BRB No 00-0216 BLA

VIRGIL CALDWELL	)	
Claimant-Petitioner	)	DATE ISSUED:
v.	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DECISION and ORDER
Respondent	)	

Appeal of the Decision and Order--Denial of Benefits of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Theodore E. Harman (Ungaretti & Harris), Chicago, Illinois, for claimant.

Barry H. Joyner (Henry L. Solano, 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: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order--Denial of Benefits (99-BLA-0246) of Administrative Law Judge Robert L. Hillyard rendered 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.

Claimant filed his initial application for benefits on December 12, 1973. Director's Exhibit 1. The district director issued an initial denial, which claimant indicated that he "appeal[ed]." Director's Exhibits 8, 9. However, the district director took no further action, and never issued a final decision on the claim. Thus, when claimant filed a new application for benefits on May 13, 1985, his first claim was still pending. Director's Exhibit 18. Consequently, Administrative Law

Judge Robert G. Mahony found that the second application merged with the first pursuant to 20 C.F.R. §725.309, and that the adjudicatory criteria of 20 C.F.R. Part 727 applied.

Judge Mahony credited claimant with ten and one-quarter years of coal mine employment and found that the evidence of record did not establish invocation of the interim presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §727.203(a). Director's Exhibit 42a. He additionally found that claimant failed to establish entitlement under either 20 C.F.R. §410.490 or 20 C.F.R. Part 718. Accordingly, he denied benefits.

Claimant appealed, but while the appeal was pending, the Director, Office of Workers' Compensation Programs (the Director), moved to remand the case to the district director because claimant had not received a complete and credible pulmonary evaluation. The Board agreed with the administrative law judge's conclusion that the only medical examination reports of record were unreasoned and were therefore insufficient to establish invocation pursuant to Section 727.203(a)(4). Consequently, the Board granted the Director's motion, vacated the administrative law judge's Decision and Order denying benefits, and remanded the case to the district director for claimant to receive a complete pulmonary evaluation. *Caldwell v. Director, OWCP*, BRB No. 89-0714 BLA (Jul. 28, 1992)(unpub.); Director's Exhibit 43.

After the new pulmonary evaluation was conducted, the district director denied benefits and claimant requested a hearing, which was held on June 21, 1994 before Administrative Law Judge J. Michael O'Neill. In his Decision and Order, Judge O'Neill found that the medical evidence did not establish invocation pursuant to Section 727.203(a), or entitlement under 20 C.F.R. Part 718. Director's Exhibit 72. Accordingly, he denied benefits.

Claimant again appealed, and the Director moved to remand the case to the administrative law judge. The Director agreed with claimant that the administrative law judge erred in his analysis of the x-ray readings pursuant to Section 727.203(a)(1), and argued that the administrative law judge failed to compare Dr. Hessl's diagnosis of a mild restrictive defect based on lung volume testing, to the exertional requirements of claimant's usual coal mine employment to determine whether invocation was established pursuant to Section 727.203(a)(4). Director's Exhibit 81 at 2, 4. The Director also stated that the new pulmonary evaluation obtained from Dr. Rosman was deficient, and that if the administrative law judge found on remand that Dr. Hessl's opinion was insufficient to establish entitlement, further remand to the district director was required for another pulmonary evaluation. Director's Exhibit 81 at 8-9.

The Board held that the administrative law judge erred in his analysis of the x-ray evidence and therefore vacated the administrative law judge's finding pursuant to Section 727.203(a)(1). *Caldwell v. Director, OWCP*, BRB No. 96-0620 BLA, (May 29, 1997)(unpub.); Director's Exhibit 85. The Board also agreed that further analysis was required pursuant to Section 727.203(a)(4). The Board further indicated that if the administrative law judge found that Dr. Rosman's opinion was not probative on the issue of total disability, the administrative law judge should remand the case to the district director for claimant to be provided with a complete pulmonary examination.

On remand, Judge O'Neill found that Dr. Rosman's opinion was insufficiently reasoned or explained to establish invocation pursuant to Section 727.203(a)(4). Director's Exhibit 91. Accordingly, he granted the Director's request to again remand the case to the district director for a complete pulmonary evaluation to be provided to claimant.

After claimant received a pulmonary evaluation by Dr. A.R. Hudson, the district director denied benefits and claimant requested a hearing, which was held before Administrative Law Judge Robert L. Hillyard on April 21, 1999. In his Decision and Order, the administrative law judge found that the weight of the x-ray readings by the most highly qualified readers established invocation of the interim presumption pursuant to Section 727.203(a)(1). The administrative law judge found, however, that the Director established rebuttal of the presumption pursuant to Section 727.203(b)(3), based on Dr. Hudson's opinion that claimant has no pulmonary impairment. The administrative law judge further found pursuant to Part 718 that the x-ray evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to Sections 718.202(a)(1), 718.203(b), but that claimant did not prove that he is totally disabled pursuant to Section 718.204(c). Accordingly, the administrative law judge denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding rebuttal established pursuant to Section 727.203(b)(3). The Director responds, urging affirmance, but contends that if the administrative law judge's finding pursuant to Section 727.203(b)(3) is not affirmed and the case is remanded, then the administrative law judge's finding that invocation was established pursuant to Section 727.203(a)(1) should be vacated. Claimant has filed a reply brief.

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).

The administrative law judge found that invocation was established pursuant to Section 727.203(a)(1). Section 727.203(b)(3) provides for rebuttal where the evidence establishes that claimant's total disability did not arise in whole or in part out of coal mine employment. 20 C.F.R. §727.203(b)(3). The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that, to establish rebuttal pursuant to Section 727.203(b)(3), the party opposing entitlement must prove that pneumoconiosis was not a contributing cause to claimant's disability. *Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir.

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[1] We affirm as unchallenged on appeal the administrative law judge's findings pursuant to 20 C.F.R. §§727.203(a)(2), (3), 727.203(b)(1), (2), and 718.204(c). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

1988); *Gibas v. Saginaw Mining Co*., 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985).

The administrative law judge found that the Director ruled out any causal connection between claimant's total disability and his coal mine employment by Dr. Hudson's opinion that claimant has no pulmonary impairment. Decision and Order at 13; Director's Exhibit 93. Claimant contends that the administrative law judge did not consider all relevant evidence in finding rebuttal established because the administrative law judge accepted Dr. Hudson's finding of no impairment without considering Dr. Hessl's 1994 finding of a restrictive impairment based on lung volume testing. Claimant's Brief at 15; Director's Exhibit 64.

Dr. Hudson examined claimant, administered pulmonary function and blood gas studies which were non-qualifying, and read a chest x-ray as negative. Based on his findings, Dr. Hudson indicated that there was no cardiopulmonary diagnosis, "except chronic bronchitis by history." Director's Exhibit 93 at 4. In the "Impairment" section of his report, Dr. Hudson indicated that there was "No pulmonary impairment." *Id*. He added that claimant was capable of performing his usual coal mine employment as he described it, although morbid obesity interfered with claimant's mobility. *Id*.

Rebuttal pursuant to Section 727.203(b)(3) is available where a physician states unequivocally that claimant suffers from no respiratory or pulmonary impairment, as the absence of a pulmonary impairment precludes pneumoconiosis as a cause of total disability. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-25 (1987); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). Claimant is correct that in crediting Dr. Hudson's opinion that there was no pulmonary impairment, the administrative law judge did not weigh the evidence in the record from Dr. Hessl suggesting at least some degree of respiratory or pulmonary impairment in the form of a restrictive defect. The administrative law judge did correctly find that all of the pulmonary function and blood gas studies of record were non-qualifying, but given the Director's chosen method of

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[2] Dr. Hessl diagnosed a "[r]estrictive defect on pulmonary function test," citing the attached pulmonary function study report of Dr. Cohen, who indicated that lung volume testing showed a "reduced TLC," indicative of a "mild restrictive defect by lung volumes." Director's Exhibit 64.

[3] A "qualifying" objective study yields values which are equal to or less than the values specified in the tables at 20 C.F.R. §§727.203(a)(2), (3). A "non-qualifying" study exceeds those values.

rebuttal, this issue is whether claimant has any type of respiratory or pulmonary impairment at all. *See Marcum, supra*; *Grigg, supra*. Since "all relevant medical evidence shall be considered" on rebuttal, 20 C.F.R. §718.203(b), and Dr. Hessl's finding of a restrictive defect based on lung volume testing is relevant to whether claimant has any respiratory or pulmonary impairment, we vacate the administrative law judge's finding pursuant to Section 727.203(b)(3) and instruct him to reweigh Dr. Hudson's "No pulmonary impairment" opinion in light of Dr. Hessl's finding of a restrictive defect.

However, we reject claimant's contention that Dr. Hudson's opinion merits no weight merely because Dr. Hudson did not diagnose pneumoconiosis. Claimant's Brief at 14. Claimant argues that Dr. Hudson's opinion is not worth much when it is based on the view that claimant has no pneumoconiosis. This is true of opinions that claimant's total disability did not arise out of coal mine employment, not of opinions of no impairment. There is no evidence that simple pneumoconiosis always causes an impairment. We likewise reject claimant's contention that Dr. Hudson's opinion must be rejected because it does not identify a cause of claimant's presumed total disability. Claimant's Reply Brief at 5; *see Welch v. Benefits Review Board*, 808 F.2d 443, 446, 9 BLR 2-196, 2-200 (6th Cir. 1986)(alternative etiology need not be proposed).

The Director contends that if the case is to be remanded, the administrative law judge's invocation finding pursuant to Section 727.203(a)(1) must be vacated. Director's Brief at 8-10. The administrative law judge considered all twenty-four readings of nine x-rays taken between 1973 and 1999. There were nine positive readings, fourteen negative readings, and one reading not classified for the presence or absence of pneumoconiosis. The early x-rays were almost entirely negative. All but one of the positive readings were of x-rays taken after 1993, and, as highlighted by the administrative law judge, they outnumbered the negative readings of the recent x-rays. Considering the x-ray readings in light of the readers' radiological qualifications and in view of the progressive nature of pneumoconiosis, the administrative law judge accorded greater weight to the more recent positive readings.

Contrary to the Director's contention, the administrative law judge did not merely "count heads," or ignore the earlier negative readings, but permissibly considered both the quantity and quality of the x-ray readings consistently with the progressive nature of pneumoconiosis to find that the weight of the x-ray evidence established the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 321, 17 BLR 2-77, 2-87 (6th Cir. 1993); *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990). The Director argues that certain of its experts' negative readings should

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[4] Dr. Hudson's statement that claimant is not totally disabled is insufficient to establish subsection (b)(3) rebuttal. *See Warman, supra; Gibas, supra*.

have received the greatest weight, in view of those experts' arguably superior credentials. Here, however, the administrative law judge considered the readers' B-reader and Board-certified Radiologist credentials, and was not required to defer to the x-ray readers who are professors of radiology. *See Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993)(the administrative law judge may consider a physician's professorship in radiology as a factor relevant to his or her radiological competence.) Because the administrative law judge considered the x-ray readings in light of the readers' qualifications, provided valid reasons for the weight that he accorded to the x-

ray evidence, *see Woodward, supra*, and substantial evidence supports his finding, we affirm the administrative law judge's finding pursuant to Section 727.203(a)(1).

Accordingly, the administrative law judge's Decision and Order--Denial of Benefits is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

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[5] Consequently, we also affirm the administrative law judge's attendant finding that rebuttal pursuant to Section 727.203(b)(4) is precluded. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Curry v. Beatrice Pocahontas Coal Co.*, 18 BLR 1-59 (1994)(*en banc*, Brown and McGranery, JJ., concurring and dissenting, separately), *rev****=d on other grounds, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).***