BRB No. 94-0398 BLA

TILDA COLE (Widow of JOHN COLE) Claimant-Petitioner v. EAST KENTUCKY COLLIERIES Employer-Respondent DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order of Robert S. Amery, Administrative Law Judge, United States Department of Labor.

H. Michael Lucas (Webster & Lucas), Pikeville, Kentucky, for claimant.

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

Cathryn Celeste Helm (Thomas S. Williamson, Jr., 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, the United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order (93-BLA-0602) of Administrative

Law Judge Robert S. Amery 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). The administrative law judge credited the miner with eighteen years of coal mine employment and found invocation of the interim presumption established pursuant to 20 C.F.R. §727.203(a)(1), (2). The administrative law judge found that

rebuttal was not established at Section 727.203(b) and, accordingly, awarded benefits. The administrative law judge also determined that employer was the responsible operator and found the date of onset of total disability due to pneumoconiosis to be June 1979.

On appeal, both employer and the Director, Office of Workers' Compensation Programs (the Director), contend that remand is required because the administrative law judge applied the true doubt rule in finding invocation established pursuant to Section 727.203(a)(1). Employer's Brief at 16-17; Director's Brief at 1. Employer also asserts that the administrative law judge erred in his analysis of the evidence pursuant to Section 727.203(b)(2) and (3), and provided an inadequate rationale for his entitlement date finding. Employer's Brief at 16-22. Lastly, employer contends that the administrative law judge erred in finding employer to be the responsible operator. Employer's Brief at 14-16. Claimant responds, contending that the Board lacks jurisdiction to hear employer's appeal because employer did not file a timely notice of appeal with the Board.[1] Claimant's Brief at 1-2.

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).

We reject claimant's contention that the Board lacks jurisdiction over this appeal. Although the Board initially dismissed employer's appeal as untimely by Order dated December 30, 1993, it determined on reconsideration that a notice of appearance filed by employer at the office of the Solicitor of Labor prior to the deadline for appeal was sufficient to constitute a timely notice of appeal pursuant to

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

20 C.F.R. §§802.205, 802.207(a)(2), 802.208. Order (Nov. 16, 1994). Thus, the Board has jurisdiction over employer's appeal.[2]

[2] Claimant does not allege that he received insufficient notice of employer's appeal or was in any way prejudiced by the Board's determination that employer's filing constituted a timely notice of appeal.

Employer and the Director contend that remand is required because the administrative law judge invoked the interim presumption at Section 727.203(a)(1) by applying the true doubt rule,[3] which was subsequently held to be invalid in *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). Employer's Brief at 16-17; Director's Brief at 1.

The administrative law judge's finding of invocation at Section 727.203(a)(1) was based on the true doubt principle, Decision and Order at 5, and he relied on his Section 727.203(a)(1) determination to find rebuttal precluded pursuant to Section 727.203(b)(4). *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). Because we must apply the law in effect at the time of this decision, *see Lynn v. Island Creek Coal Co*., 12 BLR 1-146, 1-147 (1989), we vacate the administrative law judge's findings at Section 727.203(a)(1)[4] and (b)(4) as inconsistent with law.

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[3] The true doubt rule is an evidentiary rule applicable to the administrative law judge's conclusion concerning the weight of the evidence. "True doubt" is said to arise only when equally probative but contradictory evidence is presented in the record, where selection of one set of facts would resolve the case against the claimant, but selection of the contrary set of facts would resolve the case for claimant. *See Wilt v. Wolverine Mining Co*., 14 BLR 1-70 (1990); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149 (1989)(*en banc*); *Kozele v. Rochester & Pittsburgh Coal Co*., 6 BLR 1-378 (1983).

[4] The administrative law judge need not reconsider Section 727.203(a)(1) on remand inasmuch as we have affirmed his invocation findings pursuant to Section 727.203(a)(2). *See* n.1; *Curry v. Beatrice Pocahontas Coal Co*., 18 BLR 1-59

We disagree, however, with employer's interpretation of *Ondecko's* dictum that "when the evidence is tied, the benefits claimant must lose." Employer's Brief at 16. In fact, the Supreme Court affirmed the decision of the United States Court of Appeals for the Third Circuit in *Ondecko*, which vacated the Board's affirmance of the award of benefits and remanded the case for further consideration of the evidence. The Third Circuit stated:

> It is not clear . . . whether the [administrative law judge] ever considered whether the claimant's evidence satisfied the preponderance standard. It appears that upon reaching what she believed to be the point of equipoise, and believing the true doubt rule to be applicable, the [administrative law judge] may have halted her inquiry short of deciding whether *Ondecko's* evidence preponderated. We will therefore vacate the [administrative law judge's] Order and remand for further proceedings to allow the [administrative law judge] to make this determination.

Ondecko, 990 F.2d at 737, 17 BLR at 2-76.

Thus, a finding of evidentiary equipoise under the discredited true doubt principle does not automatically require a finding of insufficient evidence under a preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of 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).

Employer further contends that the administrative law judge erred at Section 727.203(b)(2) by requiring affirmative evidence that the miner was not totally disabled from performing his usual coal mine employment. Employer's Brief at 19-21. Employer asserts that because the administrative law judge found the evidence insufficient to establish the existence of a totally disabling respiratory or pulmonary impairment pursuant to Section 727.203(a)(4), he should also have found rebuttal established pursuant to Section 727.203(b)(2). *Id*.

(1994)(Brown and McGranery, JJ., concurring and dissenting, separately), *rev'd on other grounds*, 67 F.3d 517, 20 BLR 2-1 (4th Cir. 1995).

Section 727.203(b)(2) rebuttal requires proof that the miner is able to do his usual coal mine work or comparable and gainful work. 20 C.F.R. §727.203(b)(2). The United States Court of Appeals for the Sixth Circuit, within whose appellate jurisdiction this case arises, held in *York v. Benefits Review Board*, 819 F.2d 134, 137, 10 BLR 2-99, 2-103-04 (6th Cir. 1987) that evidence that the miner was not totally disabled by a respiratory or pulmonary impairment was insufficient to establish rebuttal pursuant to Section 727.203(b)(2). Rather, the party opposing entitlement must prove that the miner is not totally disabled for any reason. *Webb*, 49 F.3d at 249, 19 BLR at 2-133 (6th Cir. 1995).

A review of the record reveals no medical opinion stating that the miner was able to do his usual coal mine employment. Nor is the administrative law judge's finding at Section 727.203(a)(4) that the evidence is insufficient to establish a totally disabling respiratory or pulmonary impairment sufficient to meet employer's burden at Section 727.203(b)(2) to establish that claimant is not totally disabled for any reason. *See York*, *supra*. Therefore, we affirm the administrative law judge's finding that rebuttal is not established at Section 727.203(b)(2).

Employer next asserts that the administrative law judge erred at Section 727.203(b)(3), first, by "discredit[ing] the opinions of Drs. Broudy, Fino and Tuteur simply because they did not examine [the miner];" second, by ignoring the opinions of several physicians who opined that pneumoconiosis "had nothing to do" with the miner's disability; and third, by mischaracterizing several opinions. Employer's Brief at 16-19.

We hold that the administrative law judge acted within his discretion in according less weight to the opinions of the non-examining physicians. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988). The administrative law judge stated that because Drs. Broudy, Fino, and Tuteur had not examined the miner, "their opinions may be given less weight," Decision and Order at 11; he did not completely reject them as unworthy of any weight, as employer contends. *See Cochran v. Consolidation Coal Co*., 16 BLR 1-101, 1-104 (1993)(administrative law judge erred by "completely" discrediting the opinion of "this non-examiner"); *Worthington v. United States Steel Corp*., 7 BLR 1-522, 1-524 (1984)(administrative law judge erred in rejecting physician's opinion solely because he did not examine claimant).

Further, contrary to employer's contention that the administrative law judge ignored medical opinions supportive of subsection (b)(3) rebuttal, the administrative law judge fully discussed the opinions of Drs. Anderson, Page, O'Neill, and Cool. Decision and Order at 7-9. All four physicians found some degree of pulmonary impairment, but Drs. Page, O'Neill, and Cool offered no opinion regarding its cause.

Director's Exhibits 10A, 10D, 10E, 24, 26. Although Dr. Anderson opined that the miner's total disability was due to smoking, Director's Exhibit 26, his opinion is legally insufficient to meet employer's burden under Section 727.203(b)(3) to establish that pneumoconiosis played no role in causing the miner's disability. *See Webb, supra*; *Gibas v. Saginaw Mining Co*., 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985); *Borgeson v. Kaiser Steel Corp*., 12 BLR 1-169 (1989)(*en banc*).

We also reject employer's contention that the administrative law judge mischaracterized several medical opinions at Section 727.203(b)(3). While Drs. T.L. Wright, Penman, B. Wright, and Sutherland did not explicitly link the miner's total disability to pneumoconiosis, their opinions support the administrative law judge's conclusion that they made determinations contrary to those of Drs. Broudy, Fino, and Tuteur "to the effect that the miner's disability was due to pneumoconiosis." Director's Exhibits 10B, 10C, 10F, 11; Decision and Order at 11. Moreover, these opinions do not meet employer's burden at Section 727.203(b)(3) to establish that pneumoconiosis played no role in causing the miner's disability. *See Webb*, *supra*; *Gibas*, *supra*; *Borgeson*, *supra*. Therefore, we affirm the administrative law judge's finding that rebuttal is not established pursuant to Section 727.203(b)(3).

Employer contends that the administrative law judge failed to consider all the evidence or explain his findings regarding the date for the commencement of benefits. Employer's Brief at 21-22. Employer's contention has merit. The administrative law judge relied on Dr. T.L. Wright's report of June 1979 stating that the miner was totally disabled. Decision and Order at 11; Director's Exhibit 10B. The administrative law judge merely chose the earliest report finding the miner totally disabled, *see Owens v. Jewell Smokeless Coal Corp*., 14 BLR 1-47 (1990), without inquiring whether the total disability diagnosed was due to pneumoconiosis, *see Carney v. Director, OWCP*, 11 BLR 1-32 (1987). The administrative law judge also ignored all other relevant evidence on this issue, *see Williams v. Director, OWCP*, 13 BLR 1-28 (1989); *Lykins v. Director, OWCP*, 12 BLR 1-181 (1989), and did not explain his finding, as required by the APA, *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, we vacate the administrative law judge's finding on this issue. If on remand the administrative law judge determines that the evidence establishes claimant's entitlement to benefits, he must consider all relevant evidence in determining the date of onset of total disability due to pneumoconiosis. *See Williams*, *supra*; *Lykins*, *supra*.

The administrative law judge must determine the date on which the miner became totally disabled due to pneumoconiosis, not the date on which he became totally disabled. 20 C.F.R. §725.503(b); *Carney*, 11 BLR at 1-33. The first evidence

of disability does not establish the date of onset of such disability but merely indicates that the miner became totally disabled at some time prior to that date. *Owens*, 14 BLR at 1-50. Where the record fails to establish an earlier date, claimant is entitled to benefits from the month of filing, unless credited medical evidence indicates that the miner was not disabled at some point subsequent to the filing date. *Edmiston v. F & R Coal Co*., 14 BLR 1-65, 1-69 (1990).

Finally, employer contends that it must be dismissed as the responsible operator based on the Board's interpretation of 20 C.F.R. §725.493(a)(4)[5] in *Matney v. Trace Fork Coal Co*., 17 BLR 1-145 (1993). Subsequent to the filing of employer's brief in this case, the United States Court of Appeals for the Fourth Circuit affirmed[6] the Board's dismissal of the named responsible operator in *Matney*, but expressly declined to adopt the Board's reading of Section 725.493. *Director, OWCP v. Trace Fork Coal Co.,* [Matney], 67 F.3d 503, 507, 19 BLR 2-290, 2-300 (4th Cir. 1995).

We are persuaded by the Fourth Circuit's reasoning in *Matney* regarding the application of Section 725.493. We therefore hold that the phrase "subject to the provisions of paragraph (a)(2) of this section and provided that the conditions of §725.492(a)(2)-(a)(4) are met" in Section 725.493(a)(4) does not preclude from responsibility prior operators who are not also successor operators. *See Matney*, 67

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[5] Section 725.493(a)(4) provides that:

> If there is no operator which meets the conditions of paragraphs (a)(1) or (2) of this section, the responsible operator shall be considered to be the operator with which the miner had the latest periods of cumulative employment of not less than 1 year, subject to the provisions of paragraph (a)(2) of this section and provided that the conditions of §725.492(a)(2)-(a)(4) are met.

20 C.F.R. §725.493(a)(4). The two subsections referred to in this provision provide for the identification of prior and successor operators. *See* 20 C.F.R. §725.493(a)(1)-(2).

[6] The Court in *Matney* affirmed the Board's holding in two respects: First, that Vernon Mining Company was not a responsible operator because of insufficient evidence presented by the Director regarding insurance and financial ability to pay benefits, and second, that Trace Fork Coal Company was properly dismissed and responsibility for benefits transferred to the Black Lung Disability Trust Fund due to our holding in *Crabtree v. Bethlehem Steel Corp.*, 7 BLR 1-354 (1984). *Matney*, 67 F.3d at 507-08, 19 BLR at 2-301-02.

F.3d at 507, 19 BLR at 2-300; *Eastern Assoc. Coal Corp. v. Director, OWCP* [Patrick], 791 F.2d 1129 (4th Cir. 1986). This interpretation is reinforced by reference to the language of subsection (a)(4), which explicitly states that if there is no operator which meets the conditions of subsections (a)(1) or (a)(2), the responsible operator shall be the one with which the miner had the latest periods of cumulative employment of not less than one year, *i.e.*, the operator prior to the one found not to be a responsible operator in accordance with Section 725.492. Therefore, we reject employer's contention and affirm as supported by substantial evidence the administrative law judge's responsible operator finding.

Accordingly, the administrative law judge's Decision and Order 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

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PART V.A.2.

Although the Board initially dismissed employer's appeal as untimely, it determined on reconsideration that a notice of appearance filed by employer at the Office of the Solicitor of Labor prior to the deadline for appeal was sufficient to constitute a timely notice of appeal pursuant to 20 C.F.R. §§802.205, 802.207(a)(2), 802.208. Thus, the Board rejected claimant's contention that it lacked jurisdiction over employer's appeal. ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PART II.L.1.

The Board departed from its dictum in ***Matney v. Trace Fork Coal Co.***, 17 BLR 1-145 (1993) regarding the application of 20 C.F.R. §725.493(a)(4), holding that 20 C.F.R. §725.493(a)(4) does not preclude from responsibility prior operators who are not also successor operators, citing ***Director, OWCP v. Trace Fork Coal Co., [Matney]***, 67 F.3d 503, 507, 19 BLR 2-290, 2-300 (4th Cir. 1995) and ***Eastern Assoc. Coal Corp. v. Director, OWCP [Patrick]***, 791 F.2d 1129 (4th Cir. 1986). Thus, as substantial evidence supported the administrative law judge's finding that the miner's two most recent employers were incapable of assuming liability for the payment of benefits, employer was properly designated as the responsible operator pursuant to 20 C.F.R. §725.493(a)(4). ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PARTS IV.D.3.c. and IX.A.1.a.

Remand was required where the administrative law judge invoked the interim presumption at 20 C.F.R. §727.203(a)(1) by applying the true-doubt rule, subsequently held to be invalid in ***Director, OWCP v. Greenwich Collieries [Ondecko]***, 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), and relied on his invocation determination to find rebuttal precluded pursuant to 20 C.F.R. §727.203(b)(4). ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PART III.E.

Because the Board must apply the law in effect at the time of its decision, *see* ***Lynn v. Island Creek Coal Co.***, 12 BLR 1-146, 1-147 (1989), the administrative law judge's findings pursuant to 20 C.F.R. §727.203(a)(1) and 727.203(b)(4) were vacated as inconsistent with law where the administrative law judge invoked the interim presumption at 20 C.F.R. §727.203(a)(1) by applying the true-doubt rule, subsequently held to be invalid in ***Director, OWCP v. Greenwich Collieries [Ondecko]***, 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), and relied on his invocation determination to find rebuttal precluded pursuant to 20 C.F.R. §727.203(b)(4). ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PARTS IV.D.1, IV.D.3.c and V.B.2.

A finding of equally probative evidence under the discredited true-doubt principle does not automatically require a finding of insufficient evidence under a preponderance of the evidence standard. Rather, the administrative law judge as fact-finder must determine on remand whether, under this standard, claimant has met his burden of proof pursuant to Section 7(c) of 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). ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PARTS V.A.12 and IX.A.2.b.

The administrative law judge's finding that rebuttal was not established at 20 C.F.R. §727.203(b)(2) was affirmed because the record contained no medical opinion stating that the miner was able to do his usual coal mine employment, and the administrative law judge's finding that the evidence was insufficient to establish a totally disabling respiratory or pulmonary impairment did not satisfy employer's burden at 20 C.F.R. §727.203(b)(2) to establish that claimant is not totally disabled for any reason, *see* ***Youghiogheny & Ohio Coal Co. v. Webb***, 49 F.3d 244, 19 BLR 2-123 (6th Cir. 1995); ***York v. Benefits Review Board***, 819 F.2d 134, 137, 10 BLR 2-99, 2-103-04 (6th Cir. 1987). ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PART IV.D.4.c.

The administrative law judge acted within his discretion in according diminished weight to the opinions of the non-examining physicians. ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PART IX.A.2.c.

The opinion of a physician that the miner's total disability was due to smoking was legally insufficient to meet employer's burden under 20 C.F.R. §727.203(b)(3) and ***Gibas v. Saginaw Mining Co.***, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) to establish that pneumoconiosis played no role in causing the miner's disability. ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).

PART III.H.1.

The administrative law judge's finding regarding the date for the commencement of benefits was vacated where the administrative law judge merely chose the earliest report finding the miner totally disabled, *see* ***Owens v. Jewell Smokeless Coal Corp.***, 14 BLR 1-47 (1990), without inquiring whether the total disability diagnosed was due to pneumoconiosis, *see* ***Carney v. Director, OWCP***, 11 BLR 1-32 (1987), ignored all other relevant evidence on this issue, *see* ***Williams v. Director, OWCP***, 13 BLR 1-28 (1989); ***Lykins v. Director, OWCP***, 12 BLR 1-181 (1989), and did not explain his finding, as required by the APA, *see* ***Wojtowicz v. Duquesne Light Co.***, 12 BLR 1-162 (1989). ***Cole v. East Kentucky Collieries***, BLR , BRB No. 94-0398 BLA (June 27, 1996).