BRB No. 97-1690 BLA

FRANKLIN OSBORNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
BILL BRANCH COAL CORP.	)	
	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER
Party-in-Interest	)	

Appeal of the Decision and Order on Remand of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

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

Ronald E. Gilbertson (Kilcullen, Wilson & Kilcullen), Washington, D.C., for employer.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand (92-BLA-1250) of Administrative Law Judge Stuart A. Levin 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. We discussed fully this claim's procedural history in our prior decision on appeal. *Osborne v. Bill Branch Coal Corp*., BRB No. 93-1569 BLA (Nov. 29, 1994)(unpub.). We now focus only on those procedural aspects relevant to employer's arguments in this appeal.

In a decision and order issued on April 28, 1993 the administrative law judge accepted the parties' stipulation to at least twenty years of coal mine employment and found that the weight of the blood gas study evidence established invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a)(3). Upon consideration of rebuttal pursuant to Section 727.203(b)(3), (4), the administrative law judge concluded that the evidence raised a true doubt that he was bound to resolve in claimant's favor. Accordingly, the administrative law judge found that employer failed to rebut the presumption, and he awarded benefits.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's invocation finding as unchallenged on appeal, but because the true-doubt rule was no longer valid, the Board vacated his findings pursuant to Section 727.203(b)(3), (4). [1994] *Osborne*, slip op. at 4; *see Director, OWCP v. Greenwich Collieries* [Ondecko], U.S. , 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Accordingly, the Board remanded the case for further consideration. The Board denied employer's motion for reconsideration challenging its designation as the responsible operator. *Osborne v. Bill Branch Coal Corp*., BRB No. 93-1569 BLA (Jan. 23, 1997)(unpub.).

On remand, the administrative law judge discounted all of employer's rebuttal evidence for various reasons, concluded that rebuttal was not established under Section 727.203(b)(3), (4), and awarded benefits.

On appeal, employer contends that the administrative law judge made several errors in weighing the medical evidence on remand. 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).

Claimant has been presumed totally disabled due to pneumoconiosis pursuant to Section 727.203(a)(3). To rebut this presumption under subsection (b)(3), employer must rule out any causal connection between claimant's total disability and his coal mine employment. *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 21 BLR 2-302, 2-314 (1998); *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). To rebut the presumption under subsection (b)(4),

employer must prove that the miner does not have pneumoconiosis, in either the clinical or legal sense. *See* 20 C.F.R. §727.202; *Barber v. Director, OWCP*, 43 F.3d 899, 900, 19 BLR 2-61, 2-67 (4th Cir.1995).

Employer submitted the opinions of Drs. Sargent, Fino, Anderson, and Lane. Dr. Sargent, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, examined and tested claimant and concluded that pneumoconiosis was absent. Director's Exhibit 82. He opined that claimant's severe obstructive ventilatory impairment resulted from emphysema due to smoking and not coal dust exposure. *Id*. Dr. Fino, who is Board-certified in Internal Medicine and Pulmonary Disease and is a B-reader, reviewed the medical evidence of record and concluded that claimant does not have any pulmonary condition related to coal dust exposure but does have an obstructive impairment resulting from emphysema due to smoking. Employer's Exhibit 3. Dr. Anderson, whose credentials are not in the record, reviewed the medical evidence and concluded that claimant has no impairment related to his coal mine employment but does have a severe obstructive ventilatory impairment resulting from smoking-related emphysema. Employer's Exhibit 5. Dr. Lane, whose credentials are not in the record, reviewed the medical evidence and opined that claimant does not have "coal workers' pneumoconiosis" but suffers from severe chronic obstructive lung disease due to smoking and not coal dust exposure. Employer's Exhibit 4.

The administrative law judge first discredited all of employer's medical opinions as inconsistent with *Warth v. Southern Ohio Coal Co*., 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995). He further found them to be of little probative value because he concluded that they were not based upon medical reasoning. In addition, the administrative law judge accorded little weight to the reports of Drs. Fino, Anderson, and Lane on the ground that they were cursory and undocumented, and further discounted Dr. Fino's opinion as internally inconsistent. The administrative law judge accorded greater weight to the medical opinions by examining and treating physicians which were submitted by claimant, and concluded that rebuttal was not established under either subsection (b)(3) or (b)(4).

Employer contends that the administrative law judge misapplied *Warth* to discredit the opinions of Drs. Sargent, Fino, Anderson, and Lane. Employer's Brief at 10-15. In *Warth*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that a medical opinion based on the erroneous assumption that obstructive disorders cannot be caused by coal mine employment merits no weight in determining disability causation. Subsequently, however, the Fourth Circuit court explained that *Warth* does not preclude consideration of a disability causation opinion that is based in part on the absence of a restrictive impairment where the opinion is documented and reasoned and is not

premised on the assumption that coal mine employment cannot cause obstructive disorders. *Stiltner v. Island Creek Coal Co*., 86 F.3d 337, 341, 20 BLR 2-246, 2-254-55 (4th Cir. 1996).

Here, Drs. Fino, Anderson, and Lane based their conclusions that claimant's severe obstructive impairment was due solely to smoking upon a review of claimant's medical history, coal mine employment history, blood gas studies, pulmonary function studies, and chest x-rays. Dr. Sargent based his opinion upon an examination of claimant. None of these physicians assumed that coal mine employment can never cause obstruction. *See Stiltner*, *supra*. Therefore, their opinions should not have been discounted under *Warth.*

Employer next argues that the administrative law judge improperly discounted its medical opinions as non-medical analyses which were cursory, undocumented, and based solely on negative chest x-rays. Employer's Brief at 15-18. This contention has merit. In his medical record review, Dr. Anderson commented that "the preponderance of the evidence is that [claimant] does not have pneumoconiosis." Employer's Exhibit 5 at 1. Dr. Lane noted in his review that because the "majority" of B-readers read claimant's chest x-ray as negative, he believed that the "preponderance of the interpretations" indicated that claimant did not have coal workers' pneumoconiosis. Employer's Exhibit 4. Apparently in response to these statements, the administrative law judge stated that "a finding of 'preponderance' is a legal determination to be made by the trier of fact." Decision and Order on Remand at 4. The administrative law judge found that since Drs. Sargent, Fino, Anderson, and Lane "based their findings," solely "upon a 'preponderance' of the x-ray evidence, their conclusions reflect[ed] legal, not medical, analysis," meriting little weight. *Id*.

While an administrative law judge has broad discretion in weighing documentary evidence, *see Lafferty v. Cannelton Industries, Inc*., 12 BLR 1-190 (1989); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), we must inquire whether the administrative law judge's credibility determinations are reasonable and supported by the record. 33 U.S.C. § 921(b)(3); *see Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). We cannot agree that the mere use of the word "preponderance" by Drs. Anderson and Lane to describe what they saw as the balance of the objective medical data automatically converted their medical opinions, and those of the other physicians, into legal analyses. Nor do we find record support for the administrative law judge's conclusion that the sole basis of the rebuttal opinions was negative x-ray evidence, or that the reports of Drs. Fino, Anderson, and Lane were cursory and undocumented. *See Tackett, supra*. In light of all of the foregoing, we must vacate the administrative law judge's findings pursuant to

Section 727.203(b)(3), (4) and remand this case for further consideration.

However, we reject employer's contention that the administrative law judge engaged in medical reasoning when he found Dr. Fino's opinion "internally inconsistent." Employer's Brief at 19; Decision and Order at 5. The administrative law judge reasoned that Dr. Fino's comment that claimant's bronchodilator treatments suggested that his impairment was reversible and thus not pneumoconiosis was inadequately explained in light of evidence in the record indicating that bronchodilators did not reverse claimant's ventilatory impairment. Director's Exhibit 93. It was within the administrative law judge's discretion to probe the quality of Dr. Fino's explanation. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). However, the administrative law judge did not consider all of the evidence on this issue, and should do so on remand if he again deems this issue relevant. The record contains three sets of legible post-bronchodilator pulmonary function study results accompanied by comments from Drs. Claustro, Robinette, and Forehand regarding the effectiveness of bronchodilators. Director's Exhibits 89, 93, 105.

On remand, the administrative law judge must reconsider all of the relevant evidence pursuant to Section 727.203(b)(3), (4), *see Massey, supra*; *Barber, supra*, in light of the physicians' relative qualifications and the quality of their medical reasoning and explanation. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). In addition, the administrative law judge must include the x-ray evidence in his consideration of rebuttal pursuant to Section 727.203(b)(4).

Accordingly, the administrative law judge's Decision and Order on Remand is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge