BRB Nos. 92-2282 BLA
and
92-2282 BLA-A

FLOYD J. MURPHY)
)
Claimant-Respondent)
Cross-Petitioner)
)
v.)
)
ZEIGLER COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY) DATE ISSUED:
)
Employer/Carrier-)
Petitioner)
Cross-Respondent)
)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
)
Party-In-Interest) DECISION and ORDER

Appeal of the Decision and Order of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Joseph H. Kelley (Leland Monhollon, P.S.C.), Madisonville, Kentucky, for claimant.

Laura Montgomery (Arter & Hadden), Washington, D.C., for employer.

Before: DOLDER, Acting Chief Administrative Appeals Judge; SMITH, Administrative Appeals Judge and SHEA, Administrative Law Judge.*

PER CURIAM:
Employer appeals, and claimant cross-appeals, the Decision and Order (83-

BLA-4871) of Administrative Law Judge Edward Terhune Miller, awarding benefits on a claim filed pursuant to the

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

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. Claimant filed a claim for benefits on July 12, 1974 and was initially informed that the evidence of record was insufficient to establish entitlement to benefits on December 4, 1974. Claimant was further instructed to submit additional evidence by letter dated September 10, 1979. On March 12, 1981, claimant was issued an initial determination of entitlement to benefits. On March 12, 1982, Administrative Law Judge Di Nardi issued a Decision and Order Awarding Benefits wherein employer was dismissed as the responsible operator, liability for payment of benefits was transferred to the Black Lung Disability Trust Fund (Trust Fund), and the case was remanded to the district director for payment. The administrative law judge affirmed his original Decision and Order in a Decision on Motion for Reconsideration dated April 23, 1982. On November 18, 1982, the district director issued a Proposed Modification of Decision and Order to reinstate employer as the responsible operator. On February 21, 1986, following a hearing on the issue, Administrative Law Judge Schoenfeld issued a Decision and Order denying Modification of Award in which he held that Administrative Law Judge Di Nardi's Orders of March 12, 1982 and April 23, 1982 transferring liability to the Trust Fund and dismissing employer as a party remain in full force and effect. On appeal, the Board held that the administrative law judge erred in denying the district director's request for modification and reinstated employer as the responsible operator. The Board also noted that the record does not contain a denial prior to March 1, 1977 sufficient to effect a transfer of liability to the Trust Fund. Accordingly, the Board reversed Administrative Law Judge Schoenfeld's Decision and Order Denying Modification of Award and remanded the case for the administrative law judge to consider all the evidence and the merits of claimant's entitlement to benefits. *See Murphy v. Zeigler Coal Co.*, BRB No. 86-814 BLA (May 31, 1988)(unpub.). On reconsideration, the Board noted that its prior order does not prohibit claimant from participating in subsequent proceedings regarding his claim and affirmed its original Decision and Order. *See Murphy v. Zeigler Coal Co.*, BRB No. 86-814 BLA (Dec. 28, 1988)(unpub.). On remand, the administrative law judge determined that claimant established twenty-two years of coal mine employment and invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(2). The administrative law judge then determined that employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b). Accordingly, benefits were awarded. On appeal, employer contends that the Board erred in reinstating employer as the responsible operator and in not transferring liability to the Trust Fund. Employer further contends that the administrative law judge erred in finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(2) and in failing to find that employer established rebuttal pursuant 20

C.F.R. §727.203(b)(3) and (4). On cross-appeal, claimant contends that the administrative law judge erred in failing to find that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1) and (4). The Director, Office of Workers' Compensation Programs (the Director), has chosen not to respond to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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's first contention of error is that the Board erred in reinstating employer as the responsible operator and in not transferring liability to the Trust Fund. Inasmuch as the Board previously determined that employer is the responsible operator potentially liable for the payment of benefits in this case and precluded transfer of liability to the Trust Fund, *see Murphy v. Zeigler Coal Co.*, BRB No. 86-814 BLA (May 31, 1988)(unpub.), and as no exception to the law of the case doctrine has been demonstrated, the law of the case doctrine is controlling on this issue and employer's status as the responsible operator potentially liable for the payment of benefits in this case is established. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990).

Employer next contends that the administrative law judge erred in weighing the pulmonary function study evidence of record pursuant to Section 727.203(a)(2). Specifically, employer contends that the administrative law judge erred in crediting the opinions of the examining physicians over the opinions of reviewing physicians. With regard to the pulmonary function studies, the administrative law judge noted that although seven of the ten pulmonary function studies have yielded qualifying results, the reliability of each study has been questioned, either by the administering physician or a consulting physician. *See* Decision and Order at 8; Director's Exhibits 13, 14, 16; Employer's Exhibits 1, 4, 7, 30-33, 42; Claimant's Exhibit 5.[1] The administrative law judge concluded that the observations of Drs. Gallo, Taylor and Broudy, each of whom noted that claimant displayed poor cooperation and poor effort on the studies they performed, were credible and persuasive and, thus, he found the qualifying studies of August 2, 1974, August 31, 1989 and February 9,

[1]The administrative law judge erroneously stated that the results of the pulmonary function study performed on March 21, 1970 were not qualifying pursuant to Section 727.203(a)(2). Thus, the record contains eight qualifying pulmonary function studies and two non-qualifying studies.

1990 to be unreliable. *See* Decision and Order at 8; Director's Exhibit 13; Employer's Exhibits 32, 42. The administrative law judge then discussed the four qualifying pulmonary function studies performed by Drs. Calhoun[2], Traughber and Simpao and found that, because they conform with the quality standards as set forth in 20 C.F.R. §410.430, they are *prima facie* reliable. *See* Decision and Order at 8; Director's Exhibits 14, 16; Claimant's Exhibit 5. The administrative law judge further noted that there is nothing in the record which suggests that the technicians and/or physicians who actually observed claimant during the tests were not trained, skilled technicians. The administrative law judge then found that the opinions of the reviewing physicians, Drs. Broudy, Lane, and Anderson, do not outweigh the affirmative proof contained in the results of the studies of the presence of a chronic respiratory or pulmonary disease pursuant to Section 727.203(a)(2). *See* Decision and Order at 8. However, the United States Court of Appeals for the Sixth Circuit, the circuit in which this case arises, has held that the quality standards contained in 20 C.F.R. Part 718 apply to pulmonary function studies performed after March 31, 1980, the effective date of the regulations. *See Wiley v. Consolidation Coal Co.*, 892 F.2d 498, 13 BLR 2-214 (6th Cir. 1989), *modified on other grounds on reh'g* 915 F. 2d 1076, 14 BLR 2-89 (6th Cir. 1990). Of the four remaining pulmonary function studies, three were performed after March 31, 1980, and, thus, they must conform to the quality standards as set forth in 20 C.F.R. §718.103. *See Wiley, supra;* Director's Exhibit 14, Claimant's Exhibit 5. Further, as the administrative law judge noted in his Decision and Order that the criticisms of the consulting physicians would be relevant under the quality standards at Section 718.103, on remand the administrative law judge must provide a specific rationale for rejecting or accepting each of these opinions. *See* Decision and Order at 8, n. 6; *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985). As a result, the administrative law judge's findings regarding the reliability of the pulmonary function study studies and the weighing of the evidence relevant to this issue are vacated and the case is remanded for further consideration of the evidence pursuant to subsection (a)(2).[3]

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[2]The administrative law judge states that the October 22, 1974 pulmonary function study was performed by Dr. Pitzer, however, the record indicates that it was performed by Dr. Calhoun. *See* Decision and Order at 8; Director's Exhibit 16.

[3]Employer also argues that the administrative law judge improperly applied the "true doubt" rule in weighing the evidence at subsection (a)(2), however, the Board need not address this issue as the case is remanded for further consideration of the evidence pursuant to subsection (a)(2). It is noted, however, that the United States Supreme Court has held that the true doubt rule is no longer available to claimants. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251 (1994), *aff'g sub nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR

2-64 (3d Cir. 1993). It should also be noted that the administrative law judge may permissibly assign greater weight to the more recent, reliable pulmonary function study results of record. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993).

Regarding Section 727.203(b)(3), employer contends that the administrative law judge erred in stating that no physician ruled out legal pneumoconiosis as a cause of claimant's disability. Specifically, employer contends that the administrative law judge erred in weighing the opinions of Drs. Taylor, Broudy, and Anderson. In his Decision and Order, the administrative law judge permissibly found Dr. Taylor's opinion to be unpersuasive because Dr. Taylor found no evidence of pulmonary disability and, without explanation, stated that if he has one it is due to cigarette smoking. *See* Decision and Order at 15; Employer's Exhibits 32, 34; *Lafferty*, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Upon considering Dr. Broudy's opinion, the administrative law judge states that Dr. Broudy's opinion that claimant's disability was due to cigarette smoking rather than pneumoconiosis was not sufficient to establish subsection (b)(3) rebuttal because it does not rule out the possibility of legal pneumoconiosis. *See* Decision and Order at 15. However, the administrative law judge does not discuss Dr. Broudy's opinion, as stated in his report of February 9, 1990, that claimant does not have any pulmonary disease or respiratory impairment which has arisen from his occupation as a coal worker. *See* Employer's Exhibit 42. Additionally, the administrative law judge does not discuss Dr. Anderson's report of July 25, 1985 in which the physician states that claimant retains a level of pulmonary function that would allow him to do the work of a coal miner, that "the remainder of the record indicates that he was disabled due to his various orthopedic problems", and that the record does not indicate that claimant, with certainty, has pneumoconiosis. *See* Employer's Exhibit 29. As these medical reports are relevant under subsection (b)(3), the administrative law judge's finding pursuant to subsection (b)(3) is vacated and the case is remanded for the administrative law judge to consider the opinions of Drs. Broudy and Anderson pursuant to Section 727.203(b)(3). *See* Employer's Exhibit 29, 39, 42; *Roberts v. Benefits Review Board*, 822 F.2d 636, 10 BLR 2-153 (6th Cir. 1987); *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987); *Michael v. James Spur Coal Co.*, 11 BLR 1-78 (1988); *Marcum v. Director, OWCP*, 11 BLR 1-2 (1987).

Employer further contends that the administrative law judge erred in failing to weigh the physicians' silence on the issue of causation pursuant to Section 727.203(b)(3). Specifically, employer, citing *Director, OWCP v. Congleton*, 743 F.2d 428 (6th Cir. 1984), contends that the administrative law judge must still consider whether the physicians' silence on the issue of causation severs the link between any disability presumed on invocation and coal mine employment. However, in *Congleton*, the Court of Appeals for the Sixth Circuit stated that their decision merely enunciates the simple and elementary premise that when employer effectively proves an absolute absence of chronic lung disease in any of the medical records available regarding the miner, the miner has rebutted the presumption of disability due to pneumoconiosis as a matter of law. *See Congleton* at 431. However, in this

case employer has not proven the absolute absence of evidence diagnosing a disability which has arisen, in whole or in part, out of claimant's coal mine employment. Also, the Board has held that opinions which are silent concerning whether a diagnosed respiratory condition arose out of coal mine employment are insufficient to rebut pursuant to subsection (b)(3). *See Allen v. Brown Badgett, Inc.*, 6 BLR 1-567 (1983). Thus, employer's contentions of error regarding the administrative law judge's weighing of the evidence which is silent as to the cause of claimant's disability are rejected.

Employer also contends that the administrative law judge erred in weighing the evidence of record pursuant to Section 727.203(b)(4). Again employer contends that the administrative law judge erred in stating that no physician ruled out the possibility of legal pneumoconiosis. As stated above, the administrative law judge erroneously failed to discuss the opinions of Drs. Broudy and Anderson relating to the non-existence of legal pneumoconiosis. *See* Employer's Exhibits 29, 39, 42; *York*, *supra*. As a result, the case is remanded for the administrative law judge to consider the opinions of Drs. Broudy and Anderson pursuant to Section 727.203(b)(4). Employer also contends that the administrative law judge erred in finding Dr. Taylor's opinion unreliable and unpersuasive because he failed to diagnose an obstructive disorder, unlike all other physicians of record who examined claimant within the last ten years. *See* Decision and Order at 15. Employer's contention of error has merit as the administrative law judge did not discuss Dr. Anderson's 1985 opinion that claimant retains a level of pulmonary function that would allow him to do the work of a coal miner, that "the remainder of the record indicates that he was disabled due to his various orthopedic problems", and that the record does not indicate that claimant, with certainty, has pneumoconiosis. *See* Employer's Exhibit 29. As Dr. Anderson examined claimant within the last ten years and as he did not diagnose an obstructive disorder, the administrative law judge's reason for finding Dr. Taylor's opinion unreliable may be questioned. As a result, on remand the administrative law judge must also reconsider Dr. Taylor's opinion pursuant to Section 727.203(b)(4).

On cross-appeal, claimant first contends that the administrative law judge erred in failing to find that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(1). The record contains seventy-four interpretations of thirty-three x-rays. *See* Director's Exhibits 15, 16, 19, 20, 34; Employer's Exhibits 1, 2, 9, 11, 13, 15, 17, 19, 26, 27, 28, 32, 35-38, 40-42; Claimant's Exhibits 1, 3-5. Of these seventy-five interpretations, seven are positive for the existence of pneumoconiosis. *See* Director's Exhibit 34; Claimant's Exhibit 1, 3-5. In his Decision and Order, the administrative law judge permissibly found that the weight of the x-ray evidence is negative for the existence of pneumoconiosis. *See* Decision

and Order at 12; *Edmiston v. F & R Coal Co*, 14 BLR 1-65 (1990). In his brief, claimant contends that the administrative law judge erred in failing to admit Dr. Baker's positive interpretation of the February 9, 1990 x-ray and states that had this interpretation been admitted then the most recent evidence of record would have been read as both positive and negative by B readers and true doubt would have been resolved in claimant's favor. This contention of error is without merit, however, as the true doubt rule is no longer available to claimants. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251 (1994), *aff'g sub nom., Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Accordingly, the administrative law judge's finding that claimant failed to establish invocation pursuant to Section 727.203(a)(1) is affirmed.

Claimant next contends that the administrative law judge erred in considering the evidence pursuant to Section 727.203(a)(4). Upon considering the medical opinion evidence of record pursuant to Section 727.203(a)(4), the administrative law judge found that Drs. West, Calhoun and Traughber found claimant totally disabled as a result of pneumoconiosis. *See* Decision and Order at 13; Director's Exhibits 15-17. As claimant contends, the administrative law judge erroneously found that the opinions of Drs. West and Calhoun were not persuasive because they based their opinions on positive x-ray readings, while the weight of the x-ray evidence is negative for pneumoconiosis. *See* Decision and Order at 13; *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985). The administrative law judge also rejected these opinions, as well as Dr. Traughber's opinion, because their conclusions as to the etiology of claimant's pulmonary condition are suspect because they did not record a smoking history. *See* Decision and Order at 13. The administrative law judge's rejection of these opinions for this reason is in error, however, as claimant need not establish the etiology of his totally disabling respiratory impairment to establish invocation pursuant to Section 727.203(a)(4). *See York*, *supra*. As a result, the administrative law judge's finding that claimant failed to establish invocation of the interim presumption pursuant to Section 727.203(a)(4) is vacated and the case is remanded for further consideration pursuant to subsection (a)(4).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge