BRB No. 03-0471 BLA

ERNESTINE BAILEY (O/B/O and Widow of VIRGIL BAILEY) Claimant-Petitioner v. HARMAN MINING COMPANY Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/09/2004 DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Esq., Richlands, Virginia, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

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

PER CURIAM:

Claimant[1] appeals the Decision and Order on Remand Denying Benefits (99-BLA-0849) of Administrative Law Judge Daniel F. Sutton 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).[2] The protracted procedural history of this case is as follows: The miner filed a claim for benefits on May 13, 1976. The district director made an initial finding of entitlement to benefits, but the case was transferred to the Office of Administrative Law Judges upon employer's request for a hearing. A hearing was held before Administrative Law Judge Howard J. Schellenberg, Jr. on June 30, 1980. In a Decision and Order dated February 5, 1981, Judge Schellenberg credited the miner with more than twenty-six years of coal mine employment, and considered the claim under the applicable, interim regulations found at 20 C.F.R. Part 727 (2000). Judge Schellenberg found the evidence insufficient to invoke the interim presumption under 20 C.F.R. §727.203(a)(1)-(4) (2000), and found that, even if the presumption had been invoked, it was rebutted pursuant to 20 C.F.R. §727.203(b)(2) and (b)(4) (2000). Consequently, Judge Schellenberg denied benefits. The Miner appealed. In a Decision and Order dated January 11, 1984, the Board held that Judge Schellenberg properly found the presumption rebutted pursuant to Section 727.203(b)(2) (2000). *Bailey v. Harman Mining Co.*, BRB No. 81-0511 BLA (Jan. 11, 1984)(unpublished). The Board held that it thus did not need to address the miner's arguments concerning invocation under Section 727.203(a) (2000), and affirmed the denial of benefits. *Id*. The miner filed an appeal with the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises.[3] The court affirmed the Board's Decision and Order affirming the denial of benefits. *Bailey v. Harman Mining Co.*, No. 84-1176 (4th Cir. Apr. 22, 1986)(unpublished).

---

[1]Claimant, Ernestine Bailey, is the widow of Virgil Bailey, the miner, who died on April 24, 1997. Director's Exhibit 174.

[2]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because the miner's coal mine employment occurred in Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 5.

The miner filed another claim on November 24, 1986, which was correctly treated as a request for modification because it was filed within one year of the final denial of the previous claim. In a Decision and Order dated May 19, 1989, Administrative Law Judge Ben L. O'Brien found that the miner failed to establish a mistake in a determination of fact or a change in conditions pursuant to 20 C.F.R. §725.310 (2000) and, consequently denied benefits.[4] Claimant requested reconsideration. In a Decision and Order dated July 8, 1994, Administrative Law Judge Richard K. Malamphy[5] indicated that he reached the same conclusion reached by Judge O'Brien concerning modification, and consequently, denied the miner's request for reconsideration.[6] The miner appealed. The Board affirmed Judge Malamphy's finding that modification was not established under Section 725.310 (2000), holding that the miner did not challenge the finding on appeal. *Bailey v. Harman Mining Co.*, BRB No. 94-3684 BLA (Jan. 30, 1995)(unpublished). The miner appealed to the United States Court of Appeals for the Fourth Circuit, which affirmed the Board's Decision and Order. *Bailey v. Harman Mining Co.*, No. 95-1286 (4th Cir. May 19, 1995)(unpublished).

In June 1995, the miner submitted new evidence, consisting of medical reports from Dr. Green, in support of a request for modification. Director's Exhibit 160. The miner died on April 24, 1997. Director's Exhibit 174. In a Decision and Order dated May 27, 1997, Administrative Law Judge Donald B. Jarvis determined that the miner failed to establish either a mistake in a determination of fact or a change in conditions under Section 725.310 (2000). Judge Jarvis thus denied modification. The miner's attorney appealed the case to the Board. In a Decision and Order dated June 9, 1998, the Board affirmed Judge Jarvis's denial of modification in the miner's claim. *Bailey v. Harman Mining Co.*, BRB No. 97-1288 BLA (June 9, 1998)(unpublished).

---

[4]In his Decision and Order, Judge O'Brien also denied the miner's request for waiver of recovery of the overpayment of temporary benefits totaling $26,633.80, which the Black Lung Disability Trust Fund paid to the miner after the district director's initial determination of entitlement to benefits in the 1976 claim. Director's Exhibits 32, 102.

[5]The case was referred to Judge Malamphy as Judge O'Brien was no longer available to the Office of Administrative Law Judges to render a decision on reconsideration.

[6]While Judge Malamphy denied reconsideration with regard to the issue of modification, he found that because the record was devoid of evidence as to the miner's assets and expenses, it was appropriate to schedule a hearing for further review of the overpayment issue. Director's Exhibit 122 at 5.

While the miner's appeal had been pending before the Board, claimant (the miner's widow) filed a survivor's claim for benefits on October 1, 1997, which the district director denied on March 20, 1998. On November 6, 1998, claimant requested modification of the denials in both the miner's and the survivor's claims. After the district director denied modification in both claims, the case was forwarded to Administrative Law Judge Daniel F. Sutton (the administrative law judge), who held a hearing on February 8, 2000. In a Decision and Order dated April 10, 2001, the administrative law judge granted a motion by employer to exclude the medical opinion of Dr. Jones on due process grounds because the pathology slides upon which Dr. Jones relied were not available for review by employer and because Dr. Jones was not available for cross-examination. Regarding the merits of the miner's claim, the administrative law judge found that while the newly submitted evidence of record established invocation of the interim presumption under Section 727.203(a)(1) (2000), and that a mistake in a determination of fact had been made, therefore, in the previous finding of no invocation, claimant's request for modification must be denied because the evidence of record was sufficient to establish rebuttal of the interim presumption pursuant to Section 727.203(b)(3) (2000). Regarding the survivor's claim, the administrative law judge found that, because there was no evidence of record to establish that pneumoconiosis caused, substantially contributed to, or hastened the miner's death pursuant to 20 C.F.R. §718.205(c)(1)-(3), claimant failed to establish that a mistake in a determination of fact had been made in the previous decision. Accordingly, the administrative law judge denied benefits in both the miner's and the survivor's claims. Claimant appealed.

The Board affirmed the administrative law judge's finding that claimant was entitled to invocation of the interim presumption at Section 727.203(a)(1) (2000) based on the autopsy report of Dr. Coogan, which indicates that the miner suffered from pneumoconiosis, and that, therefore, claimant established a mistake in the prior determination that invocation was not established. *Bailey v. Harman Mining Co.*, BRB No. 01-0648 BLA (Mar. 27, 2002)(unpublished). The Board also affirmed the administrative law judge's finding that Dr. Coogan's opinion is insufficient to establish death due to pneumoconiosis pursuant to Section 718.205(c), since the doctor addressed only the existence of pneumoconiosis and not whether the miner's death was due to the disease. *Id;* Director's Exhibit 175. In addition, the Board affirmed the administrative law judge's exclusion of Dr. Jones's autopsy report, indicating that the miner's death was hastened by pneumoconiosis. *Bailey v. Harman Mining Co.*, BRB No. 01-0648 BLA (Mar. 27, 2002)(unpublished); Director's Exhibit 186. The Board held that the administrative law judge rationally found that admission of the report would deny employer's due process rights because the autopsy slides, which had been lost, were unavailable for review by employer's experts, and because Dr. Jones, who

could not be located, was unavailable for cross-examination.[7] *Bailey v. Harman Mining Co.*, BRB No. 01-0648 BLA (Mar. 27, 2002)(unpublished). The Board vacated, however, the administrative law judge's finding that rebuttal of the interim presumption was established under Section 727.203(b)(3) (2000). *Id*. The Board held that it was irrational for the administrative law judge to find the autopsy evidence sufficient to establish the existence of pneumoconiosis and then find rebuttal established based on the absence of any evidence of lung disease in the new evidence. *Id*., slip op. at 5-6. The Board thus remanded the case for the administrative law judge to reconsider the evidence regarding rebuttal under Section 727.203(b)(3) (2000). *Id*.

In his Decision and Order on Remand, dated March 5, 2003, the administrative law judge determined that the evidence of record established rebuttal of the interim presumption under Section 727.203(b)(3) (2000). Accordingly, the administrative law judge denied benefits. On appeal, claimant challenges the administrative law judge's finding of rebuttal at Section 727.203(b)(3) (2000). Claimant also generally contends that she established entitlement in her survivor's claim, and renews her argument in her previous appeal that the administrative law judge erred in excluding Dr. Jones's autopsy report from consideration. Employer responds in support of the decision denying benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he does not presently intend 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 rational, supported by substantial evidence, and in accordance with applicable 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).

In challenging the administrative law judge's finding that employer had established that the miner's total disability did not arise in whole or in part out of coal mine employment and therefore had rebutted the interim presumption pursuant to Section 727.203(b)(3) (2000), claimant argues that the administrative law judge improperly relied upon the opinions of Drs. Fino and Castle. In order to establish rebuttal of the interim presumption under Section 727.203(b)(3) (2000),

---

[7]In rejecting claimant's arguments with regard to the reports of Drs. Coogan and Jones, the Board effectively affirmed the administrative law judge's denial of benefits in the survivor's claim because the opinions of Drs. Coogan and Jones are the only opinions of record which, if credited, could support an award in the survivor's claim. *Bailey v. Harman Mining Co.*, BRB No. 01-0648 BLA (Mar. 27, 2002)(unpublished).

the party opposing entitlement must "rule out" any relationship between a miner's disability and coal mine employment. *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). The Fourth Circuit has held in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), that an opinion of no pulmonary impairment may be sufficient to rule out any connection between coal mine employment and the miner's total disability. The court held that such an opinion must state without equivocation that the miner had no respiratory or pulmonary impairment of any kind. *Grigg*, 28 F.3d at 419, 18 BLR at 2-305. The court considered such an opinion to be more persuasive if the physician gives an actual cause for the miner's disability, and that such an opinion is suspect if the doctor diagnoses both no pulmonary impairment and no pneumoconiosis. *Id*.

Dr. Fino, who reviewed the evidence of record, testified at his deposition that the miner suffered from no pulmonary or respiratory impairment. Employer's Exhibit 5 at 14. Dr. Fino opined that the miner's severe kidney disease and coronary artery disease caused him to be disabled. Employer's Exhibits 1, 5 at 15. In addition, contrary to claimant's suggestion that Dr. Fino opined that the miner did not suffer from pneumoconiosis, Dr. Fino indicated that, notwithstanding his opinion that the x-ray evidence was insufficient to establish the existence of pneumoconiosis, the miner in fact suffered from the disease in light of the pathological evidence of pneumoconiosis.[8] Employer's Exhibit 1. The administrative law judge thus properly found that Dr. Fino's opinion supports a finding of rebuttal under Section 727.203(b)(3) (2000). *Grigg*, 28 F.3d at 419, 18 BLR at 2-305; Decision and Order on Remand at 7; Employer's Exhibits 1, 5.

---

[8]The United States Court of Appeals for the Fourth Circuit stated in *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), that it agrees with those circuits that have held that a medical opinion finding "no respiratory or pulmonary impairment" which is premised on an erroneous finding that the miner does not suffer from pneumoconiosis is not worthy of much weight regarding the issue of disability or death causation. *Grigg*, 28 F.3d at 419, 18 BLR at 2-306-307, *citing Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993) and *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990). The court held that while it need not go so far as to hold that such an opinion is without any probative value, such an opinion does not have enough force to satisfy the standard for establishing rebuttal under 20 C.F.R. §727.203(b)(3) (2000) set forth in *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984) – *i.e.*, that the party opposing entitlement must "rule out" the causal relationship between the miner's death or total disability and coal mine employment. *Grigg*, 28 F.3d at 419, 18 BLR at 2-307.

