BRB No. 95-1568 BLA

MARVIN FERGUSON (deceased) Claimant-Respondent v. PEABODY 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 Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

C. Dale Bartlett II, Hartford, Kentucky, for claimant.

Sirina Tsai (Arter & Hadden), Washington, D.C., for employer.

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

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (80-BLA-

7331) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim[1] filed pursuant to the provisions of

[1] Marvin Ferguson, the miner, filed this claim for benefits on April 25, 1979, which was awarded on March 10, 1980. Director's Exhibits 1, 19. The miner died on February 4, 1981, and Imogene Ferguson, his widow, is pursuing the miner's claim on his behalf. Director's Exhibits 25-26. Section 422(l) of the Act, 30 U.S.C. §932(l), relieves survivors of the burden of filing a claim and proving their own entitlement to benefits in cases involving awards to deceased miners on claims filed prior to January 1, 1982. *Smith v. Camco Mining Inc*., 13 BLR 1-17 (1989). Thus, if the miner's claim is awarded, claimant will be entitled to derivative benefits.

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 the miner with thirty-two years of qualifying coal mine employment, and found the evidence sufficient to establish invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (3), 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 rebuttal findings pursuant to Section 727.203(b)(2) and (b)(3), and in *Ferguson v. Peabody Coal Co*., BRB No. 82-1203 BLA (Dec. 10, 1985) (unpub.), the Board affirmed the administrative law judge's finding pursuant to Section 727.203(b)(3), but remanded the case for consideration of all relevant evidence pursuant to Section 727.203(b)(2). On remand, the administrative law judge discussed the opinions of Drs. Crowder and Gallo as instructed, discredited each of their reports, and again found that employer failed to establish subsection (b)(2) rebuttal.

Employer appealed, and in *Ferguson v. Peabody Coal Co*., BRB No. 86-0586 BLA (Aug. 28, 1989)(unpub.), the Board affirmed the award of benefits, holding that the opinions of Drs. Gallo and Crowder were legally insufficient to establish subsection (b)(2) rebuttal under *York v. Benefits Review Board*, 819 F.2d 134, 10 BLR 2-99 (6th Cir. 1987).

Because *York* had been decided by the United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, subsequent to the issuance of the administrative law judge's decision on remand, employer requested reconsideration of the Board's Decision and Order, contending that, under *Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 14 BLR 2-1 (6th Cir. 1990), it must have the opportunity to present evidence addressing the new subsection (b)(2) rebuttal standard. The Board granted employer's motion, vacated the administrative law judge's finding pursuant to Section 727.203(b)(2), and remanded the case for further consideration. *Ferguson v. Peabody Coal Co*., BRB No. 86-0586 BLA (Dec. 9, 1992)(unpub.).

Although employer had addressed only subsection (b)(2) rebuttal on reconsideration, on remand employer requested that the administrative law judge re-open the record for the submission of new evidence addressing rebuttal under both subsections (b)(2) and (b)(3). Motion for Discovery Order and Briefing Schedule. The administrative law judge re-opened the record on December 8, 1994, and employer submitted the medical opinion of Dr. Branscomb.

In his Supplemental Decision and Order on Remand, the administrative law judge noted that, although employer raised Section 727.203(b)(3) rebuttal in its brief, he would disregard employer's argument because the Board had instructed him to consider only subsection (b)(2) and had affirmed his finding that rebuttal under Section 727.203(b)(3) was not established. The administrative law judge then discussed the opinions of Drs. Gallo, Crowder, and Branscomb, and concluded that none was sufficient to establish rebuttal pursuant to Section 727.203(b)(2) under *York*. Accordingly, he reaffirmed the award of benefits.

On appeal, employer contends that the administrative law judge failed to consider all relevant evidence pursuant to Section 727.203(b)(2). Employer's Brief at 12-15. Employer further asserts that the administrative law judge erred in refusing to consider rebuttal pursuant to Section 727.203(b)(3). Employer's Brief at 15-17. 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).

Pursuant to Section 727.203(b)(2), employer contends that remand is required because the administrative law judge failed to weigh all relevant evidence, including the non-qualifying objective tests, four medical opinions, and "evidence pertaining to the physical demands" of the miner's usual coal mine employment. Employer's Brief at 12-15. The administrative law judge stated that to establish subsection (b)(2) rebuttal under *York*, employer was required to show that there was "no medical condition which prevented claimant from performing his previous coal mine duties." Supplemental Decision and Order on Remand at 2.

The administrative law judge then found that Drs. Gallo and Crowder listed various physical impairments, but did not address whether the miner could perform his usual coal mine employment despite them. Supplemental Decision and Order on Remand at 2-3; Director's Exhibits 18, 20. The administrative law judge also found Dr. Branscomb's opinion legally insufficient under *York* because the physician "did not express an opinion that the [miner] had no medical conditions which might have prevented him from performing his usual coal mine duties." Supplemental Decision and Order on Remand at 3; Employer's Exhibit 2.

Contrary to employer's argument, where the record documents non-

respiratory impairments, the *York* standard for subsection (b)(2) rebuttal cannot be satisfied by non-qualifying pulmonary function tests or blood gas studies or by evidence that the miner was not totally disabled by his respiratory impairment. *See York*, 819 F.2d at 137, 10 BLR at 2-103-04; *see also White v. Director, OWCP*, 7 BLR 1-348, 1-352 (1984). Further, the administrative law judge correctly concluded that while Drs. Gallo, Crowder, and Branscomb acknowledged the miner's potentially disabling non-respiratory impairments,[2] none offered an opinion that the miner could perform his usual coal mine work despite these conditions. Employer's Exhibit 2.

Furthermore, employer cites no medical opinion indicating that, despite his non-respiratory impairments, the miner could perform the work of a coal truck driver, which both the miner and claimant indicated was the miner's last coal mine employment. Director's Exhibit 5; Hearing Transcript at 11; *see Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); *York*, *supra*. Because a finding that the miner can perform his usual coal mine employment must be supported by medical evidence, employer's contention that the administrative law judge erred in not considering evidence of the physical demands of the miner's usual coal mine employment is rejected. *See Temple v. Big Horn Coal Co*., 14 BLR 1-142 (1990). Finally, while the administrative law judge did not discuss on remand the four medical opinions submitted prior to re-opening the record, he fully considered these reports in his prior decisions, *see* [1982] Decision and Order at 2-5; Supplemental Decision and Order Upon Remand at 2, finding them insufficient to establish subsection (b)(2) rebuttal under the pre-*York* standard, and none of them is legally sufficient to establish rebuttal pursuant to *York*. *See* Director's Exhibit 10,

[2] The record documents the miner's lymphoma, fracture of the left leg due to the lymphoma, the effects of chemotherapy, and his heart disease. Director's Exhibits 18, 20; Claimant's Exhibit 1; Employer's Exhibits 1-2.

Claimant's Exhibit 1, Employer's Exhibit 1; *York*, *supra*; *Webb*, *supra*. Therefore, we reject employer's contention[3] and affirm the administrative law judge's finding pursuant to Section 727.203(b)(2).

[3] Employer relies on *Neace v. Director, OWCP*, 867 F.2d 264, 12 BLR 2-160 (6th Cir. 1989), *aff'd on reh'g*, 877 F.2d 495, 12 BLR 2-303 (6th Cir. 1989) and *Bartley v. L&M Coal Co.,* 901 F.2d 1311, 13 BLR 2-414 (6th Cir. 1990), which are distinguishable. There, substantial evidence supported the administrative law judge's finding of no totally disabling respiratory impairment and the record was devoid of any evidence of any other type of impairment other than a respiratory impairment. Here, by contrast, the administrative law judge invoked the presumption pursuant to Section 727.203(a)(3), and the record contains evidence of non-respiratory impairments. *See* discussion, *supra*.

Employer next asserts that remand is required because the administrative law judge refused to consider rebuttal pursuant to Section 727.203(b)(3). Employer's Brief at 15. Employer argues that intervening case law has changed the standard for subsection (b)(3) rebuttal since the Board's affirmance of the administrative law judge's finding in 1985, citing *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985), and *Warman v. Pittsburg & Midway Coal Co*., 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988), and that employer "has repeatedly sought reconsideration" of subsection (b)(3) since *Lemar* was decided.[4] Employer's Brief at 15-16.

Prior to *Gibas* and *Warman*, the Board had held that subsection (b)(3) rebuttal required the party opposing entitlement to prove that there is no significant relationship[5] between the miner's pneumoconiosis and total respiratory disability. *Shaw v. Bradford Coal Co*., 7 BLR 1-462 (1982), *overruled en banc*, *Borgeson v. Kaiser Steel Corp*., 12 BLR 1-169 (1989). In discussing rebuttal, the administrative law judge found that while the miner's cardiovascular problems may have been "primarily responsible" for his pulmonary difficulties, employer had failed to carry its burden of showing that pneumoconiosis did not totally disable the miner. [1982] Decision and Order at 5. On appeal, employer challenged the administrative law judge's (b)(3) finding on the ground that he failed to consider whether the miner's death was due to a cause other than pneumoconiosis,[6] but did not contest the

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[4] Contrary to employer's statement, employer did not seek reconsideration of the Board's subsection (b)(3) holding when employer filed its motion for reconsideration on appeal on December 21, 1989. [1989] Employer's Motion. Employer raised the possibility of establishing rebuttal pursuant to subsection (b)(3) in its motion to the administrative law judge to re-open the record on remand. [1994] Employer's Motion at 4.

[5] Subsequently, the Sixth Circuit rejected the Board's no significant relationship standard, holding that rebuttal is established by evidence showing that the miner's disability was not caused, in whole or in part, by pneumoconiosis. *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Warman v. Pittsburg & Midway Coal Co*., 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988). Thus, the no contributing cause standard replaced the no significant relationship standard, and the Board held that it would apply the former in cases arising within the Sixth Circuit's jurisdiction. *Michael v. James Spur Coal Co*., 11 BLR 1-78 (1988)(Tait, J., concurring).

[6] The Board rejected employer's contention because the administrative law judge had found that the miner died due to a myocardial infarction, and because there was no presumption of

administrative law judge's finding that employer failed to meet its burden of establishing that the miner's disability was not due to pneumoconiosis, which the Board therefore affirmed. [1985] *Ferguson*, slip op. at 3.

Inasmuch as employer further failed to challenge on reconsideration the administrative law judge's weighing of the rebuttal evidence relevant to subsection (b)(3), and the Board addressed only subsection (b)(2) in its order granting reconsideration, the administrative law judge properly declined to consider employer's arguments regarding (b)(3) rebuttal. To do so would have exceeded the scope of the Board's remand order. *See Hall v. Director, OWCP*, 12 BLR 1-80 (1988). Therefore, we reject employer's argument.

Citing *Peabody Coal Co. v. Greer*, 62 F.3d 801, 19 BLR 2-235 (6th Cir. 1995), employer argues that remand is required for reconsideration of subsection (b)(3) rebuttal because employer "focused its efforts on (b)(2) rebuttal" once the Board affirmed the administrative law judge's finding pursuant to Section 727.203(b)(3). Employer's Brief at 17. Subsequent to the issuance of the administrative law judge's [1995] Decision and Order, the Sixth Circuit held that, to avoid manifest injustice, an employer which chose pre-*York* to rely primarily on subsection (b)(2) to establish rebuttal should have the opportunity to rebut under subsection (b)(3) when the case is remanded for consideration of subsection (b)(2) rebuttal under *York*. The court stated that the employer in *Greer* was unduly prejudiced by its pre-*York* decision not to challenge on appeal the administrative law judge's finding of no rebuttal pursuant to Section 727.203(b)(3) because it had established subsection (b)(2) rebuttal under the more favorable standard, which *York* then changed.

Employer states that this case meets *Greer's* criteria exactly. Employer's Brief at 16. We disagree. *Greer* involved an employer which had chosen to rebut primarily under subsection (b)(2) and was lulled into forgoing an appeal of the administrative law judge's finding of no subsection (b)(3) rebuttal because it had established subsection (b)(2) rebuttal under the easier pre-*York* standard. Here, by contrast, employer did not forgo at trial or on appeal an attempt to establish rebuttal at subsection (b)(3); employer attempted both (b)(2) and (b)(3) rebuttal, submitting evidence relevant to its burden under both subsections. Employer's Exhibit 1. In fact, employer contended that it had established rebuttal at subsection (b)(3) because "the overwhelming competent medical evidence shows that [the miner's] . .

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death due to pneumoconiosis for employer to rebut in this miner's claim. [1985] *Ferguson*, slip op. at 3, 4 at n 5.

. disability was not caused in whole (as required by case law) by diseases attributable to his occupation as a coal miner." Employer's Exhibit 1 at 2. Although the subsection (b)(3) rebuttal standard has changed since then to increase the burden on employer, *see Gibas*, *supra*; *Warman*, *supra*; *Borgeson*, *supra*, the 1982 opinions of Drs. Wallace and Hansbarger would have been legally sufficient, if credited, to meet the no contributing cause standard. *See* n. 5, *supra*. The existence of this evidence and argument in the original record distinguishes the case at bar from *Greer*, where the court found that employer chose to rebut primarily under subsection (b)(2).

Furthermore, unlike the employer in *Greer*, employer in its initial appeal challenged the administrative law judge's unfavorable weighing of the evidence pursuant to Section 727.203(b)(3). [1985] *Ferguson*, slip op. at 3-4. The change in subsection (b)(2) law rendered by *York* does not affect the fact that employer not only had the opportunity to challenge subsection (b)(3) rebuttal at trial and on appeal but also used that opportunity, albeit unsuccessfully. *See Wright v. Island Creek Coal Co.*, 824 F.2d 505, 10 BLR 2-185 (6th Cir. 1987); *Lynn v. Island Creek Coal Co*. 13 BLR 1-57 (*en banc*)(McGranery, J., concurring). Thus, *Greer* does not require remand for employer to attempt rebuttal again pursuant to Section 727.203(b)(3). Therefore, we reject employer's contention.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge