that the administrative law judge erred by failing to consider a physician's opinion regarding the effects of age, altitude, and obesity on the miner's August 15, 1979 qualifying blood gas study under the Section 727.203(b)(2) rebuttal inquiry, and remanded the case for further consideration. *Big Horn Coal Co. v. Temple*, 793 F.2d 1165, 9 BLR 2-67 (10th Cir. 1986). On remand, the administrative law judge considered the physician's opinion at the rebuttal stage and reinstated his original award of benefits. Subsequent to the issuance of the administrative law judge's decision, the Tenth Circuit court held that all evidence regarding the probative value of objective studies must be considered prior to invocation of the interim presumption. *Big Horn Coal Co. v. Director, OWCP [Alley]*, 897 F.2d 1052, 13 BLR 2-372 (10th Cir. 1990); *Twin Pines Coal Co. v. United States Department of Labor*, 854 F.2d 1212, 11 BLR 2-198 (10th Cir. 1988). Accordingly, pursuant to employer's appeal, the Board vacated the award of benefits and remanded the case for the administrative law judge to consider the pertinent testimony in conjunction with the blood gas studies[1] at Section 727.203(a)(3) and at Section 727.203(b)(2), if reached. *Temple v. Big Horn Coal Co*., BRB No. 88-2151 BLA (Oct. 5, 1990)(unpub.).

[1] The Board instructed the administrative law judge on remand to consider the qualifying April 1, 1980 blood gas study. [1990] *Temple*, slip op. at 3.

On remand, the administrative law judge denied employer's request to reopen the record for the submission of additional evidence and hold a new hearing on the issue of Section 727.203(a)(3) invocation. The administrative law judge then considered the two qualifying blood gas studies in light of the physicians' opinions[2] regarding the adjustment of the study scores for non-disease factors, found invocation of the interim presumption established pursuant to Section 727.203(a)(3), and concluded that the evidence of record failed to establish rebuttal of the presumption pursuant to Section 727.203(b)(2). In evaluating the physicians' opinions regarding the appropriate degree of adjustment to the blood gas study values, the administrative law judge referred to the altitude-adjusted 20 C.F.R. Part 718 blood gas study tables for guidance. On reconsideration, the administrative law judge rejected employer's contention that, because the Part 718 tables were consulted for this purpose, the Part 718 quality standards for blood gas studies should also have been applied at Section 727.203. Accordingly, the administrative law judge reaffirmed the award of benefits.

On appeal, employer contends that the administrative law judge erred by failing to apply the Section 718.105 quality standards. Employer further asserts that the administrative law judge's reliance on the April 1, 1980 blood gas study violates the Administrative Procedure Act, the Federal Rules of Evidence, and employer's due process rights. Employer argues that the administrative law judge abused his discretion in failing to reopen the record or grant a new hearing, and contends that the administrative law judge's finding pursuant to Section 727.203(a)(3) is not supported by substantial evidence. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.[3]

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[2] The record contains the opinions of two physicians on this issue. Dr. Hoyer was deposed on behalf of employer regarding the adjustment of blood gas study scores. Employer's Exhibit B. At the hearing, Dr. Thickman testified regarding his examination of the miner and addressed the adjustment of blood gas study scores. Hearing Transcript at 14, 23-27, 35-36.

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

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).

Employer argues that the administrative law judge erred by failing to apply the Section 718.105(c) blood gas quality standards, which employer contends the April 1, 1980 study cannot meet because the record does not contain a written report of its results.[4] Employer's Brief at 17. For claims adjudicated under Part 727, the applicable quality standards for medical tests are found at 20 C.F.R. Part 410. However, Part 410 does not contain quality standards for blood gas studies. The Part 718 regulations, which do contain such standards, are by their terms inapplicable to claims filed before their effective date. 20 C.F.R. §718.2; *Peabody Coal Co. v. Director, OWCP*, 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992); *Knuckles v. Director, OWCP*, 869 F.2d 996, 12 BLR 2-217 (6th Cir. 1989). Employer cites no Tenth Circuit court case applying the Part 718 quality standards to Part 727 blood gas studies.[5] Furthermore, neither physician testified that the April 1, 1980 blood gas study was medically invalid, *see Orek v. Director, OWCP*, 10 BLR 1-51 (1987); they disagreed only over whether its values indicated an impairment in oxygen transfer if one accounted for non-disease factors. The administrative law judge permissibly referred to the Part 718 altitude-adjusted tables for the limited purpose of assessing the physicians' opinions on this point. *See Alley*, 897 F.2d at 1056, 13 BLR at 2-379. In light of the foregoing, we reject employer's contention that the administrative law judge was required to apply the Part 718 quality standards.

Employer argues that, because no written report of the April 1, 1980 blood gas study was submitted, the original decision to admit Dr. Thickman's testimony relating the results of that study and the administrative law judge's current reliance thereupon violates the Federal Rules of Evidence, the Administrative Procedure Act, and "employer's defense rights under the Due Process Clause." Employer's Brief at 15. Contrary to employer's

[4] The results of this blood gas study were submitted into the record via the 1980 hearing testimony of examining physician Dr. Thickman. Hearing Transcript at 13-14. Employer's counsel raised a hearsay objection which was overruled after Dr. Thickman, who is board-certified in internal medicine, testified that the blood gas study was performed at the Sheridan County Hospital pathology laboratory and that he could attest to its results. Hearing Transcript at 11, 13-14.

[5] We note that in *Alley*, a Part 727 case, the Tenth Circuit court upheld the administrative law judge's referral to the Part 718 altitude-adjusted blood gas study tables for guidance in assessing a physician's opinion regarding adjustment for non-disease factors, while declining to address employer's argument that the Section 718.105(c) quality standards should have been applied. *Big Horn Coal Co. v. Director, OWCP*, 897 F.2d 1052, 1054-56, 13 BLR 2-372, 2-375-80 (10th Cir. 1990).

contention, the administrative law judge is not bound by formal rules of evidence, 33 U.S.C. §923(a); 20 C.F.R. §725.455(b); 29 C.F.R. §18.44, and the Administrative Procedure Act permits the admission of any "oral or documentary evidence," except "irrelevant, immaterial, or unduly repetitious evidence." Administrative Procedure Act, 5 U.S.C. §556(d), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Bennett v. NTSB*, 66 F.3d 1130 (10th Cir. 1995). Employer does not allege that the April 1, 1980 blood gas study is irrelevant, immaterial, or unduly repetitious evidence, only that it is hearsay. The admission of reliable and probative hearsay evidence will not violate due process if the party against whom it is admitted has the opportunity to cross-examine the declarant, even where, as here, the opportunity is forgone.[6] *Bennett*, 66 F.3d at 1137; *Richardson v. Perales*, 402 U.S. 389, 407 (1971). Employer points to no evidence in the record that the April 1, 1980 blood gas study was unreliable or non-probative. Therefore, we reject employer's contention.

We reject employer's argument that the administrative law judge abused his discretion in declining to reopen the record. Employer's Brief at 17. On remand, employer sought to introduce a transcript of the Part 718 rulemaking testimony concerning adjustment of blood gas study scores for non-disease factors. Because employer had already submitted evidence regarding the adjustment of blood gas study values for such factors via the testimony of Dr. Hoyer, the administrative law judge did not abuse his discretion in declining to reopen the record for submission of the transcript. *See Lynn v. Island Creek Coal Co*., 12 BLR 1-146 (1989)(*en banc*)(McGranery, J, concurring). We also reject employer's contention that a new hearing was required because the decision involved a credibility determination. Employer's Brief at 17. Contrary to employer's contention, credibility in the sense of witness demeanor was not the basis of the administrative law judge's resolution of the factual dispute in this case. *See Worrell v. Consolidation Coal Co*., 8 BLR 1-158 (1985). Rather, the administrative law judge weighed the medical evidence as instructed, evaluating the physicians' opinions with reference to the Part 718 altitude-adjusted tables. *See Alley, supra*.

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[6] At the hearing, Dr. Thickman identified the specific laboratory from which the blood gas study originated. Hearing Transcript at 13-14. During cross-examination, employer's counsel questioned Dr. Thickman regarding the study, but did not press him to identify the doctor or technician who administered it. Hearing Transcript at 22-27. The record was left open for the submission of x-ray re-readings, Hearing Transcript at 119-21, yet employer's counsel did not request the opportunity to obtain a copy of the blood gas study report or to identify and depose those who administered the study.

Employer also contends that the administrative law judge's finding at Section 727.203(a)(3) is not supported by substantial evidence because he failed to consider exercise values of the August 15, 1979 blood gas study which would have been non-qualifying under the Part 718 tables. Employer's Brief at 19. These scores were qualifying under the applicable table values listed at Section 727.203(a)(3), which, as the administrative law judge explained on reconsideration, was the basis of his invocation finding. Order Denying Motion for Reconsideration at 2 ("Because claimant's scores qualified using §727.203(a)(3), it was not necessary to use §718.105 otherwise."). Moreover, in finding invocation established, the administrative law judge permissibly regarded the more recent, April 1, 1980 blood gas study as more probative of the miner's condition, because it "produc[ed] a lower value than his 1979 test and, thus, [was] consistent with the progressive nature of pneumoconiosis." *See Sexton v. Southern Ohio Coal Co*., 7 BLR 1-411 (1984). Therefore, we reject employer's contention and affirm the administrative law judge's finding pursuant to Section 727.203(a)(3).

Accordingly, the administrative law judge's Decision and Order on Remand and Order Denying Motion for Reconsideration awarding benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge