BRB No. 97-0433 BLA

ARTHELL PHIPPS (Widow of HENRY O. PHIPPS)	)	
Claimant-Respondent	)	
v.	)	
CLINCHFIELD COAL COMPANY	)	DATE ISSUED:
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of James Guill, Administrative Law Judge, United States Department of Labor.

Timothy W. Gresham (Penn, Stuart & Eskridge) Abingdon, Virginia for employer.

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

DOLDER, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (85-BLA-3247) of Administrative Law Judge James Guill awarding benefits on a miner's 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). The miner's claim is before the Board for the third time. The deceased miner filed for benefits on March 27, 1978. The administrative law judge initially denied benefits under 20 C.F.R. Part 727, finding that while invocation was established under 20 C.F.R. §727.203(a)(1), employer rebutted the interim presumption pursuant to 20 C.F.R. §727.203(b)(2). On appeal, the Board affirmed the administrative law judge's finding of invocation under 20 C.F.R. §727.203(a)(1) and reversed the administrative law judge's finding of rebuttal under 20 C.F.R. §727.203(b)(2). *Phipps v. Clinchfield Coal Co.*, BRB No. 84-1940 BLA (May 20, 1988) (unpub.) (*Phipps*). The Board remanded the case to the administrative law judge for consideration of rebuttal under 20 C.F.R. §727.203(b)(3). *Id*. On remand, the administrative law judge did not address rebuttal under subsection (b)(3) as previously instructed by the Board, but instead

considered entitlement under 20 C.F.R. §410.490. The administrative law judge concluded that while the miner invoked the presumption under 20 C.F.R. §410.490(b)(1)(i), employer rebutted the presumption under 20 C.F.R. §410.490(c)(2). Accordingly, the administrative law judge denied benefits. On appeal for the second time, the Board, *inter alia*, found that the miner was not entitled to have his claim considered under 20 C.F.R. §410.490, and consequently, the Board vacated the administrative law judge's denial of benefits. *Phipps v. Clinchfield Coal Co.*, BRB Nos. 88-2930 BLA and 93-1462 BLA (Aug. 30, 1993) (unpub.) (*Phipps* II). The Board remanded the case for consideration of rebuttal under 20 C.F.R. §727.203(b)(3) in accordance with its original instructions in *Phipps*. *Id*.

On remand, the administrative law judge found that employer failed to rebut the interim presumption under 20 C.F.R. §727.203(b)(3), and as such, the miner was entitled to benefits under 20 C.F.R. Part 727. However, in determining the onset date of total disability due to pneumoconiosis, the administrative law judge found that the miner was not totally disabled by a respiratory or pulmonary impairment prior to his death by suicide on October 2, 1983. The administrative law judge, therefore, concluded that "the onset of the miner's total disability began when he committed suicide in October 1983." Consistent with 20 C.F.R. §725.212, claimant was awarded derivative survivor's benefits. On appeal, employer argues that the Board previously erred in reversing the administrative law judge's finding of rebuttal under 20 C.F.R. §727.203(b)(2). Employer also argues that the administrative law judge erred in weighing Dr. Byers' opinion relevant to rebuttal under 20 C.F.R. §727.203(b)(3). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are rational, supported by substantial evidence, and consistent with applicable law, they are binding upon this Board and must be affirmed. 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).

On appeal, employer argues that the Board erred in reversing the administrative law judge's prior finding that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(2). According to employer, the Board erred in holding that subsection (b)(2) rebuttal is precluded under circumstances where a miner files a claim, but dies prior to the scheduled hearing before the Office of Administrative Law Judges. Employer contends that the miner's death by suicide unfairly deprived it of the opportunity to demonstrate that the miner was capable of resuming his usual coal mine work. Employer's argument, however, is without merit. As the Board previously noted, the administrative law judge's original analysis under 20 C.F.R. §727.203(b)(2) was directly affected by *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987), which was issued subsequent to the administrative law judge's August 21, 1984 Decision and Order. *Phipps*, slip op. at 2-3. In *Sykes*, the United States Court of Appeals for the Fourth Circuit, within those jurisdiction this case arises, held that in order to establish rebuttal pursuant to subsection (b)(2), the party opposing entitlement must show that the miner is not disabled for "whatever reason." *Sykes v. Director, OWCP*, 812 F.2d 890, 893-94, 10 BLR 2-95, 2-98 (4th Cir. 1987).

The administrative law judge's prior finding of subsection (b)(2) rebuttal is not affirmable under the standard ennunciated in *Sykes*. First, the administrative law judge overlooked the significance of the fact that the miner was deceased at the time of the hearing, and obviously was not "able to do his usual coal mine work or comparable and gainful work." 20 C.F.R. §727.203(b)(2). Second, the evidence that the administrative law judge relied upon in support of his subsection (b)(2) finding did not establish that the miner was not disabled for "whatever reason," but merely that the miner did not have a disabling respiratory impairment.[1] Therefore, even if the miner had been alive at the time of the hearing, the record would not have supported a finding of subsection (b)(2) rebuttal in accordance with *Sykes*.

Employer also challenges the administrative law judge's finding that employer failed to rebut the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). Specifically, employer contends that the administrative law judge erred in his treatment of Dr. Byers' opinion. We disagree. In weighing the medical opinion evidence relevant to Section 727.203(b)(3), the administrative law judge properly stated that the applicable standard for establishing rebuttal is whether employer has ruled out any causal relationship between the miner's total disability and his coal mine employment, *see Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). Decision and Order (D&O) On Remand at 6. Furthermore, in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), the United States Court of Appeals for the Fourth Circuit held that an employer may establish rebuttal at Section 727.203(b)(3) if it is established that the miner had no

[1] The administrative law judge previously relied upon the opinions of Drs. Byers and Thomas to establish Section 727.203(b)(2) rebuttal. Dr. Byers specifically opined that it was unlikely that the miner would have been able to return to his usual coal mine employment due to his age; therefore, the doctor's opinion is insufficient to carry employer's burden of proving that the miner was not totally disabled for any reason. *See Sykes v. Director, OWCP,* 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987); Employer's Exhibit 2. Dr. Thomas' opinion is likewise insufficient to establish rebuttal under *Sykes* as the doctor did not address whether the miner suffered from non-respiratory conditions which would have precluded the performance of his usual coal mine employment. *See Sykes, supra*; Director's Exhibit 7.

respiratory or pulmonary impairment.

In the instant case, the administrative law judge properly found that Dr. Byers is the only physician of record to opine that the miner had no respiratory impairment. D&O on Remand at 8. Contrary to employer's contention, although Dr. Byers' opinion is supportive of Section 727.203(b)(3) rebuttal, because the administrative law judge found the existence of pneumoconiosis established based on the autopsy evidence, he reasonably questioned whether Dr. Byers' opinion was reliable, given the doctor's erroneous belief that the miner did not have pneumoconiosis. *See Grigg,* 28 F.3d 416, 18 BLR 2-299; D&O on Remand at 8; Employer's Exhibit 2. In this regard, the administrative law judge reasonably found that "Dr. Byers' failure to diagnose coal workers pneumoconiosis, chronic bronchitis, and emphysema - all conditions which could cause respiratory impairment - casts significant doubt upon his conclusion that the miner had absolutely no measure of respiratory or pulmonary impairment." D&O on Remand at 9. As observed by the administrative law judge, "had Dr. Byers diagnosed these conditions, it may have caused him to validate the miner's subjective complaints and at least found [sic] some measure of impairment." *Id*. Inasmuch as it is the duty of the administrative law judge to weigh the evidence, and his analysis of Dr. Byers' opinion is in accordance with *Grigg*, we affirm his conclusion that Dr. Byers' opinion is insufficient to establish rebuttal under 20 C.F.R. §727.203(b)(3). We, therefore, affirm the administrative law judge's determination that employer failed to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3).[2]

Finally, we affirm as unchallenged on appeal the administratrative law judge's determination that benefits should commence as of May, 1983. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Our dissenting colleague challenges the propriety of the administrative law judge's finding on the issue of date of onset. That issue, however, is not properly before us, as it has not been raised by claimant on cross-appeal, *see Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984), nor briefed by employer, *see Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Fish v. Director, OWCP*, 6 BLR 1-107

[2]The administrative law judge also refused to credit the opinions of Drs. Caffrey and Thomas relevant to the issue of disability causation because they did not diagnose pneumoconiosis. D&O on Remand at 10; Director's Exhibit 7; Employer's Exhibit (EX) 23. Additionally, the administrative law judge found that the opinions of Drs. Senter, Smiddy, Buddington, and Naeye fail to rule out a contribution to the miner's disability from his coal mine employment. D&O on Remand at 10-11; DX 10: Claimant's Exhibits 3, 6, 7; EXs 5, 24.

(1983). In any event, we disagree with our dissenting colleague that the date of onset should be April, 1978, when the miner filed his claim, rather than October, 1983, when the miner died, because the evidence affirmatively shows that the miner was not totally disabled due to pneumoconiosis prior to his death, and the law is clear that the miner is not entitled to receive benefits for any period during which he is not totally disabled due to pneumoconiosis. *See Lykins v. Director, OWCP*, 12 BLR 1-181 (1989).

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

SO ORDERED.

NANCY S. DOLDER
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring and dissenting:

I write separately because while I agree to affirm the administrative law judge's findings relevant to entitlement, I would modify his award such that benefits would commence April, 1978, the month in which the miner filed his claim. As grounds for his finding on the issue of date of onset, the administrative law judge noted that prior to the miner's suicide, the miner had the respiratory or pulmonary capacity to perform his usual coal mine work. Decision and Order on Remand at 13. By considering only whether the miner was totally disabled by a respiratory impairment prior to his death, the administrative law judge resurrected his previous 20 C.F.R. §727.203(b)(2) analysis, which was rejected by the Board as contrary to *Sykes*. Because the administrative law judge's finding as to the date of onset is inconsistent with the Part 727 interim presumption of total disability due to pneumoconiosis, I would vacate the administrative law judge's date of onset finding, and award benefits commencing with the month in which the miner filed his claim.

In all other respects, I concur in the decision of the majority.

JAMES F. BROWN
Administrative Appeals Judge