BRB No. 88-3990 BLA

FLOYD REESE)
)
Claimant-Petitioner)
)
v.)
)
CONSOLIDATION COAL COMPANY)
) DATE ISSUED:
Employer-Respondent)
)
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 John C. Holmes, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen), Fairmont, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: BROWN and McGRANERY, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order on Remand (80-BLA-6305) of Administrative Law Judge John C. Holmes denying 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 on appeal before the Board for the third time. On October 29, 1981 the administrative

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(Su-pp. V 1987).

law judge issued a Decision and Order denying benefits. On August 15, 1985 the Board vacated the Decision and Order and remanded the case because the administrative law judge did not have the opportunity to review the decision in Whicker v. U.S. Dept. of Labor Benefits Review Board, 733 F.2d 346 (1984)(in which the Court of Appeals for the Fourth Circuit, wherein jurisdiction for this claim arises, held that non-qualifying pulmonary function and arterial blood gas studies can not be used alone to establish rebuttal) and because the administrative law judge may have principally relied on non-qualifying tests in finding that claimant was not disabled. The Board also remanded the case for discussion of rebuttal under 20 C.F.R. §727.203(b)(3) and gave the administrative law judge leave to reopen the record for further discovery. See Reese v. Consolidation Coal Co., BRB No. 81-1221 BLA (August 15, 1985) (unpub.). On October 11, 1985 the administrative law judge issued a Decision and Order on Remand denying benefits and on November 29, 1985 issued an order denying motion for reconsideration. On August 25, 1988 the Board again vacated the administrative law judge's decision based on Sykes v. Director, OWCP, 812 F.2d 890 (4th Cir. 1987), and instructed the administrative law judge to review the evidence, particularly the opinions of Dr. Piccirillo and Dr. Cox, under 20 C.F.R. §727.203(b)(3), citing Bethlehem Mines Corp. v. Massey, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984). See Reese v. Consolidation Coal Co., BRB No. 85-2864 BLA-R (August 25, 1988) (unpub.). On November 18, 1988 the administrative law judge issued the Decision and Order on Remand which is the subject of this appeal. The administrative law judge considered the evidence and found that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3). Accordingly, benefits were denied. On appeal, claimant contends that the administrative law judge erred in finding the evidence sufficient to establish rebuttal. Employer responds in support of the administrative law judge's Decision and Order on Remand. The Director, Office of Workers' Compensation Programs, has not responded to this appeal.

The Board's scope of review is defined by statute. The administrative law judge's findings of fact and conclusions of law must be affirmed if they are supported by substantial evidence, are rational, and are in accordance with 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 determining that employer established rebuttal pursuant to 20 C.F.R. §727.203(b)(3), the administrative law judge considered Dr. Piccirillo's medical opinion and found that he stated that claimant is

> ... totally and permanently disabled to do his regular coal mining job and the etiology of his disability is twofold. One is his age and two his

> Hypertension and his Hypertensive Cardiovascular Disease. It is my opinion that this gentleman's Coal Worker's Pneumoconiosis plays no significant role in his disability.

See Decision and Order of November 18, 1988 at 1, 2. Dr. Piccirillo, however, further stated that if he "were to place a percentage on the amount of respiratory impairment secondary to Coal Worker's Pneumoconiosis it would surely be no greater than 10%." See Director's Exhibit 45. The administrative law judge then considered the opinion of Dr. Cox and determined that it was not supported by objective evidence and was not well reasoned.[1] As a result he afforded Dr. Cox's opinion very little weight. He then concluded that Dr. Cox's opinion "does not contradict Dr. Piccirillo's opinion which is sufficient to rebut." See Decision and Order at 2.

The Board has interpreted the Fourth Circuit's holding in Massey, supra., as requiring that employer must completely rule out pneumoconiosis as a cause of claimant's total disability in order to rebut the interim presumption pursuant to 20 C.F.R. §727.203(b)(3). In the instant case, the medical opinion relied upon by the administrative law judge to establish rebuttal stated that pneumoconiosis plays "no significant role" in claimant's disability and that pneumoconiosis was "no greater than 10%" of the cause of claimant's disability. See Director's Exhibit 45. Neither of these statements is sufficient to rule out pneumoconiosis as a cause of claimant's total disability. As a result, the administrative law judge's Decision and Order on Remand denying benefits is reversed, as a matter of law, and benefits are awarded.

[1]Dr. Cox examined claimant on two occasions, January 31, 1978 and June 21, 1979. See Director's Exhibits 19, 20. On the first physical examination form Dr. Cox diagnosed "occasional rale", checked "yes" for relation to coal mine employment, and described the severity of claimant's impairment as "[u]nable to walk much. Dyspnea arising aggravating coughing spell". See Director's Exhibit 19. On the second form, Dr. Cox diagnosed emphysema and pneumoconiosis. He described the severity of claimant's impairment as "[d]ypsnea, cough & wheezing all continue to keep him from doing any work. Tires out too easy." See Director's Exhibit 20.

Accordingly, the Decision and Order denying benefits is reversed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

RENO E. BONFANTI
Administrative Law Judge