In weighing Dr. Fino's opinion against the contrary opinions of record, the administrative law judge properly credited Dr. Fino's opinion as better reasoned and documented than the newly submitted opinion of Dr. Green, and the previously submitted opinions of Drs. Sutherland and Thakkar.[9] *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); Decision and Order on Remand at 7; Director's Exhibits 70, 71, 160; Employer's Exhibits 1, 5. The administrative law judge found that although Dr. Green was the miner's treating physician, Dr. Green did not explain his opinion that the miner's shortness of breath and dypsnea on exertion were multifactorial in origin, and due in part to pneumoconiosis from a long history of working in the mines. Decision and Order on Remand at 7; Director's Exhibit 175. The administrative law judge also found that Dr. Green did not cite any objective evidence in support of his finding of a respiratory impairment. *Id*. Furthermore, the administrative law judge properly accorded greatest weight to Dr. Fino's opinion on the ground that he is a Board-certified pulmonary specialist, whereas Dr. Green's credentials are not in evidence. *See Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 7; Employer's Exhibit 5. With regard to the opinions of Drs. Thakkar and Sutherland, which indicate that the miner had a moderate to severe pulmonary impairment, Director's Exhibits 70, 71, the administrative law judge agreed with Judge Malamphy's previous finding that these opinions were not well-reasoned and documented, a finding that the Board had previously affirmed. *Bailey v. Harman Mining Co.*, BRB No. 94-3684 BLA (Jan. 30, 1995)(unpublished); 1994 Decision and Order at 5. Finally, we reject claimant's contention that the administrative law judge improperly relied upon Dr. Castle's medical opinion in finding rebuttal established under Section 727.203(b)(3) (2000). The

---

[9]Periodic hospital records for hospitalizations from November 1995 until May 1996 indicate that Dr. Green treated the miner for chronic, endstage renal failure secondary to diabetes mellitus, and cardiovascular disease. Director's Exhibit 160. In a report dated May 20, 1996, Dr. Green indicated that among the miner's conditions was chronic dypsnea on exertion and shortness of breath which was due in part to pneumoconiosis. *Id*. Dr. Green did not otherwise specifically indicate in his hospital reports, the May 20, 1996 report, or an undated letter to claimant referring to the miner's lung disease, Director's Exhibit 186, that the miner had a pulmonary or respiratory impairment. In a 1987 report, Dr. Sutherland indicated that he had been taking care of the miner since 1983, and that it was his impression that the miner exhibited a severe pulmonary impairment due to pneumoconiosis. Director's Exhibit 71. Dr. Thakkar indicated in a letter dated August 18, 1987, that the miner had a moderately severe, totally disabling pulmonary impairment related to his twenty-six year coal dust exposure history. Director's Exhibit 70.

administrative law judge specifically found Dr. Castle's opinion insufficient to rebut the presumption because the doctor's finding of no significant respiratory impairment did not rule out a respiratory impairment. Decision and Order on Remand at 6; Employer's Exhibit 3. Accordingly, we affirm the administrative law judge's finding that the medical opinion evidence is sufficient to establish rebuttal of the interim presumption pursuant to 20 C.F.R. §727.203(b)(3) (2000).

We again reject both claimant's general contention on appeal that the evidence is sufficient to establish death due to pneumoconiosis in the survivor's claim pursuant to Section 718.205(c) and her argument that the administrative law judge erred in excluding from consideration in both the miner's and survivor's claims, Dr. Jones's opinion that pneumoconiosis hastened the miner's death. Because we rejected these arguments in our previous Decision and Order, and because claimant has not shown an exception to the law of the case doctrine, the law of the case doctrine is controlling. *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983). *Bailey v. Harman Mining Co.*, BRB No. 01-0648 BLA (Mar. 27, 2002)(unpublished).

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

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge