BRB No. 96-0882 BLA

NOAH W. VANDYKE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED:
FAITH COAL COMPANY	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Supplemental Decision and Order on Remand of Charles P. Rippey, Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus (Arter & Hadden), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Supplemental Decision and Order on Remand (86-BLA-4122) of Administrative Law Judge Charles P. Rippey awarding benefits on a claim[1] filed pursuant

[1] Claimant is Noah W. Vandyke, the miner, who filed this application for benefits on July

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 second time. Initially, Administrative Law Judge John H. Bedford found the x-ray evidence sufficient to invoke the interim presumption pursuant to 20 C.F.R. §727.203(a)(1), but concluded that the evidence of record established rebuttal of the presumption pursuant to Section 727.203(b)(2). Accordingly, he denied benefits.

Pursuant to claimant's appeal, the Board affirmed as unchallenged the administrative law judge's invocation finding pursuant to Section 727.203(a)(1), but vacated his finding pursuant to Section 727.203(b)(2) because it was insufficient to establish rebuttal of the presumption under *Sykes v. Director, OWCP*, 812 F.2d 890, 10 BLR 2-95 (4th Cir. 1987). *Vandyke v. Faith Coal Co.*, BRB No. 91-0490 BLA (Feb. 25, 1993)(unpub.). The Board concluded, however, that a remand was not required because the administrative law judge's finding that claimant suffers from no pulmonary or respiratory impairment, applied to Section 727.203(b)(3), established rebuttal as a matter of law. *Vandyke*, slip op. at 3. Accordingly, the Board affirmed the administrative law judge's Decision and Order denying benefits.

6, 1978. Director's Exhibit 1.

Pursuant to claimant's appeal, the United States Court of Appeals for the Fourth Circuit vacated the Board's decision. *Vandyke v. Director, OWCP*, No. 93-1465 (4th Cir., Feb. 28, 1995)(unpub.). The Fourth Circuit court held that, with the exception of Dr. Fino, none of the physicians whose reports the administrative law judge relied upon in finding subsection (b)(2) rebuttal found the absence of any respiratory of pulmonary impairment whatsoever, as required under *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994), and therefore, their reports did not establish subsection (b)(3) rebuttal as a matter of law. The court concluded that because the reports of Drs. Stewart and Endres-Bercher were legally sufficient to establish subsection (b)(3) rebuttal under *Bethlehem Mines Corp. v. Massey*, 736 F.2d 120, 7 BLR 2-72 (4th Cir. 1984), remand was required. The court also held, citing *Malcomb v. Island Creek Coal Co.*,15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994), that because Dr. Fino was a non-examining physician, his opinion could not establish subsection (b)(3) rebuttal unless the administrative law judge found on remand that his conclusions had also been addressed by an examining physician. Accordingly, the court remanded the case for further consideration.[2]

On remand, the administrative law judge found that rebuttal of the presumption was not established pursuant to Section 727.203(b)(3). Accordingly, he awarded benefits as of the claim's filing date.

On appeal, employer contends initially that intervening case law requires a remand for the administrative law judge to reconsider invocation of the interim presumption pursuant to Section 727.203(a)(1). Regarding subsection (b)(3) rebuttal, employer asserts that the administrative law judge failed to comply with the court's remand instructions to consider Dr. Stewart's opinion and improperly presumed that Dr. Endres-Bercher was biased. 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).

[2] Because Judge Bedford is no longer with the Office of Administrative Law Judges, on remand the case was reassigned, without objection, to Judge Rippey.

Pursuant to Section 727.203(a)(1), employer contends that intervening case law requires remand for reconsideration of invocation because Judge Bedford relied solely on the numerical superiority of the positive x-ray readings, a practice which the Fourth Circuit court prohibited in *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Employer's Brief at 17-18. Contrary to employer's contention, Judge Bedford did not rely on "head-counting" to resolve the conflicting x-ray evidence; he in fact offered no rationale for his conclusion.[3] [1990] Decision and Order at 5. His finding thus did not comply with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Director, OWCP v. Congleton*, 743 F.2d 428, 7 BLR 2-12 (6th Cir. 1984), the requirements of which were the same in 1993, when this case was first before the Board, as they are now. Employer thus could have but neglected to timely challenge the administrative law judge's invocation finding, which the Board affirmed in its prior decision. Inasmuch as employer has not demonstrated that a basis for an exception to the law-of-the-case doctrine exists, nor is any exception apparent, we hold that this doctrine is controlling on this issue. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting); *Gillen v. Peabody Coal Co.*, 16 BLR 1-22 (1991)(Stage, J., dissenting).

Pursuant to Section 727.203(b)(3), employer contends that the administrative law judge failed to consider Dr. Stewart's opinion. Employer's Brief at 26. Employer's contention has merit. The Fourth Circuit court instructed the administrative law judge to consider Dr. Stewart's opinion that claimant's respiratory impairment is unrelated to coal mine employment but rather is due solely to ischemic heart disease.[4] Employer's Exhibits 1,

[3] The record contains one hundred and six readings of twenty x-rays. There are forty positive readings, sixty-two negative readings, and four reports classifying certain x-rays as unreadable. Most of the readings were rendered by physicians possessing radiological credentials. Judge Bedford did not discuss any specific x-ray reading or film, nor did he count the total number of positive and negative readings. He merely stated that "it would be extremely unlikely for one to study this massive array of positive x-ray evidence without concluding, as I do, that it is sufficient to establish the existence of pneumoconiosis. . . ." [1990] Decision and Order at 5. We do not read this statement as an instance of "head-counting;" the negative readings actually outnumber the positive readings.

[4] Contrary to the Fourth Circuit court's statement that Dr. Stewart examined claimant, the record indicates that Dr. Stewart merely reviewed claimant's medical records. Employer's Exhibits 1, 3, 12. However, he reviewed reports by examining physicians, one of whom diagnosed arteriosclerotic heart disease. Claimant's Exhibit 3. Thus, the record could support a finding that Dr. Stewart's conclusion regarding the source of claimant's disability has been addressed by an examining physician. *See Malcomb v. Island Creek Coal Co.*,

3, 12. Because the administrative law judge failed to consider this opinion on remand, we must vacate his finding pursuant to Section 727.203(b)(3).

15 F.3d 364, 18 BLR 2-113 (4th Cir. 1994).

Employer further asserts that the administrative law judge erred by concluding that Dr. Endres-Bercher was biased towards employer. Employer's Brief at 24-28. The Board has held that, without specific evidence indicating that a report prepared for employer is unreliable, an administrative law judge should consider that report as equally reliable as the other reports of record. *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-36 (1991)(*en banc*). Here, the administrative law judge did not point to specific evidence of bias, but merely noted Dr. Endres-Bercher's change of opinion regarding the existence of pneumoconiosis.[5] Based on this factor, the administrative law judge concluded that Dr. Endres-Bercher "contradict[ed] his own judgment" and discredited the physician's opinion because he found that the "strained and tortured paths of his reasoning and verbiage . . . indicate that he knew what result the [e]mployer wanted him to reach . . . and although he had to work very hard, he finally reached it." Supplemental Decision and Order on Remand at 4. Because we see no evidence of bias in the record, and because the administrative law judge failed to consider Dr. Endres-Bercher's supplemental report, submitted by employer pursuant to the administrative law judge's February 6, 1996 order reopening the record, we instruct the administrative law judge on remand to consider and reweigh the entirety of Dr. Endres-Bercher's opinion.

In sum, the administrative law judge on remand must consider the opinions of Drs.

[5] In 1988, after examining claimant, Dr. Endres-Bercher diagnosed pneumoconiosis and opined that claimant had no respiratory disability. Employer's Exhibit 2. In 1989, after reviewing additional medical evidence, he concluded that the x-rays were negative for pneumoconiosis and that the medical records indicated that claimant's pulmonary impairments were due solely to ischemic heart disease. Employer's Exhibits 11. The administrative law judge did not consider Dr. Endres-Bercher's 1996 supplemental report, in which he concluded that additional x-ray readings were consistent with the existence of simple pneumoconiosis, and that the presence of simple pneumoconiosis would have no effect on claimant's pulmonary condition. February 6, 1996 Supplemental Exhibit (unstamped).

Stewart, Endres-Bercher, and Fino to determine whether rebuttal is established pursuant to Section 727.203(b)(3) under *Massey*, *Grigg*, and *Malcomb*, *supra*.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge