BRB No. 95-1651 BLA

WILLIAM AVERY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	
	)	DATE ISSUED:
Employer-Petitioner	)	
	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Lawrence E. Gray, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West, Virginia, for claimant.

Thomas H. Odom (Arter & Hadden), Washington, D.C., for employer.

Elizabeth A. Goodman (J. Davitt McAteer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand (87-BLA-2422) of Administrative Law Judge Lawrence E. Gray 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 the original Decision and Order, Administrative Law Judge John S. Patton credited claimant with thirty years of

qualifying coal mine employment and determined that claimant established the existence of totally disabling pneumoconiosis pursuant to 20 C.F.R. §410.490. Accordingly, benefits were awarded.

On appeal, the Board affirmed the administrative law judge's finding regarding the length of claimant's coal mine employment, reversed the administrative law judge's award of benefits pursuant to Section 410.490 and remanded the case for further findings pursuant to 20 C.F.R. Part 727. *Avery v. Eastern Associated Coal Corp.*, BRB No. 91-0273 BLA (Aug. 27, 1992)(unpub.). On remand, Administrative Law Judge Lawrence E. Gray found that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), (a)(3) and (a)(4), and that employer failed to establish rebuttal pursuant to Section 727.203(b). Accordingly, benefits were awarded as of July, 1975, the month in which the claim was filed.

On appeal, the Board affirmed the administrative law judge's findings pursuant to subsections (a)(4), (b)(1)-(3), and the onset date of disability, vacated his findings pursuant to subsection (a)(1), and consequently remanded the case for consideration of rebuttal pursuant to subsection (b)(4). *Avery v. Eastern Associated Coal Corp.*, BRB No. 93-1810 BLA (Sep. 29, 1994)(unpub.). On remand, the administrative law judge found that employer failed to establish rebuttal pursuant to subsection (b)(4). Accordingly, benefits were awarded as of July 1, 1975.

On appeal, employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal pursuant to subsections (b)(3) and (b)(4), that claimant established invocation of the interim presumption pursuant to subsections (a)(1), (a)(3), and (a)(4), and in determining the date of onset of total disability. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's Decision and Order.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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 first contends that the administrative law judge failed to provide adequate explanation for his weighing of the medical opinion evidence pursuant to Section 727.203(b)(4). Employer's Brief at 16-21. In considering rebuttal pursuant to subsection (b)(4), the administrative law judge stated:

> The same rationale I used in finding no rebuttal at §727.203(b)(3) also serves to preclude Drs. Hatfield's, Morgan's, and Tuteur's opinions from establishing rebuttal at §727.203(b)(4). Again, I point out that there is a respectable body of x-ray evidence that establishes the existence of pneumoconiosis. Moreover, I note that the Board upheld the increased weight placed upon the opinion of Dr. Qazi, who diagnosed the existence of pneumoconiosis.
>
> As further review of the body of evidence reveals no rebuttal at §727.203(b)(4), I reaffirm and reinstate the award of benefits as of July 1, 1975.

Decision and Order on Remand at 1-2.

In finding that rebuttal was not established pursuant to subsection (b)(3) in his prior Decision and Order, the administrative law judge weighed the medical opinions of Drs. Hatfield, Tuteur, and Morgan, which do not diagnose pneumoconiosis, as well as the opinion of Dr. Qazi, which diagnoses pneumoconiosis. Decision and Order of May 27, 1993 at 9-10; Director's Exhibit 8; Claimant's Exhibit 5; Employer's Exhibits 7, 9. On remand, the Board affirmed the administrative law judge's weighing of the medical opinions, including his decision to assign greater weight to Dr. Qazi's opinion because he examined claimant. *Avery* (Sep. 29, 1994), *supra*; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Hall v. Director, OWCP*, 8 BLR 1-193 (1985).

Because the administrative law judge stated that he considered the evidence of record pursuant to subsection (b)(4) and applied the same rationale in his weighing of the medical opinions as he did in his prior Decision and Order and because the Board affirmed the administrative law judge's weighing of these opinions on appeal, we again affirm the administrative law judge's weighing of these medical opinions. Decision and Order at 1-2; *Avery* (Sep. 29, 1994), *supra*; *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Inasmuch as the administrative law judge permissibly assigned greater weight to Dr. Qazi's opinion, because he examined claimant, *see Clark*, *supra*; *Hall*, *supra*, we affirm his finding that employer failed to establish rebuttal pursuant to subsection (b)(4). Decision and Order at 1-2; Decision and Order of May 27, 1993 at 9-10; Claimant's Exhibit 5.

Employer next contends that the administrative law judge's finding pursuant to subsection (b)(3) must again be considered by the Board because this finding was incorporated by reference to justify the administrative law judge's (b)(4) finding on

remand. Employer's Brief at 21. We disagree. The administrative law judge did not make findings pursuant to subsection (b)(3) on remand. The administrative law judge merely stated that he relied upon the same rationale in weighing the evidence pursuant to subsection (b)(4) that he did pursuant to subsection (b)(3). Thus, because the administrative law judge's finding pursuant to subsection (b)(3) was previously affirmed by the Board, and because no exception to the law of the case doctrine has been established, we hold that the administrative law judge's finding pursuant to subsection (b)(3) is the law of the case. *See Brinkley*, *supra*.

Employer next contends that intervening case law compels reconsideration of the administrative law judge's finding of invocation pursuant to subsection (a)(4). Employer's Brief at 25. In support of this contention, employer attached a copy of the opinion of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Bailey v. Sewell Coal Co.*, No. 92-2409, (4th Cir. October 22, 1993)(unpublished). Contrary to employer's contention, this case is not intervening case law. The Court of Appeals, in *Bailey*, merely restates the principle which was previously stated in *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991) and *Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), that a physician must be aware of the exertional requirements of a miner's job prior to determining whether or not the miner is totally disabled from his usual coal mine employment.

However, upon considering the administrative law judge's finding of invocation pursuant to subsection (a)(4), we hold that the administrative law judge erred in finding invocation established pursuant to that subsection. Pursuant to subsection (a)(4), claimant must establish that his respiratory or pulmonary impairment is, by itself, totally disabling. *See York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Baker v. North American Coal Corp.*, 7 BLR 1-79 (1984). In his Decision and Order of May 27, 1993, the administrative law judge stated:

> Dr. Hatfield, Dr. Qazi, and Dr. Morgan all find Claimant to be totally disabled and find pulmonary impairment to be one of the significant contributing causes--although they disagree as to the etiology of that impairment. At this stage, the preponderance of the medical opinion evidence establishes the existence of a totally disabling pulmonary impairment, and invokes the presumption under Section 727.203(a)(4).

Decision and Order of May 27, 1993 at 8.

The administrative law judge's conclusion that claimant's pulmonary impairment is "one of the significant causes" of claimant's total disability is not sufficient to establish invocation pursuant to subsection (a)(4). *See York, supra;*

Baker, supra. Thus, we vacate the administrative law judge's finding that claimant established invocation pursuant to subsection (a)(4).

Because we have vacated the administrative law judge's finding of invocation pursuant to subsection (a)(4), we must now address employer's contentions regarding invocation pursuant to subsection (a)(3) as they were not addressed in our prior opinion. Pursuant to subsection (a)(3), the administrative law judge considered the eleven arterial blood gas studies of record and noted that nine of these studies yielded qualifying results. Decision and Order of May 27, 1993 at 3-4.

Employer contends that the administrative law judge erred in finding invocation established pursuant to subsection (a)(3) because he failed to consider explanations provided by Drs. Tuteur and Morgan for claimant's qualifying arterial blood gas study results. Employer's Brief at 33-34. This contention is without merit, because, in his consideration of the medical opinion evidence, the administrative law judge discussed the opinions of Drs. Tuteur and Morgan and noted their explanations for claimant's arterial blood gas study results. Decision and Order of May 27, 1993 at 6-7. Further, the administrative law judge considered all of the evidence of record and permissibly determined that the preponderance of the arterial blood gas study evidence was qualifying and sufficient to establish invocation pursuant to subsection (a)(3).[1] Decision and Order of May 27, 1993 at 3-4; *see Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989). Thus, we affirm the administrative law judge's finding that claimant established invocation of the interim presumption pursuant to Section 727.203(a)(3).

Finally, employer contends that the Board's interpretation of 20 C.F.R. §725.503(b), in determining the date of entitlement to benefits, is contrary to the Act and Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), because it improperly shifts the burden of proof from claimant in light of the Supreme Court's holding in *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). Employer's Brief at 36. Employer, citing *Johnson v.*

[1]The administrative law judge erred in finding that nine of the arterial blood gas studies were qualifying because only seven of the studies were qualifying pursuant to 20 C.F.R. §727.203(a)(3). Claimant's Exhibit 1; Decision and Order of May 27, 1993 at 3. This error is harmless, however, because the evidence still supports the administrative law judge's finding that the preponderance of the arterial blood gas study evidence is qualifying. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Director, OWCP, 1 BLR 1-600 (1978), states: "the Board's interpretation of 20 C.F.R. §725.503(d) in its prior decision suggests that the Board believes the regulation is designed to aid the adjudication officer in resolving this common impasse [regarding the onset date] in favor of the claimant"'. Employer's Brief at 36.

The Board has held that if the medical evidence does not establish the date on which claimant became totally disabled, then claimant is entitled to benefits as of his filing date, unless credited medical evidence indicates that claimant was not totally disabled at some point subsequent to his filing date. *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *see also Gardner v. Consolidation Coal Co.*, 12 BLR 1-184 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989). This interpretation of Section 725.503(b) does not operate in favor of claimant unless claimant was not actually totally disabled due to pneumoconiosis on his filing date. If claimant was totally disabled due to pneumoconiosis prior to his filing date but did not have sufficient proof of this fact, then Section 725.503(b) operates in favor of employer.

Because the presumption in Section 725.503(b), benefits both claimant and employer, depending upon the circumstances, it does not necessarily favor claimant and is not contrary to the Supreme Court's ruling in *Ondecko*. Even if Section 725.503(b) did lessen claimant's burden, the Section would not necessarily be invalid because the Supreme Court acknowledges that, "in part due to Congress's recognition that claims such as those involved here would be difficult to prove, claimants in adjudications under these statutes benefit from certain statutory presumptions easing their
burden." *Ondecko*, 114 S.Ct. at 2259.

Thus, because the Board previously affirmed the administrative law judge's finding that the medical evidence did not establish the date on which claimant became totally disabled due to pneumoconiosis, *see Avery*, BRB No. 93-1810 BLA (Sep. 29, 1994)(unpub.) at 5; *Brinkley*, *supra*, and because we hold that Section 725.503(b) is not prohibited by the Supreme Court holding in *Ondecko,* we reject employer's contention and reaffirm the administrative law judge's finding as to the date of entitlement to benefits.

Accordingly, the administrative law judge's 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