BRB No. 95-1359 BLA

CHARLIE McFARLAND Claimant-Respondent v. B & B COAL COMPANY and OLD REPUBLIC 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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (84-BLA-8145) of

Administrative Law Judge Thomas M. Burke 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 third time. Initially, the administrative law judge credited claimant with twenty years of coal mine employment and found the evidence sufficient to establish invocation of the interim

[1] Claimant is Charlie McFarland, the miner, who filed this claim for benefits on March 24, 1980. Director's Exhibit 1.

presumption pursuant to 20 C.F.R. §727.203(a)(1), (2), and (4), but insufficient to establish rebuttal pursuant to 20 C.F.R. §727.203(b). Accordingly, he awarded benefits.

Employer appealed the administrative law judge's findings, and in *McFarland v. B & B Coal Co*., BRB No. 88-3735 BLA (Mar. 24, 1992) (unpub.), the Board affirmed the administrative law judge's finding pursuant to Section 727.203(a)(2), but remanded the case for consideration of all relevant evidence pursuant to Section 727.203(b)(3) and (4), with additional instructions to consider all evidence relevant to the date for the commencement of benefits, if awarded. On remand, the administrative law judge found that rebuttal was not established pursuant to Section 727.203(b)(3) and (4) and awarded benefits effective May 6, 1981, the date claimant stopped working.

Employer appealed, and in *McFarland v. B & B Coal Co*., BRB No. 93-1500 BLA (Aug. 11, 1994)(unpub.), the Board affirmed the administrative law judge's finding pursuant to Section 727.203(b)(3), but remanded the case for further consideration of rebuttal pursuant to Section 727.203(b)(4) because the administrative law judge erred in weighing the medical opinion evidence. The Board again instructed the administrative law judge to consider the evidence relevant to the entitlement date, because he erroneously found certain medical opinions to be hostile to the Act. On remand, the administrative law judge again found that rebuttal was not established pursuant to Section 727.203(b)(4) and awarded benefits effective May 1981.

On appeal, employer challenges the administrative law judge's weighing of the evidence pursuant to Section 727.203(b)(4). Employer's Brief at 12-23. Employer further asserts that the administrative law judge erred in determining the entitlement date. Employer's Brief at 24-27. Claimant responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), has declined to participate in this appeal.

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).

To establish rebuttal pursuant to Section 727.203(b)(4), the party opposing entitlement must prove that claimant is not suffering from pneumoconiosis as broadly defined by the Act and regulations. 20 C.F.R. §§727.203(b)(4), 727.202; *Daugherty*

v. Dean Jones Coal Co., 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Biggs v. Consolidation Coal Co.*, 8 BLR 1-317 (1985). Accordingly, the administrative law judge weighed the medical opinions to determine whether employer carried its burden of proof.

The administrative law judge noted employer's contention that the opinions of the most qualified physicians established the absence of pneumoconiosis. Decision and Order on Remand at 3. Specifically, Drs. Stewart, O'Neill, and Dahhan opined that claimant's respiratory impairment was not pneumoconiosis because it was unrelated to coal dust exposure and was due solely to cigarette smoking. Director's Exhibits 33, 43; Employer's Exhibits 1-3. Drs. Stewart and Dahhan based their opinions, in part, on the nature of claimant's ventilatory impairment as measured by the pulmonary function studies, which they reviewed along with the other medical evidence.[2] They cited the obstructive nature of claimant's impairment, coupled with the lack of restriction, as evidence that his pulmonary impairment was the result of cigarette smoking and not coal dust exposure. Employer's Exhibits 1, 2. Dr. O'Neill also reviewed the medical evidence, including the pulmonary function studies, and concluded that claimant had "obstructive airway disease caused primarily by chronic cigarette smoking." Director's Exhibit 43.

The administrative law judge noted, however, that the record contained a pulmonary function study interpreted by Dr. Kanwal, the administering physician, as consistent with an obstructive and restrictive ventilatory impairment. Decision and Order on Remand at 3; Director's Exhibit 12. The administrative law judge observed that Drs. Stewart and O'Neill did not address Dr. Kanwal's interpretation because they concluded that the study was invalid for lack of effort, while Dr. Dahhan interpreted the study as showing an obstructive impairment without commenting on Dr. Kanwal's finding of restriction. Decision and Order on Remand at 3; Director's Exhibit 43; Employer's Exhibits 1, 2. The administrative law judge also noted that Dr. Zaldivar reviewed the study at the request of the Department of Labor and concluded that it was valid. Director's Exhibit 14.

The administrative law judge considered the conflicting reports regarding the study's validity and found that, because Dr. Zaldivar was Board certified in both internal and pulmonary medicine and his validation was consistent with the administering technician's observations that claimant's understanding and effort on the test were good, the August 31, 1981 study was valid. Decision and Order on Remand at 3; Director's Exhibits 12, 14. The administrative law judge then

[2] Dr. Dahhan also examined claimant. Director's Exhibit 33; Employer's Exhibit 3.

compared Dr. Kanwal's finding of restriction and obstruction with Dr. Dahhan's opinion that the test merely revealed obstruction. The administrative law judge found that, because Dr. Dahhan, as a reviewing physician, did not explain his interpretation of the study in light of Dr. Kanwal's finding of both obstruction and restriction based on the same values, there was no reason to credit his interpretation over that of Dr. Kanwal, the administering physician. Decision and Order on Remand at 4. Therefore, the administrative law judge credited Dr. Kanwal's opinion that the August 31, 1981 pulmonary function study indicated both ventilatory obstruction and restriction.

In light of this study, the administrative law judge accorded diminished weight to the opinions of Drs. Stewart and Dahhan because they failed to account for the presence of documented ventilatory restriction in opining that the absence of restriction weighed against coal dust exposure as a factor in claimant's respiratory disease. The administrative law judge also found Dr. O'Neill's report unreasoned because he failed to address claimant's years of coal mine employment as a potential causal factor. Therefore, the administrative law judge concluded that employer did not carry its burden "to establish the absence of any respiratory or pulmonary impairment arising out of claimant's coal mine employment." Decision and Order on Remand at 4.

Employer challenges every step of the administrative law judge's weighing of the evidence pursuant to Section 727.203(b)(4). Employer's Brief at 15-23. For the reasons that follow, we reject these allegations of error and hold that the administrative law judge acted within his discretion as fact-finder in finding rebuttal not established.

Regarding the validity of the August 31, 1981 pulmonary function study, the administrative law judge permissibly credited Dr. Zaldivar's validation report over Dr. O'Neill's invalidation of the study based on Dr. Zaldivar's qualifications, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985), because employer bears the burden of establishing its experts' qualifications, *see Rankin v. Keystone Coal Mining Corp*., 8 BLR 1-54 (1985), and the administrative law judge permissibly found that employer "has not established that [Dr. O'Neill's] certification in either Ireland or England would be equivalent to [Dr. Zaldivar's] certification in the United States."[3] Decision and Order on Remand at Director's Exhibit 14. Although employer is correct in its assertion that Dr. Stewart's qualifications are equal to those of Dr. Zaldivar, Employer's Exhibit 2, the

[3] Dr. O'Neill is certified by the Irish and English Boards of Internal Medicine. Director's Exhibit 43.

administrative law judge provided a valid alternative rationale for crediting Dr. Zaldivar's validation report over Dr. Stewart's invalidation, *see Kozele v. Rochester and Pittsburgh Coal Co*., 6 BLR 1-378 (1983)(Miller, J., dissenting). Specifically, the administrative law judge found Dr. Zaldivar's conclusion supported by the administering technician's observation on the data sheet signed by Dr. Kanwal that claimant's understanding and effort on the test were "good." *See Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Inasmuch as the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable, *see Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985), we reject employer's contentions that the administrative law judge erred in finding the August 31, 1981 pulmonary function study to be valid.

Contrary to employer's contentions that the administrative law judge erred in crediting Dr. Kanwal's interpretation of the August 31, 1981 pulmonary function study over that of Dr. Dahhan, Employer's Brief at 18-20, the administrative law judge permissibly concluded that, because Dr. Dahhan did not explain why his interpretation of the study differed from Dr. Kanwal's interpretation, he could find no reason to credit the reviewing physician's opinion over that of the administering physician. *See Clark*, *supra*; *Tackett*, *supra*. Because we are not empowered to reweigh the evidence, *see Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we reject employer's contentions.

We also reject employer's argument that the administrative law judge erred in relying on the pulmonary function study interpretations to find no rebuttal. Employer's Brief at 21-22. Contrary to employer's contention, the administrative law judge permissibly considered whether the medical opinions emphasizing the absence of ventilatory restriction as a basis for excluding coal dust exposure as a factor in claimant's respiratory impairment were well-reasoned and persuasive. *See Gorzalka v. Big Horn Coal Co*., 16 BLR 1-48 (1990); *Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984).

Employer's argument that the administrative law judge erred in discrediting Dr. O'Neill's opinion for not discussing claimant's coal mine employment history lacks merit. Employer's Brief at 22-23. The administrative law judge permissibly accorded diminished weight to the physician's opinion because, while he expressly considered claimant's smoking history, he failed to address the possibility that claimant's coal dust exposure was also a causal factor which contributed to or aggravated claimant's pulmonary condition. Director's Exhibit 43; *see Clark*, *supra*. Regarding employer's contention that the administrative law judge should have similarly

required Dr. Kanwal to explain the relationship of smoking to claimant's pulmonary condition, Employer's Brief at 23, we note that employer bears the burden of proof on rebuttal to show that claimant's pulmonary impairment is not significantly related to or aggravated by coal dust exposure. 20 C.F.R. §§727.203(b)(4), 727.202; *Daugherty*, *supra*; *Biggs*, *supra*. Therefore, we reject these contentions.

Employer also contends that remand is required because the administrative law judge failed to weigh the x-ray evidence on rebuttal. Employer's Brief at 21. Because negative x-rays are insufficient, alone, to defeat entitlement, *see* 30 U.S.C.§923(b); *Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976), employer could only rebut the presumption if the medical opinion evidence also demonstrated the absence of pneumoconiosis, as legally defined. *See* 20 C.F.R. §§727.203(b)(4), 727.202; *Daugherty*, *supra*; *Biggs*, *supra*. Because the administrative law judge permissibly concluded that employer failed to prove the absence of statutory pneumoconiosis, his failure to weigh the x-ray evidence constitutes harmless error. *See Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984). Therefore, we reject employer's contentions and affirm the administrative law judge's finding pursuant to Section 727.203(b)(4).

The administrative law judge found that the evidence of record failed to establish the onset date of total disability due to pneumoconiosis and awarded benefits as of May 1981, the month in which claimant stopped working.[4] In so doing, the administrative law judge rejected employer's argument that claimant did not become totally disabled until after 1983. Decision and Order on Remand at 4-7. Because the administrative law judge properly weighed the evidence, we reject employer's challenges to his finding. Employer's Brief at 24-27.

Specifically, the administrative law judge permissibly credited the opinion of claimant's treating physician finding claimant totally disabled as of May 1981, *see Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Berta v. Peabody Coal Co*., 16 BLR 1-69 (1992), Dr. Kanwal's listing of claimant's physical limitations in June 1981 as compared to the exertional requirements of his usual coal mine employment, Director's Exhibits 7, 16; *see Budash v. Bethlehem Mines Corp.,* 9 BLR 1-48, *aff'd on recon.*, 9 BLR 1-104 (1986)(*en banc*), and the qualifying pulmonary function study of August 31, 1981, Director's Exhibit 12, over the opinions of Drs. Dahhan, O'Neill, and Stewart to conclude that claimant became totally disabled at some time prior to 1983. Decision and Order on Remand at 4-7. Because we are not empowered to reweigh the evidence, *see Anderson*, *supra*;

[4] Claimant continued to work for approximately one year after filing his claim for benefits. Director's Exhibits 1, 6.

Fagg, *supra*, we reject employer's contentions on this issue.

The administrative law judge also found that the evidence, "no matter how it is weighed," failed to establish precisely the date of onset of total disability due to pneumoconiosis, Decision and Order on Remand at 7, a finding that employer does not challenge.[5] Because the administrative law judge considered all relevant evidence and permissibly found that the evidence failed to establish the date of entitlement, we affirm his award of benefits effective as of the month during which claimant stopped working. *See* Section 413(d), 30 U.S.C. §923(d); 20 C.F.R. §727.205(c); *Tackett v. Peabody Coal Co*., 6 BLR 1-526 (1983).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[5] Employer states only that the onset date is sometime "after 1983 and before 1987." Employer's Brief at 27.